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PREFACE

This study guide is intended to be a convenient reference for use by Navy and Marine Corps personnel on civil law subjects. Those subjects include, inter alia, JAG Manual investigations, enlisted administrative separations, officer personnel matters, relations with civil law-enforcement authorities, legal assistance, freedom of expression, claims, standards of conduct, and the Freedom of Information and Privacy Acts.

This study guide is continually under revision; however, due to the inherent delays of the publication process, certain portions may not reflect the current state of the law. While every effort is made to ensure the accuracy of the study guide, it is the responsibility of the student to supplement the text with independent research. The study guide is designed to be a starting point for research, not a substitute for it.

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CHAPTER I

ADMINISTRATIVE FACTFINDING BODIES

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CHAPTER 1

ADMINISTRATIVE FACTFINDING BODIES

PART A - GENERAL

0101 ADMINISTRATIVE FACTFINDING BODIES - GENERALLY

A. Definitions. JAGMAN, § 0201a.

1. An "administrative factfinding body" is any one of a number of administrative (as distinguished from judicial) entities, including single individuals functioning as such, employed to collect and record information respecting some subject.

2. A "JAG Manual investigation" is an administrative factfinding body constituted under any portion of the regulations set forth in chapters II through X of the Manual of the Judge Advocate General.

B. Purposes of an administrative factfinding body. JAGMAN, § 0201c.

1. The primary purpose of an administrative factfinding body is to provide convening and reviewing authorities with adequate information upon which to base decisions.

2. An administrative factfinding body is purely administrative in nature, not judicial. Its report is advisory; opinions are not final determinations or legal judgments; and recommendations are not binding upon convening or reviewing authorities.

C. Functions of an administrative factfinding body. JAGMAN, § 0201b.

1. Primary function - to search out, develop, assemble, analyze, and record all available information concerning the matter under investigation.

2. Collateral function - a court of inquiry, and an investigation required to conduct a hearing, when so directed by the convening authority, may provide a hearing to certain persons whose conduct or performance of duty is "subject to inquiry" or who have "a direct interest in the subject of the inquiry." These persons would be designated as parties.

D. Need and importance of an administrative factfinding body. JAGMAN, § 0202.

1. Efficient command and administration. A JAG Manual investigation is a management tool. It is a means by which one can gather the facts needed to make a decision.

2. Proper disposition of claims for or against the Government. JAGMAN, chs. XX-XXIV.

3. Timely and accurate replies to public inquiry.

4. Redress of injuries to property. Art. 139, UCMJ.

5. Administrative determinations respecting personnel and former personnel. JAGMAN, ch. VIII.

E. JAG Manual investigations vis-a-vis investigations under special regulations. JAGMAN, § 0203.

1. A JAG Manual investigation is not required if there is no reason for the investigation other than possible disciplinary action. JAGMAN, § 0203b. A JAG Manual investigation should not normally proceed at the same time as a law-enforcement type of investigation by the Federal Bureau of Investigation, Naval Investigative Service, or local law-enforcement units. JAGMAN, § 0203c.

2. Experience indicates, however, that JAG Manual investigating officers should communicate with the law-enforcement personnel, explain the need for the JAG Manual investigation, and request that the police investigators keep the JAG Manual investigating officer informed of what information is obtained. The JAG Manual investigator will usually find that his or her duties will be greatly simplified.

0102 TYPES OF ADMINISTRATIVE FACTFINDING BODIES. JAGMAN, § 0204.

A. General

1. On the basis of membership, there are three types of administrative factfinding bodies: courts of inquiry, boards of investigation, and single individual investigations.

2. On the basis of procedure, there are two types of administrative factfinding bodies:

a. factfinding bodies required to conduct a hearing ordinarily take all testimony under oath, often make a verbatim record of all evidence, and may be authorized to designate parties (Parts D & E, Ch. V); and

b. factfinding bodies not required to conduct a hearing, which normally employ the preliminary inquiry method of gathering evidence and are not authorized in the Navy and Marine Corps to designate parties (Part C, Ch. V).

B. Principal distinguishing features of administrative factfinding bodies

1. Investigations not required to conduct a hearing. JAGMAN, § 0204d.

a. It may consist of one or more commissioned officers, warrant officers, senior enlisted persons, or civilian employees of the Department of the Navy as member or members.

b. It is convened by a written appointing order.

c. It is ordinarily not directed to take testimony under oath or to record testimony verbatim.

d. It utilizes the preliminary inquiry method in collecting evidence, including personal interviews, telephone inquiries, and correspondence.

e. It must not designate any person as a party to the investigation.

f. It does not possess the power to subpoena witnesses.

2. Investigations required to conduct a hearing (other than a court of inquiry). JAGMAN, § 0204c.

a. It consists of one or more commissioned officers, warrant officers, senior enlisted persons, or civilian employees of the Department of the Navy as member or members.

b. It is convened by a written appointing order.

c. The appointing order may direct that the body take all testimony under oath and/or record all proceedings verbatim.

d. It uses a formal hearing procedure.

e. Persons whose conduct is subject to inquiry may be designated parties by the convening authority in the appointing order. Additionally, the convening authority may authorize the factfinding body to designate parties during the proceedings.

f. It does not possess the power to subpoena witnesses, unless convened under Article 139, UCMJ and chapter X of the JAG Manual.

3. Courts of inquiry. JAGMAN, § 0204b. A court of inquiry has a number of distinguishing features.

a. It consists of at least three commissioned officers as members and a counsel for the court. The members must be senior to any party designated before the court.

b. It is convened by a written appointing order.

c. It must take all testimony under oath and record all proceedings verbatim whether or not directed to do so in the appointing order.

d. Persons subject to the UCMJ whose conduct is subject to inquiry must be designated parties.

e. Persons subject to the UCMJ or employed by the Department of Defense who have a direct interest in the subject of the inquiry must be designated parties upon their request to the court.

f. It possesses the power to subpoena civilian witnesses. (Article 47, UCMJ provides for prosecution in U.S. District Court for anyone failing to appear, testify, or produce evidence before a court of inquiry.)

C. Practical application. In actual practice, putting all the above in order, the Navy has the following factfinding entities at its disposal:

1. Investigations not requiring a hearing, which may be either a board of investigation or a single individual investigation (Part C, Ch. V);

2. investigations requiring a hearing, which may be either a board of investigation or a single individual investigation (JAGMAN, § 0204 and Parts D & E, Ch. V); and

3. the court of inquiry (JAGMAN, § 0401).

D. Responsibility to order JAG Manual investigations. JAGMAN, § 0207.

1. General. The officer in command of the unit or activity concerned is primarily responsible for initiating an investigation into an incident arising in his command.

2. Afloat commands

a. If the command is an afloat command, the investigation of incidents occurring ashore may be conducted by another appropriate command when the afloat command so requests and certifies that to conduct the investigation by the afloat command would not be feasible.

b. The area coordinator (usually the senior shore-based officer in a given geographical area) usually has local procedures and instructions on requesting the transfer of an investigation ashore.

3. Incidents involving more than one command. Where an incident involves more than one activity, the common superior of all involved is normally the convening authority. JAGMAN, § 0207d.

4. Incidents far removed from location of command. JAGMAN, § 0207b.

a. Where an activity required to conduct an investigation is far removed geographically from the scene of the incident, the officer in command or in charge may refer the investigation of the incident to another officer qualified to order the appropriate factfinding body. In such a situation, the area coordinator in which the incident occurred, or comparable authority, should be requested to cause the appropriate investigation to be conducted. The request shall contain all available information, such as: Time, place, nature of incident; full names, grade, service numbers, leave status of naval personnel involved; names and addresses of all known witnesses; all available evidence and statements; and copies of all reports made.

b. Examples of such situations would be the investigations required concerning personnel who are injured or die at a place distant from their command (i.e., on leave or duty in another part of the United States, or

mobile activities required to move from the locality of an incident before a thorough investigation can be completed).

E. Selection of type of administrative factfinding body and designation of parties. JAGMAN, § 0205. The selection of the type of factfinding body is left to the judgment and discretion of the officer in command. Ordinarily, the simplest type of factfinding body necessary to investigate the incident adequately should be utilized. Section 0205a of the JAG Manual sets forth JAG guidelines.

1. The type of factfinding body to be ordered should be determined in large measure by:

a. The powers which the factfinding body will require;

b. the paramount purpose of the inquiry;

c. the relative seriousness of the subject of inquiry;

d. the probable complexity of the factual issues involved; and

e. the need to subpoena witnesses.

2. Designation of parties. JAGMAN, § 0205b. The desirability of designating parties and affording the persons so designated all the rights of a party should be considered in connection with the selection of the type of factfinding body to be employed. The JAG Manual, however, indicates that, under most circumstances, designation of parties is both unnecessary and undesirable.

F. Dissolution of an administrative factfinding body. JAGMAN, § 0208. A factfinding body is considered dissolved when its duties have been completed; no formal order of dissolution is necessary.

G. Authority to administer oaths. JAGMAN, § 0214. Pursuant to Article 136, UCMJ and section 0214 of the JAG Manual, a person on active duty appointed to perform an investigation or to serve as counsel for an administrative factfinding body is empowered to administer oaths.

H. Preliminary investigation of major incidents. JAGMAN, § 0213. In major incidents, the convening authority should consider initially convening a factfinding body under Part C of Chapter V to:

1. Ascertain the seriousness of the incident;

2. interview all available witnesses;

3. prepare a summary of their testimony; and

4. submit to the convening officer an oral interim report.

Note: The importance of this JAG Manual section cannot be stressed enough. Based upon information received from such a preliminary investigation, officers in command and their staff judge advocates can make informed estimates of the type of further investigation necessary, the scope of

the investigative inquiry, t possible designation of parties, and the need for counsel and clerical assistance to conduct the further investigation.

PART B - INVESTIGATION OF SPECIFIC TYPES OF INCIDENTS

0103 SPECIFIC TYPES OF INCIDENTS

A. General. Various directives establish requirements for the conducting of inquiries into specific matters. Of all the directives which deal with this area, the JAG Manual is the most inclusive. Some incidents involve the conducting of an inquiry for several different purposes. Some of these multiple-purpose inquiries can be handled by one investigation; others may not. One must be careful to determine why an investigation is being conducted, who is supposed to conduct it, and whether it will satisfy all requirements or only a portion of them. The following are examples of the most common types of investigations.

B. JAG Manual

1. Aircraft accidents. JAGMAN, § 0902.

a. In every instance in which an aircraft mishap results in death or serious injury, extensive damage to government property, or in which there is a possibility of a claim either by or against the government, an appropriate factfinding body shall be ordered to determine the cause and responsibility for the mishap, the nature and extent of any injuries, and to obtain a description of all damage to property and all other attendant circumstances.

b. A JAG Manual investigation of an aircraft accident may not be combined with the Aircraft Accident Reports and Aircraft Mishap Investigations. JAGMAN, § 0203.

2. Vehicle accidents. Section 0903 of the JAG Manual provides a good basic checklist of pertinent material to be covered in any vehicular accident investigation.

3. Explosions. JAGMAN, § 0904.

4. Loss or stranding of a ship of the Navy. JAGMAN, § 0905. A checklist is set forth in appendix D-5(15) of this text.

5. Collisions. JAGMAN, § 0906. A checklist is set forth in appendix D-5(13) of this text. In collision cases, be aware of the claims problems -- particularly the admiralty claims regulations found in chapter XII of the JAG Manual.

6. Accidental or intentional flooding of a ship. JAGMAN, § 0907. A checklist is set forth in appendix D-5(11) of this text.

7. Article 32, UCMJ, pretrial investigations. JAGMAN, § 0908.

8. Loss of Government funds or property. JAGMAN, § 0909.

9. Claims for or against the Government. JAGMAN, § 0910. A checklist is set forth in appendix D-5(6) of this text. This section of the JAG Manual is a bridge between the regulations governing investigations and the regulations governing claims matters and their specific investigations. JAGMAN, chs. XX-XXIV.

10. Reservists. If a reservist is injured or killed, section 0911 of the JAG Manual provides for disability and hospitalization and/or survivor's benefits in certain circumstances. For additional information, see 10 U.S.C. § 1074a (Supp. II 1984), regarding "portal-to-portal" medical benefits coverage for reservists injured while traveling to or from drilling site.

11. Admiralty matters. JAGMAN, ch. XII.

12. Injury, disease, and death of servicemembers. JAGMAN, ch. VIII. A checklist is set forth in appendix D-5(2) of this text.

13. Firearms accidents. JAGMAN, § 0912.

14. Fires. JAGMAN, § 0913d.

15. Quality of medical care reasonably in issue. JAGMAN, §§ 0810, 0811, 2003.

C. Other directives

1. Safety investigations. OPNAVINST 5100.14 series.

a. Aircraft Accident Reports and Aircraft Mishap Investigations. OPNAVINST 3750.6 series.

b. Accidental injury to personnel. OPNAVINST 5102.1 series.

c. Automobile accidents. OPNAVINST 5100.12 series; MCO 5101.8 series.

2. Admiralty. JAGINST 5880.1 series.

3. Pretrial investigations. Article 32, UCMJ.

4. Naval Investigative Service (NIS) investigations

a. Felonies involving both naval and civilian personnel. SECNAVINST 5820.1 series.

b. Exclusive NIS jurisdiction. SECNAVINST 5520.3 series; OPNAVINST 5450.97 series.

5. Security violations. OPNAVINST 5510.1 series.

6. Stolen Government property. SECNAVINST 5500.4 series.

7. Postal violations. OPNAVINST 5112.6 series.

CHAPTER II

LINE OF DUTY/MISCONDUCT DETERMINATIONS

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CHAPTER II

LINE OF DUTY/MISCONDUCT DETERMINATIONS

PART A - INJURY, DISEASE AND DEATH INQUIRY

0201 GENERAL

A. Responsibility. To assist in the administration of naval personnel, the military commander is required to inquire into certain cases of injury, disease, or death.

B. Type of inquiry. The type of inquiry and the degree of formality of the report will depend upon the circumstances of each case.

1. This report may be made available to the Department of Veterans' Affairs to assist them in their determinations.

2. The results of the inquiry allow the Department of the Navy to determine which benefits and/or rights administered by the Department to which the injured party may be entitled and can affect the following:

a. Extension of enlistment;

b. longevity and retirement multiplier;

c. forfeiture of pay;

d. disability retirement and severance pay, and

e. benefits administered by the Department of Veterans' Affairs. JAGMAN, § 0801.

3. The effect will depend on what is commonly referred to as the line of duty/misconduct determination.

0202 WHEN LINE OF DUTY/MISCONDUCT DETERMINATIONS ARE REQUIRED

A. Injury. JAGMAN, § 0805. In each case in which a member of the naval service incurs an injury which *might* result in permanent disability or which results in his physical inability to perform duty for a period exceeding 24 hours, as distinguished from a period of hospitalization for evaluation or observation, findings concerning line of duty and misconduct must be made.

B. Disease. JAGMAN, §§ 0803a, 0805, 0808b, and 0809.

1. The JAG Manual does not specifically address the necessity for LOD/Misconduct determinations in disease situations. Section 0803a discusses

"misconduct" as follows: "To support an opinion of misconduct it must be established by clear and convincing evidence that the injury or disease was either intentionally incurred or was the proximate result of such gross negligence as to demonstrate a reckless disregard of the consequences." (Emphasis added). Clearly, section 0803a of the JAG Manual contemplates that circumstances exist which would justify a finding of "not in the line of duty/due to own misconduct" in a disease situation.

2. Section 0805 of the JAG Manual, entitled "When Misconduct-Line of Duty Determinations Required," omits the word "disease" entirely and thus seems to require that such determinations be made only for injuries. Section 0805, however, is not exhaustive of all situations that require that determinations be made. There are at least three disease situations specifically mentioned in the JAG Manual which require that LOD/Misconduct determinations be made:

a. Alcohol and drug-induced disease. A disease that is directly attributable to a specific, prior, proximate, and related intemperate use of alcoholic liquor or habit-forming drugs may be considered to have been incurred as the result of the servicemember's own misconduct and therefore not in the line of duty. JAGMAN, § 0808b.

b. Refusal of medical or dental treatment. If a servicemember unreasonably refuses to submit to medical, surgical, or dental treatment, any disability that proximately results from such refusal may be considered to have been incurred as a result of the member's own misconduct. JAGMAN, § 0809a.

c. Venereal disease. Any disability resulting from venereal disease may be the result of an individual's own misconduct if that individual has not complied with the regulations that require reporting and receiving treatment for such disease. JAGMAN, § 0809b.

3. The three situations described above are analogous to a servicemember's incurring an injury as the result of his own gross negligence. In addition to these three situations for which specific support may be found in the JAG Manual, it is possible to hypothesize other situations which are not totally unrealistic and which involve either intentional efforts to contract disease to avoid service or grossly negligent conduct which proximately results in a disabling disease. For example, a servicemember who intentionally disregards posted quarantine warnings and is therefore exposed to, and contracts, a highly contagious disease falls within the parameters of the above-quoted language from section 0803a of the JAG Manual, thereby supporting an adverse misconduct determination.

C. Death. See section 0206D infra.

0203 WHAT CONSTITUTES LINE OF DUTY

A. General rule. Injury or disease incurred by a member of the naval service while in active service will be presumed to have been incurred "in line of duty" (LOD), unless there is clear and convincing evidence that it was incurred:

1. As a result of the member's own misconduct, as defined in section 0803 of the JAG Manual;

2. while avoiding duty by deserting the service;

3. while absent without leave (UA) if such absence materially interfered with the performance of required military duties, as discussed in section 0203C below;

4. while confined under sentence of a court-martial that included an unremitted dishonorable discharge; or

5. while confined under sentence of a civil court following conviction of an offense that is defined as a felony by the law of the jurisdiction where convicted. JAGMAN, § 0802.

B. "Active service" defined. JAGMAN, § 0802b. "Active service," as used in this section, includes full-time duty in the naval service, extended active duty, active duty for training, leave or liberty from any of the foregoing, and inactive duty training.

C. Special unauthorized absence rule. JAGMAN, § 0802d.

1. Whether absence without leave "materially interferes" with the performance of required military duties necessarily depends upon the facts of each situation to which must be applied a standard of reality and common sense. No definite rule can be formulated as to what constitutes "material interference." Generally speaking, absence in excess of twenty-four hours constitutes a material interference unless there is evidence to establish the contrary. An absence less than twenty-four hours will not be considered a material interference without clear and convincing evidence that the absence constituted such interference with the performance of required military duties. A statement of the individual's commanding officer, division officer or other responsible official, and any other available evidence to indicate whether an absence without leave constituted a material interference with the performance of required military duties, should be included in the record - at least whenever the absence is less than twenty-four hours.

2. It should be noted that, under 10 U.S.C. § 1207 (1982), a member is ineligible for physical-disability retirement or severance benefits from the armed forces if his disability was incurred during a period of unauthorized absence, regardless of the length of such absence and regardless of whether such absence constituted a material interference with the performance of his required military duties.

0204 WHAT CONSTITUTES MISCONDUCT

A. General rule. Injury or disease suffered by a member of the naval service while in active service will be presumed to have been incurred not as a result of his own misconduct unless there is clear and convincing evidence that:

1. The injury was intentionally incurred; or

2. the injury was the proximate result of such gross negligence as to demonstrate a reckless disregard of the consequences.

a. An injury or disease is the "proximate result" of conduct if that injury could have been reasonably foreseen from the course of conduct. JAGMAN, § 0803a.

b. Gross negligence is only briefly defined in section 0803 of the JAG Manual in terms of "reckless disregard for the consequences" of an act or omission, but the term is commonly utilized to describe any act or omission that involves willful or wanton disregard, as well as reckless disregard, for the life, safety, and well-being of self or others. Therefore, simple or ordinary negligence is not sufficient to constitute misconduct.

c. The fact that the injurious conduct violated a law, regulation or order does not, of itself, constitute a basis for a determination of misconduct.

B. No military duty can require misconduct. Any opinion of "due to own misconduct" must result also in an opinion that the injury was incurred "not in line of duty." JAGMAN, §§ 0802a(1), 0803, 0804. Accordingly, if a servicemember is properly performing his military duty and is injured as a result of that duty, the "due to his own misconduct" finding would be erroneous since no military duty can require a servicemember to commit an act which would constitute "misconduct."

C. Special rules

1. Intoxication. JAGMAN, § 0808a. In order for intoxication alone to be the basis for a determination of misconduct respecting a related injury, there must be a clear showing that the following three elements exist:

a. The member's physical or mental faculties were impaired due to intoxication at the time of the injury;

b. the extent of that impairment; and

c. that the impairment was a (not the) proximate cause of the injury.

An injury incurred as the proximate result of prior and specific voluntary intoxication is presumed to have been incurred as the result of misconduct. The Judge Advocate General has opined that careful attention must be paid to the factual scenario of each case, especially when the blood alcohol content of the injured driver is above that constituting a legal state of intoxication in the particular jurisdiction (normally 0.10% BAC). A showing of a blood alcohol level of above .10 mg/dl will, in many cases, be sufficient to satisfy the first two elements. Intoxication (impairment) may be produced by alcohol, a drug, or inhalation of fumes, gas, or vapor. In all cases involving intoxication, the propriety of a hearing under section 0815 of the JAG Manual should be considered.

2. Mental responsibility. JAGMAN, § 0807.

a. General. In the absence of evidence to the contrary, it is presumed that all persons are mentally responsible for their acts.

(1) In view of this presumption, it is not necessary to present evidence of mental responsibility unless:

(a) The question is raised by the facts developed by the investigation; or

(b) the question is raised by the nature of the act itself.

If either (a) or (b) above is present, the presumption of mental responsibility ceases to exist and evidence must be developed to clearly and convincingly establish mental responsibility before the member can be considered mentally competent.

(2) Where an act resulting in injury or disease is committed by a mentally incompetent person, that person is not responsible for that act and the injury or disease incurred as the result of such an act is "not due to misconduct."

(3) The term "mentally incompetent," as used above, means that as a result of mental defect, disease or derangement, the person involved was, at the time of the act, unable to comprehend the nature of such acts or to control his actions. Also covered is the concept that a person may not be held responsible for his acts or their foreseeable consequences if, as the result of a mental condition not amounting to a defect, disease or derangement and not itself the result of prior misconduct, he was, at the time, unable to comprehend the nature of such acts and to control his actions. However, where the impairment of mental faculties is the result of the servicemember's misconduct (e.g., the voluntary and unlawful ingestion of a hallucinogenic drug) the injuries would be deemed to have been incurred as a result of the person's misconduct.

b. Suicide attempts. JAGMAN, § 0807c. Because of the strong instinct for self-preservation, an unsuccessful, but bona fide, attempt to kill oneself is evidence of a lack of mental responsibility.

(1) Question: If a person intentionally, but unsuccessfully, attempts to kill himself and there is no other evidence of mental irresponsibility, is he mentally responsible or not?

(2) Significance: This is important because:

(a) If the person is sane (i.e., competent), it is misconduct not in LOD.

(b) If the person is insane (i.e., incompetent), it is not misconduct and may be either in LOD or not in LOD.

(3) Answer: It depends on whether or not he had reasonable and adequate motive, according to an objective "reasonable man" standard, to attempt to kill himself. If he had such a motive, he is mentally responsible (i.e., the presumption of mental responsibility is not rebutted). On the other hand, if he did not have such a motive, the presumption of sanity is rebutted and other evidence must be obtained which will clearly and convincingly establish his mental responsibility before a determination of misconduct may be made. JAGMAN, § 0807b-c.

(4) Examples:

(a) Where there was "no" reasonable and adequate motive (not mentally responsible): An enlisted man, who received a "Dear John" letter from his wife, attempted suicide by jumping from a second-floor window of his barracks. Held: Not due to the member's own misconduct and in line of duty. Rationale: Since his domestic problems were not of such magnitude as to prompt a rational man to suicide, this man was not mentally responsible. Op JAGN 1952/103 (2 May 1952).

(b) Where there was a reasonable and adequate motive (mentally responsible):

-1- Servicemember stabbed former fiancee to death and then attempted suicide by stabbing himself in the abdomen. Held: Due to the member's own misconduct and not in line of duty. Rationale: Servicemember attempted suicide immediately after committing a most heinous offense. "Where suicide is attempted in an effort through self-destruction, to escape the consequences of a prior act of violence, there is deemed in the absence of affirmative proof of insanity [lack of mental responsibility] to be sufficient motivation to cause a reasonable man to take his own life." Op JAGN 1953/184 (15 May 1953).

-2- Recruit intentionally cut wrist with a razor. Later stated his reason to be that he could not endure Marine Corps life and felt he was being persecuted. He further stated that, if he were returned to duty, he would attempt suicide again. Held: Due to the member's own misconduct and not in line of duty. Rationale:

> When the evidence indicates that the suicidal act was probably motivated by a reason that might prompt a rational person to take his own life, the presumption of mental competency is not rebutted and question of sanity will depend upon all of the evidence pertaining to mental competence of the person at the time of the suicidal act .... There was no evidence aside from his self-inflicted injury to indicate the enlisted man was not mentally responsible either before or after his act. On the contrary, his statements indicate at all times he realized the significance of his acts and chose self-injury or self-destruction as the only way out of what was to him an impossible situation. Under the circumstances, the evidence presents sufficient motive....

Op JAGN 1951/30 (15 Oct 1951).

c. Suicidal gestures and malingering. If a person intentionally injures himself with no intent to die, and there is no evidence of lack of mental responsibility, the injury is the result of his own misconduct. Moreover, the mere act alone does not raise a question of insanity since there is no intent to take his own life. Instead, the intent is merely self injury for the purpose of achieving some secondary gain, such as a Marine cutting off his trigger finger to avoid combat.

0205 RELATIONSHIP BETWEEN MISCONDUCT AND LINE OF DUTY

A. Only three possible determinations. JAGMAN, § 0804.

1. In line of duty, not due to member's own misconduct (LOD/NDOM)

2. Not in line of duty, not due to member's own misconduct (NLOD/NDOM). This determination would occur when misconduct is not involved, but an injury or disease is contracted by a servicemember who falls within one of four other exceptions to the LOD presumption (desertion; UA; confinement as a result of a civilian conviction; confinement pursuant to sentence by a general court martial that included an unremitted dishonorable discharge). Example: A sailor has been UA for 8 months and is injured while lawfully crossing a street. The injuries were not the result of his negligence.

3. Not in line of duty, due to member's own misconduct (NLOD/DOM). A determination of "misconduct" always requires a determination of "not in the line of duty."

B. Disciplinary action. JAGMAN, § 0813. An adverse determination as to misconduct or line of duty is not a punitive measure. Disciplinary action, however, may be taken independently of any misconduct determination. A favorable or unfavorable determination of misconduct or line of duty is not binding on any issue of guilt or innocence in any disciplinary proceeding.

0206 RECORDING AND REPORTING

A. General rule. JAGMAN, § 0805. In each case in which a member of the naval service incurs an injury or disease, as discussed in section 0202 above, that might result in a permanent disability or which results in his physical inability to perform duty for a period exceeding 24 hours, as distinguished from a period of hospitalization for evaluation or observation, findings concerning line of duty and misconduct must be made.

B. Recording and reporting options for injury/disease cases. In each instance of injury and those disease situations discussed in section 0202 above, the inquiry and findings may be recorded in one of three ways:

1. Health or dental record entry;

2. form or letter report; or

3. JAG Manual investigation.

C. Criteria for determining which recording/reporting option to employ

1. Health and dental record entries. JAGMAN, § 0814b. Health and dental record entries suffice and are utilized when:

a. The member's physical inability to perform duty exceeds 24 hours; and

b. the medical representative and commanding officer agree that no likelihood of permanent disability exists, and that the disease or injury occurred in "line of duty" and "not as a result of member's own misconduct."

In any case, a form or letter report may be made to the Judge Advocate General if there appears to be any reason for maintaining a record in that office.

2. Form or letter reports. JAGMAN, § 0814c.

a. An injury report form and/or a letter report may be used in any case in which a LOD/Misconduct determination is required by section 0805 of the JAG Manual (as discussed in section 0202 above) and in which all of the following conditions are met:

(1) In the opinion of the medical officer (or representative of a medical department) concurred in by the commanding officer, the injury was incurred "in the line of duty" and "not as a result of the member's own misconduct";

(2) a factfinding body is not required under the JAG Manual and is not otherwise contemplated; and

(3) the reporting requirements of the Judge Advocate General are not fully satisfied by a health or dental record entry (i.e., a permanent disability may be involved).

b. Reports may be made to the Judge Advocate General using an Accidental Injury/Death Report (NAVJAG Form 5800/15) without a cover letter. Appendix A-8-c of the JAG Manual contains such a form completed for this purpose.

c. Any accident reporting form may be used including the Marine Corps Accident and Injury Report (NAVMC 10767) and Standard Form 91A in reporting injuries resulting from motor vehicle accidents. These forms must be forwarded with a letter report that includes the following information if it is not otherwise contained on the form:

(1) A specific statement that the injury was incurred "in the line of duty" and "not as a result of the member's own misconduct";

(2) name, rank or rate, and service number of the medical officer or medical department representative who concurred in the "line of duty" findings; and

(3) a statement as to the nature and extent of any injury and what, if any, permanent disability may be involved.

d. Appendices A-8-c through A-8-g of the JAG Manual demonstrate how to use NAVJAG Form 5800/15, and NAVMC 10767 with its transmittal letter report. When forms are used, care must be exercised to ensure that the copy being submitted to the Judge Advocate General is a duplicate original.

e. The form or letter report that is directed to the Judge Advocate General under section 0814c shall be forwarded via an officer exercising general court-martial jurisdiction, who will cause it to be examined by a judge advocate. Examples of recommendations of examining judge advocates are set forth in appendixes A-8-f and A-8-g of the JAG Manual.

f. JAG has to return many forms because either they are not filled in as required or they were not forwarded via the general court-martial convening authority or the Commandant of the Marine Corps, as appropriate. JAG would prefer a letter report to a form report where it is possible that someone else might also have an interest in the case, which means normally the following:

(1) Most death cases;

(2) clear cases of permanent disability;

(3) extended hospitalization cases; and

(4) automobile accident cases (also include Standard Form 91A).

3. JAG Manual investigation. JAGMAN, § 0814a. A factfinding body must be convened, and the commanding officer must make findings concerning misconduct and line of duty in any case in which:

a. The injury was incurred under circumstances which suggest that a finding of "misconduct" might result;

b. the injury was incurred under circumstances which suggest that a finding of "not in line of duty" might result;

c. there is a reasonable chance that a permanent disability is involved, and the commanding officer determines that such an investigation is the appropriate means for recording the circumstances surrounding the incident; or

d. the injured party is a member of the Naval or Marine Corps Reserve, and an investigation is determined by the commanding officer to be the appropriate means for recording the circumstances.

D. Death cases. JAGMAN, § 0810. Opinions concerning misconduct and line of duty are prohibited in death cases. However, because Federal agencies, especially the Department of Veterans' Affairs, must make determinations with

respect to survivor benefits, a report should be made to provide the facts for such a determination. In practice, determinations made by the Department of Veterans' Affairs rely either partially or completely on the documentation generated by, and within, the Department of the Navy. JAGMAN, § 0810b.

1. Factfinding body required. JAGMAN, § 0810a. A factfinding body must be convened in the following situations:

a. In any case in which the death of a member of the naval service occurred other than from natural causes, particularly all apparent suicides; or

b. in any case in which civilians or other nonnaval personnel are found dead on a naval installation under peculiar or doubtful circumstances, unless the incident is one over which the Naval Investigative Service has exclusive jurisdiction. See JAGMAN, § 0212; SECNAVINST 5520.3 series.

2. Letter reports. JAGMAN, § 0810f. In those death cases in which the appointment of a factfinding body is not required, but it is considered appropriate for a record of the circumstances to be maintained in the Office of the Judge Advocate General, a letter report may be used. Care should be exercised, however, to ensure that no statement is made expressing an opinion concerning line of duty or misconduct. An example of a letter report in a death case is contained in appendix A-8-b of the JAG Manual.

3. Death as a result of enemy action. JAGMAN, § 0810c. No report to the Judge Advocate General is required in the case of a death occurring as a result of enemy action. However, a factfinding body should be convened, and the record forwarded in any case in which peculiar or doubtful circumstances are involved. Because a number of commercial life insurance policies contain certain restrictions and/or certain types of double-indemnity provisions, it is desirable to ensure that the essential facts are recorded while witnesses are known and available. To the extent feasible, the facts reported should permit determinations as to whether death resulted from accidental causes, natural causes, or enemy action.

4. Status reports. Investigation-progress-status reports are required on all death investigations from all commands and reviewing authorities in the Navy every 14 days. A message is sent to Commander, Naval Military Personnel Command, with JAG and all intermediate commands/reviewing authorities as information addressees. The requirement for the status report ceases once the investigation has been forwarded to the next higher level of command/reviewing authority. MILPERSMAN, art. 4210100.6.

5. Copies. The next of kin of deceased servicemembers frequently are advised that they may request copies of the death investigation from the Judge Advocate General. It is therefore most important that these investigations be completed in an accurate, professional, and expeditious manner by mature, experienced officers. If it would unduly delay submission of the investigation to await a final autopsy report, autopsy protocols, death certificates, or similar documents, an initial report should be promptly submitted when the basic investigation is completed and a supplemental report should be

submitted via the review chain, advance copy to JAG, once the autopsy has been completed. An advance copy of each death investigation, with the First Endorsement, shall be forwarded to the Judge Advocate General by the convening authority. Usually, the advance report is released to the requesting next of kin by JAG (after exclusion of materials protected by the exemptions to the Freedom of Information/Privacy Acts), unless JAG has been alerted that subsequent reviewers may significantly alter findings, opinions or recommendations, in which case release is withheld until the investigative report is finally reviewed.

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REPORTING OF DEATH CASES
JAGMAN, § 0810

LOD/Misconduct determinations are never made by naval authorities regardless of the circumstances since Department of the Navy administered benefits for servicemembers are not dependent on such determinations.

No Report to JAG Required where:

1. Death as a result of enemy action; or
2. death from natural causes.

Letter Report to JAG may be used where:

1. No disciplinary action contemplated;
2. no claims probable; and
3. no factfinding body required.

Factfinding Body is required where:

1. Member of the naval service dies from other than natural causes; or
2. civilian or other nonnaval personnel dies on a naval installation under peculiar or doubtful circumstances unless NIS has exclusive jurisdiction.

PART B - MISCELLANEOUS PROVISIONS RELATING TO LINE OF DUTY/MISCONDUCT INQUIRIES

0207 RESPONSIBILITY TO ORDER INQUIRIES. JAGMAN, § 0806.

A. General. Normally, the commanding officer of the person involved is responsible for making the initial determination as to the necessity and type of inquiry required.

B. Afloat commands. Investigation of incidents ashore shall be conducted by an ashore command when the afloat command so requests and certifies that conduct of the investigation by the afloat command would not be feasible.

C. Incidents involving more than one command. If the incident involves members of more than one command, a single investigation should be conducted whenever possible. The area coordinator or other comparable authority will resolve any issue as to which command will conduct the investigation. If use of an injury report is authorized, each command may report on its own personnel, either by:

1. Conducting its own investigation; or

2. utilizing certified copies of all statements, etc., collected by a single investigator.

D. Incidents far removed from location of command

1. Often, an incident takes place at a distance from the person's own command, in which case the victim's command will, in most instances, be notified of the incident and the circumstances. The command should then request the appropriate area coordinator or other comparable authority for the place where the incident occurred to assume cognizance and order an investigation. Typically, a subordinate command is made responsible for making the initial LOD/Misconduct determination and forwarding a copy of the report to the victim's own command. See JAGMAN, § 0806. See also JAGMAN, § 0207b.

2. If an individual is injured at a place distant from his command and is admitted to a naval hospital, the commanding officer of the naval hospital shall, if no investigation has been ordered, report the matter to the local area coordinator or other comparable authority who shall take action to cause an investigation to be conducted.

0208 MISCONDUCT AND LINE OF DUTY HEARINGS. JAGMAN, § 0815.

A. Convening authority's action. In each case in which a member of the naval service has incurred an injury or contracted a disease, and the circumstances are such that an investigation by a factfinding body was required and conducted under provisions of the JAG Manual, the convening authority of the factfinding body, unless he returns the record or report for further inquiry, shall take one of the following actions:

1. If a factfinding body was directed to, and did inquire into, the circumstances surrounding the incurrence of an injury or the contraction of a disease, and the convening authority concludes that such injury or disease was incurred "in line of duty" and "not due to a member's own misconduct" (or that clear and convincing evidence is not available to rebut the presumption of line of duty and not misconduct), he must express this conclusion in his action (endorsement) on the record of proceedings. This action may be taken regardless of whether it differs from, or concurs with, an opinion expressed by the factfinding body.

2. If the member involved was designated a party before an investigation requiring a hearing and was fully accorded his rights as such, and if the factfinding body was directed to, and did inquire into, the circumstances surrounding the incurrence of an injury or the contraction of a disease, the convening authority shall express his conclusions concerning misconduct and line of duty in his action (endorsement) on the record of proceedings. Any of the permissible findings described in section 0804 of the JAG Manual may be made regardless of whether they differ from or concur with opinions expressed by the factfinding body.

3. If the member was not designated a party before the factfinding body or, if having been so designated he was not fully accorded his rights as such and, if upon review of the record or report of the factfinding body, the convening authority has substantial doubt that the injury or disease of the member was incurred in line of duty (i.e., a NLOD determination is possible or considered appropriate), he shall afford the member, if competent, a hearing under JAGMAN, § 0815a(3), or shall forward the record or report to the command to which the member, if competent, is attached so that such a hearing may be afforded. The hearing in such a case shall include the following elemental requirements:

a. The member shall be advised that questions have arisen concerning the circumstances under which he incurred an injury or disease and that line of duty and misconduct determinations must be made;

b. if the member is suspected of having committed an offense, he shall be so advised, as required by Article 31(b), UCMJ;

c. any statement, record, or other evidentiary matter considered by the factfinding body shall be made available for inspection by the member; and

d. the member shall be given full opportunity to present any relevant matter in refutation, explanation, rebuttal, or otherwise respecting the incurrence of the injury or disease. A reasonable period of time shall be provided to the member for this purpose.

Note: Appendix C-1 of this text has a supplemental hearing checklist.

B. Service record entries. Prior to forwarding the report of investigation of an injury to a servicemember which the convening authority has concluded was incurred not in line of duty, the convening authority should

ensure that appropriate time lost, enlistment extension, and similar entries are made in the member's service and/or medical records. (In the event the NLOD opinion is later disapproved by the officer exercising general court-martial convening authority, corrective entries can be made at that time.)

0209 GENERAL COURT-MARTIAL AUTHORITY'S RESPONSIBILITY. JAGMAN, § 0815. Unless the convening authority is empowered to convene general courts-martial, the record or report shall be forwarded to an officer exercising general court-martial jurisdiction. This officer may take any action on the report that could have been taken by the convening authority. With respect to conclusions concerning misconduct and line of duty, he shall indicate his approval, disapproval, or modification of such conclusions unless he returns the record for further inquiry. See JAGMAN, § 0210. When an adverse line of duty/misconduct determination has been made or approved by the officer exercising general court-martial jurisdiction, appropriate entries shall be made in the individual's service and medical records. A copy of this action shall be forwarded to the commanding officer of the member concerned. While no adverse determination can be rendered for a servicemember who is incompetent and unable to participate in a JAGMAN, § 0815a(3) hearing, the officer exercising general court-martial jurisdiction should ensure that the incompetency is documented in the record and noted in the forwarding endorsement. The endorsement should also state which line of duty determination is supported by the facts and that, when and if the member becomes able to participate in the hearing, the member should be informed of the right to a hearing. A copy of the endorsement should then be placed in the member's service and medical records. Reviewing authorities subsequent to the officer exercising general court-martial jurisdiction need neither comment nor record approval or disapproval of the prior actions concerning line of duty and misconduct.

0210 SPECIAL WARNING REQUIRED BEFORE REQUESTING STATEMENTS REGARDING DISEASE OR INJURY. JAGMAN, § 0306; NJS, Civil Law Study Guide, app. B 1(2). A member of the armed forces may not be required to sign a statement relating to the origin, incurrence, or aggravation of a disease or injury that he has. Any such statement against his interests, signed by a member, is invalid. 10 U.S.C. § 1219 (1982). Any person in the armed forces, prior to being asked to sign any statement relating to the origin, incurrence, or aggravation of any disease or injury that the member has suffered, shall be advised of his/her right not to sign such a statement. The spirit of this section is violated if an investigating officer, in the course of a JAG Manual investigation, obtains the injured member's oral statements and reduces them to writing without the above advice having been given first.

0211 PRIVACY ACT WARNINGS. JAGMAN, § 0308; NJS, Civil Law Study Guide, apps. B 1, B-2. When any individual, other than a witness, is requested to provide personal information about himself by a government representative in the course of any type of JAG Manual investigation (regardless of whether by way of oral testimony, deposition, affidavit, sworn/unsworn statement, or simple interview), the individual shall be provided with a suitable Privacy Act

statement. JAGMAN, § 0308a, app. A-3-a. Privacy Act statements will not ordinarily be required for witnesses, since it would be extremely rare for personal information furnished by a witness to be retrieved by the witness' name or personal identifier. Social security numbers (SSN) should not be solicited from any individual. This will avoid the need to give the individual a specially tailored SSN Privacy Act statement. (Note, however, that SSN's can often be obtained from existing records, thereby avoiding the need for Privacy Act statements.) The requirement for a Privacy Act statement is cumulative to other applicable warnings or advisements required by Article 31, UCMJ, the JAG Manual or any other authority. The reasons for any noncompliance with the Privacy Act should be explained in the preliminary statement or forwarding endorsements of the JAG Manual investigation and the officer exercising general court-martial jurisdiction reviewing the record of proceedings should ensure that any remedial action necessary to effect compliance with the Privacy Act is taken prior to forwarding the record to JAG. JAGMAN, § 0308b.

CHAPTER III

JAG MANUAL INVESTIGATIONS NOT REQUIRING A HEARING

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CHAPTER III

JAG MANUAL INVESTIGATIONS NOT REQUIRING A HEARING

NOTE: Recent changes to the JAGMAN have revised the terminology used for JAGMAN investigations. What were formerly called "informal investigations" are now referred to as single individual investigations not requiring a hearing. Since Part C, Chapter V of the JAGMAN contains specific guidance on these investigations, in our study guide we have also referred to these as investigations convened under Part C, Chap. V.

0301 GENERAL

A. Function. As is the case with any factfinding body, the primary function of an investigation not requiring a hearing is to search out, develop, assemble, analyze, and record all available information relative to the matter under investigation. In contrast to a factfinding body requiring a hearing, a factfinding body not requiring a hearing in the Navy and Marine Corps does not have the power to designate parties and therefore does not have the collateral function of providing a hearing to a party.

B. Distinguishing features. The principal distinguishing features of a factfinding body not requiring a hearing are that it:

1. May consist of one or more commissioned or warrant officers, senior enlisted persons, or mature civilian employees of the Department of the Navy as member or members;

2. is convened orally or in writing;

3. is ordinarily not directed to take testimony under oath or to record testimony verbatim;

4. does not utilize hearing procedures in collecting evidence;

5. may not designate any persons as parties to the investigation;

6. does not possess the power to subpoena civilian witnesses; and

7. cannot be used in Article 139, UCMJ proceedings.

0302 CONVENING AUTHORITY. JAGMAN, §§ 0206b, 0207. Any officer in command may order a board of investigation or a single individual investigation under Part C of Chapter V. For purposes of the JAG Manual, "officer in command" means an officer authorized to convene any type of court-martial under Articles 22, 23, or 24, UCMJ, or authorized to impose disciplinary punishment under Article 15, UCMJ, including officers in charge.

0303 COMPOSITION AND APPOINTMENT

A. Composition. Factfinding bodies not requiring a hearing may be composed of a single investigator or a board of investigation consisting of two or more members.

B. Seniority principle. If practicable, the member or members of an investigation not requiring a hearing should not be junior to any person whose conduct or performance of duty will be subject to inquiry.

C. Participation by expert. An expert may participate as investigating officer or for the limited purpose of utilizing his special experience. The report should make clear any limited participation by a member. JAGMAN, § 0507c.

D. Counsel. Ordinarily, counsel is not appointed for investigations convened under Part C of Chapter V, although a single judge advocate is often made available to assist the investigation with any legal problems or questions that may arise.

0304 APPOINTING ORDER

A. General

1. A factfinding investigation not requiring a hearing is convened by a written order of any officer in command. The appointing order of any factfinding body, other than a court of inquiry, may be issued by an officer who holds a delegation of authority for such purposes from the convening authority. For example, the executive officer may order a junior officer to do an investigation based upon the commanding officer's delegation to the executive officer. JAGMAN, § 0206b.

2. An appointing order must be in official letter form addressed to the senior member of a board of investigation or to the investigating officer of a one-officer investigation. When circumstances warrant, an investigation may be convened on oral or message orders. Signed, written confirmation of oral or message orders must be issued in each case, and must be included in the investigative report. JAGMAN, § 0503b.

B. Contents. JAGMAN, § 0503c; JAGMAN, app. A-5-a & A-5-b; NJS, Civil Law Study Guide, app. A-1.

1. General. The written appointing order for a JAG Manual investigation not requiring a hearing will contain:

a. Subject line in accordance with OPNAVNOTE 5211 (JAG Manual investigations are filed by calendar year groupings, by surname of individual, bureau number of aircraft, name of ship, hull number of unnamed water craft, or vehicle number of Government vehicle);

b. the name(s) of the member(s);

c. a recital of the specific purpose(s) of the investigation and explicit instructions as to the scope of the inquiry;

d. ample instructions to ensure that the investigating officer or board accomplish all the objectives of the investigation, not just the immediate objectives of the convening authority (e.g., an automobile accident involving a member of the naval service may give rise to various concerns:

(1) The convening authority who orders the investigation may be concerned whether local procedures should be changed and whether disciplinary action may be warranted.

(2) JAG may be concerned with a line of duty/misconduct determination.

(3) The nearest NLSO claims office will be concerned with potential claims for or against the Government.)

For the investigation to be properly completed, the investigator will have to satisfy the special requirements of each of these different determinations.

e. Directions for complying with the Privacy Act, Art. 31 of the UCMJ and sections 0306 and 0505d of the JAGMAN.

f. If the possibility of a claim exists, include a statement that: "This investigation is being convened because of anticipated litigation and for the purpose of assisting attorneys representing the interests of the United States in this matter." JAGMAN, § 0503c.

g. Citation to applicable JAGMAN sections pertaining to the subject of the investigation.

2. Findings of fact. All factfinding bodies are directed to make findings of fact.

a. For investigations of serious or complex incidents, the convening authority is often quite specific about those areas the investigation will consider and those it will not. For example, if a ship were to lose a radar mast during a storm, the investigation might be specifically directed to make no findings concerning any structural defect or failure of the mast. That aspect of the incident may be considered by a separate investigation convened at the shipyard where the mast was installed.

b. In the typical investigation not requiring a hearing, the appointing order directs the investigator to conduct a thorough investigation into all the circumstances connected with subject incident and to report findings of fact, opinions, and recommendations as to:

(1) The resulting damage;

(2) the injuries to members of the naval service, and their line-of-duty and misconduct status;

(3) the circumstances attending the death of members of the naval service;

(4) the responsibility for _____, including any recommended administrative or disciplinary action;

(5) claims for and against the government; and/or

(6) any other specific investigative requirements that are relevant, such as those contained in chapter IX of the JAG Manual.

c. During the course of the investigation, on advice of the investigative body or on his own initiative, the convening authority may broaden or narrow the scope of the inquiry by issuing supplemental directions amending the appointing order.

3. Opinions and recommendations. The appointing order must direct the investigator(s) to report opinions and recommendations. For guidance as to opinions normally required in specific situations, see Chapters VIII and IX. A convening authority may require recommendations in general or in limited subject areas.

4. Testimony, oath, and record. The appointing order may direct that testimony or statements of some or all witnesses be taken under oath and may direct that testimony of some or all witnesses be recorded verbatim. When a factfinding body not requiring a hearing takes testimony or statements of witnesses under oath, it should utilize the oath prescribed in section 0415 of the JAG Manual.

5. Sample. Sample appointing orders are contained in appendixes A-5-a and A-5-b of the JAG Manual and appendix A-1 of this text.

0305 PROCEDURAL ASPECTS

A. Oaths. JAGMAN, § 0509. In an investigation not requiring a hearing, a single individual investigator and members of a board usually are not sworn.

B. Challenge. There is no mention of challenges to an investigator or members of boards of investigation in Part C of Chapter V of the JAG Manual, although the possibility obviously exists. The convening authority should consider granting the challenge, if it has any merit.

C. Procedure. JAGMAN, § 0510a.

1. Inasmuch as a factfinding body under Part C, Chapter V, does not perform the collateral function of affording a hearing, it is free to determine and utilize the most effective methods of seeking out, uncovering, collecting, analyzing, and recording all information that is or may be relevant to a determination of all the facts and circumstances of the subject under inquiry. For example, if a board desires, it may divide aspects, witnesses, or evidentiary facets of the inquiry among the members for individual investigation and development, holding no collective meeting until an initial review is made of all the information collected to determine its completeness.

2. This type of factfinding body may call witnesses before its assembled members to present testimony, or it may obtain relevant information from the witnesses by personal interview, correspondence, telephone inquiry, or other means. In short, a factfinding body under Part C, Chapter V, may employ any method that it finds efficient and effective in performing its investigative function.

3. If the telephone inquiry method is used, the investigator(s) should prepare a written memorandum of the call, identifying the person by name, rank, armed force, and duty station (if a servicemember) or by name, address, and occupation (if a civilian). The memorandum should set forth the substance of the conversation, the time and date it took place, and any rights or warnings provided.

0306 THE INVESTIGATION

A. Preliminary steps. The universal question every officer has when he receives his first investigative assignment is where to begin. He should begin by examining the appointing order to see if it was signed by someone authorized to convene the investigation, to wit: any officer in command, or his delegate. Then, the officer should examine the appointing order to ascertain the nature of the tasking, its completeness and accuracy vis-a-vis the special investigative requirements of chapters VIII and IX of the JAG Manual for certain types of incidents.

B. Conducting the investigation. The circumstances surrounding the particular incident under investigation will probably dictate the most effective method of proceeding. For example, an investigation of an automobile accident, in which one or more of the parties was injured, would involve: Interviews at the hospital with the injured parties; collection of hospital records and police records; eyewitness accounts; damage estimates; mechanical evaluation; inspection of the scene; and other matters required by sections 0811, 0903 and probably 2007 of the JAG Manual. On the other hand, an investigation of a shipboard casualty or loss of a piece of equipment could involve merely the calling and examination of material witnesses. A checklist of possible sources of information, depending on the nature of the incident, is set forth in appendix D-4 of this text.

C. Timing. The investigation should commence as soon as possible after the incident has occurred. Normally, the sooner an investigation is conducted the better the results will be, since:

1. Witnesses may be required to leave the scene;

2. a ship's operating schedule may require leaving the area of the incident;

3. events will be fresh in the minds of witnesses; and

4. damaged equipment/materials are more apt to be in the same relative position/condition as a result of the incident.

NAVOP 059/83 requires that the initial investigation be completed within 30 days of the incident/accident under investigation, and that each subsequent review be completed within 30 days (20 days in death cases) of each preceding input. Delays must be requested from, and approved in writing by, the next superior reviewing authority.

D. Evidence. JAGMAN, § 0510b.

1. Rules of evidence. A factfinding body not requiring a hearing is not bound by the formal rules of evidence applicable before courts-martial and may collect, consider, and include in the record any matter of reasonable believability or authenticity that is relevant to the matter under inquiry. In general, however, care should be taken to authenticate (indicate the genuineness of) real and documentary items and to enclose reproductions thereof with the report by certifications of correctness of copies or statements of authenticity, as may be appropriate. The statement of a witness should be signed by the witness or should be certified to be either an accurate summary or the verbatim transcript of oral statements made by the witness.

2. Real and documentary evidence

a. General. Photographs, records, operating logs, pertinent directives, watchlists, and pieces of damaged equipment are examples of evidence which the factfinding body may have to identify, accumulate, and evaluate.

b. Photographs. Photographs with sufficient clarity to depict actual conditions are invaluable as evidence. Although, in some instances, color photos present the best pictorial description, they are more difficult to reproduce and normally require more time to develop. Therefore, it may be more prudent to utilize black-and-white film. Polaroid prints offer practically instantaneous review to ensure that the desired picture is obtained, but they are somewhat difficult to reproduce or to enlarge. Photographs should be taken from two or more angles, using a scale or ruler to show dimensions. The investigative report should include complete technical details relating to the type of camera, its settings, film used, lighting conditions, time of day, etc. In cases of personal injury or death, photographs that portray the results of bodily injury should be included only if they contribute to the usefulness of the investigation. Lurid or morbid photographs that serve no useful purpose should not be taken nor provided with the report.

c. Sketches. Sketches in lieu of, or in conjunction with, photographs provide valuable additional information. In sketching, insignificant items can be omitted, providing a more uncluttered view of the scene. For the purpose of portraying skid marks or other phenomenon, where dimensions are critical but may be distorted by camera perspective, accurate sketches can be more valuable than photographs. They should be drawn to scale and the use of graph paper is recommended. They can also be used as a layout to orient numerous photos and measurements.

d. Pieces of equipment. Pieces or parts of equipment and material as evidence must be carefully handled to ensure that this physical evidence is not destroyed. Where it is not appropriate to attach real evidence

to the report, it should be preserved in a safe place under proper chain of custody--and the report of investigation should so reflect. Each item should be tagged with a full description of its relationship to the accident. If it is to be sent to a laboratory for analysis, it must be packaged with care. A photo or sketch should accompany the item(s) to depict the "as found" location and condition.

e. Documents, logs, and records. Verbatim copies of relevant operating logs, records, directives, memos, medical reports, police or shore patrol reports, motor vehicle accident reports, and other similar documents should be made. If at all possible, they should be reproduced by mechanical or photographic means to ensure exactness. The copies should be checked to ensure that all are clear and legible and to watch for obvious erasures and mark-overs which might not show up with certain methods of reproduction.

f. Witnesses. JAGMAN, § 0505d.

(1) Warnings

(a) Privacy Act. The Privacy Act of 1974 [5 U.S.C. § 552a (1982)] requires that a Privacy Act statement be given to an individual who is requested to supply personal information in the course of a JAG Manual investigation when that information will be included in a "system of records," as defined in section 0308a(3) of the JAG Manual. Social security numbers (SSNs) should not be solicited from a witness. This avoids the need to give the individual a specially tailored SSN Privacy Act statement. Note that witnesses will rarely provide personal information that will be retrievable by the witness' name or other personal identifier. Since such "retrievability" is the cornerstone of the definition of "system of records," in most cases the Privacy Act will not require warning anyone unless the investigation may eventually be filed under their name(s). JAGMAN, § 0308a(3).

(b) Article 31, UCMJ. In the case of a witness suspected of an offense, Article 31(b), UCMJ must be complied with. If it appears probable that a prosecution of the individual for the suspected offense may ensue, refer to appendix A-1-n of the JAG Manual and appendix B of this text for the proper warnings and forms. Ordinarily, the investigator or board should collect all relevant information from all available sources -- other than those persons suspected of offenses, misconduct, or improper performance of duty -- before interviewing such persons.

(c) Injury/disease warning. A member of the armed forces, prior to being asked to sign any statement relating to the origin, incurrence or aggravation of any disease or injury that he/she has suffered, shall be advised that he/she has a statutory right not to sign such a statement and, therefore, is not required to do so. A proper warning form is set forth in appendix B-1(2) of this text. JAGMAN, § 0306.

(2) Interview

(a) Written statement. The statement of a witness is obtained in an informal interview. The best method for examining a witness obviously depends on the witness and the complexity of the incident. Whatever

method of interview is employed, though, the witness' statement, wherever possible, should be reduced to writing and signed by the witness. Sworn statements may be taken, unless the appointing order directs otherwise. A sworn statement is, in fact, considered more desirable than an unsworn statement, since it adds to the reliability of the statement and can expedite subsequent action such as pretrial investigations. The statement should be dated and should properly identify a servicemember by full name, grade, service, and duty station and a civilian by full name, title, business or profession, and residence.

(b) Other methods. In many instances, limitations on availability of witnesses will prevent the investigating officer from obtaining a written, signed statement in the above manner. When this happens, an investigating officer or a board may take testimony or collect evidence in any fair manner it chooses. Unavailable witnesses may be examined by mail or by telephone. A single member of a board may obtain information in this manner and such evidence may be considered by the whole board.

(c) Content. In examining a witness, use the appointing order and the requirements set forth in the JAG Manual for investigations of that type of incident as a checklist to ensure that all relevant information is obtained. Statements taken from witnesses, in addition to covering the full scope of the investigative requirements, should be as factual as possible in content. Vague conclusory statements, such as "pretty drunk," "a few beers," and "pretty fast," are of little value to the reviewing authority who is trying to evaluate the record. When a witness makes a statement of this kind, pin him/her down to the actual facts. The rules for admissibility of evidence in court-martial proceedings offer guidelines for separating conclusions from observations. For example, instead of accepting the conclusory statement "pretty drunk," use the kind of questions one would use in a court-martial to lay a foundation for that kind of opinion.

How long did you observe the person?

Describe the clarity of his speech.

Did you observe him walk?

What was the condition of his eyes, etc.?

What was he drinking?

How much?

Over what period of time?

0307 COMMUNICATIONS WITH THE CONVENING AUTHORITY. JAGMAN, § 0511. If at any time during the investigation it should appear, from the evidence adduced or otherwise, that circumstances exist in the light of which the convening authority might consider it advisable to enlarge, restrict, or otherwise modify the scope of the inquiry or to change in any respect any instruction provided in the appointing order, an oral or written report should be

made to the convening authority. The convening authority may take such action on this report as he, in his discretion, deems appropriate. There is no written requirement that such communications with the convening authority be included in the report or the record of the investigation.

0308 INVESTIGATIVE REPORT

A. General. JAGMAN, § 0512. The investigative report, in letter form, shall consist of:

1. A list of enclosures;

2. a preliminary statement;

3. findings of fact;

4. opinions;

5. recommendations; and

6. enclosures.

B. List of enclosures. JAGMAN, § 0512f. The appointing order will be the first enclosure. JAGMAN, § 0901a requires that all persons involved in the incident under investigation be properly identified (full name, title, business or profession, and residence if a civilian; or full name, grade, service, duty station, and service number if a member of the armed forces). The list of enclosures is a suggested place for ensuring compliance with that section (e.g , "statement of SN John Doe, USN, 000-00-0000, NETC, Newport, R.I., dated _____").

C. Preliminary statement. JAGMAN, § 0512b.

1. Purpose. The purpose of the preliminary statement is to inform the convening and reviewing authorities that the requirements as to procurement of all reasonably available evidence and the directives of the convening authority have been met.

2. Content. The preliminary statement should refer to the appointing order and set forth:

a. The nature of the investigation;

b. any limited participation by a member;

c. any difficulties encountered in the investigation;

d. conflicts in evidence;

e. failure to advise persons of various rights;

f. reasons for any delay;

g. the fact that all social security numbers/serv. . numbers were obtained from official sources and not solicited from the individual servicemember;

h. a statement in claims investigations to the effect: "This investigation has been conducted and this report is being prepared in contemplation of litigation and for the express purpose of assisting attorneys representing the interests of the United States in this matter.";

i. any individual who assisted in the investigation; and

j. any other information necessary for a complete understanding of the case.

It is not necessary for the investigating officer to set out his itinerary in obtaining the information contained in the report.

D. Findings of fact. JAGMAN, § 0512c.

1. Format. Findings of fact should be clearly labeled as such and should be broken into separate findings or grouped into a narrative. It is for the factfinding body to determine which method is the most effective presentation for a particular case, but it is strongly recommended that the method of separate findings be used because it is easier to determine whether the finding is as specific as possible as to times, places, persons, and events; it allows for the referencing of one or more enclosures to support each finding; and it reduces the possibility of making a finding that is not founded on the evidence in the enclosures.

2. Evidentiary support. Every finding of fact must be supported by evidence contained in the enclosures. For example, the investigating officer may not state: "The car ran over Seaman Smith's foot," without a supporting enclosure. He may, however, have Smith execute a statement stating: "The car ran over my foot." Include this statement as enclosure (X) and, in the findings of fact, state: "The car ran over Seaman Smith's foot," referencing enclosure (X). Each finding of fact must contain a reference by number to the enclosure on which it is based. This should be done regardless of whether the narrative method or separate finding method is used to report the findings.

3. Checklists. In making findings of fact, the investigating officer should use the appointing order and the specific requirements set out in chapters VIII and IX of the JAG Manual as a checklist to ensure he/she has not omitted any of the requirements. If the investigation covers more than one of the incidents dealt with in chapter IX, the investigating officer must ensure that the investigation satisfies the requirements of each separate incident. For example, an investigation of an automobile accident between a Navy vehicle and a civilian vehicle, resulting in injury to the Navy driver, would involve the following sections of the JAG Manual:

a. Section 0817, concerning injuries to servicemembers;

b. section 0903, concerning vehicular accidents; and

c. sections 0910 and 2001-07, concerning claims for or against the government.

4. Evidentiary conflicts. If the evidence in the enclosures is in any way contradictory, the investigating officer still must make a factual determination in the findings-of-fact section and explain the basis for that determination in the preliminary statement.

E. Opinions. JAGMAN, § 0512d. Opinions are logical inferences that flow from the listed findings. An investigative report must list all appropriate opinions supported by facts. For guidance as to opinions normally required in specific situations, see chapters VIII and IX. Each opinion must reference each finding of fact supporting it. This will take the same form as enclosures supporting findings of fact.

F. Recommendations. JAGMAN, § 0512e. Recommendations must be based on expressed opinions and should be as specific as possible as to the corrective action to be taken. If trial by court-martial is recommended, a signed, sworn charge sheet shall be submitted as an enclosure to the investigative report. If a punitive letter of reprimand or admonition is recommended, a draft of the recommended letter will be prepared and submitted with the investigative report. If a nonpunitive letter is recommended, a draft will not be included in the investigation, but should be forwarded to the appropriate authority separately for issuance. The various types of letters are discussed in section 0106 of the JAG Manual. Also, see appendixes A-1-a, A-1-b, and A-1-c for samples.

G. Enclosures. JAGMAN, § 0512f.

1. The signed, written appointing order will be the first enclosure.

2. Subsequent enclosures will contain all the evidence developed in the investigation.

3. If the investigating officer's personal observations provide the basis for any findings of fact, he should attach as an enclosure a signed, sworn statement as to those observations.

4. Each statement, document, or exhibit will be a separate enclosure.

5. Each enclosure should be separately numbered and completely identified.

6. The Privacy Act statement for each party or witness from whom personal information was obtained must be enclosed.

7. The signatures of the single investigating officer or the board members on the basic report serve to authenticate all of the enclosures to the report. Nevertheless, individual authenticating or witnessing is necessary in situations discussed in JAGMAN, §§ 0505b, 0505c, and 0510b.

8. Any requests for extensions of time for submission shall be included as enclosures in addition to letters granting or denying such requests.

H. Signing and authenticating. JAGMAN, § 0512g.

1. General. All persons who participated in the investigation shall sign the investigative report. This includes all persons who participated in the investigation at the time of the findings, even though their participation was limited.

2. Dissenting opinions. If there are two members of a board of investigation, and they cannot agree on findings of fact, opinions, or recommendations, the report shall be signed by the senior member. The other member shall, in a signed dissenting report, state clearly the parts of the report with which he disagrees and his reasons therefor. If the board consists of three or more members, the majority shall provide the report of the board and the signed minority report of the dissenting member, stating his reasons for dissent, shall be included.

I. Classification of report. JAGMAN, § 0209c. When classified material is included in the record of proceedings or an investigative report, the record or report is assigned the classification of the highest subject matter contained therein. In order to facilitate the processing of requests for release of investigations (such as FOIA requests which require "declassification" review) and simplify handling and storage, staff judge advocates and reviewers are urged to declassify enclosures whenever possible. If the information in question cannot be declassified, but contributes nothing to the report, consideration should then be given to removal of the enclosure from the investigation with notification in the forwarding endorsement.

J. Copies of report. JAGMAN, §§ 0209b, 0211c.

K. Sample report. JAGMAN, app. A-5-e; NJS, Civil Law Study Guide, app. A-2.

0309 DISPOSITION OF THE REPORT. JAGMAN, §§ 0210, 0211.

A. Intermediate routing. The disposition and action upon the record of an investigation convened under Part C, Chapter V, is the same as the disposition and action upon the record covered under courts of inquiry and investigations convened under Parts D & E, Chapter V. In essence, the report of investigation goes to the convening authority and all appropriate superior authorities in the chain of command who have a direct official interest in the recorded facts. Area coordinators, or comparable authorities of shore-based activities, should be included as via addressees on the investigative report if the investigation relates to a subject matter affecting their area coordination, command responsibility, or claims adjudicating authority, unless they direct otherwise. Any flag or general officer in command may publish categories of JAG Manual investigation reports which are of direct interest to them and direct exceptional intermediate routing including routing it directly to him, bypassing all echelons of authority in between. An advance copy, with the convening authority's First Endorsement shall be forwarded directly to JAG in admiralty cases, death cases, or other serious cases.

B. Review and forwarding. The convening authority and each field authority to whom a JAG Manual investigation is routed shall transmit it by endorsement which effects one of the following actions:

1. Forward the record or report by endorsement, without comment or recommendation, where the matter is of no direct official interest to the authority;

2. return the report for further inquiry where it is found to be incomplete, ambiguous, or in error;

3. return the report for further corrective action, stating in detail the inadequacy or incompleteness noted; or

4. forward the record, setting forth any action taken or comments, along with his approval or disapproval, in whole or in part, of the proceedings, findings, opinions, or recommendations contained therein.

C. Deadlines. NAVOP 059/83 requires that the convening authority complete his review of a JAG Manual investigation within 30 days (20 days in death cases) from receipt of the investigation, and each subsequent reviewer must complete his review of the investigation within 30 days (20 days in death cases) from receipt of the investigation. Delays must be requested from, and approved in writing by, the next superior reviewing authority and then documented in the investigation or endorsements.

D. Disciplinary action. Whenever punitive or nonpunitive disciplinary action is contemplated, initiated, or taken respecting any person as a result of the incident that was the subject of inquiry, such action shall be noted in the endorsement of the convening authority. Disciplinary action should be taken in a timely manner and should not await the concurrence of higher authority. Punitive letters of censure or copies of recommended drafts shall be included as enclosures. Nonpunitive letters or copies of recommended drafts are private and shall not be included, but shall be separately forwarded to the appropriate commander for issuance.

E. Privacy Act monitoring. The officer exercising general court-martial jurisdiction who reviews the JAG Manual investigation record has the responsibility to review the record to ensure compliance with the Privacy Act and, if necessary, to return it to the convening authority for remedial action prior to forwarding it to the Judge Advocate General.

F. Additional information. Each reviewing authority shall include any information known -- or reasonably ascertainable -- at the time of the review concerning action taken or being taken in the case, but not already contained in the record or previous endorsement.

G. Ultimate disposition. JAGMAN, § 0211. Subject to the exceptions noted in section 0211 of the JAG Manual, the complete original record or report of every JAG Manual investigation shall be routed to the Judge Advocate General, Department of the Navy, 200 Stovall Street, Alexandria, Virginia 22332-2400.

CHAPTER IV

COURTS OF INQUIRY, INVESTIGATIONS REQUIRING A HEARING, AND PARTIES

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CHAPTER IV

COURTS OF INQUIRY, INVESTIGATIONS REQUIRING A HEARING, AND PARTIES

PART A - COURTS OF INQUIRY

NOTE: Due to recent changes in the JAGMAN, investigations that were previously called "formal investigations" are now called single individual investigations requiring a hearing or board of investigations requiring a hearing. Since Parts D or E, Chapter V, of the JAGMAN contain specific guidance on these investigations, in our study guide we have also referred to them as investigations convened under Part D or E, Chapter V.

0401 GENERAL. Since courts of inquiry are highly formalized proceedings used only infrequently, treatment within this study guide is confined to the basics -- as they facilitate an understanding of all investigations requiring a hearing described by the JAG Manual. Chapters II and IV of the JAG Manual provide a lengthy discussion of courts of inquiry. To understand their relationship to other investigations classified as JAG Manual investigations, the chart contained in paragraph 0428 of this text should be helpful.

0402 PURPOSE AND CONVENING AUTHORITY. Courts of inquiry usually are reserved for the most serious incidents involving major damage and loss of life. JAGMAN, § 0205a. They may be convened by any person authorized to convene a general court-martial or any other person designated by the Secretary of the Navy for this purpose. UCMJ, art. 135; JAGMAN, §§ 0206a, 0401a, 0402a. A court-of-inquiry convening authority (other than SECNAV) may not delegate to a subordinate the authority to convene a court of inquiry. JAGMAN, § 0206b.

0403 APPOINTING ORDER

A. Content. While a court of inquiry requires a written appointing order, oral direction or message may be used to initiate the proceedings and the written appointing order may follow. JAGMAN, § 0402. The court should be directed to report findings of fact and, if the convening authority desires, to submit opinions and recommendations. The appointing order should be specific with regard to the time, date, and place of the court's first meeting. Furthermore, it should delineate the scope of inquiry of the court. This is essential in order to meet the needs of the particular situation and to give the court guidelines along which it may operate. JAGMAN, § 0402.

B. Parties. With regard to the designation of parties, the convening authority may designate parties in his appointing order and/or he may rely upon the court of inquiry to designate parties. A court of inquiry has inherent power to designate parties under section 0302d of the JAG Manual and it is the only JAG Manual investigative body which inherently possesses this authority. No delegation of this authority is necessary in the appointing order as would be the case with an investigation convened under Part D or E, Chapter V.

C. Amendment. The appointing order may be amended any time a specific need arises (e.g., a change in membership or additional instructions concerning the scope of the inquiry). JAGMAN, § 0402c. Furthermore, the court is free to communicate with the convening authority should the need arise, subject to the requirement that this communication be made a matter of record and included in the court's proceedings. JAGMAN, § 0425.

D. Signature. The appointing order of a court of inquiry must be personally signed by the convening authority.

0404 COMPOSITION, MEMBERSHIP AND SENIORITY. A court of inquiry is composed of three or more commissioned officers and an appointed counsel for the court (who need not be, but usually is, a judge advocate). JAGMAN, § 0401. All members of a court of inquiry, with the exception of counsel for the court (and his assistant, if designated), should be senior to any person designated a party before the court. Should a person who is senior to any member of the court be subsequently designated a party, then the convening authority should be notified and the membership revised to remedy this situation. This is what is known as, and what will be referred to as, the "seniority rule." If it is not practicable to adhere to this principle, the convening authority shall explain the reason(s) in his action (endorsement) on the record of proceedings. JAGMAN, § 0402d. The senior member is called the "President" and exercises those rights, powers, and prerogatives normally associated with any official exercising parliamentary control over an administrative body (e.g., administering oath to counsel, preserving order, deciding upon matters of routine operation, and making preliminary rulings). JAGMAN, § 0403a.

0405 RULINGS AND CHALLENGES. The president's rulings are subject to the objection of any member; once there has been an objection, a vote is taken and the vote of the majority prevails. In case of a tie, the decision of the president controls -- except in cases of challenges of members. In case of a challenge of a member, a tie vote will operate to disqualify the member. Once a member has been initially challenged, he is excluded from deliberation on the issue of whether or not he should sit and has no vote in this matter. JAGMAN, §§ 0403b, 0414b.

0406 COUNSEL FOR THE COURT OF INQUIRY. A court of inquiry may, through its president, direct counsel for the court to pursue a desired line of questioning, to expand upon areas already covered by counsel, and to obtain any additional witness or evidence where necessary. JAGMAN, § 0403c. When requested by the court, counsel for the court may assist the court in setting

forth its findings of fact, opinions, and recommendations in proper form. JAGMAN, § 0429. Section 0410b of the JAG Manual indicates that, when the court is cleared for deliberation or consultation, counsel for the court will normally withdraw unless requested to remain.

0407 ATTENDANCE. Attendance of members of a court of inquiry is mandatory, except where excused by the convening authority. Temporary absence does not preclude a member's further participation, but the absent member must examine the part of the record made during his period of absence and the fact of his absence must be noted in the record of proceedings. A quorum of three members is necessary to transact all business except adjournment. JAGMAN, § 0404. The counsel for the court of inquiry and the party's counsel have the right to be present during all open proceedings of the court. JAGMAN, §§ 0304a, 0413.

0408 PROCEDURE

A. Meetings and adjournment. The court of inquiry will normally meet at the time and place specified in the appointing order, or as close thereto as possible. The court may adjourn, when desirable, to any place which may be convenient to the court. JAGMAN, § 0409. Adjournments in excess of three days require that the convening authority be notified by the president. JAGMAN, § 0411. Members are seated in the same order as they would be if attending a court-martial. JAGMAN, § 0409.

B. General. Basically, the same procedure will be followed as if the proceeding were a court-martial proceeding with respect to preliminary statements, introduction of evidence, testimony and arguments by counsel for the court and counsel for the party or parties. JAGMAN, § 0408. Appendix A-4-d of the JAG Manual sets forth a recommended guide for conducting the hearing. Evidentiary exhibits will be attached in the order in which they are introduced. JAGMAN, § 0424. After the proceedings have been concluded, the court will formulate findings of fact and, if required, opinions and recommendations. The facts, opinions, and recommendations are attached at the end of the verbatim record of proceedings and exhibits, following which the entire record of proceedings is forwarded to the convening authority. It must be remembered that any factfinding body's work product is advisory with regard to the convening authority. JAGMAN, § 0201c.

C. Disagreement among members. There is no requirement that all members concur in the findings of fact, opinions, and recommendations. Therefore, provision is made whereby a majority and minority report may be expressed. Depending upon a member's opinion, he would sign one or the other. This is not to say, however, that the court would be limited to only one minority opinion. JAGMAN, § 0433.

D. Rules of evidence. A court of inquiry is not bound strictly by the formal rules of evidence, but constitutional and statutory personal privileges must be enforced and a general observance of the Military Rules of Evidence promotes orderly proceedings and a full, fair, and impartial investigation.

E. Communication with the convening authority. During the course of the proceedings, a court of inquiry may encounter difficulties that may necessitate communication with the convening authority (e.g., additional members may be required because a member is junior to a person named a party during the course of the proceedings). Subject to the requirement that communications of this nature be made a part of the record, the court of inquiry is free to communicate with the convening authority. JAGMAN, § 0425.

0409 RECORD. A verbatim record of the court of inquiry is normally required. Exceptions are noted in section 0435 of the JAG Manual. The record should include the testimony of all witnesses before the court, the appointing order, a statement that proper advice as to rights was given any person designated a party, an indication that persons required to be sworn were sworn, and all other proceedings of the court. JAGMAN, §§ 0433, 0435. Persons required to be sworn are the reporter or reporters (JAGMAN, §§ 0407, 0415a); members (JAGMAN, § 0415b); counsel to the court, but not counsel for a party (JAGMAN, § 0415c); the interpreter, if one is required (JAGMAN, § 0415d); a challenged member, if voir dire is conducted (JAGMAN, § 0415e); and witnesses (JAGMAN, § 0415f). The "swearing" may be by oath or affirmation. JAGMAN, § 0415 note.

0410 PRIVACY ACT. The Privacy Act must be complied with in all JAG Manual investigations whenever an individual is requested to provide personal information by a Government representative, regardless of the type of investigation and the context in which the information is solicited (e.g., from sworn testimony at a court of inquiry or a single individual investigation under Part C, Chapter V, if such information is to be included in a Government "system of records" as defined in section 0308a(3) of the JAG Manual). JAGMAN, §§ 0211, 0305d, 0308, 0420, 0421.

0411 SUMMARY. A court of inquiry is the most formal of JAG Manual investigations. It possesses subpoena power and inherent power to designate parties; all witnesses testify under oath or affirmation; a verbatim record is maintained; procedures applicable to general courts-martial are applicable to courts of inquiry; and it is reserved for only the most serious incidents. As stated earlier, this study guide is an instructional tool, and a thorough reading of chapters II and IV of the JAG Manual is considered indispensable to a complete understanding of the nature and function of courts of inquiry.

PART B - INVESTIGATIONS UTILIZING A HEARING PROCEDURE

0412 INTRODUCTION. An investigation convened under Part D or E, Chapter V, is much like a court of inquiry in many respects. For instance, both utilize formal hearing procedures. However, there are important distinctions between the two. An investigation requiring a hearing does not possess all of the powers of a court of inquiry nor is it usually bound by all of the strict requirements levied upon a court. For example, it does not possess subpoena power unless convened under Article 139, UCMJ (redress of injuries to property); a court of inquiry does. Investigations requiring a hearing have

no power (unless delegated by the appointing order) to designate parties, whereas a court of inquiry does possess this power. Also, they do not require a counsel for the investigation, whereas appointment of counsel for a court of inquiry is a necessity. An investigation requiring a hearing may or may not be required to maintain a verbatim record. A court of inquiry normally must.

0413 COMPOSITION AND MEMBERSHIP. Investigations convened under Part D or E, Chapter V, may be composed of one or more commissioned officers. When the convening authority considers it appropriate, warrant officers, senior enlisted persons, or civilian employees of the Department of the Navy may be assigned as members in addition to at least one commissioned officer. However, the seniority rule -- that no member should be junior in rank to any duly designated party -- applies. JAGMAN, § 0502b. Moreover, the JAG Manual recommends that the senior member of an investigation, who is the presiding officer, be at least an O-4 or above. JAGMAN, § 0502.

0414 APPOINTING ORDER

A. Convening authority. An investigation requiring a hearing may be convened by any officer in command. The term "officer in command" means an officer authorized to convene any type of court-martial under Articles 22, 23, or 24, UCMJ, or authorized to impose disciplinary punishment under Article 15, UCMJ -- including officers in charge. However, only a commanding officer empowered to convene a special court-martial, or superior authority, may order an investigation that involves redress of injury under Article 139, UCMJ. JAGMAN, §§ 0206b, 1005.

B. Form. An investigation under Part D or E, Chapter V, requires an official letter signed by the convening authority (or "by direction" thereof), but circumstances may dictate that this letter be subsequent to an oral or message order to convene the investigation. If the investigation is convened initially by a message order, the message, as well as the subsequent letter, must be included in the investigation. JAGMAN, § 0503.

C. Contents of the appointing order. As is the case with courts of inquiry, the appointing order of an investigation convened under Part D or E, Chapter V, should specify a number of things depending upon the requirements of the situation. The member(s) of the investigation and the time and place of their initial meeting should be included. The purpose, as well as the scope of the inquiry, should be delineated in the appointing order. The appointing order should contain instructions as to whether the record is to be verbatim or summarized and whether oaths are to be administered to witnesses. If the convening authority desires to designate parties in the appointing order, this may be done; or, if the convening authority desires to leave the designation of parties to the discretion of the investigative body, the authority to designate such parties must be delegated in the appointing order. It is good practice to alert the investigative body in the appointing order to those sections of the JAG Manual that impose specific investigative requirements. JAGMAN, §§ 0503c, 0901-0913. The appointing order may be amended at any time. JAGMAN, § 0503e.

0415 DUTIES OF SENIOR MEMBER AND MEMBERS

A. Senior member. The senior member is the senior officer who is a member of the board of investigation. In a single individual investigation, of course, that individual would function as the senior member. As the term implies, the senior member is the presiding officer. He presides over all routine matters of business such as uniforms, times, places for meetings (after the original meeting, if designated in the appointing order), preservation of order, etc. In the case of a board, his ruling is subject to objection by any member of the board. In the event of a vote, the majority vote will govern; or, if a tie vote results, the senior member's ruling will prevail. As the membership of the board may require, the senior member will direct counsel for the board, who may be a separately appointed counsel, lawyer or nonlawyer, or the junior member of the board, to inquire into areas not covered in counsel's original questioning, to call additional witnesses, or to produce additional evidence. JAGMAN, § 0515.

B. Members. As is the case with courts of inquiry, members of an investigation convened under Part D or E, Chapter V, are required to attend unless excused by competent authority, and, in the event a member is absent, the investigation may proceed only if directed to do so by the convening authority. JAGMAN, § 0516b. Unlike a court of inquiry, however, a board of investigation may proceed (if authorized) with reduced membership. In addition, a member of the board may be temporarily absent and, following his return, may continue to participate in the proceedings as would any other member -- subject to the dual requirements that his absence must be reflected in the record and that he must examine the record made during his absence. JAGMAN, § 0516c.

0416 COUNSEL FOR THE INVESTIGATION. An investigation convened under Part D or E, Chapter V, does not require the appointment of a separate counsel. If no separate counsel is appointed, the junior member must act as counsel. If separate counsel has been appointed, his absence requires the board or single individual to notify the convening authority. The convening authority may either appoint new counsel or direct that the junior member function as counsel. Counsel performs those duties normally associated with a trial counsel or recorder to an administrative discharge board. He calls witnesses, administers oaths, presents evidence, and generally assists the investigation in its proceedings. Unlike trial counsel, however, the counsel for an investigation requiring a hearing is not an advocate; he must take a fair and impartial role and present all the evidence in an impartial manner. JAGMAN, § 0517. He need not be a judge advocate. However, the appointment of a judge advocate who has had experience in this area is recommended. If the junior member of a board of investigation serves as counsel, he shall not make an argument. A separately appointed counsel for the investigation would be entitled to make an argument in the sense that he could summarize the evidence presented in an impartial manner. JAGMAN, § 0522.

0417 CHALLENGES. If any party to an investigation believes a member should not sit, he may present evidence to show such reason. A party may examine a member about his fitness as a member and such examination may be

under oath at the discretion of the party. The board does not decide the issue; instead, it reports the facts to the convening authority who must determine if the member continues to sit. Copies of the communication and reply must be appended to the record. JAGMAN, § 0519.

0418 OATHS. Members and counsel of an investigation under Part D or E, Chapter V, need not be sworn. JAGMAN, § 0520.

0419 WITNESSES AND PARTIES. Investigations requiring a hearing, with the exceptions of an investigation convened under Article 139, UCMJ and a court of inquiry, do not possess subpoena power. JAGMAN, § 0521. It is the duty of counsel for the investigation to secure the presence of military witnesses on active duty, as well as other witnesses, if they are willing to testify. JAGMAN, §§ 0305, 0417. No witness (civilian or military) may be compelled to incriminate himself, and a witness suspected of an offense shall be advised of the subject matter of the inquiry, the offense of which he is suspected, and his fifth amendment or Article 31(b), UCMJ, rights, as appropriate. JAGMAN, § 0305c. Furthermore, a member of the armed forces may not be required to sign a statement relating to the origin, incurrence, or aggravation of a disease or injury that he has. Any such statement against his interests, signed by a member, is invalid. Any person in the armed forces, prior to being asked to sign any statement relating to the origin, incurrence, or aggravation of any disease or injury that he has suffered, shall be advised of his right not to sign such a statement. JAGMAN, § 0306. Additionally, a witness requested to supply personal information may have to be given a Privacy Act statement. JAGMAN, § 0308.

0420 PROCEDURE. Section 0518 of the JAG Manual begins by stating: "As a general rule, the principles and rules of procedure applicable to courts of inquiry ... apply to boards of investigations, when practical and not otherwise modified by provisions of this chapter." In essence, then, an investigation under Part D or E, Chapter V, operates under the same ground rules which were explained in regard to courts of inquiry in section 0408 of this text. In fact, section 0518 of the JAG Manual incorporates, by reference, most of the pertinent court-of-inquiry provisions. Where procedures differ, they are set forth in the chart at section 0428 of this text.

0421 THE IMPORTANCE OF THE JAG MANUAL. Parts A and B of this chapter are intended only to introduce the student to courts of inquiry and investigations requiring a hearing. It is not their purpose to supplant the JAG Manual, which is considered basic source material. A thorough reading of the material contained in chapters II, IV, and V of the JAG Manual is considered a necessity when dealing with courts of inquiry or investigations convened under Part D or E, Chapter V.

PART C - PARTIES AND WITNESSES

0422 INTRODUCTION. In the above discussions of courts of inquiry and investigations requiring a hearing, the term "party" has been used frequently. It is the purpose of Part C to introduce the student to the concept of "parties" to investigations. A full discussion of parties is contained in chapter III of the JAG Manual. At any judicial proceeding, criminal or civil, parties to the proceeding (i.e., accused, plaintiff, and defendant) have certain rights and privileges defined by law. In an administrative proceeding, such as the JAG Manual investigations discussed in this chapter, the same is true. A person who may suffer adverse consequences, either directly or indirectly, as a result of the administrative proceeding is afforded certain rights and privileges. Hence, we have the term "party."

0423 PARTY DEFINED

A. General. The JAG Manual defines "party" as "an individual who has properly been designated as such in connection with a court of inquiry or an investigation requiring a hearing." JAGMAN, § 0301a. The designation of parties before a JAG Manual investigation is generall, unnecessary because an individual will receive a chance for a hearing in other administrative or judicial proceedings before suffering any adverse action. Where, however, the subject matter of the inquiry involves such disputed issues of fact that a risk of substantial injustice to a person or persons exists, the designation of parties would be appropriate. A person may be designated a party if that person has a direct interest in the subject of inquiry or if his/her conduct or performance of duty is subject to inquiry. What do these terms mean?

B. Direct interest. JAGMAN, § 0301c. A person has a "direct interest" in the subject of inquiry:

1. When the findings, opinions, or recommendations of the fact-finding body may, in view of his relation to the incident or circumstances under investigation, reflect questionable or unsatisfactory conduct or performance of duty; or

2. when the findings, opinions, or recommendations may relate to a matter over which the person has a duty or right to exercise official control.

C. Subject to inquiry. A person's conduct or performance of duty is "subject to inquiry" when the person is involved in the incident or event under investigation in such a way that disciplinary action may follow, that his rights or privileges may be adversely affected, or that his personal reputation or professional standing may be jeopardized. JAGMAN, § 0301b.

0424 DESIGNATION AS A PARTY. The following chart sets forth the circumstances under which particular factfinding bodies may designate parties as well as who may be designated (e.g., military and/or civilian personnel). JAGMAN, § 0302.

A. Court of inquiry

	Designee	When Designated	Designation
1.	any person subject to the UCMJ	conduct or performance of duty subject to inquiry	mandatory
2.	any person subject to the UCMJ or employed by DoD	direct interest in subject of inquiry	mandatory upon his request
3.	any member of the USNR or USMCR not subject to UCMJ by virtue of his status	conduct or performance of duty subject to inquiry	optional, upon his request
4.	no other person without SECNAV (JAG) approval	----------	----------

B. Investigations requiring a hearing. When authorized by the convening authority:

	Designee	When Designated	Designation
1.	any member of the naval service subject to the UCMJ	conduct or performance of duty subject to inquiry	optional
2.	any member of any other armed force other than Navy or Marine Corps subject to UCMJ; DoD employees; any member of the USNR or USMCR not subject to UCMJ by virtue of his status	conduct or performance of duty subject to inquiry	optional, upon his request
3.	no other person without SECNAV (JAG) approval	----------	----------

C. Investigations not requiring a hearing. No person may be designated as a party before a factfinding body constituted under Part C of Chapter V, JAGMAN, § 0302.

D. Designation requirements. From the above discussion, it should be apparent that only specific categories of persons may be designated parties. Furthermore, the ability to designate parties varies with the factfinding body and, depending upon the situations, designation may be (1) mandatory; (2) mandatory, when requested by the individual; (3) optional; or (4) optional, when requested by the individual.

E. Who may designate. Parties may be designated by the convening authority of a court of inquiry or investigation requiring a hearing, by any court of inquiry, or by a factfinding body requiring a hearing when expressly authorized by the convening authority. When it is apparent that a person should be designated a party prior to the issuance of the appointing order, the appointing order should be utilized to effect designation. Depending upon the circumstances, however, it may be necessary for the factfinding body itself to effect designation at a later point in the proceeding if the necessity of appointment is not apparent at the outset. JAGMAN, § 0302d.

0425 CHANGE IN STATUS OF A PARTY. When it becomes apparent during the course of a proceeding, either before a court of inquiry or fact-finding body requiring a hearing, that a person designated a party need no longer occupy this status because of the degree of his involvement in the matter under investigation, the court or factfinding body may release the person as a party, either upon the individual's application or upon the court's or factfinding body's own initiative. JAGMAN, § 0303.

0426 RIGHTS OF A PARTY

A. Basic rights. After a person has been designated a party to a court of inquiry or an investigation requiring a hearing, certain rights are available to him. To be specific, the JAG Manual lists 11 basic rights which are available to a party to an investigation requiring a hearing, and two additional rights which are afforded a party to a court of inquiry:

1. To be given due notice of such designation;

2. to be present during the proceedings, but not when the investigation is cleared for deliberations;

3. to be represented by counsel (see paragraph B below);

4. to examine and to object to the introduction of physical and documentary evidence and written statements;

5. to object to the testimony of witnesses and to cross-examine witnesses other than his own;

6. to introduce evidence;

7. to testify as a witness;

8. to refuse to incriminate himself and, if accused or suspected of an offense, to be informed of the nature of the accusation and advised that he does not have to make any statement regarding the offense of which he is accused or suspected, and that any statement made by him may be used as evidence against him in a trial by court-martial;

9. to make a voluntary statement, oral or written, to be included in the record of proceedings;

10. to make an argument at the conclusion of presentation of evidence;

11. to be properly advised in accordance with the Privacy Act;

Note: In courts of inquiry only, a party shall be advised of, and accorded, two additional rights:

12. to challenge members of the court of inquiry for cause stated to the court [UCMJ, art. 135(d); JAGMAN, § 0414]; and

13. if charged with an offense, to be a witness at his own request and not to be called as a witness in the absence of his own request. JAGMAN, § 0304.

Note: A party at any other type of investigation requiring a hearing may be called as a witness regardless of whether the party has been charged with an offense or requests to be a witness. However, the party may still assert his article 31 or fifth amendment rights.

B. Right to counsel. The right to be represented by counsel may be subdivided as follows:

1. Basic rights:

a. To be represented by civilian counsel (no special legal qualifications are required of civilian counsel);

b. to be represented by appointed military counsel*; or

c. to be represented by military counsel of the party's own selection, provided the counsel chosen is reasonably available. JAGMAN, § 0304.

* Note: While the JAG Manual recommends the use of lawyer counsel [UCMJ, art. 27(b)] "if practicable," there is no absolute requirement for lawyer counsel unless the investigation is to serve as an Article 32, UCMJ, investigation. Even then, the party could proceed at his own request with nonlawyer counsel. JAGMAN, § 0304b(1).

2. Additional requirements regarding civilians' right to military counsel. Military counsel will be provided for a civilian designated a party only under the following circumstances:

a. When the civilian might be amenable to trial by court-martial, and the investigation may be used as an Article 32, UCMJ investigation;

b. when the mental or physical competency of the civilian is in doubt, and he is not represented by counsel who seems capable of adequately protecting his rights; and

c. when the convening authority deems it appropriate and so directs. JAGMAN, § 0304.

3. Duties and presence of counsel. It is the duty of counsel to represent the party to the best of his or her ability. If counsel is absent, the investigation must recess until counsel is once again available or until new counsel may be appointed. An intelligent waiver of counsel's presence by the party, however, if made a verbatim part of the record of proceedings, will be allowed. JAGMAN, § 0304.

4. Incompetents and injured. If, in the opinion of a medical officer, a person to be designated a party will be mentally or physically incompetent due to injury or disease for at least 60 days, lawyer counsel will be appointed to represent the party. Such counsel is bound to exercise all of the party's rights as though the party were present. JAGMAN, § 0304b(3).

C. Procedure. JAGMAN, § 0304c-f. At the outset of a court of inquiry or investigation requiring a hearing, the person designated as a party will have his rights fully explained to him. In the event a person is designated a party after the commencement of the proceeding, his rights will be explained to him at the time of designation. At the time of his designation after the commencement of the proceedings, the party has a right to examine the record of proceedings up to that point; further, at his request, the party has the right to have witnesses who have already testified recalled for the purpose of cross-examination. In the event a witness is no longer available, evidence may be obtained from the witness by means of a sworn statement. In the absence of compelling justification, the proceedings will not be suspended in order to obtain such a statement. In the event a person is designated a party subsequent to his testifying as a witness, his testimony remains in the record and is considered and used thereafter without regard to his subsequent designation.

D. Effect of failure to accord party rights. JAGMAN, § 0304.

1. Nonjudicial punishment contemplated. In the event a person was not designated a party or, if designated, was not fully accorded his rights as a party, and nonjudicial punishment is contemplated, the procedures set forth in section 0104 of the JAG Manual will be followed (i.e., an impartial hearing prescribed by the Manual for Courts-Martial, 1984, must be conducted or, in the alternative, the investigation may be returned to the investigative body in order to afford the party rights previously denied).

2. General court-martial contemplated. In the event an individual was not designated a party, or was not fully accorded his rights as a party, a separate Article 32, UCMJ investigation must be conducted; the record of previous investigation requiring a hearing may not be substituted therefor. Furthermore, even if an individual is properly accorded all rights as a party before an investigation under Part D or E, Chapter V, there may be difficulties in using the record of this investigation as an article 32 investigation. The

problems would arise if affidavits/statements of witnesses rather than live testimony were used at the investigation and no information is in the record of investigation to satisfy the requirement of United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976) and United States v. Chestnut, 2 M.J. 84 (C.M.A. 1976) concerning availability of witnesses at article 32 investigations.

3. Adverse LOD/Misconduct determination contemplated. In cases where a finding that a servicemember's injury or disease was incurred not in the line of duty or due to the member's own misconduct, and that individual was not designated a party or accorded the rights of a party, the convening authority shall afford the member a hearing or shall forward the report/record to the command to which the member is attached so that a hearing may be afforded as discussed in section 0208 of this text. JAGMAN, § 0815a(3).

E. Right to copy of the record. A party is entitled to a copy of the record if it is to be utilized as a pretrial investigation under Article 32, UCMJ and trial by GCM has been ordered, subject to the regulations applicable to classified material. If a letter of censure or other nonjudicial punishment is imposed, the party upon whom it was imposed has a right to have access to a copy of the record in order to appeal. JAGMAN, § 0304i.

0427 WITNESSES

A. Subpoena power. Witnesses may be subpoened by only two fact-finding bodies -- a court of inquiry and an investigation requiring a hearing specifically convened under Article 139, UCMJ. Members of the armed forces or employees of DoD may be made available by their superiors. JAGMAN, § 0305a.

B. Self-incrimination. With regard to self-incrimination, the provisions of Article 31, UCMJ apply to all military witnesses, and the fifth amendment privilege applies to civilian witnesses. Moreover, a witness shall not be compelled to make any statement if the statement or evidence is not material to any issue under investigation and may tend to degrade him. At both courts of inquiry and investigations requiring a hearing, witnesses suspected of offenses shall be informed of their right against self-incrimination. JAGMAN, § 0305c.

0428 CHART: COMPARATIVE ANALYSIS OF COURTS OF INQUIRY, INVESTIGATIONS REQUIRING A HEARING AND INVESTIGATIONS NOT REQUIRING A HEARING. The following chart is designed to outline in a categorized format the essential differences between the three basic types of JAG Manual investigations.

NOTE -- ALL REFERENCES ARE TO THE JAGMAN

JAG Manual Investigation	Procedure	Convening Authority	Membership	Membership (Oath or Affirmation)
Court of Inquiry (C/I)	Formal; virtually same as court-martial except where C/I deems it appropriate to deviate (but not to prejudice interest of a party) (0408; 0416)	OEGCMJ or any other person authorized by SECNAV (0401)	3 officers and Counsel for Court (0401)	Required for members (0415b); Counsel for Court (0415c); Reporter (0415a); Interpreter, if required (0415d); and member on voir dire (0415c)
Investigation Requiring a Hearing a. Board b. Single individual Part D or E, Chap V (hearing required)	Formal hearing procedure, insofar as possible the same as for a C/I (0502)	Any officer in command; except for Art. 139, UCMJ redress of injury to property which requires OESPCMJ (0206b)	a. 2 or more commissioned officers, WO's, senior enl. persons, or civilian employees of DoN, but must have at least one commissioned officer b. One commissioned officer or, when appropriate, one WO, senior enlisted person or employee of DoN (0502)	Members and counsel need not be sworn; reporters and interpreters apparently must be sworn (0520)
Investigation Not Requiring a Hearing a. Board b. Single individual Part C, Chap V (no hearing required)	Informal, no hearing required, free to use most effective methods (0510)	Any officer in command (0206b)	Same as for Part D or E, Chapter V investigations	Usually not sworn (0509)

JAGMAN Investigation	Rules of Evidence	Testimony (Oath or Affirmation)	Verbatim	Record	
C/I	No formal rules; must enforce constitutional and statutory privileges (0411	Required (0415f	Required for all testimony and proceedings of court except in discretion of court. Arguments in behalf of Govt. and party may be summarized (1403	Affidavits may be used if desired by C/I because of geographical location of witness or unavailability of witness (0421) (but see (0416d(2) re: availability of witnesses at Art. 32 [illegible] investigations. Documentary Evidence Original or true copy [illegible]	Exhibits shall be numbered in sequence as they are received in evidence; photographs shall be substituted for real evidence (0424

JAGMAN Investigation	Copies of Record	Parties	Status as a Party	Rights Accorded Person Designated a Party
C/I	Each copy must be complete in and of itself (0209b)	Inherent power to designate May also be designated by CA in his appointing order (0302d)	Can be released by court (0303)	1. Be given due notice of designation. 2. Be present during proceedings, but not when investigation is cleared for deliberation. 3. Be represented by counsel: appointed lawyer; military counsel of own selection; civilian counsel at own expense. 4. Examine and object to introduction of physical and documentary evidence and written statements. 5. Object to testimony of witnesses and to cross-examine witnesses other than his own. 6. Introduce evidence. 7. Testify as witness. 8. Be advised of Art. 31, UCMJ, and to exercise, if desired (Civilian: 5th Amendment). 9. Make a voluntary statement, oral or written, to be included in record. 10. Be advised of Privacy Act rights. 11. Make an argument at the conclusion of the proceedings. 12. To challenge any member for cause. 13. Not to be called as a witness except at his own request, if charged with an offense (0304).

JAGMAN Investigation	Copies of Record	Parties	Status as a Party	Right Accorded Person Designated a Party
Under Part D or E Chap V	Each copy must be complete in and of itself (0209b)	May designate only if authorized by CA in appointing order	Can be released by board or officer (0303)	Same as above, except for 12 & 13) (0304)
(hearing required)		*May also be designated by CA in his appointing order		
Under Part C Chap V	Each copy must be complete in and of itself (0209b)	May not designate (0302c)	Not applicable (0302c)	Not applicable (0302c), but Art. 31, UCMJ, applies (0505) to witnesses. (Note: no member of the armed forces may be required at any investigation listed herein "to sign a statement relating to the origin, incurrence, or aggravation of a disease that he has." (0306)
(no hearing required)				

JAGMAN Investigation	Appointing Order	Challenges	Subpoena Power	Effect of Findings of Fact, Opinions & Recommendations	Assistance or Transferral
C/I	Must be form letter addressed to President, signed by CA. In interest of time, it may initially be convened by oral or message orders followed by form letter (0402b)	Any member at any time for cause; voir dire; mbr excluded & voted upon; majority vote tie will disqualify (0414)	Yes (0204b)	Purely advisory (0201)	Not applicable
Under Part D or E Chap V (hearing required)	Official ltr form addressed to senior mbr of board or to IO; when circumstances warrant, may use oral or message orders, but signed written confirmation must be included in inv. report (0503)	No authority for; voir dire permitted; refer matter to CA for decision (0519); no voir dire for single individual investigation (0527)	None (0204c) except when convened pursuant to Art. 139, UCMJ (10 USC 939)	Purely advisory (0201)	Could request another command to perform investigation where a deployed afloat command or incident far removed, usually via area coordinator (0207)
Under Part C Chap V (no hearing required)	Same as investigations under Part D or E of Chap V	None; matter should be referred to CA (0511)	None (0204d)	Purely advisory (0201)	Same as for investigations convened under Part D or E of Chapter V (0207)

CHAPTER V

FAMILY ADVOCACY PROGRAM

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CHAPTER V

FAMILY ADVOCACY PROGRAM

0501 REFERENCES

A. DoD Dir. 6400.1 Series, Subj: Family Advocacy Program
B. SECNAVINST 1752.3 Series, Subj: Family Advocacy Program
C. SECNAVINST 1754.1 Series, Subj: Family Services Center Program
D. SECNAVINST 5800.1 Series, Subj: Protection and Assistance of Crime Victims and Witnesses
E. OPNAVINST 1752.2 Series, Subj: Family Advocacy Program
F. OPNAVINST 1752.1 Series, Subj: Rape Prevention and Victim Assistance
G. MCO 1752.3 Series, Subj: Marine Corps Family Advocacy Program
H. MCO 1710.30 Series, Subj: Child Care Center Policy and Operational Guidelines
I. MCO 1700.24 Series, Subj: Marine Corps Family Services Center Program
J. COMDINST 1750.7 Series, Subj: Coast Guard Family Advocacy Program
K. NAVMEDCOMINST 6320.22 Series, Subj: Family Advocacy Program
L. The Navy Family Advocacy Program: Legal Deskbook, developed by Robert Horowitz, J.D.
M. *The Navy Family Advocacy Program*: Curriculum for Attorneys, developed by Robert Horowitz, J.D.
N. Navy Sponsor: Navy Military Personnel Command (NMPC 663) AUTOVON 224-1006
O. Marine Sponsor: Commandant of the Marine Corps (Code MHF) AUTOVON 224-2895
P. Coast Guard Sponsor: Commandant (G-PS) -- (202) 267-2237

0502 INTRODUCTION. The Department of Defense (DOD) has established Family Advocacy Programs (FAP's) DOD-wide. Each service must have its own program and provide Family Service Centers (FSC's) to help minimize further trauma to the victims of family violence. DOD policy encourages each service to:

A. Develop programs to promote healthy family life and to treat families experiencing violence and neglect;

B. relinquish jurisdiction as may be required to ensure the applicability of state laws regarding child and spouse protection;

C. identify suspected perpetrators of violence and neglect so that further injury can be prevented and therapy for dysfunctional families provided;

D. cooperate with civilian authorities and report cases of child maltreatment as required by state laws;

E. make specific efforts to fully serve families living on and off installations; and

F. combine the management of the FAP with similar medical and social programs.

0503 OBJECTIVES OF THE FAMILY ADVOCACY PROGRAM

A. Prevention. The FAP seeks to prevent family maltreatment by establishing and maintaining education and awareness programs that contribute to healthy family life, encourage voluntary self-referral, and break the cycle of abuse through identification and treatment. Since the well-being of **ALL** military families is a primary concern, whether they are in crisis or not, commands are required to insure all members of the command receive instruction on the FAP regularly. The FSC in particular is tasked with providing a wide range of courses and programs to improve family life in general. In addition to improving morale and retention in the service of valuable personnel, the program helps reduce stress that can lead to spouse or child maltreatment. Along with the training, commands need to insure that members are aware of what programs the FSC and state and local agencies provide.

B. Deterrence. The FAP deters illegal activities through knowledge that administrative or disciplinary action will be taken when appropriate.

C. Treatment. Identify, support, and treat at-risk families -- including both the victim and perpetrator. Military personnel with potential for further useful service are to be assisted, and treatment is encouraged for personnel with a record of proven performance. Nonmedical personnel may be utilized to provide treatment if they are properly certified.

D. Intervention. FAP personnel must recognize the sensitive nature of family advocacy and respond by ensuring careful handling of case information -- following confidentiality guidelines scrupulously. Intervention involves:

1. Identifying suspected abusers and neglectors as early as possible;

2. encouraging voluntary self-referral;

3. cooperating with civilian agencies by observing local laws pertaining to child/spouse abuse and neglect;

4. ensuring that all involved agencies and individuals cooperate and coordinate; and

5. applying disciplinary or administrative sanctions, when appropriate.

E. Reporting. FAP personnel must comply with local laws on the reporting of child or spouse abuse. Coordination and cooperation between all military and civilian agencies is required. Substantiated cases and suspected cases (without identifying data) are to be reported to Navy Marine Corps Family Advocacy Central Registry by the Family Advocacy Representative (FAR) for filing in their central registry. The Coast Guard submits its report to Commandant (G-PS-2), using CG-5488. Reporting to civilian agencies will normally be done through the FAR. Some of the FAR's reporting requirements include:

1. All cases must have a completed DD 2486 (Child/Spouse Abuse Incident Report) forwarded to the Commanding Officer, Naval Medical Data Services Center (Code 42) within 15 days of the date the CRS makes a status determination or closes, transfers, or reopens the case. Enclosure (9) of reference K provides directions for completion of the form. Cases with a status determination of "suspected" must be updated within 12 weeks to either substantiated, unsubstantiated -- did not occur, unsubstantiated -- unresolved, or at risk.

2. Spouse or child maltreatment cases resulting in death require special DOD-mandated reporting procedures. Suspected and substantiated cases involving death must be reported, in writing, to MEDCOM-343, with a copy sent to Commanding Officer, Naval Medical Data Services Center, as soon as possible after the CRS makes its initial status determination regarding the case. Enclosure (11) of reference K outlines the information the FAR must gather and type, or legibly write, on a separate sheet of paper. This report, labeled "Family Advocacy Report of Death," will be attached to the completed DD 2486. The FAR should be aware that, in these cases, it is possible the only source of initial information regarding such cases may be the local newspaper. Rather than awaiting a referral in these cases, the FAR will have to take the initiative in seeking the necessary information. Each death case, if not involved in an already active case, must be opened as any other case.

3. Cases which involve suspected child sexual abuse in a DOD sponsored or sanctioned child care facility of DOD-sponsored or sanctioned program of any kind (e.g., church group, scouting program, recreational activity, child care home, etc.) involve an additional reporting requirement per DOD Directive 6400.2. These cases must be reported to COMNAVMEDCOM, MEDCOM-343, not later than 72 hours after receipt of the referral. Also, in cases on Navy installations, COMNAVMILPERSCOM (NMPC 663) must be notified. In cases occurring on Marine Corps installations, the Commandant of the Marine Corps (Code MHF) must be notified. Enclosure (10) of reference K outlines the information the FAR must gather before reporting. Report can be made by telephone or message.

0504 DEFINITION OF CHILD MALTREATMENT AND SPOUSE ABUSE

A. Physical abuse of children includes any major injury -- such as brain damage, skull or bone fracture, subdural hematoma, sprain, internal injury, poisoning, scalding, severe cut, laceration, bruise, or any combination constituting a substantial risk to the life or well-being of the child. It also includes minor injuries -- such as twisting or shaking -- which does not constitute a substantial risk to the well-being of the child. These nonaccidental injuries are those inflicted by the child's parent or caretaker.

B. Sexual abuse of a child includes the involvement of a child in any sex act or situation that is for the sexual or financial gratification of the perpetrator. All sexual activity between a child and caretaker is considered sexual abuse.

C. Neglect is defined as deprivation of necessities when the caretaker is able to provide them (including the failure to provide a spouse or child with support, nourishment, shelter, clothing, health care, education, and supervision). This can occur regardless of whether the family is living together as a unit.

D. Emotional maltreatment of children is an act of commission - such as intentional berating or disparaging a child -- or omission -- such as passive/aggressive inattention to a child's emotional needs by the caretaker. These acts must cause injury to the child -- evidenced by a child's low self-esteem, undue fear or anxiety, or other damage to the child's emotional well-being.

E. Child is defined as: An unmarried person (whether natural, adopted, foster, stepchild, or ward) who is a dependent of the military member or spouse and is either under the age of 18 or is incapable of self-support due to a mental or physical incapacity for which treatment is authorized in a medical treatment facility (MTF).

F. Spouse abuse includes assault, threats to injure or kill, or any other act of force or violence or emotional abuse/neglect inflicted on a partner in a lawful marriage (a spouse under the age of 18 will be treated in this category).

G. Sexual assault is a nonconsensual sexual contact, even if it is with the spouse. Under some state laws, nonconsensual coitus with one's wife is considered rape.

0505 POLICY

A. The FAP is a line-managed program, and commanding officers are required to insure compliance.

B. Adverse personnel actions. Providing assistance to maltreators under the FAP shall not, in and of itself, be the basis for adverse actions -- such as punitive action; removal from base housing; revoking or removing security clearances, Personnel Reliability Program (PRP), enlisted classification code, or warfare specialty. Swift intervention and disciplinary action is an effective deterrent to family violence, but the following must be considered:

1. When the member is judged treatable and has potential for further effective service, the Navy's interests, justice, and the family/victim may be better served by taking disciplinary action and then suspending the sentence while the member is being treated;

2. disciplinary/administrative action is most appropriate when:

a. The member does not acknowledge his/her behavior and assume responsibility for it;

b. the behavior is compulsive;

c. the victim is seriously injured;

d. there is sufficient evidence for a conviction; and

e. testifying in court would be in the best interest of the victim (for the Coast Guard, the CO may only retain a child/spouse abuser if the Commandant (G-PE) or (G-PO) concurs with the CO's recommendation); and

3. if there are indications of substance abuse, the member should be referred for screening and possible treatment.

C. Voluntary self-referral. Such referral is encouraged, since the goal of FAP is to prevent or break the cycle of abuse. An admission of abuse is sufficient to substantiate a FAP case and requires notification of the member's CO and the FAR, unless the admission is made as a privileged communication to attorney/clergyman. If the CO determines the self-referral was voluntary, the servicemember's disclosures may not be the sole basis for disciplinary action or characterizing a discharge as OTH. (In the Coast Guard, the CO must seek the guidance of a law specialist.) If it is considered to be a voluntary self-referral, no disciplinary action may be taken by the military and, if the servicemember is ADSEP-processed, the matter may not be used to characterize their service. In other words, processing after voluntary self-referral should be for a type warranted by service record (TWSR) characterization of service. Disciplinary action and use in characterization can be made from acts that are not derivative of the information provided from the self-referral. A self-referral is not voluntary if the member does so knowing that the victim has or will be reporting the matter. Thus, the self-referral policy under the FAP is similar to that in the drug abuse area. Self-referrals should be made to the FAR, CAAC/DAPA, FSC counselor, CO, or XO. Due to the potential privilege problem, chaplains should not be used for self-referral purposes but should be involved in other aspects of the FAP. Unfortunately, few cases of abuse are self-referrals. A majority of cases come to the CO's attention through police or hospital reports, allowing the information provided (even by the perpetrator) to be used in a court action.

D. Prevention. The FAP is responsible for enhancing awareness of the issues of family violence. This is done through the area Family Advocacy Committee (FAC) which is made up of representatives from relevant agencies and organizations (such as the FSC).

E. Identification and referral. All personnel have a duty to report suspected or known cases of abuse and neglect in accordance with local reporting laws. Military personnel will report such matters to the FAR, who in turn will report the incident to the appropriate civilian agencies -- usually child protective services (CPS's). If the FAR is not available, the report should be made directly to the CPS. MTF's must also report the abuse to the

sponsor's CO within 48 hours. The FAR serves as the point of contact between the reporting source (the FAR subcommittee) and the local agencies. The applicable subcommittee reviews each case and reaches a consensus on its status. Each installation must have a written Memorandum of Understanding (MOU) with the local CPS agency defining investigative responsibilities.

F. Coordination. Since family violence is a complex and multidimensional problem, it requires the involvement and coordination of many agencies and services The Family Advocacy Officer (FAO) is responsible for the coordination of all the nonmedical aspects of the FAP.

G. Intervention. A servicemember's CO has many intervention options in family violence cases. Since each case is unique, intervention action (if taken) needs to be tailored to each case. Prior to intervention, if time permits, coordination with the legal officer, the FAR, and the appropriate subcommittee are encouraged. Some of the options are:

1. Temporary removal of the military member from the home (if the CO restricts the person to the barracks or the ship, it must be clear that this is not for UCMJ purposes but for "protection" of the victim to avoid speedy-trial problems);

2. through MOU's with civilian agencies, establish cooperative intervention along with a safe house or other overnight accommodations in order to protect the victims and provide shelter;

3. the issuance of various types of protective orders -- such as ordering the member not to have any contact with the victim without prior authorization;

4. in the case of a nonmilitary abuser (since items 1 and 2 are not available), bar the person from the base/base housing area or seek (through the FAR) a protective order from a civilian court; and

5. in overseas areas or isolated CONUS sites where there are no state agencies to assist in providing social services, various remedies can be fashioned by appropriate military authority. In foreign countries, insure that the remedy does not conflict with the SOFA. If no local court is willing to take jurisdiction, and the immediate transfer of the family to CONUS is not possible, the following actions may be taken:

a. In child maltreatment, have an emergency FAC subcommittee review the situation and recommend appropriate action (such actions may include having NIS or medical personnel interview the child without parental consent, temporarily removing the child from the home, or admitting the child to the MTF without parental approval);

b. in family violence situations that require critical medical care not locally available, the member or family may be transported to a location that can provide the care if recommended by the FAC subcommittee; or

c. in situations where the abuse has been substantiated by the subcommittee and the CO recommends the family be returned to CONUS, a message must be sent to the appropriate service headquarters -- NMPC-4 or USMC HQ Code MMOS -- in Washington for authorization with an information copy provided to NAVMEDCOM. In the Navy, NMPC-663 and MEDCOM-343 make recommendations to NMPC-40 as to where the servicemember should be assigned in the U.S.

H. Rehabilitation

1. The MTF is responsible for determining the need for treatment and for the referral to other professional resources as needed. The primary goal of the FAP is to protect the victim and provide treatment for ALL involved family members. Treatment is generally subject to a one-year limitation.

2. Some cases are not amenable to treatment (such as pedophiles). In these cases, ADSEP processing should be considered.

3. Counseling/treatment is recommended when the member has a positive record of performance and good potential for treatment. At the same time, appropriate disciplinary action should be considered unless there is a "bona fide" voluntary self-referral or, based on the facts of the case, it is determined that only therapy is needed to stop the abuse/neglect, protect the victim, and improve family function.

4. If the member repeats the offense, fails to cooperate, fails to progress or satisfactorily complete treatment, disciplinary or administrative action may be taken (including the vacating of any previously suspended punishments).

5. Upon successful completion of treatment, a member's case will be considered closed. Treatment is considered successful when the abuse or neglect has stopped, the problems contributing to the maltreatment have been remedied, and it is determined that no further maltreatment will occur.

6. Dependents and retirees who are victims or perpetrators should be offered appropriate intervention and encouraged to participate voluntarily.

0506 IMPLEMENTATION OF THE BASE FAP

A. Medical Treatment Facility/Family Advocacy Representative. The CO of the MTF cooperates with the installation CO to establish local policies and directives necessary to implement the FAP. A representative for the MTF co-chairs the area FAC and the MTF CO appoints the FAR. The FAR, usually a social worker, is responsible for implementing and managing the FAP in the MTF. The MTF must also have a photographer available for the photographing of victims. Reference K provides in-depth explanations on how the MTF and FAR are to carry out their duties.

B. Family Advocacy Officer. The FAO is appointed by the installation CO to serve as the point of contact for the coordination of all nonmedical family advocacy matters, coordinate all local FAP efforts, monitor the program, and provide staff support for the FAP. The FAO is normally the director of the FSC.

C. Area Family Advocacy Committee

1. Provides recommendations for FAP policy and procedures;

2. facilitates military/civilian interface and interaction of the delivery of social services;

3. ensures a teamwork approach to the prevention and intervention of family violence;

4. conducts ongoing needs assessment and evaluation of the FAP;

5. recommends new resources and programs;

6. identifies long-range, intermediate, and immediate needs -- and ensures that the needs are met; and

7. serves as an advocate for families and children.

D. Family Advocacy Case Review Subcommittee. Such committees review and perform case management functions and determine the status of a case (i.e., substantiated, suspected, unsubstantiated, or at-risk). Membership may include command/FSC/tenant command/child care representatives, the FAR, NIS agents, judge advocates, chaplains, social workers, and personnel from medical fields. In substantiated cases, a Child/Spouse Incident Report (DD Form 2486) is completed and forwarded by the FAR to NAVMEDCOM central registry, who then notifies NMPC or HQ USMC to place the perpetrator on assignment control. Any reassignment must be cleared with NAVMEDCOM. For Navy personnel, however, incest case assignments are managed by NMPC's Family Advocacy Branch. (In the Coast Guard, the same DD form is used and sent to Commandant (G-PS-2). Units at Governors Island and Support Center Alameda submit these reports via the Maintenance and Logistics Command (MLC), while the rest of the Coast Guard submit them via the district FAR.)

E. Family advocacy case management. Once a case has been reported, there are a number of concerns to be addressed (such as medical concerns, family rehabilitation, therapy for the victim, type of action to be taken against the perpetrator). Both the FAP and the Privacy Act require that strict confidentiality be observed, with information released on a need-to-know basis only. Although rare, there have been cases of false allegations involving spouse or child abuse. The FAR is responsible for managing cases in the program, but may delegate that responsibility to others (e.g., an FSC counselor). Case management from one installation to another may vary, but the following procedures are generally followed:

1. Upon discovery of suspected family abuse, the FAR is notified. The FAR then presents the matter to the appropriate Family Advocacy Case Review Subcommittee (it is recommended that a staff judge advocate be on the subcommittee). After notification to civilian service agencies by FAR (depending on the MOU with the local authorities), local or military police authorities may be called in to investigate the allegations provided they are not already involved.

2. The subcommittee determines the status of the case (substantiated, unsubstantiated, suspected, or at-risk) and makes recommendations for treatment -- usually after consultation with the servicemember's CO, NIS, legal officers, and the FSC.

3. The FSC provides short-term counseling, identification and referral, crisis intervention, education, coordination, and prevention efforts for the installation.

0507 MANAGEMENT OF INCEST CASES

A. Generally. The military has a substantial investment in the training of military personnel. In an incest case, it is not unusual to find that the abuser has an outstanding record of military service. When that is the case, and rehabilitation has been recommended, the abuser and family should be afforded the option of treatment. While undergoing treatment, the member will be retained in the service; after successful completion of treatment, the member may be retained in the service. This does not preclude UCMJ action, but consideration should be given to suspending punishment -- especially any punitive discharge.

B. Administrative discharge processing in incest cases

1. Navy. The option to retain is the result of both the FAP and a change to the MILPERSMAN, Article 3610200, which requires mandatory processing for sexual perversion. In incest cases, CNMPC makes the final determination as to processing for separation or retention and treatment, and the commanding officer of the servicemember may not commence ADSEP processing without CNMPC approval. NMPC will base its decision on the following:

a. The CO's recommendation;

b. the member's record of performance;

c. evidence that the incident occurred only within the family and was not a new offense;

d. psychological evaluations showing a good treatment prognosis (including a determination that the person is not a pedophile, as pedophiles are generally considered ineligible);

e. the fact that the perpetrator self-referred;

f. the facts of the case;

g. court action;

h. CREO/NEC or other factors determining the perpetrators usefulness to the Navy; and

i. the treatment progress.

[redacted] has a similar policy to that of the [redacted] requirement that the initial processing [redacted] it will be decided at the GCMA [redacted] whether to process for separation or [redacted]

[redacted] policy on processing and retention [redacted] wants to retain and place the [redacted] case must be forwarded to [redacted] the matter and consider the [redacted] Coast Guard requires this review [redacted]

[redacted] fails to complete the year-long [redacted] treatment will be suspended and [redacted] possible UCMJ action may also take place.

[redacted] ORTING LAWS. All state child abuse [redacted] agency to receive and investigate reports [redacted] offer rehabilitation services to CPS [redacted] quired to report suspected maltreatment, [redacted] testifying, and the penalties for not [redacted] comply with these laws when such abuse [redacted] nance of duties. Reporting shall normally [redacted] voluntary self referrals must be reported by the [redacted] cluding a situation where, although the military [redacted] the civilians authorities could prosecute if they [redacted]

[redacted] THE FAMILY ADVOCACY PROGRAM. [redacted] in family violence requires a cooperative [redacted] the part of all command professionals. Each can [redacted] to the FAP. Attorneys in the military have a [redacted] Attorneys are often called upon to:

[redacted] that will insure the safety of the victims

[redacted] of legal action against perpetrators [redacted] treatment;

[redacted] perpetrator with the needs of the [redacted] punitive discharge, forfeitures, [redacted]

[redacted] command personnel involved with the [redacted] provides guidance in the area of self- [redacted] should be given);

E. participate actively as a member of the FAC and in the Family Advocacy Case Review Subcommittees;

F. employ special procedures to protect child victims during the legal process (references (L) and (M), supra at page 1, provide a wealth of ideas in this area as well as in the area of prosecution of such cases); or

G. be involved in the development, review, and revision of the MOU with civilian authorities.

CHAPTER VI

ENLISTED ADMINISTRATIVE SEPARATIONS

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CHAPTER VI

ENLISTED ADMINISTRATIVE SEPARATIONS

0601 INTRODUCTION. This chapter discusses the substantive aspects of enlisted administrative separations. The following chapter (chapter VII) will discuss the procedure for processing and reviewing involuntary enlisted administrative separations. Both chapters are therefore interrelated and will be cross-referenced. A servicemember's obligation to his armed service generally terminates after a specific period of time has elapsed. The time period is determined by the terms of his enlistment contract. Termination of this obligation of service is accomplished as a result of the normal lapse of time or earlier administrative or disciplinary separation due to specifically identified conduct on the part of the servicemember. Two terms, "discharge" and "separation," are used in discussing the termination of a service obligation. SECNAVINST 1910.4 series Subj: Enlisted Administrative Separations, defines these terms as follows:

> Discharge. A complete severance from all naval status gained by the enlistment or induction concerned.....
>
> Separation. A general term which includes discharge, release from active duty, transfer to the Fleet Reserve or retired list, release from custody and control of the Military Services, transfer to the IRR, and similar changes in active or reserve status.

SECNAVINST 1910.4 series implemented DoD Directive 1332.14 series Enlisted Administrative Separations. The Navy (in the MILPERSMAN) and the Marine Corps (in MARCORSEPMAN) further implemented the SECNAVINST 1910.4 series for their respective services. These service regulations are the primary references for enlisted administrative separations and serve as the basis for the material in this chapter.

0602 TYPES OF SEPARATIONS. There are two types of separations given by the armed forces of the United States to enlisted servicemembers: (1) punitive discharges; and (2) administrative separations.

0603 PUNITIVE DISCHARGES. Punitive discharges are authorized punishments of courts-martial and can only be awarded as an approved sentence of a court-martial pursuant to a conviction for a violation of the UCMJ. There are two types of punitive discharges: (1) dishonorable discharge, which can only be adjudged by a general court-martial and is a separation under dishonorable conditions; and (2) bad-conduct discharge, which can be adjudged by either a general court-martial or a special court-martial and is a separation under conditions other than honorable.

0604 ADMINISTRATIVE SEPARATIONS

A. General. Administrative separations are only awarded through the administrative process, not courts-martial. Enlisted personnel may be administratively separated with a characterization of service (characterized separation) or description of separation (uncharacterized separation) as warranted by the facts of the particular case.

B. Definitions. Some basic concepts that are important for understanding the administrative separation system are:

1. Basis for separation. "Basis for separation" is simply the reason for which the person is being administratively separated (e.g., misconduct, convenience of the government).

2. Characterization of service. This term refers to the quality of the individual's military service (e.g., honorable, general, or OTH).

3. Uncharacterized separations. This term refers to descriptions of separation, such as entry level separation or order of release from custody and control of the armed forces, which are used in cases when the member's service does not qualify for either favorable or unfavorable characterization.

4. Entry level status. Upon enlistment, a member qualifies for entry level status during the first 180 days of continuous active military service or the first 180 days of continuous active service after a break of more than 92 days of active service. A member of a Reserve component who is not on active duty, or who is serving under a call or order to active duty for 180 days or less, begins entry level status upon enlistment in a Reserve component. Entry level status for such a member of a Reserve component terminates as follows: (a) 180 days after beginning training if the member is ordered to active duty for training for one continuous period of 180 days of more; or (b) 90 days after the beginning of the second period of active-duty training if the member is ordered to active duty for training under a program that splits the training into two or more separate periods of active duty.

5. Processing for separation. "Processing for separation" simply means that the administrative machinery is being set in motion and not that the member will necessarily be separated.

6. Execution of the separation. A term that means the processing for separation has been completed, the actual separation has been approved, and it can be executed; that is, the separation papers can be delivered to the individual who can then return to civilian life in most cases.

7. Convening authority. The "convening authority" is simply the commanding officer who is responsible for beginning the appropriate administrative separation processing and submitting the documentation to the separation authority when necessary. Under some circumstances, it is mandatory that an individual's commanding officer process an individual for separation. Under most circumstances, however, the commanding officer will be permitted to exercise discretion.

8. Separation authority. The "separation authority" is the officer in the chain of command who decides, based on the documentation presented

to him, whether any recommended separation should be approved or disapproved and, if a separation is approved, what type of separation and whether it should be executed or suspended.

NOTE: In some instances, the convening authority and the separation authority will be the same. See NAVOP 013/87.

C. Characterized separations. Separations are characterized as either honorable, general (under honorable conditions), or under other than honorable conditions (OTH). The latter characterization was formerly known as the undesirable discharge (UD).

1. Honorable. An honorable separation (discharge) is with honor, and is appropriate when the quality of the member's service has met the standards of acceptable conduct and performance of duty or is otherwise so meritorious that any other characterization would be clearly inappropriate.

a. In the Navy:

(1) An honorable separation requires a minimum final average for the current enlistment in performance and conduct marks of 2.8 and a minimum average in personal behavior of 3.0. MILPERSMAN, art. 3610300.3a(1).

(2) A member whose marks do not otherwise qualify for an honorable separation may nevertheless receive an honorable separation if he was awarded certain personal decorations (e.g., Medal of Honor, Combat Action Ribbon) during the period of service or prior service.

b. In the Marine Corps:

(1) For paygrades E-4 and below, overall conduct marks for the current enlistment averaging 4.0 and proficiency marks averaging 3.0 are prima facie qualifications for an honorable separation. (The Marine Corps places great weight on the commanding officer's recommendation of appropriate characterization and a strong recommendation can turn what would otherwise be a general discharge into an honorable discharge and vice versa.) MARCOR-SEPMAN, paras. 6107, 6305.

(2) For paygrades E-5 and above, an honorable discharge is automatic unless unusual circumstances warrant other characterization and such characterization is approved by the GCM authority or higher. MARCOR-SEPMAN, Table 1-1.

2. General (under honorable conditions). A general separation (discharge) is issued to servicemembers whose military record is satisfactory, but less than that required for an honorable discharge. It is a separation under honorable conditions and entitles the individual to all veterans' benefits as reflected in the table at pages 6-25 and 6-26 of this text. A servicemember will normally receive a general discharge when the member's service has been under honorable conditions, but either the overall average evaluation mark or the overall average personal behavior mark does not meet the 2.8/3.0 (Navy) or 3.0/4.0 (Marine) E-4 and below standards, respectively, and the member is not otherwise being processed for separation under other than honorable conditions.

3. Under other than honorable conditions (OTH). A characterization of other than honorable is appropriate when the reason for separation is based upon a pattern of adverse behavior or one or more acts that constitute a significant departure from the conduct expected from members of the naval service. An OTH discharge is an administrative separation that is now used in place of the former undesirable discharge. As of 1 January 1977, the undesirable discharge (UD) was replaced with the OTH.

a. Persons given an OTH discharge are not entitled to retain their uniforms or wear them home (although they may be furnished civilian clothing at a cost of not more than $40), must accept transportation in kind to their homes, are subject to recoupment of any reenlistment bonus they may have received, are not eligible for notice of discharge to employers, and do not receive mileage fees from the place of discharge to their home of record.

b. The Department of Veterans' Affairs will make its own determination with respect to the benefits listed in the table at page 6-25 of this text as to whether the discharge was under conditions other than honorable. Most veterans' benefits will be forfeited if that determination is adverse to the former servicemember, such as when based on the following circumstances:

(1) Deserter;

(2) escape trial by general court-martial;

(3) conscientious objector who refused to perform military duty, wear the uniform, or comply with lawful orders of competent military authorities;

(4) willful or persistent misconduct;

(5) an offense involving moral turpitude;

(6) mutiny or spying; or

(7) homosexual acts involving aggravating circumstances.

c. Persons given OTH discharges may find employment difficult to secure, since its stigma is reputed to be worse than that associated with the bad-conduct discharge. (See Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 87th Cong., 2d Sess. (1962) (testimony of Chief Judge Quinn); Jones, The Gravity of Administrative Discharges -- A Legal and Empirical Evaluation, 59 Mil. L. Rev. 1 (1973); Everett, Military Administrative Discharge -- The Pendulum Swings, 1966 Duke L.J. 41. See also Lance, A Criminal Punitive Discharge -- An Effective Punishment?, 79 Mil. L. Rev. 1 (1978); Stichman, Developments in the Military Discharge Review Process, 4 Mil. L. Rep. 6001 (1976); Lunding, Judicial Review of Military Administrative Discharges, 83 Yale L.J. 33 (1973).

d. The adverse effects of an OTH discharge, the large number of them issued as compared with punitive discharges, and the absence in administrative separations of the extensive review procedures comparable to those afforded servicemembers awarded a punitive discharge have resulted in

congressional concern that those being considered and processed for such OTH discharges also be afforded adequate safeguards. This has resulted in significantly increased protections being afforded persons being processed for an OTH discharge.

(1) Commanding officers are to explain periodically and issue a written fact sheet on the types of characterization of service, the bases on which they can be issued, and the possible adverse effect they may have upon employment in the civilian community, veterans' benefits, and reenlistment. MILPERSMAN, art. 3610100.3d; MARCORSEPMAN, para. 6103. The Navy and Marine Corps require explanations of the foregoing each time the punitive articles of the UCMJ are explained pursuant to Article 137, UCMJ. Article 137 provides that the explanation be made to enlisted personnel at the time of entering upon active duty, or within six days thereafter; and again after completing six months or active duty; and at the time of every reenlistment. Failure of any member to receive or understand this advice is not a bar to separation or characterization of service.

(2) Any member being separated, except those separated for immediate reenlistment, must be advised of the purpose and authority of the Naval Discharge Review Board and the Board for Correction of Naval Records at the time of processing for such a separation. The advice includes a warning that an OTH based on a 180-day UA or more is a conditional bar to veterans' benefits, notwithstanding any action by the Naval Discharge Review Board. Failure of any member to receive or understand this advice is not a bar to separation or characterization of service. MILPERSMAN, art. 3610100.7; MARCORSEPMAN, para. 6104. Male servicemembers are also required to be advised before separation (if born in 1960 or later and 18 years old or older) of the requirement to register within 30 days of separation from active duty if they have not previously done so. MILPERSMAN, art. 3640497; MARCORSEPMAN, para. 1101.4g. Under 10 U.S.C. § 1046, servicemembers upon discharge or release from active duty must be counseled in writing -- signed by the member and documented in his/her service record -- on educational assistance benefits and the procedures for, and advantages of, affiliating with the Selected Reserve.

(3) As a general rule, in order for a member to be processed for an administrative separation under conditions other than honorable, the member must be afforded the opportunity to present his or her case in person before an administrative board with the advice and assistance of lawyer counsel. Exceptions to the foregoing are as follows:

(a) The servicemember may request an OTH in lieu of trial by court-martial, in which case the member will not be entitled to an administrative board. MILPERSMAN, art. 3630650; MARCORSEPMAN, para. 6419. Both the Navy and Marine Corps provide that a member may be separated, upon request, to avoid trial by special or general court-martial if charges have been preferred with respect to an offense for which a punitive discharge is authorized. The escalator clause (R.C.M. 1003(d), MCM, 1984) may be used to determine, if a punitive discharge is authorized, if the charges have been referred to a court-martial authorized to adjudge a punitive discharge.

(b) A member can unconditionally waive his rights to a board and counsel, as well as any other right. Such a waiver will ordinarily be accomplished in writing.

(c) A member of the naval service may be separated, while absent without authority, after receiving notice of separation processing. MILPERSMAN, art. 3640300.1c; MARCORSEPMAN, para. 6312. In addition, a marine may be separated while on unauthorized absence when prosecution of the member appears to be barred by the statute of limitations (which has not been tolled) or when the member is an alien in a foreign country where the U.S. has no authority to apprehend the member. MARCORSEPMAN, para. 6312.

(d) If a member is out of military control because of civil confinement, and if the civil authorities are unwilling to release the member, the member's case may be heard by the board in his absence (following appropriate notice to the confined servicemember) and the case may be presented on respondent's behalf by counsel for respondent. MILPERSMAN, art. 3640300.2n; MARCORSEPMAN, para. 6303.4a. [See Kalista v. Secretary of Navy, 560 F.Supp. 608 (D.C. Colo. 1983).]

D. Uncharacterized separations

1. Entry level separation (ELS). A member in an entry level status (as defined in section 0604B above) or the first 180 days of a period of continuous active military service will ordinarily be separated with an entry level separation. A member in an entry level status may also be separated under other than honorable conditions if warranted by the facts of the case (e.g., separation processing for misconduct or homosexuality). By the same token, a member in entry level status is not precluded from receiving an honorable discharge when clearly warranted by unusual circumstances and approved on a case by case basis by the Secretary of the Navy. MILPERSMAN, art. 3610300.5a; MARCORSEPMAN, para. 6107.3a.

2. *Void enlistment or induction.* A member whose enlistment or induction is void will be separated with an order of release from custody and control of the Navy or Marine Corps and will not receive a discharge certificate (honorable, general, or OTH) or an entry level separation. For example, a member would receive this type of uncharacterized separation if the member was insane at the time of enlistment, a deserter from another service, or under age 17 when processed for a minority separation. MILPERSMAN, art. 3610300.5b; MARCORSEPMAN, para. 6107.3b.

E. Additional procedural matters

1. When the sole basis for separation is an offense for which the member was convicted by special or general court martial but not awarded a punitive discharge (BCD or DD), characterization of service as OTH must be approved by the Secretary of the Navy on a case by case basis. MILPERSMAN, art. 3610300.4c; MARCORSEPMAN, para. 6107.2c(3).

2. A member may not be separated on the basis of conduct that has been the subject of judicial proceedings resulting in an acquittal, or action having the effect of an acquittal, except in the following circumstances (MILPERSMAN, art. 3610200.12a; MARCORSEPMAN, para. 6106.1a):

a. When such action is based on a judicial determinat[illegible] not going to the merits of the issue of the factual guilt of the respondent (See Garrett v. Lehmann, 751 F.2d 997 (9th Cir. 1985), where an OTH [illegible] upheld even though N.M.C.M.R. reversed the court martial); or

b. when the judicial proceeding was conducted in a state [illegible] foreign court and the separation is in the best interest of the naval service as determined by the Secretary of the Navy on a case by case basis.

3. Although a servicemember is processed and appropriately recommended for an OTH, the member may nevertheless still be awarded an honorable or general discharge if the separation or higher authority considers such to be warranted based on an overall evaluation of the member's current period of service. MILPERSMAN, art. 3640370.1c(2)(C); MARCORSEPMAN, para. 6309.2b(2)(b).

4. Conduct in the civilian community of a member of a Reserve component who is not on active duty may form the basis for characterization under other then honorable conditions only if such conduct affects directly the performance of military duties (e.g., conduct that results in incarceration excluding the member from participating in drills or being mobilized). Such conduct may form the basis of characterization as general under honorable conditions only if such conduct has an adverse impact on the overall effectiveness of the naval service, including military morale and efficiency (e.g., discreditable involvement with civil authorities while not on active duty for training and while wearing the Navy uniform without authorization). MILPERSMAN, art. 3610300.4d; MARCORSEPMAN, para. 6107.2c(4).

5. When the separation is based solely on a court martial where the sentence of a punitive discharge was remitted or suspended by the same court-martial convening authority, the processing package shall be forwarded to Commander, Naval Military Personnel Command, via that convening authority for endorsement. Commander, Naval Military Personnel Command will review each of these endorsements prior to any decision on administrative separation. Those cases, where the convening authority who suspended or remitted the punitive discharge has not seen the administrative discharge case, will be returned for appropriate endorsement. In keeping with established time goals for processing administrative discharge cases (section 0703.F below), convening authorities should take no longer than ten working days in providing these endorsements. MILPERSMAN 3610200.5.

0605 BASES FOR SEPARATING ENLISTED PERSONNEL

A. General. This section lists the bases or specific reasons for administratively separating enlisted personnel. The involuntary separation of a member requires the utilization of either the notification or administrative board procedure as indicated. These procedures and the requirement for counseling are discussed in detail in chapter VII. This study applies [illegible] are 15 specific reasons for separation. They are:

1. Expiration of enlistment or fulfillment of service obligor; or

2. selected change in service obligation.

3. convenience of the government;

4. disability;

5. defective enlistment and induction;

6. entry level performance and conduct;

7. unsatisfactory performance;

8. homosexuality;

9. drug abuse rehabilitation failure;

10. alcohol abuse rehabilitation failure;

11. misconduct;

12. separation in lieu of trial by court-martial;

13. security;

14. unsatisfactory participation in the Ready Reserve; and

15. separation in the best interest of the government.

These reasons are discussed in detail below.

B. Bases for separation defined. This subsection lists the types of separations available for the particular bases of separation, the applicable procedures (including counseling, where required), and defines these bases in general terms.

1. Expiration of enlistment or fulfillment of service obligation. MILPERSMAN, art. 3620150; MARCORSEPMAN, para. 1005.

a. Honorable, general, or ELS.

b. Self-explanatory.

2. Selected change in service obligation. MILPERSMAN, art. 3620100; MARCORSEPMAN, para. 6202.

a. Honorable, general, or ELS.

b. General demobilization, reduction in strength, and other "early-outs."

3. Convenience of the government

a. Honorable, general, or ELS.

b. Notification procedure utilized generally.

c. Specific grounds. These are the subcategories of the convenience-of-the-government basis for discharge.

(1) Dependency or hardship. MILPERSMAN, art. 3620210; MARCORSEPMAN, para. 6407. This ground envisions a member voluntarily initiating a request setting forth:

(a) Genuine dependency or undue hardship;

(b) not temporary in nature;

(c) arisen or aggravated since the member's entry into service;

(d) in which every reasonable effort has been made to eliminate the hardship;

(e) that a discharge will in fact alleviate the hardship; and

(f) that no other means are available.

Unlike the Navy, the Marine Corps provides for a three-member advisory board to be convened by the marine commander exercising special court-martial jurisdiction over the servicemember to hear the member's case. MARCORSEPMAN, para. 6407.6.

(2) Pregnancy or childbirth. This is a voluntary separation initiated upon written request by the female servicemember. The request may be denied in the best interest of the naval service if, for example, the member is serving in a critical rate, has received special compensation during the current enlistment, has not completed obligated service incurred, or has executed orders in a known pregnancy status. MILPERSMAN, art. 3620220; MARCORSEPMAN, para. 6408.

(3) Parenthood. MILPERSMAN, art. 3620200.1c; MARCORSEPMAN, para. 6203.1.

(a) Notification procedure utilized.

(b) Counseling required.

(c) Applicable when member is unable to perform duties satisfactorily, or is unavailable for worldwide assignment, due to parenthood. MILPERSMAN, art. 3810190 requires single parents and military couples with children to provide a plan for dependent care arrangements. After counseling, a commanding officer may give a parent up to 60 days to present an adequate plan. Noncompliance requires processing for parenthood.

(4) Conscientious objection. Persons who by reason of religious training or belief have a firm, fixed, and sincere objection to participate in war in any form or the bearing of arms may claim conscientious objector status. MILPERSMAN, arts. 3620200.1d, 1860120; MARCORSEPMAN, para. 6409.

(5) Surviving family member (inductees only). MILPERSMAN, art. 3620240; MARCORSEPMAN, para. 6410.

(6) Sole surviving son or daughter. MILPERSMAN, art. 3620245.

(7) Alien. This is a voluntary request initiated upon the written request of the servicemember. The request may be denied in the best interest of the naval service if, for example, the member is serving in a critical rate, has received special compensation during the current enlistment, or has not completed obligated service incurred. MILPERSMAN, art. 3620260.

(8) Other designated physical or mental conditions. These are involuntary separations where counseling is required (unless otherwise indicated) and notification procedures are utilized.

(a) Obesity. The Navy treats obesity in general as a convenience-of-the-government matter. The Marine Corps considers only pathologically caused obesity (certified by a medical board) as a convenience-of-the-government matter. If a marine's obesity is not medically caused and results simply from an inability to push oneself away from the dinner table, then the Marine Corps processes such an individual for unsatisfactory performance instead of convenience of the government. MARCORSEPMAN, paras. 6203.2a(1), 6206.1.

(b) Motion/air sickness, when verified by medical opinion.

(c) Enuresis (bed-wetting)/somnambulism (sleep-walking). The Navy and Marine Corps process only such individuals whose behavior has been medically confirmed.

(d) Allergies (e.g., uniform material, bee stings).

(e) Excessive height.

NOTE: (b), (c), (d), and (e) do not require counseling prior to processing.

(f) Personality disorder. Separation processing is discretionary with the member's commanding officer. In order for this to be a proper basis for separation, a two-part test must be satisfied. First, a psychiatrist or psychologist must diagnose the member as having a personality disorder which is such as to render the member incapable of serving adequately in the naval service. Second, there must be documented interference with the member's performance of duty. MILPERSMAN, art. 3620200; MARCORSEPMAN, para. 6203.3.

4. Disability. MILPERSMAN, art. 3620270; MARCORSEPMAN, ch. 8.

a. Honorable, general, or ELS. A member may be separated for disability in accordance with the Disability Evaluation Manual, SECNAVINST 1850.4 series.

b. A medical board must determine that a member is unable to perform the duties of his or her rate in such a manner as to reasonably fulfill the purpose of his or her employment on active duty.

5. Defective enlistment and induction

a. Minority. MILPERSMAN, art. 3620285; MARCORSEPMAN, para. 6204.1.

(1) Notification procedure utilized.

(2) Member may be separated for enlisting without proper parental consent prior to reaching the age of majority. The type of uncharacterized separation is governed by the member's age when separation processing is commenced/completed.

(a) If member is under age 17, the enlistment is void and the member will be separated with an order of release from the custody and control of the Navy or Marine Corps.

(b) If the member is age 17, the member will be separated with an entry level separation only upon the request of the member's parent or guardian within 90 days of the member's enlistment.

(c) If the member has attained the age of 18, separation is not warranted under this article since the member has effected a constructive enlistment. MARCORSEPMAN, para. 6107.3b.

b. Erroneous enlistment. MILPERSMAN, art. 3620280; MARCORSEPMAN, para. 6204.2.

(1) Honorable, ELS, or order of release (OOR) by reason of void enlistment.

(2) Notification procedure utilized.

(3) A member may be separated for erroneous enlistment if the enlistment would not have occurred had certain facts been known and there was no fraudulent conduct on the part of the member, and the defect is unchanged in material respects.

c. New entrant drug and alcohol testing: MILPERSMAN (Pending); MARCORSEPMAN, para. 6215.

(1) Per HQ USMC SJA and ALMAR 37/89 -- Instead of an ELS or OOR, the voided enlistment is reflected by the number zero if they are found to be dependent. People who are dependent require mandatory processing. If they are not dependent, they MAY BE processed and, if so, processing is done under Erroneous Enlistment.

(2) This new basis for processing was created under 10 U.S.C. § 978.

d. Fraudulent entry into naval service. MILPERSMAN, art. 3630100; MARCORSEPMAN, para. 6204.3.

(1) Honorable, general, OTH or ELS, or OOR.

(2) Notification procedure utilized unless issuance of OTH is desired or misrepresentation includes preservice homosexuality, in which case the administrative board procedure must be utilized. Processing is unnecessary where the commanding officer opts to retain and the defect is no longer present, or the defect is waivable and the waiver is obtained from the Commander, Naval Military Personnel Command or the Commandant of the Marine Corps, as appropriate.

(3) A member may be separated for fraudulent entry for any knowingly false representation or deliberate concealment pertaining to a qualification of military service [other than the false representation of age by a minor (Navy only)].

e. Other defective enlistment. MILPERSMAN, art. 3620283; MARCORSEPMAN, para. 6402.

(1) Honorable, ELS, or OOR.

(2) A member may be separated on this basis if:

(a) As the result of a material misrepresentation by recruiting personnel upon which the member reasonably relied, the member was induced to enlist or reenlist for a program for which the member was not qualified;

(b) the member received a written enlistment commitment from recruiters which cannot be fulfilled; or

(c) the enlistment was involuntary.

6. Entry level performance and conduct. MILPERSMAN, art. 3630200; MARCORSEPMAN, para. 6205.

a. ELS.

b. Notification procedure utilized.

c. Counseling required.

d. This basis for separation is only applicable to members in an entry level status; in essence, the first 180 days of continuous, active military service. A member may be separated if it is determined that he or she is unqualified for further military service by reason of unsatisfactory performance or conduct, or both, as evidenced by incapability, lack of reasonable effort, failure to adapt to the naval environment, or minor disciplinary infractions. Nothing in this provision precludes separation of a member in an entry level status under another basis for separation discussed in this chapter.

7. Unsatisfactory performance. MILPERSMAN, art. 3630300; MARCORSEPMAN, para. 6206.

a. Honorable or general.

b. *Notification procedure utilized.*

c. Counseling required.

d. A member may be separated for unsatisfactory performance -- as characterized by performance of assigned tasks and duties that is not contributory to unit readiness and/or mission accomplishment as documented in the service record -- or failure to maintain required proficiency in rate -- as demonstrated by below-average evaluations (Marine Corps) or two consecutive enlisted performance evaluations (Navy), regular or special, with unsatisfactory marks for professional factors of 1.0 in either military or rating knowledge or with an overall evaluation, where applicable, of 2.0. This basis for separation may not be used for separation of a member in an entry level status. Unsatisfactory performance is not evidenced by disciplinary infractions; cases involving only disciplinary infractions should be processed under misconduct. The Marine Corps includes unsanitary habits and failure to conform to weight standards (not the result of a pathological or organic condition) as examples of unsatisfactory performance. MARCORSEPMAN, para. 6206.

8. Homosexuality. MILPERSMAN, art. 3630400; MARCORSEPMAN, para. 6207.

a. Characterization of separation. Honorable, general, OTH, or ELS.

(1) A separation under other than honorable conditions by reason of homosexuality may be issued only if there is a finding that during the current term of service the member attempted, solicited, or committed a homosexual act in one or more of the following circumstances:

(a) By using force, coercion, or intimidation;

(b) with a person under 16 years of age;

(c) with a subordinate in circumstances that violate customary military superior-subordinate relationships;

(d) openly in public view;

(e) for compensation;

(f) aboard a military vessel or aircraft; or

(g) in another location subject to military control under aggravating circumstances noted in the findings that have an adverse impact on discipline, good order, or morale comparable to the impact of such activity aboard a vessel or aircraft.

(2) In all other cases, the characterization of the separation is to reflect the character or description of the member's service.

b. Procedure. Administrative board procedure utilized.

(1) Inquiry. A commanding officer or officer in charge, who receives apparently reliable information indicating that separation of a member of his or her unit or organization is warranted, shall inquire thoroughly into the matter to determine all the facts and circumstances of the case.

(2) Disposition. If, upon completion of the inquiry, the commanding officer determines that there is not probable cause to believe that one or more of the circumstances for which separation is authorized has occurred, the commander should promptly terminate all action on the case. Otherwise, the commanding officer shall initiate administrative separation proceedings, in accordance with applicable regulations, as discussed in chapter VII of this text. In the Navy, if the basis for homosexuality is evidenced solely by a court-martial conviction and the court-martial convening authority has remitted or suspended a punitive discharge, the case should be forwarded to that court-martial convening authority for endorsement prior to forwarding the case to Commander, Naval Military Personnel Command. MILPERSMAN, art. 3630400.4a.

c. Definitions

(1) A "homosexual act" means bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires.

(2) "Homosexual" means a person, regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts.

(3) "Bisexual" means a person who engages in, desires to engage in, or intends to engage in homosexual and heterosexual acts.

d. Policy

(1) Homosexuality is considered to be incompatible with military service (see Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980) upholding said policy). Members are to be separated administratively if one or more of the following three approved findings is made:

(a) The member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts -- unless there are approved further findings that:

-1- Such conduct is a departure from the member's usual and customary behavior;

-2- such conduct under all the circumstances is unlikely to recur;

-3- such conduct was not accomplished by use of force, coercion, or intimidation by the member during the period of military service;

-4- under the particular circumstances of the case, the member's continued presence in the naval service is consistent with the interest of the naval service in proper discipline, good order, and morale; and

-5- the member does not desire to engage in or intend to engage in homosexual acts.

(b) The member has stated that he or she is a homosexual or bisexual, unless there is a further finding that the member is not a homosexual or bisexual.

(c) The member has married or attempted to marry a person known to be of the same biological sex (as evidenced by the external anatomy of the persons involved), unless there are further findings that the member is not a homosexual or bisexual and that the purpose of the marriage or attempt was the avoidance or termination of military service.

(2) A member may be administratively separated from the naval service on the basis of preservice, prior service, or current service homosexual conduct or statements.

(3) Undisclosed preservice homosexuality constitutes a fraudulent enlistment. The standards and procedures for separation by reason of homosexuality shall apply, but the basis for and characterization of separation are to be in accordance with regulations governing separation by reason of defective enlistment due to fraudulent entry into the naval service.

e. AIDS/HIV. 10 U.S.C. § 1002; SECNAVINST 5300.30 series; NAVOP 013/86, 117/86, 026/87, 069/87. Navy points of contact: (1) Policy-OP-13Bb, AUTOVON 224-5562; (2) Assignment - NMPC 453, AUTOVON 224-3785; (3) Retention - NMPC 831, AUTOVON 224-8223. Marine Corps point of contact: MPP 39, AUTOVON 224-1931/1519.

(1) Individuals who are human immunodeficiency virus (HIV) positive are not allowed to enlist in the armed forces. Once on active duty, individuals who become HIV positive will generally be allowed to reenlist and are retained. Retention will be continued so long as there is no evidence of immunological deficiency, neurological involvement, acquired immune deficiency syndrome (AIDS), or AIDS-related complex (ARC). If such conditions do develop, and interfere with the member's performance of duties, personnel are to be processed for disability. The member may request voluntary separation within the first 90 days of discovery of being HIV positive, but may lose certain veterans' medical benefits. Personnel requesting voluntary separation must be counseled of this possibility.

(2) Assignments limitations. Personnel who are HIV positive can only be assigned to shore units within CONUS and within a 300-

mile radius of certain medical treatment facilities. Only the immediate commanding officer and medical officer need know the HIV status of a member. Confidentiality is extremely important, and 10 U.S.C. § 1002 provides severe penalties for unauthorized disclosure of AIDS/HIV-related information (information is to be disseminated on a need-to-know basis only).

(3) Adverse action

(a) Servicemembers may not be processed for separation nor have UCMJ action taken based solely on an HIV-positive blood test or the epidemiological assessment interview which is conducted by the medical treatment facility. To establish drug abuse or homosexuality for processing or UCMJ action, independent evidence must be obtained. This cannot be reflected in fitness reports or enlisted evaluations and is without effect on promotions.

(b) Exceptions - Members who are HIV positive may be ordered not to have unprotected sex and to inform future sex partners of their condition. Several prosecutions have occurred due to violation of such orders, as well as under assault and novel specifications drafted under Article 134, UCMJ. See United States v. Morris, 25 M.J. 579 (A.C.M.R. 1987); Military Justice Advisory 8-87 (Navy JAG msg 041215Z JAN 88).

9. Drug abuse rehabilitation failure. MILPERSMAN, art. 3630500; MARCORSEPMAN, para. 6208.

a. Honorable, general, or ELS.

b. Notification procedure utilized.

c. A member who has been referred to a formal program of rehabilitation for personal drug abuse (in accordance with OPNAVINST 5350.4 series or MCO 5300.12 series) may be separated for failure through inability or refusal to participate in, cooperate in, or successfully complete such a program when:

(1) There is a lack of potential for continued naval service; or

(2) long-term rehabilitation is determined necessary and the member is transferred to a civilian medical facility for rehabilitation.

d. Nothing in this provision precludes the separation under any other basis for separation discussed in this chapter, in appropriate cases, of a member who has been referred to such a program. For example, a member who abuses drugs, after having completed a drug abuse rehabilitation program, may also be separated by reason of misconduct due to drug abuse (discussed later in this chapter).

10. Alcohol abuse rehabilitation failure. MILPERSMAN, art. 3630550; MARCORSEPMAN, para. 6209.

a. Honorable, general, or ELS.

b. Notification procedure utilized.

c. A member who has been referred to a formal program of rehabilitation for personal alcohol abuse (in accordance with OPNAVINST 5350.4 series or MCO 5370.6 series) may be separated for failure, through inability or refusal, to participate in, cooperate in, or successfully complete such a program when:

(1) There is a lack of potential for continued naval service; or

(2) long-term rehabilitation is determined necessary and the member is transferred to a civilian medical facility for rehabilitation.

d. Nothing in this provision precludes the separation under any other basis for separation discussed in this chapter, in appropriate cases, of a member who has been referred to such a program.

11. Misconduct. MILPERSMAN, arts. 3630600, 3630620; MARCOR-SEPMAN, para. 6210.

a. Honorable, general, OTH, or ELS.

b. Administrative board procedure utilized in all cases except (as noted below) with respect to the subcategories of minor disciplinary infractions and pattern of misconduct.

c. Counseling required only for the subcategories of minor disciplinary infractions and pattern of misconduct.

d. Subcategories. There are five subcategories under misconduct: Minor disciplinary infractions, pattern of misconduct, drug abuse, commission of a serious offense, and civilian convictions.

(1) Minor disciplinary infractions

(a) "Minor disciplinary infractions" is defined as a series of at least three minor disciplinary infractions appropriately disciplined under Article 15, UCMJ, and documented in the service record, within one enlistment. (The Marine interpretation of this provision is that it is not even necessary that the infractions resulted in NJP, only that they be documented in the service record -- e.g., a page 11 counseling/warning regarding extra military instruction.) (The Navy interpretation of this provision is that the UCMJ violations must be between three and eight in number, non-drug related, and, in fact, punished under the UCMJ. If one or more of the violations cited could have resulted in a punitive discharge, or there are three or more periods of unauthorized absence of more than three days duration each, or there are three or more punishments under the UCMJ (NJP's) within the current enlistment, processing in the Navy should be effected for pattern of misconduct rather than minor disciplinary infractions.) If separation of a member in entry level status is warranted solely by reason of minor disciplinary infractions, processing should be under entry level performance and conduct, rather than misconduct (minor disciplinary infractions).

(b) Counseling required.

(c) In the Marines, a commanding officer may elect to use the notification procedure, vice the administrative board procedure, if an OTH will not be recommended in the case. If the commanding officer contemplates recommending an OTH, the administrative board procedure must be utilized.

(d) In the Navy, notification procedures should always be used for minor disciplinary infractions; however, if any of the offenses for which the member is being processed has a punitive discharge authorized in the table of maximum punishments, then misconduct commission of a serious offense is the proper basis for processing.

(2) Pattern of misconduct

(a) "Pattern of misconduct" is defined as a pattern of more serious misconduct consisting of two or more discreditable involvements with civil or naval authorities or two or more instances of conduct prejudicial to good order and discipline within one enlistment. Such a pattern may include both minor and more serious infractions. (For the Navy, the latest offense must have occurred while assigned to the parent command.) A pattern of misconduct includes the following:

-1- Any established pattern of involvement of a discreditable nature with civil or naval authorities [the Navy interprets this provision to include two or more civilian convictions for misdemeanors, three or more punishments under the UCMJ (NJPs or courts-martial), or any combination of three minor civilian convictions for misdemeanors or punishments under the UCMJ. MILPERSMAN, art. 3630600.1a(2)];

-2- an established pattern of minor unauthorized absences;

-3- an established pattern of dishonorable failure to pay just debts; or

-4- an established pattern of dishonorable failure to contribute adequate support to dependents or failure to comply with orders, decrees, or judgments of a civil court concerning support of dependents.

(b) Counseling required.

(c) A commanding officer may elect to utilize the notification procedure, vice the administrative board procedure, in a case in which an OTH is not sought or will not be recommended.

(3) Drug abuse

(a) A member may be separated for even a single drug-related incident. OPNAVINST 5350.4 series defines a drug-related incident, in pertinent part, as: "Any incident in which drugs are a factor. For the purposes of this instruction, voluntary self-referral, use or possession of drugs or drug paraphernalia, or drug trafficking constitute an incident."

(b) As stated above, even mere possession of drug paraphernalia may result in separation. Drug abuse paraphernalia, as defined in OPNAVINST 5350.4 series includes: "All equipment, products, and materials of any kind that are used, intended for use, or designed for use in injecting, ingesting, inhaling, or otherwise introducing into the human body marijuana, narcotic substances, or other controlled substances in violation of law."

(c) If the drug incident involves drug trafficking, processing for separation is mandatory.

(d) For a senior enlisted member (USN E-6/USMC E-6 and above), processing for separation is mandatory even for a single incident. OPNAVINST 5350.4 series; MCO P 5300.12 series.

(e) In the Navy, the policy governing separation processing for junior enlisted personnel (E-1 through E-5) depends on the number of incidents and the member's drug dependency and potential for future service. OPNAVINST 5350.4 series. (See chart on page 6-32.)

-1- First incident and nondependent. A member may be retained if he/she exhibits exceptional potential and desire for further useful service as determined by the CO. If retained, the member shall be disciplined, as appropriate, and afforded Level I or II drug education/rehabilitation. A member not meeting these criteria shall be processed for separation.

-2- First incident and drug-dependent

-a- A member who is E-1 to E-3, or who is E-4 with less than two years of active service, is considered to have no potential for further useful service. He/she shall be detoxified when appropriate, processed for immediate separation, and offered VA treatment at the time of separation.

-b- A member who is E-4 with over two years of active service, or who is E-5, may be afforded in-service rehabilitation (Level III) if he/she exhibits exceptional potential and desire for further useful service and high probability for successful rehabilitation as determined by the CO. A member not meeting these criteria shall be detoxified when appropriate, processed for immediate separation, and offered VA treatment at the time of separation.

-3- Second incident. A junior enlisted member who commits a second drug offense will be processed immediately for separation after completion of disciplinary action, as appropriate. No waivers of the requirement to process for separation with two separate drug incidents will be authorized.

(f) In the Marine Corps, the policy governing separation processing for junior enlisted personnel (E-1 through E-5) depends on the number of incidents and the potential for future service. MCO P5300.12 series.

-1- First drug incident. The CO must process if he/she determines that the member has no potential for future useful

service. Otherwise, after appropriate discipline and counseling, the CO may retain the member and document the drug incident in accordance with MCO P5300.12 series.

-2- Second drug incident. The CO must process if he/she determines that the member has no potential for future useful service. If the CO determines that the member has exceptional potential for further useful service, he/she may, after appropriate discipline and counseling, retain the member, document the drug incident, and inform the Commandant of the Marine Corps that the member is being retained.

-3- Third drug incident. The CO must process if he/she determines that member has no potential for future useful service. If the CO determines that the member has exceptional potential for further useful service, a waiver for continued naval service must be requested from the Commandant of the Marine Corps. Such a waiver will be granted only under the most unusual circumstances.

(g) A medical officer's opinion or Counseling and Assistance Center evaluation of the member's drug dependency as evaluated subsequent to the most recent drug incident must be included with the case submission.

(h) Characterization of discharge. Under most circumstances involving possession, use and/or trafficking, the member will receive an other than honorable (OTH) discharge. If evidence of the drug-related incident was derived from a urinalysis test, the characterization of the discharge depends upon the circumstances under which the urine sample was obtained. Generally, if the urinalysis results could be used in disciplinary proceedings, it can be used to characterize an administrative discharge as less than honorable. (See charts pages 6-30 and 6-31). Some reasons for ordering urinalysis tests which yield results which can be used in disciplinary proceedings, and therefore can be utilized to characterize a discharge as other than honorable, include:

-1- Search or seizure (member's consent, or probable cause);

-2- inspections [random samples, unit sweeps, service-directed samples, rehabilitation facility staff (military only)]; and

-3- medical tests for general diagnostic purposes

(i) Examples of fitness-for-duty urinalysis results which cannot be used in disciplinary proceedings, and therefore cannot be used to characterize a discharge as other than honorable, include: Command-directed tests, competence-for-duty exams pursuant to BUMEDINST 6120.20 series, drug rehabilitation tests, mishap/ safety investigation tests, aftercare testing.

(j) If the urinalysis result is not usable to characterize the discharge as other than honorable, the commanding officer may then elect to use the notification procedure vice the administrative board procedures.

(k) Example: SN Jones has had two previous *nonjudicial punishments*: one for wrongful possession and use of marijuana, and the other for a random urinalysis ordered by higher authority. Following the last NJP, his commanding officer ordered him to submit to a urinalysis screening to determine his fitness for duty. SN Brown, the roommate of SN Jones, was also ordered to submit a urine sample for screening for fitness-for-duty purposes. SN Brown has been a 4.0 sailor with absolutely no prior indication of drug usage. The results of both tests were positive for THC (marijuana). The commanding officer convened an administrative board for each sailor, the grounds for separation processing of which was misconduct due to drug abuse. What evidence can each board consider?

SN Jones: In determining whether to retain or separate SN Jones, the board may consider both nonjudicial punishments and the positive urinalysis result. When determining the characterization of discharge, however, the board may only consider the two nonjudicial punishments. Since the urinalysis was ordered for the purpose of determining fitness for duty only, it cannot be used by the board in arriving at the proper characterization of Jones' service. He still could receive an OTH because of the previous nonjudicial punishments.

SN Brown: The fitness-for-duty urinalysis result can only be used by the board in determining whether to retain or separate SN Brown. It cannot be used to characterize a discharge as other than honorable. Therefore, if the board recommends separation, it would be characterized as type warranted by service record (i.e., honorable in Brown's case). It is important to note that, since Brown could not have received an OTH discharge, the CO could have elected to process him under the notification procedures instead of the administrative board procedures.

(l) In the Navy, if the basis for drug processing is evidenced solely by a court-martial conviction, and the court-martial convening authority has remitted or suspended a punitive discharge, the case should be forwarded to that court-martial convening authority for endorsement prior to forwarding the case to Commander, Naval Military Personnel Command. MILPERSMAN, art. 3630620.3c.

(m) Portable urinalysis kits

-1- These kits are designed for initial screening of certain urine samples. Samples screened positive by the portable kits should be forwarded for confirmation to the designated drug screening lab. Local requirements should be followed in this regard. Portable kit results may also be confirmed by the member's admission or confession.

-2- Use of unconfirmed portable kit results are very limited. Unconfirmed results may not be used in any disciplinary proceeding (including NJP), administrative separation proceeding, or other adverse administration action (such as change of rate due to loss of security clearance). The portable kit results can be used by the commanding officer to temporarily suspend the member from sensitive duties pending confirmation. He may also order the member to initiate counseling, evaluation, and/or rehabilitation.

(4) Commission of a serious offense. A member may be separated for commission of a serious military or civilian offense under the following circumstances:

(a) The specific circumstances of the offense warrant separation; and

(b) a punitive discharge would be authorized for the same, or a closely related, offense under the UCMJ.

A member may not be separated on the basis of conduct that has been the subject of judicial proceedings resulting in an acquittal or its equivalent, except in the circumstances discussed in section 0604 E.2 above.

In the Navy, if the basis for processing under this provision is evidenced solely by a court-martial conviction, and the court-martial convening authority has remitted or suspended a punitive discharge, the case should be forwarded to that court-martial convening authority for endorsement prior to forwarding the case to Commander, Naval Military Personnel Command. MILPERSMAN, art. 3630600.1(b)(3).

(5) Civilian conviction

(a) A member may be separated upon conviction by civilian authorities, foreign or domestic, or action taken which is tantamount to a finding of guilty (including similar adjudications in juvenile proceedings) when the specific circumstances of the offense warrant separation and the following conditions are present:

-1- A punitive discharge would be authorized for the same, or a closely related, offense under the Manual for Courts-Martial, 1984; or

-2- the sentence by civilian authorities includes confinement for 6 months or more without regard to suspension or probation.

(b) Separation processing may be initiated whether or not a member has filed an appeal of a civilian conviction or has stated an intention to do so. However, execution of an approved separation should be withheld pending the outcome of the appeal, or until the time for appeal has passed, unless the member has requested separation or the member's separation has been requested by CNO or CMC, and such requests have been approved by the Secretary of the Navy who may direct that the member be separated prior to final action on the appeal.

e. While sexual perversion is not a specific basis for separation, paragraph 6210.4 of the MARCORSEPMAN indicates that marines involved in the commission of lewd and lascivious acts, sodomy, indecent exposure, indecent act(s) with, or assault upon, a child, or acts for compensation shall be processed for separation under commission of a serious offense or civilian conviction, as appropriate.

12. Separation in lieu of trial by court-martial. MILPERSMAN, art. 3630650; MARCORSEPMAN, para. 6419.

a. Characterization of service will ordinarily be OTH, but a higher characterization may be warranted in some circumstances.

b. Both the Navy and Marine Corps permit a member to request -- in writing -- a discharge to avoid trial by general or special court-martial, provided that a punitive discharge is authorized for the offense(s) preferred. The escalator clause at R.C.M. 1003(d), MCM, 1984, may be used to determine if a punitive discharge is authorized, provided the charges have been referred to a court-martial authorized to adjudge a punitive discharge. In the written request, the member shall state that he understands:

(1) The elements of the offense(s) charged, and acknowledges guilt of one or more of the offenses charged (or of any lesser included offense) for which a punitive discharge is authorized;

(2) that characterization of service as under other than honorable conditions is authorized; and

(3) the adverse nature of such a characterization of service and the possible consequences thereof.

The request shall also include:

(1) An acknowledgement of guilt of one or more offense(s) charged (or of any lesser included offenses) for which a punitive discharge is authorized;

(2) a summary of the evidence or a list of documents (or copies thereof) provided to the member pertaining to the offense(s) for which a punitive discharge is authorized; and

(3) as a condition precedent to approval of the request, the member, if serving in paygrade E-4 or above, must also request administrative reduction to paygrade E-3.

Upon approval of a servicemember's request for separation in lieu of trial by court-martial, such member will be reduced to paygrade E-3 pursuant to his or her request. The Navy also requires that the member's request, when forwarded by the command to the separation authority, include the results of a medical exam attesting to the member's mental competence. MILPERSMAN, art. 3630650.3c(1). The incriminating statement by the member or member's counsel is not admissible against the servicemember in a courts-martial except as provided in the Military Rules of Evidence 410. In United States v. Colcol, 16 M.J. 479 (C.M.A. 1983), the Court of Military Appeals held, where a witness had been an accomplice of the accused and was to receive an OTH discharge in lieu of trial by court-martial, that the promise of discharge was equivalent to a promise of transactional immunity and the defendant was entitled to notice of the witness' administrative separation, discovery of the defendant's OTH request, and cross-examination of the witness' request/statement.

13. Security. MILPERSMAN, art. 3630700; MARCORSEPMAN, para. 6212.

a. Honorable, general, OTH, or ELS.

b. The notification procedure is utilized, except when an OTH discharge is warranted -- in which case, the administrative board procedure is utilized.

c. A member may be separated by reason of security when retention is clearly inconsistent with interests of national security.

14. Unsatisfactory participation in the Ready Reserve. MILPERSMAN, art. 3630800; MARCORSEPMAN, para. 6213.

a. Honorable, general, or OTH.

b. The notification procedure is utilized, except when an OTH discharge is warranted -- in which case the administrative board procedure is utilized.

c. A member may be separated by reason of unsatisfactory performance under criteria established in BUPERSINST 5400.42 series or MCO P1000R.1, as applicable. In the Navy, unsatisfactory participation includes the member's failure to report for physical examination or failure to submit additional information in connection therewith as directed. Discharge proceedings shall not be initiated until 30 days after second notice has been given to the member.

15. Separation in the best interest of the service. MILPERSMAN, art. 3630900; MARCORSEPMAN, para. 6214.

a. Honorable, general, or ELS.

b. The notification procedure is utilized, but the member has no right to an administrative board.

c. The Secretary of the Navy may direct the separation of any member in those cases where none of the previous reasons for separation apply, or where retention is recommended following separation processing under any other bases for separation discussed above, and separation of the member is considered in the best interest of the service by the Secretary.

0606 U.S. GOVERNMENT BENEFITS LIST AS THE RESULT OF SPECIFIC TYPES OF DISCHARGES

Eligibility Based on Type of Discharge

VA Benefits	DISHONORABLE	BAD CONDUCT General Court-Martial	BAD CONDUCT Special Court-Martial	OTH	GENERAL Under Honorable Conditions	HONORABLE
Wartime disability compensation	NE	NE	A	A	E	E
Wartime death compensation	NE	NE	A	A	E	E
Peacetime disability compensation	NE	NE	A	A	E	E
Peacetime death compensation	NE	NE	A	A	E	E
Dependency and indemnity compensation to survivors	NE	NE	A	A	E	E
Education assistance	NE	NE	A	A	E	E
Pensions to widows and children	NE	NE	A	A	E	E
Hospital and domiciliary care	NE	NE	A	A	E	E
Medical and dental care	NE	NE	A	A	E	E
Prosthetic appliances	NE	NE	A	A	E	E
Seeing-eye dogs, mechanical and electronic aids	NE	NE	A	A	E	E
Burial benefits (flag, headstones, national cemeteries, expenses)	NE	NE	A	A	E	E
Special housing	NE	NE	A	A	E	E
Vocational rehabilitation	NE	NE	A	A	E	E
Survivor's educational assistance	NE	NE	A	A	E	E
Home and business loans						
Autos for disabled veterans	NE	NE	A	A	E	E
Inductees reenlistment rights	NE	NE	A	A	E	E

Note: This chart shows the eligibility for benefits based on the type of discharge. It does not indicate other requirements that must be met. 'A' indicates eligible only if the administering agency determines that, for its purposes, the discharge was not under dishonorable conditions. 'E' indicates eligible and 'NE' indicates not eligible.

Eligibility Based on Type of Discharge

	DISHONORABLE	BAD CONDUCT General Court-Martial	BAD CONDUCT Special Court-Martial	OTH	GENERAL Under Honorable Conditions	HONORABLE
Military Benefits						
Mileage	NE	NE	NE	NE	E	E
Payment for accrued leave	NE	NE	NE	NE	E	E
Transportation for dependents & household goods	NE	NE	NE	NE	E	E
Retain and wear uniform home	NE	NE	NE	NE	E	E
Notice to employer of discharge	NE	NE	NE	NE	E	E
Award of medals, crosses and bars	NE	NE	NE	NE	E	E
Admission to Naval Home	NE	NE	NE	NE	E	E
Board for Correction of Naval Records	E	E	E	E	E	E
Death gratuity	NE	NE	A	A	E	E
Use of wartime title and wearing of uniform	NE	NE	NE	NE	E	E
Naval Discharge Review Board	NE	NE	E	E	E	E
Other Benefits						
Homestead preference	NE	NE	NE	NE	E	E
Civil Service employment preference	NE	NE	NE	NE	E	E
Credit for retirement benefits	NE	NE	NE	NE	E	E
Naturalization benefits	NE	NE	NE	NE	E	E
Employment as District Court bailiffs	NE	NE	NE	NE	E	E
D.C. police, fireman, & teacher retirement credit	NE	NE	NE	NE	E	E
Housing for distressed families of veterans	NE	NE	A	A	E	E
Farm loans and farm housing loans	NE	NE	A	A	E	E
Jobs counseling, training and placement	NE	NE	A	A	E	E
Social Security wage credits for WWII service	NE	NE	A	A	E	E
Preference in purchasing defense housing	NE	NE	A	A	E	E

NAVY AND MARINE CORPS
ENLISTED ADMINISTRATIVE SEPARATIONS

	REASON FOR SEPARATION	CHARACTERIZATION OF SERVICE	MILPERSMAN/ MARCORSEPMAN	ADMIN BOARD (A) NOTIFICATION (N)
1.	EXPIRATION OF SERVICE OBLIGATION	HON/GEN/ELS	3620100/3620150 6202/6403/6404	
2.	CONVENIENCE OF GOVERNMENT	HON/GEN/ELS		(N);(A) if 6 yrs
	Dependency or Hardship		3620210/6407	
	Pregnancy or Childbirth		3620220/6408	
	Physical Condition Not Disability		3620200/6203	
	Personality Disorder		3620200/6203	
	Parenthood		3620220/6203	
	Aliens		3620260/None	
	Obesity		3620250/6203	
	Conscientious Objection		1860120/6409 [MCO 1306.16 DoD Dir 1300.6]	
3.	DEFECTIVE ENLISTMENTS			
	Minority		3620285/6204	
	Under 17	OOR		(N)
	Age 17	ELS		(N)
	Defective Enlistment	HON/ELS/OOR	3620283/6204	(N)
	Erroneous Enlistment	HON/ELS/OOR	3620280/6204	(N);(A) if 6 yrs
	Fraudulent Enlistment*	HON/GEN/ELS OTH/OOR	3630100/6204	(N);(A) if 6 yrs or OTH
	New Entrant Drug/Alcohol Testing		USN Pending/6215	(N)
4.	ENTRY LEVEL PERFORMANCE AND CONDUCT	ELS	3630200/6205	(N);(A) if 6 yrs
5.	UNSATISFACTORY PERFORMANCE	HON/GEN	3630300/6206	(N);(A) if 6 yrs

	REASON FOR SEPARATION	CHARACTERIZATION OF SERVICE	MILPERSMAN/ MARCORSEPMAN	ADMIN BOARD (A)/ NOTIFICATION (N)
6.	HOMOSEXUALITY [Mandatory Processing]	HON/GEN/OTH ELS	3630400/6207 SECNAVINST 1900.9D	(A)
7.	SECURITY	HON/GEN/OTH ELS	3630700/6212	(N);(A) if 6 years or OTH
8.	DRUG/ALCOHOL ABUSE REHAB FAILURE	HON/GEN/ELS	3630500/3630550 6208/6209	(N);(A) if 6 yrs
9.	MISCONDUCT	HON/GEN/ELS OTH		
	Minor Disciplinary Infractions		3630600/6210	(N);(A) if 6 yrs or OTH
	Pattern of Misconduct		3630600/6210	(N);(A) if 6 yrs or OTH
	Misconduct due to Drug Abuse*		3630620/6210	(N);(A) if 6 yrs or OTH
	Commission of Serious Offense*		3630600/6210	(A)
	Civilian Conviction*		3630600/6210	(A)
10.	SEPARATION IN LIEU OF COURT MARTIAL	HON/GEN/ELS OTH	3630650/6419	(N);(A) if 6 yrs or OTH
11.	SEPARATION IN BEST INTEREST OF SERVICE	HON/GEN/ELS	3630900/6214	(N)
12.	UNSATISFACTORY PERFORMANCE IN READY RESERVE	HON/GEN/ELS OTH	3630650/6213	(N);(A) if 6 yrs or OTH
13.	DISABILITY	HON/GEN/ELS	3620270/8401-8512 SECNAVINST 1850.4B	(N)

HIV INFECTION (AIDS): SEE SECNAVINST 5300.30B

* MANDATORY PROCESSING IN CERTAIN CASES

I. CONVENIENCE OF GOVERNMENT
   PARENTHOOD
   OBESITY
   PERSONALITY DISORDER
   PHYSICAL/MENTAL CONDITION NOT DISABILITY

II. ENTRY LEVEL PERFORMANCE/CONDUCT

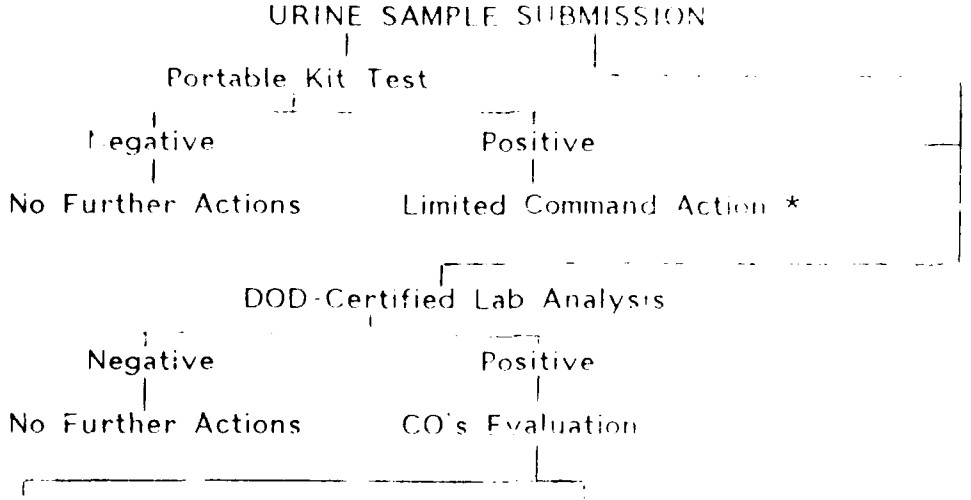
III. UNSATISFACTORY PERFORMANCE

IV. MISCONDUCT
   PATTERN OF MISCONDUCT
   MINOR DISCIPLINARY INFRACTIONS

NAVY AND MARINES

URINALYSIS SCREENING LOGIC TREE

Possible actions based on reason for collection



Reason for Collection	Reason for Collection
- Search & Seizure (probable cause) Mil.R.Evid. 312, 314, 315 **	- Incident Related (No Probable Cause)
- Inspection (Unit Sweep, Random Screening) Mil.R.Evid. 313(b)	- Fitness for Duty (No Probable Cause) Urine Test for Identification, Counseling, Treatment
- Medical Purpose Mil.R.Evid. 312(f)	
Options	Options

Disciplinary Action	Administrative Action	Disciplinary Action
1. NJP	1. Education	None Permitted
2. Court-martial	2. CO s Dir Evaluation	
	a. CAAC	
	b. Other	
	3. Urinary Surveillance	
	4. Admin Separation Based on Misconduct (Drug Abuse) ***	
	5. Admin Reduction	
	6. Other Admin Action ****	

* The following limited admin action may be taken. Such action must be based on safety or security concerns. No disciplinary action may be taken at this point. (1) Temporary removal from position of leadership (2) Temporary reassignment away from flight line, etc.

** Mil.R.Evid. refers to Military Rules of Evidence paragraph numbers from The Manual for Courts-Martial, 1984

*** If based solely on an incident for which no disciplinary action is permitted, must be under honorable conditions.

**** See MCO P5300.12, para. 2204; OPNAVINST 5350.4 series (encl (7)).

NAVY AND MARINES

USE OF DRUG URINALYSIS RESULTS
(That have been confirmed by a DOD lab)

	Usable in disciplinary proceedings	Usable as basis for separation	Usable for (other than honorable) characterization of service
1. Search or Seizure	YES	YES	YES
- member's consent	YES	YES	YES
- probable cause	YES	YES	YES
2. Inspection			
- random sample	YES	YES	YES
- unit sweep	YES	YES	YES
3. Medical - general diagnostic purposes (e.g., emergency room treatment, annual physical exam, etc.)	YES	YES	YES
4. Fitness for duty			
command-directed	NO	YES	NO
- competence for duty	NO	YES	NO
- aftercare testing	NO	YES	NO
- surveillance	NO	YES	NO
evaluation	NO	YES	NO
mishap/safety investigation	NO	NO	NO
5. Service directed			
rehab facility staff (military members)	YES	YES	YES
- drug/alcohol rehab testing	NO	YES	NO
- PCS overseas, naval brigs, "A" school	YES	YES	YES
- Accession (entrance test)	NO	YES	NO

NAVY POLICY ON RETENTION AND REHABILITATION ELIGIBILITY FOR NONACCESSION OFFICERS AND ENLISTED MEMBERS

Exceptional Potential for Further Service		Drug Dependent		Not Drug Dependent	
		Incidents		Incidents	
		1st (note 1)	2nd	1st	2nd (note 1)
NO	All officers All E-6/E-9	Process* (note 2)	Reprocess* (note 2)	Process*	Reprocess*
	E-5 & E-4 with more than 2 yrs active service	Process* (note 2)	Reprocess* (note 2)	Process*	Reprocess*
	E-4 with fewer than 2 yrs active service and E-1/E-3	Process* (note 2)	Reprocess* (note 2)	Process*	Reprocess*
YES	All officers All E-6/E-9	Process* (note 2)	Reprocess* (note 2)	Process*	Reprocess*
	E-5 & E-4 with more than 2 yrs active service	Level III (note 3)	Process* (note 2)	Level I or II	Process*
	E-4 with fewer than 2 yrs active service and E-1/E-3	Process* (note 2)	Reprocess* (note 2)	Level I or II	Process*

* Process for separation. The second and each subsequent incident require mandatory processing each time in ALL cases.

NOTES:

1. Count all of the member's drug incidents on or before 1 November 1985 as a single incident. For administrative and discharge characterization purposes, count incidents in current enlistment only; use prior incidents to assess member's potential for further service and for diagnosis of dependency.

2. Offer VA treatment. Contact COMNAVMILPERSCOM (NMPC-83) for guidance. VA treatment is to be offered after the separation authority authorizes separation prior to discharging.

3. Contact NAVALREHCEN Miramar to arrange quotas for Level III drug treatment for those members eligible.

CHAPTER VII

ENLISTED ADMINISTRATIVE SEPARATION PROCESSING AND REVIEW

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CHAPTER VII

ENLISTED ADMINISTRATIVE SEPARATION PROCESSING AND REVIEW

0701 INTRODUCTION. The decision whether or not to process an enlisted member for administrative separation is normally a matter within the discretion of the commanding officer. In certain instances however, the bases for separation mandate separation processing. Those grounds are:

A. Homosexuality;

B. minority under the age of 17;

C. fraudulent enlistment, unless a waiver is obtained from NMPC/CMC (see NAVOP 013/87);

D. drug abuse that involves the illegal use and/or possession of drugs for individuals E-6 and above;

E. drug abuse that includes sale or trafficking in drugs or drug paraphernalia, or possession of drugs in amounts in excess of that reasonably considered to be for personal use;

F. a felony conviction or commission of a felonious offense (Navy only); and

G. commission of a serious offense that reflects sexual perversion [including, but not limited to, lewd and lascivious acts, sodomy, indecent exposure, and indecent acts with, or assault upon, a child (Preliminary notification should be provided to NMPC-66/83 before the initiation of administrative processing in incest cases.)].

MILPERSMAN, arts. 3610200.2, 3620285.1a; MARCORSEPMAN, paras. 1004, 6204, 6207, 6210. Although processing in the Marine Corps under paragraphs (6) and (7) above is not made mandatory by the MARCORSEPMAN, Marine commanders should consult with their cognizant separation authority to ascertain whether there are separate local policies on mandatory separation. Mandatory processing requires only that the case be forwarded to the separation authority for review and final action. The separation authority may still retain the servicemember in exceptional circumstances. When processing is not mandatory, counseling/warning requirements apply to most bases for involuntary enlisted separations. All involuntary enlisted separations require the use of either the notification procedure or administrative board procedure. The applicable procedure is cited in chapter VI of this text in the discussion of the specific reasons for separation. Primary references for administrative separation processing are MILPERSMAN and NMPCINST 1910.1 series, Subj: ADMINISTRATIVE SEPARATION PROCEDURES, for the Navy and MARCORSEPMAN for the Marine Corps. In addition, for processing Navy members, NAVOP 013/87 should be consulted to ascertain the appropriate separation authority.

0702 COUNSELING

A. Bases for separation. Counseling and rehabilitation efforts are a prerequisite to the initiation of separation processing for the following bases for separation discussed in chapter VI of this text:

1. Convenience of the government due to parenthood, personality disorder, obesity and (Marines only) other designated physical or mental conditions [MILPERSMAN 3620200; MARCORSEPMAN, para. 6203.];

2. entry level performance and conduct (MILPERSMAN, art. 3630200.2; MARCORSEPMAN, para. 6205.);

3. unsatisfactory performance (MILPERSMAN, art. 3630300.2; MARCORSEPMAN, para. 6206.); and

4. misconduct due to minor disciplinary infractions or pattern of misconduct (MILPERSMAN, art. 3630600.2; MARCORSEPMAN, para. 6210.).

B. When required. The counseling warning requirements are a commitment by the command to the member that potential for further service exists and correction of identified deficiencies will result in continuation on active duty. Accordingly, administrative separations will be denied if, subsequent to this counseling, members have been processed for administrative separation without violating the counseling. This counseling must be documented in the service record and only one service record entry is required. For Navy personnel, the counseling requirements must be accomplished by the member's parent command. For Marine Corps personnel, the counseling requirement can be accomplished at any command to which the member was assigned during the current enlistment. If more than one entry is made, the last entry applies (i.e., it must be violated prior to initiating administrative separation processing). Thus, administrative separation cases which contain an unviolated counseling warning must be rejected by the separation authority.

C. Content and form. In any case in which counseling is required, the member should be afforded an opportunity to overcome his or her deficiencies. The command's efforts to counsel the member should be documented in the member's service record and must include the following information:

1. Written notification concerning deficiencies or impairments;

2. specific recommendations for corrective action, indicating any assistance that is available to the member;

3. comprehensive explanation of the consequences of failure to undertake successfully the recommended corrective action; and

4. reasonable opportunity for the member to undertake the recommended corrective action.

Forms for the counseling warning are contained in enclosure (2) of NMPCINST 1910.1 series and MARCORSEPMAN, para. 6105. This counseling warning may be a page 13 entry or a letter in the Navy, and a page 11 entry

in the Marine Corps. It must be dated and signed by the servicemember. If the member refuses to sign, a notation to that effect should be made in the service record entry and signed and dated by an officer. A copy of the counseling warning must be included in the administrative separation package. See page 7-27 infra for an example.

0703 NOTIFICATION AND ADMINISTRATIVE BOARD PROCEDURES

A. General. All involuntary enlisted separations require the use of either the notification procedure or administrative board procedure. If a member is processed for separation for more than one reason, the administrative board procedure will be utilized if applicable to any one of the reasons for separation used in the case. The primary distinction between the two separation procedures is as follows:

1. Under the notification procedure, the respondent has the right to request an administrative board only if the member has six or more years of total active and Reserve naval service.

2. Under the administrative board procedure, the respondent always has the right to request an administrative board.

B. Notification procedure

1. Notice. MILPERSMAN, art. 3640200.2; MARCORSEPMAN, para. 6303.3a. If the notification procedure is required, the respondent shall be notified in writing of the matter by his or her commanding officer. Such written notice shall include the following:

a. Each of the specific reasons for separation that forms the basis of the proposed separation, including the circumstances upon which the action is based for each of the specified reasons and a reference to the applicable provisions of the MILPERSMAN or MARCORSEPMAN [See Fairchild v. Lehman, 609 F. Supp. 287 (D.C. Va.), aff'd, 814 F.2d 1555 (4th Cir. 1987) (reversible error if notice deficient)];

b. whether the proposed separation could result in discharge, release from active duty to a Reserve component, transfer from the Selected Reserve to the Individual Ready Reserve (IRR), transfer to the Fleet Reserve/retired list, if requested, release from the custody or control of the naval service, or other form of separation;

c. the least favorable characterization of service or description of separation authorized for the proposed separation;

d. a statement of the respondent's right to obtain copies of documents that will be forwarded to the separation authority supporting the basis of the proposed separation (Classified documents summarized.);

e. a statement of the respondent's right to submit statements;

f. a statement of the respondent's right to consult with counsel in accordance with paragraph B2 below, and, if applicable, that nonlawyer counsel will be provided in accordance with paragraph B2b below;

g. a statement of the right to request an administrative board -- if the respondent has six or more years of total active and Reserve naval service;

h. a statement of the right to waive the rights afforded in subparagraphs d through g above after being afforded a reasonable opportunity to consult with counsel, and that failure to respond shall constitute a waiver of these rights;

i. for eligible members, a statement that the proposed separation could result in a reduction in paygrade prior to transfer to the Fleet Reserve/retired list; and

j. in the Navy, a statement that the respondent's proposed separation will continue to be processed in the event that, after receiving notice of separation, the respondent commences a period of unauthorized absence.

Forms for this notification may be found for the Navy in MILPERSMAN, art. 3640200.3, and NMPCINST 1910.1 series, encl. (3), and for the Marine Corps in MARCORSEPMAN, fig. 6-2. The notification requirements set forth in this paragraph do not apply when the member is processed for separation by reason of convenience of the government or disability, and the character of service is based upon performance evaluations in the member's service record. If the respondent is in civil confinement, absent without authority, in a Reserve component not on active duty, or transferred to the IRR, the relevant additional notification procedures in paragraph B4 below apply.

2. Counsel. MILPERSMAN, art. 3640200.2c; MARCORSEPMAN, para. 6303.3b.

a. A respondent has the right to consult with qualified counsel (Article 27b, UCMJ counsel who does not have any direct responsibility for advising the convening authority or separation authority about the proceedings involving the respondent) at the time the notification procedure is initiated, except under the following circumstances:

(1) The respondent is attached to a vessel or unit operating away from or deployed outside the United States or away from its overseas home port, or to a shore activity remote from judge advocate resources;

(2) no qualified counsel is assigned and present at the vessel, unit, or activity;

(3) the commanding officer does not anticipate having access to qualified counsel from another vessel, unit, or activity for at least the next five days; and

(4) the commanding officer determines that the needs of the naval service require processing before qualified counsel will be available.

b. Nonlawyer counsel shall be appointed whenever qualified counsel is not available under paragraph B2a above. Any appointed nonlawyer counsel shall be a commissioned officer with no prior involvement in the circumstances leading to the basis of the proposed separation and no involvement in the separation process itself. The nonlawyer counsel shall be encouraged to seek advice by telephone or other means from any judge advocate on any legal issue relevant to the case whenever practicable. When a nonlawyer counsel is appointed, the appointing letter shall state that qualified counsel is unavailable for the applicable reasons in paragraph B2a above and that the needs of the naval service warrant processing before qualified counsel will be available. A copy of the appointing letter will be attached to each copy of the written notice of separation processing.

c. The respondent may also consult with a civilian counsel at the respondent's own expense. Respondent's use of a civilian counsel does not eliminate the requirement to furnish counsel in paragraphs B2a or B2b above. Consultation with civilian counsel shall not delay orderly processing in accordance with this instruction.

3. Response. MILPERSMAN, art. 3640200.2d; MARCORSEPMAN, para. 6303.2c. The respondent shall be provided a reasonable period of time--not less than two working days -- to respond to the notice. An extension may be granted upon a timely showing of good cause by the respondent. The respondent's election as to each of the rights set forth in paragraphs B1d-h above shall be recorded and signed by the respondent and witnessed by respondent's counsel, if available locally, subject to the following limitations:

a. If notice by mail is authorized (see B4 below), and the respondent fails to acknowledge receipt or submit a timely reply to the mailed notice, that fact shall constitute a waiver of rights and an appropriate notation shall be recorded on a retained copy of the appropriate form.

b. If the respondent declines to respond as to the selection of rights, such declination shall constitute a waiver of rights and an appropriate notation will be made on the retained copy of the form provided for respondent's reply. If the respondent indicates that one or more of the rights will be exercised, but declines to sign the appropriate form, the selection of rights will be noted and an appropriate notation as to the failure to sign will be made.

c. The respondent's commanding officer shall forward a copy of the notice and the respondent's reply to the separation authority. Forms for the respondent's statement of awareness may be found for the Navy in MILPERSMAN, art. 3640200.4 and NMPCINST 1910.1 series, encl. (4).

4. Additional notification requirements

a. Member confined by civil authorities. MILPERSMAN, art. 3640200.2b; MARCORSEPMAN, para. 6303.4a. If separation proceedings have been initiated against a respondent confined by civil authorities, the case may

be processed in the absence of the respondent. When a board is appropriate or required, there is no requirement that the respondent be present at the board hearing. Rights of the respondent before the board can be exercised by counsel on behalf of the respondent. The following additional requirements apply:

(1) The notice shall contain the matter set forth in section 0703B or 0703C of this chapter as appropriate. The notice shall be delivered personally to the respondent or sent by mail or certified mail, return receipt requested (or by an equivalent form of notice if such service is not available for delivery by U.S. mail at an address outside the United States). If the member refuses to acknowledge receipt of notice, the individual who mails the notification shall prepare a sworn affidavit of service by mail which will be inserted in the member's service record together with PS Form 3800.

(2) If delivered personally, receipt shall be acknowledged in writing by the respondent. If the respondent refuses to acknowledge receipt, an appropriate notation will be made on the form provided for the respondent acknowledging receipt.

(3) The notice shall state that the action has been suspended until a specific date (not less then 30 days from the date of delivery) in order to give the respondent the opportunity to exercise the rights set forth in the notice. If respondent does not reply by such date, the separation authority shall treat the failure to respond as a waiver of rights and take appropriate action.

(4) The name and address of the military counsel appointed for consultation shall be specified in the notice.

(5) If the case involves entitlement to an administrative board, the respondent shall be notified that the board will proceed in the respondent's absence and that the case may be presented on respondent's behalf by counsel for the respondent.

b. Certain reservists. MILPERSMAN, art. 3640200.2b; MARCORSEPMAN, para. 6303.4b.

(1) If separation proceedings have been initiated against a reservist not on active duty, the case may be processed in the absence of the member in the following circumstances:

(a) At the request of the member;

(b) if the member does not respond to the notice of proceedings on or before the suspense date provided therein; or

(c) if the member fails to appear at a hearing without good cause.

The notice shall contain the matter set forth in section 0703B or 0703C of this chapter.

(2) If the action involves a transfer to the IRR, the member will be notified that the characterization of service upon transfer to the IRR also will constitute the characterization of service upon discharge at the completion of the military service obligation, unless the following conditions are met:

(a) The member takes affirmative action to affiliate with a drilling unit of the Selected Reserve; and

(b) the member satisfactorily participates as a drilling member of the Selected Reserve for a period of time which, when added to any prior satisfactory service during this period of obligated service, equals the period of obligated service.

(3) The following requirements apply to the notice given to reservists not on active duty:

(a) Reasonable effort should be made to furnish copies of the notice to the member through personal contact by a representative of the command. In such a case, a written acknowledgement of the notice shall be obtained.

(b) If the member cannot be contacted or refuses to acknowledge receipt of the notice, the notice shall be sent by registered or certified mail -- return receipt requested (or by equivalent form of notice if such a service by U.S. mail is not available for delivery at an address outside the United States) -- to the most recent address furnished by the member as an address for receipt or forwarding of official mail. The individual who mails the notification shall prepare a sworn affidavit of service by mail which will be inserted in the member's service record -- together with PS Form 3800.

(c) Members beyond military control by reason of unauthorized absence. MILPERSMAN, art. 3640200.1c; MARCORSEPMAN, para. 6312. Prior to execution of a separation for a member who is an alien absent without leave in a foreign country, where the United States has no authority to apprehend the member, or who is absent without authority -- prosecution of which is barred by the statute of limitations -- notice will be sent of the intended action by registered or certified mail return receipt requested to the member's last known address or the next of kin. The notice shall contain the matter set forth in section 0703B or 0703C of this chapter and shall specify that the action has been suspended until a specific date (not less than 30 days from the date of waiting) in order to give the respondent the opportunity to return to military control. If the respondent does not return, the separation authority shall take appropriate action.

C. Administrative board procedure

1. General. The administrative board procedures must be utilized:

a. If the proposed reason for separation is homosexuality; or

b. if the proposed characterization of service is under other than honorable conditions (except when the basis of separation is separation in lieu of trial by court-martial).

NOTE: A member with 6 or more years of total active and Reserve military service being processed under the notification procedure (except when the basis for separation is in the best interests of the service) will have the right to request an administrative board.

2. Notice. If an administrative board is required, the member shall be notified in writing by his or her commanding officer of the following matters [note: forms for this notice may be found in MILPERSMAN 3640300, and NMPCINST 1910.1 series, encls. (6)-(7); MARCORSEPMAN, fig. 6-3.]:

a. The basis of the proposed separation, including the circumstances upon which the action is based and the reference supporting the applicable reason for separation (see Fairchild supra);

b. whether the proposed separation could result in discharge, release from active duty to a Reserve component, transfer from the Selected Reserve to the IRR, transfer to the Fleet Reserve/retired list, if requested, release from the custody or control of the Department of the Navy, or other form of separation;

c. the least favorable characterization of service or description of separation authorized for the proposed separation (USN only -- if the respondent is in the paygrade of E-4 or above and receives an OTH, he will be administratively reduced to paygrade E-3);

d. the respondent's right to consult with counsel in accordance with paragraph 5 below;

e. the right to obtain copies of documents that will be forwarded to the separation authority supporting the basis of the proposed separation (Classified documents summarized.);

f. the respondent's right to an administrative board;

g. the respondent's right to present written statements to the administrative board or to the separation authority in lieu of the administrative board;

h. the respondent's right to representation before the administrative board by counsel as set forth in paragraph 5 below;

i. the right to representation at the administrative board by civilian counsel at the respondent's own expense;

j. the right to waive the rights in subparagraphs d through i above;

k. that failure to respond after being afforded a reasonable opportunity to consult with counsel constitutes a waiver of the rights in subparagraphs d through i above;

l. failure to appear without good cause at a hearing constitutes waiver of the right to be present at the hearing;

m. for eligible members, a statement that the proposed separation could result in transfer to the Fleet Reserve/retired list, if requested; and

n. in the Navy, a statement that the respondent's proposed separation will continue to be processed in the event that, after receiving notice, the respondent commences a period of unauthorized absence.

3. Additional notice requirements. MILPERSMAN, 3640300.2; MARCORSEPMAN, para. 6304.2.

a. If separation processing is initiated on the basis of more than one reason, the notice requirements of paragraph C2 above apply to all proposed reasons for separation.

b. If the respondent is in civil confinement, absent without authority, in a Reserve component not on active duty, or transferred to the IRR, the relevant additional notification requirements set forth in paragraph B4 apply.

c. The notification requirements utilized for the notification procedure set forth in paragraph B above shall be used when the characterization of service as general is authorized and the member is processed for separation by reason of convenience of the government or disability, and the characterization is not based on performance evaluations.

d. If the respondent is Fleet Reserve/retired list eligible and is being processed for misconduct, security, or homosexuality, the respondent must be notified of the following:

(1) The right to request transfer to the Fleet Reserve/retired list within 30 days;

(2) the board may recommend that the respondent be reduced to the next inferior grade to that in which the respondent is currently serving before being transferred to the Fleet Reserve/retired list; and

(3) if the Commander, Naval Military Personnel Command, approves the recommendation and the respondent is transferred to the Fleet Reserve/retired list, the respondent will be reduced to the next inferior paygrade immediately prior to transfer.

4. Counsel. MILPERSMAN, art. 3640300.3; MARCORSEPMAN, para. 6304.3.

a. A respondent has the same right to consult with counsel as that prescribed for the notification procedure in paragraph B2, above, prior to electing or waiving any of his/her rights under paragraphs C2d-i above.

b. If an administrative board is requested, the respondent shall be represented by qualified counsel appointed for him/her by the convening authority, or by individual counsel of the respondent's own choice if

that counsel is determined to be reasonably available. The determination as to whether individual counsel is reasonably available shall be made in accordance with the procedures set forth in section 0120 of the JAG Manual for determining the availability of individual military counsel for courts-martial. Upon receipt of notice of the availability of individual military counsel, the respondent must elect between representation by appointed counsel and representation by individual military counsel. A respondent may be represented in these proceedings by both appointed counsel and individual counsel only if the convening authority, in his/her sole discretion, approves a written request from the respondent for representation by both counsel; such written request must set forth in detail why representation by both counsel is essential to ensure a fair hearing.

c. The respondent shall have the right to consult with civilian counsel of the respondent's own choice and may be represented at the hearing by that or any other civilian counsel, all at the respondent's own expense. Exercise by the respondent of this right shall not waive any of the respondent's other counsel rights. Consultation with civilian counsel shall not unduly delay administrative board procedures. If undue delay appears likely, the convening authority may direct the board to proceed without the desired civilian counsel after properly documenting the facts.

d. Nonlawyer counsel may represent a respondent before an administrative board if:

(1) The respondent expressly declines appointment of qualified counsel and requests a specific nonlawyer counsel; or

(2) the separation authority assigns nonlawyer counsel as assistant counsel.

5. Response. MILPERSMAN, art. 3640300.4; MARCORSEPMAN, para. 6304.4. The respondent shall be provided a reasonable period of time--but not less than two working days -- to respond to the notice. An extension may be granted upon a timely showing of good cause. The election of the respondent as to each of the rights set forth in paragraphs C2d through 2i, and applicable provisions referenced in paragraph C3, shall be recorded and signed by the respondent and respondent's counsel -- subject to the following limitations:

a. If the respondent declines to respond as to the selection of rights, such refusal shall constitute a waiver of rights and an appropriate notation will be made on the form provided for respondent's reply. If the respondent indicates that one or more of the rights will be exercised, but declines to sign the appropriate form, the selection of rights will be noted and an appropriate notation as to the failure to sign will be made on the form.

b. If notice by mail is authorized and the respondent fails to acknowledge receipt or submit a timely reply to that mailed notification, those facts shall constitute a waiver of rights and an appropriate notation shall be recorded on a retained copy of the appropriate form.

Forms for the respondent's statement of awareness may be found for the Navy in MILPERSMAN, art. 3640300.7, and NMPCINST 1910.1 series, encl. (7), and for the Marine Corps in MARCORSEPMAN, fig. 6-3.

6. Waiver. MILPERSMAN, art. 3640300.5; MARCORSEPMAN, para. 6304.5.

a. If the right to an administrative board is waived, the case shall be forwarded to the separation authority who will direct either retention, separation, or suspended separation.

b. A respondent entitled to an administrative board may request a conditional waiver, after a reasonable opportunity to consult with counsel, in accordance with paragraph C4 above. A conditional waiver is a statement initiated by a respondent and his/her counsel, waiving the right to a hearing, contingent upon receiving a characterization of service or description of separation higher than the least favorable characterization or description authorized for the basis of separation set forth in the notice to the respondent, but no higher than general.

c. In the Navy, when a respondent requests a conditional waiver, the commanding officer, if he/she favorably endorses the conditional waiver, shall forward a copy of the notice, the conditional waiver, and a recommendation to Commander, Naval Military Personnel Command, for action. In the Marine Corps, when a respondent requests a conditional waiver, the commanding officer shall forward the same aforementioned documentation to the separation authority unless he has been delegated authority by the separation authority to disapprove requests for conditional waivers and so elects. Upon receipt of a conditional waiver, the separation authority may either grant the waiver or deny it, depending upon the circumstances of the case. The Navy considers a conditional waiver inappropriate when the respondent's history of misconduct involves the commission of a serious offense for which a punitive discharge could be awarded. MILPERSMAN, art. 3640300.5c. If the waiver request is denied, the respondent may then elect an administrative board.

d. If a respondent -- eligible for transfer to the Fleet Reserve/retired list and being processed for misconduct, security, or homosexuality -- waived the right to appear before a board, the Commander, Naval Military Personnel Command, shall make a determination as to whether the respondent should, if he or she requests transfer to the Fleet Reserve/retired list, be allowed to transfer in the grade currently held or in the next inferior paygrade. The Commander, Naval Military Personnel Command, is authorized to transfer a respondent to the Fleet Reserve/retired list, when eligible, if such respondent waives the right to appear before a board.

D. Message submissions by Navy commanding officers. In the Navy, when a member has waived his right to an administrative board, commanding officers are authorized to submit the case to Commander, Naval Military Personnel Command, by message for final action. Message submissions are to be transmitted by routine precedence in the format provided in NMPCINST 1910.1 series, encls. (13)-(14). When an administrative separation case is submitted by message, formal submission of the case by letter of transmittal in accordance with the MILPERSMAN is still required. Moreover, the letter of transmittal -- with supporting documentation -- must be forwarded within 15 working days after submission of the message to Commander, Naval Military Personnel Command.

F. Processing goals. MILPERSMAN, art. 3610100.9; MARCORSEPMAN, para. 6102. To ensure efficient administration of enlisted separations, the Secretary of the Navy has established processing time goals.

1. Discharges without board action. When board action is not required or is waived, separation action should be completed in 15 working days from the date the command notifies a member of the commencement of separation proceedings to the date of separation, except when the initiating authority and the separation authority are not located in the same geographical region -- in which case, separation action should be completed in 30 working days (10 days of which is allocated in the Navy to the initiating command).

2. Separations with board action. Separations which involve an administrative board should be completed within 50 working days from the date of notification of the member of commencement of proceedings to the date of separation (30 days of which is allocated in the Navy to the initiating command).

3. Separations with Secretarial action. When action is required by the Secretary, final action should be completed in 55 working days.

0704 ADMINISTRATIVE BOARDS

A. Convening authority. MILPERSMAN, art. 3640350.1b; MARCORSEPMAN, para. 6314. An administrative board may, by written order, be appointed by the following:

1. In the Navy, any commanding officer with authority to convene special courts martial (SPCM); and

2. in the Marine Corps, any Marine commander exercising SPCM authority when authorized by an officer who has GCM authority.

B. Composition. MILPERSMAN, art. 3640350.1b; MARCORSEPMAN, para. 6315.1. Administrative boards are composed of three or more experienced Regular or Reserve officers or senior enlisted (E-7 or above), senior to the respondent, in the naval service, at least one of whom must be a line officer serving in the grade of O-4 or higher. An officer frocked to the grade of O-4 is not eligible to be the senior member. In the Navy, if an O-4 line officer is not available at the command, an O-4 staff corps officer may be used. An explanation as to why an O-4 line officer is not reasonably available should be included in the comments of the commanding officer in the letter of transmittal. A majority of the board shall be commissioned or warrant officers. When the respondent is a member of a Reserve component, at least one member of the board shall be a Reserve commissioned officer and all members must be commissioned officers if characterization of service as other than honorable is warranted. When the respondent is an active duty member, the senior member must be on the active duty list of the service. In the Navy, when no active duty list officer is reasonably available, the convening authority may substitute a TAR officer who has been on continuous active duty for over 12 months immediately prior to the board appointments. The explanation as to why an O-4 USN was not available should be included in the letter of transmittal. The opportunity to serve on administrative boards should be given

to women and minorities. The mere appointment or failure to appoint a member of such a group to the board, however, does not provide a basis for challenging the proceedings. It is recommended that an odd number of board members be appointed to avoid evenly divided decisions.

C. Recorder. MILPERSMAN, art. 3640350.1; MARCORSEPMAN, para. 6315.3. The convening authority shall further detail an officer on active duty as recorder and, where desired, an assistant recorder who may, at the direction of the recorder, perform any duty required of the recorder. According to the Marine Corps, the recorder should be an experienced warrant or commissioned officer and may be a lawyer within the meaning of Article 27(b), UCMJ. If, however, a respondent is represented by counsel, the recorder may not possess any greater legal qualifications than respondent's counsel. MARCORSEPMAN, para. 6315.3. The recorder's duties include clerical and preliminary preparation, as well as presenting to the board, in an impartial manner, all available information concerning the respondent. He:

1. Conducts a preliminary review of available evidence;

2. interviews prospective witnesses (determining whom to call);

3. arranges for the attendance of all witnesses for the government and witnesses for the respondent who are government employees (military or civilian);

4. arranges for the time and place of the hearing after consulting with the president of the board and respondent's counsel;

5. may not attend the closed sessions of the board nor participate in the determination of the board's findings, opinions, and recommendations; and

6. prepares the report of the board which, together with all allied papers, is forwarded to the separation authority.

D. Reporter. There is no requirement that a reporter be appointed. Where witnesses are expected to testify, however, the presence of a reporter is desirable.

E. Legal advisor. MILPERSMAN, art. 3640350.1b(7); MARCORSEPMAN, para. 6315.4. At the discretion of the convening authority, a nonvoting legal advisor who is a judge advocate certified in accordance with Article 27(b), UCMJ may be appointed to the administrative board. If appointed, the legal advisor shall rule finally on all matters of procedure, evidence, and challenges except challenges to himself. A legal advisor shall not be both junior to, and in the same chain of command as, any voting member of the board.

F. Hearing procedure. MILPERSMAN, art. 3640350.2; MARCORSEPMAN, paras. 6316, 6317.

1. Rules of evidence. An administrative board functions as an administrative, rather than a judicial, body; consequently, the strict rules of evidence applicable at courts-martial do not apply. Other than Article 31, UCMJ limitations, the board should consider any competent evidence which is relevant and material in the case, subject to its discretion; but it should not

exclude evidence simply because it could have been excluded at a trial by court-martial. [See Garrett v. Lehman, 751 F.2d 997 (9th Cir. 1985).] Witnesses are normally sworn and testify under oath or affirmation. All witnesses are subject to cross-examination on their testimony and general credibility. The respondent may be sworn and testify at his election. If he testifies under oath, he may be cross-examined. The respondent has a second option, which is to present an unsworn statement upon which he may not be cross-examined. MILPERSMAN, art. 3640350.3h; MARCORSEPMAN, para. 6317.2a. The respondent must be provided a Privacy Act statement whenever personal information is solicited.

2. Preliminaries. MILPERSMAN, art. 3640350.3; MARCORSEPMAN, para. 6316.2. At the outset of the hearing, the president of the board should inquire of the respondent concerning his knowledge of his rights, including the right:

a. To appear in person (with or without counsel) or, in his absence, have counsel represent him at all open board proceedings;

b. to challenge any voting member of the board for cause only (The member cannot render a fair and impartial decision.):

(1) In the Navy, if a member is challenged, the convening authority or the legal advisor, if any, decides the challenge (MILPERSMAN 3640350.1b.);

(2) in the Marine Corps, the board (excluding the challenged member) or the legal advisor, if any, determines the propriety of a challenge to any member. (A tie vote or a majority vote in favor of sustaining the challenge disqualifies that member from sitting. MARCORSEPMAN, para. 6316.7c.);

c. to request the personal appearance of witnesses (see paragraph G below);

d. to submit, either before the board convenes or during the proceedings, sworn or unsworn statements, depositions, affidavits, certificates or stipulations, including depositions of witnesses not reasonably available or unwilling to appear voluntarily;

e. to testify under oath and submit to cross-examination or, in the alternative, to make or submit an unsworn statement and not be cross-examined;

f. to question any witness who appears before the board;

g. to examine all documents, reports, statements, and evidence available to the board;

h. to be apprised of, and to interview, all witnesses to be called;

i. to have witnesses excluded except while testifying; and

j. to make argument.

Note: A failure on the part of the respondent to exercise any of these rights, after being advised of them, will not bar the board's proceeding.

3. Presentation of evidence. The recorder presents the case for the government, providing the board with complete and impartial information. If the presentation includes the calling of witnesses, the procedure for examination of each witness should be like that prescribed for courts-martial: Direct examination by the counsel calling the witness; cross-examination by the counsel for the other side; re-direct examination by the side calling the witness; recross-examination by the adversary; and, finally, questions posed, if any, by members of the board. Next, the respondent has the opportunity to present matters in his behalf. The board proceedings should be sufficiently formal so as to allow the respondent full opportunity to present his case and exercise his rights. Where witnesses are called by the respondent, the examination procedures outlined above apply. Following any matter presented by the respondent, the recorder may, when he deems it appropriate, present rebuttal evidence. When the recorder introduces rebuttal evidence, the respondent is entitled to do likewise. Finally, prior to closing for deliberation, the board may call any witness or hear other evidence it deems appropriate.

4. Burden of proof. The burden of proof before administrative boards is on the government, and the standard of proof to be employed is the "preponderance of evidence" test. MILPERSMAN, art. 3640350.5b; MARCORSEPMAN, para. 6316.10.

G. Witness requests. MILPERSMAN, art. 3640350.4c(2); MARCORSEPMAN, para. 6317.

1. General. The respondent may request the attendance of witnesses in his behalf at the hearing. The request shall be in writing, dated, signed by the respondent or his counsel, and submitted to the convening authority via the president of the board, as soon as practicable, after the need for the witness becomes known to the respondent or his counsel. Failure to submit a request for witnesses in a timely fashion shall not automatically result in denial of the request but, if it would be necessary to delay the hearing in order to obtain a requested witness, lack of timeliness in submitting the witness request may be considered along with other factors in deciding whether or not to provide the witness. Further, the testimony of a witness may be excluded if the legal advisor or, in the absence of a legal advisor, the president of the board determines that its probative value is substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

2. Respondent's witness request involving expenditure of funds. If production of a witness will require expenditure of funds by the convening authority, the written request for the attendance of a witness shall also contain the following:

a. A synopsis of the testimony that the witness is expected to give;

b. an explanation of the relevance of such testimony to the issues of separation or characterization; and

c. an explanation as to why written or recorded testimony would not be sufficient to provide for a fair determination.

3. Convening authority's action. The convening authority may authorize expenditure of funds for production of witnesses only if the presiding officer (after consultation with a judge advocate, if reasonably available, or the legal advisor, if appointed) determines that:

a. The testimony of a witness is not cumulative;

b. the personal appearance of the witness is essential to a fair determination on the issues of separation or characterization;

c. written or recorded testimony will not accomplish adequately the same objective;

d. the need for live testimony is substantial, material, and necessary for a proper disposition of the case; and

e. the significance of the personal appearance of the witness, when balanced against the practical difficulties in producing the witness, favors production of the witness. (Factors to be considered in relation to the balancing test include, but are not limited to, the cost of producing the witness, the potential delay in the proceeding that may be caused by producing the witness, or the likelihood of significant interference with military operational deployment, mission accomplishment, or essential training.) Guidance for funding the travel may be found in section 0137 of the JAG Manual.

4. Postponement of the hearing. If the convening authority determines that the personal testimony of a witness is required, the hearing shall be postponed or continued, if necessary, to permit the attendance of the witness.

5. Witness unavailable. The hearing shall be continued or postponed to provide the respondent with a reasonable opportunity to obtain a written statement from the witness, if the witness requested by the respondent is unavailable, when:

a. The presiding officer determines that the personal testimony of the witness is not required;

b. the commanding officer of a military witness determines that military necessity precludes the witness' attendance at the hearing; or

c. a civilian witness declines to attend the hearing.

6. Civilian government employee. Paragraph G5c above does not authorize a Federal employee to decline to appear as a witness if directed to do so in accordance with applicable procedures of the employing agency.

H. Board decisions. MILPERSMAN, art. 3640350.5; MARCORSEPMAN, para. 6319. The board shall determine its findings and recommendations in closed session. The board must make:

1. Findings of fact related to reasons for processing;

2. recommendations as to retention or separation;

3. if the board recommends separation, it may recommend that the separation be suspended;

4. if separation is recommended, the basis therefor, as well as the character of the separation, must be stated (In determining the character of the discharge to be recommended, the board may consider only those matters that occurred during the current enlistment or period of service.);

5. recommendations as to whether the respondent should be retained in the Ready Reserve as a mobilization asset to fulfill the respondent's total service obligation (except when the board has recommended separation on the basis of homosexuality, misconduct, drug trafficking, or defective enlistment and induction, or has recommended an OTH);

6. in homosexual cases:

a. If the board finds that one or more of the circumstances authorizing separation is supported by the evidence, the board shall recommend separation -- unless the board finds that retention is warranted under the limited circumstances described in chapter VI;

b. if the board does not find that there is sufficient evidence that one or more of the circumstances authorizing separation has occurred, the board shall recommend retention -- unless the case involves another basis for separation of which the member has been duly notified; and

7. a recommendation as to whether the member should be transferred in the paygrade held or the next inferior paygrade (when the respondent is eligible for transfer to the Fleet Reserve/retired list and the board recommends separation).

I. Record of proceedings

1. General. The record of proceedings shall be kept in summarized form, unless the convening authority or separation authority directs that a verbatim transcript be kept. The record of proceedings, which is authenticated in the Navy by the president and in the Marine Corps by the president and the recorder, is forwarded, together with all exhibits and the board's report, to the convening authority who, after receiving the record, notes his/her concurrence or nonconcurrence in a letter of transmittal.

2. Contents of the record of proceedings

a. Navy. In the Navy, the record of proceedings shall, as a minimum, contain (MILPERSMAN, art. 3640350.6-7):

(1) A summary of the facts and circumstances;

(2) supporting documents on which the board's recommendation is based, including (at least) a summary of all testimony;

(3) the identity of respondent's counsel and the legal advisor, if any, including their legal qualifications;

(4) the identity of recorder and members;

(5) a verbatim copy of the board's majority findings and recommendations signed by all members making the findings and recommendations;

(6) the authenticating signature of the president on the entire record of proceedings or, in his absence, any member of the board;

(7) signed, dissenting opinions of any member, if applicable, regarding findings and recommendations; and

(8) counsel for the respondent's authentication of findings.

NOTE: NAVOP 058/86 makes it unnecessary for counsel for respondent (or respondent, if not represented by counsel) to review the record of proceedings and all supporting documentation before forwarding to CNMPC, as long as they are provided a copy prior to submission. A statement of deficiencies can be submitted separately via the convening authority to CNMPC. The Report of Administrative Board must still be signed by the board members and counsel for respondent.

b. Marine Corps. In the Marine Corps, the record of proceedings shall contain as a minimum (MARCORSEPMAN, para. 6320):

(1) An authenticated copy of the appointing order;

(2) any other communication from the convening authority;

(3) a summary of the testimony of all witnesses, including the respondent when he/she testifies under oath or otherwise;

(4) a summary of any sworn or unsworn statements made by absent witnesses, if considered by the board;

(5) the identity of the counsel for the respondent and the recorder with their legal qualifications, if any;

(6) copies of the letter of notification to the respondent, advisement of rights, and acknowledgement of rights;

(7) a complete statement of facts upon which the board's recommendation for discharge is based, accompanied by appropriate supporting documents;

(8) a summary of any unsworn statement submitted by the respondent or his counsel; and

(9) the respondent's signed acknowledgement that he was advised of, and fully understood, all of his rights before the board.

J. Actions by the convening authority

1. In the Navy. MILPERSMAN, art. 3640350.1.

a. If the commanding officer determines that the respondent should be retained, the case may be closed -- except for any case in which processing is mandatory in accordance with MILPERSMAN; in which case, the matter must be referred to NMPC for disposition.

b. If the commanding officer decides that separation is warranted or separation processing is mandatory, it is sent directly to NMPC for action. In the Navy, any discharge recommendation must be signed by the commanding officer. At no time may the convening authority recommend a discharge characterization less favorable than the board's recommendation.

c. When the basis for processing rests solely on a court-martial conviction, see section 0604 E5.

2. In the Marine Corps. MARCORSEPMAN, para. 6305.

a. If the convening authority is not the appropriate separation authority, the convening authority will forward the case with a recommendation in a letter of transmittal to the appropriate separation authority.

b. If the convening authority is the appropriate separation authority, before taking final action, he will refer the case to his staff judge advocate for a written review to determine the sufficiency in fact and law of the processing -- including the board's proceedings, record, and report. MARCORSEPMAN, para. 6308.1c.

NOTE: For Navy members, NAVOP 013/87 authorizes the special court-martial convening authority to be the separation authority in the following situations:

a. When the member does not object to the processing for separation -- and he is being processed for parenthood, pregnancy/childbirth, surviving family member, obesity, erroneous enlistment, fraudulent enlistment -- if it cannot not be used to characterize service, entry level performance, unsatisfactory performance, drug rehabilitation failure, alcohol rehabilitation failure, misconduct-minor disciplinary infractions, misconduct-drug abuse if medical disorders under convenience of the government but NOT motion sickness, airsickness, or allergies.

b. If the member elects a board, the SPCMA can only be the separation authority if the board recommends an honorable or general discharge and the member now states he no longer objects to being processed. This exception does not apply to misconduct-drug abuse where one of the drug incidents found by the board could have been used to characterize service. All such drug cases must be submitted to NMPC for approval.

c. If a member is being processed for homosexuality -- even if they will be getting a TWSR -- NMPC is still the separation authority. The only time the SPCMA is the separation authority is AFTER the member has had his board, the board has recommended an honorable discharge, and the member now states he no longer objects to the processing. If the member waives his board, the case must be sent to NMPC for approval in ALL cases.

d. NMPC is still the separation authority in processing cases involving conscientious objectors, EAOS, fraudulent enlistments that involve matters that can be used to characterize service, change in enlistment obligation, motion/air sickness, allergies, alien, disability, defective enlistment, minority, misconduct-drug abuse that can be used to characterize service, security, unsatisfactory performance in the Reserves, and in best interest of the service. If the administrative board recommends an OTH, no matter what the bases of processing, NMPC is the separation authority.

e. Besides situations where the board has recommended an OTH, the case must be sent to NMPC if the board recommends retention or suspension of the discharge, the member has over 18 years of service, the member protests being processed, or the member is being processed for misconduct-drug abuse that can be used to characterize service. All conditional waivers must be sent to NMPC if the CO recommends approval.

f. In those cases where the SPCMA does separate a person under this NAVOP, the DD 214 and allied paperwork must be sent to NMPC after separation has been completed.

K. Action by the separation authority

1. General rules (other than homosexuality cases). When the separation authority receives the record of the board's proceedings and report in an administrative separation case, he may specifically take one of the following actions (MILPERSMAN, art. 3640370; MARCORSEPMAN, para. 6309.2):

a. Approve the board's recommendation for retention;

b. disagree with the administrative board's recommendation for retention and refer the entire case to the Secretary of the Navy for authority to direct a separation under honorable conditions with an honorable or general discharge or, if appropriate, entry level separation or, if eligible, transfer to the Fleet Reserve/retired list in the current or next inferior paygrade;

c. approve the board's recommendation for separation and direct execution of the recommended type/description of separation (including, if applicable, transfer to the Fleet Reserve/retired list in the current or next inferior paygrade);

d. approve the board's recommendation for separation, but upgrade the type of characterization of service or description of service to a more creditable one;

e. approve the board's recommendation for separation, but change the basis therefore when the record indicates that such action would be appropriate;

f. disapprove the recommendation for separation and retain the member;

g. disapprove the board's recommendation concerning transfer to the IRR;

h. approve the recommendation for separation, but suspend its execution for a specific period of time;

i. approve the separation, but disapprove the board's recommendation as to suspension of the separation;

j. (USN only) submit the case to SECNAV recommending separation when the no misconduct findings of the board are contrary to the substantial weight of the evidence; or

k. set aside the findings and recommendations of the board and send the case to another board hearing if the separation authority finds legal prejudice to the substantial rights of the respondent, or that findings favorable to the respondent were obtained by fraud or collusion.

Note: Both the Navy and Marine Corps provide a separation authority with power to send a case to a second board hearing. Neither the members nor the recorder from the first board may sit as voting members of the second board. Although the second board may consider the record of the first board's proceedings, less any prejudicial matter, it may neither see nor learn of the first board's findings, opinions, or recommendation. Additionally, the separation authority may not approve findings or recommendations of the subsequent board which are less favorable to the respondent than those ordered by the previous board -- unless the separation authority finds that fraud or collusion in the previous board is attributable to the respondent or an individual acting on the respondent's behalf.

2. Suspension of separation. MILPERSMAN, art. 3610200.14; MARCORSEPMAN, para. 6310.

a. Except when the bases for separation are fraudulent enlistment or homosexuality and, in the Marine Corps, when the approved separation is an OTH, a separation may be suspended by the separation authority or higher authority for a specified period of not more than 12 months if the circumstances of the case indicate a reasonable likelihood of rehabilitation.

b. Unless sooner vacated or remitted, execution of the approved separation shall be remitted upon completion of the probationary

period, upon termination of the member's enlistment or period of obligated service, or upon decision of the separation authority that the goal of rehabilitation has been achieved.

c. During the period of suspension, if further grounds for separation arise or if the member fails to meet appropriate standards of conduct and performance, one or more of the following actions may be taken:

(1) Disciplinary action;

(2) new administrative action; or

(3) vacation of the suspension and execution of the separation.

d. Prior to vacation of a suspension, the member shall be notified in writing of the basis for the action and shall be afforded the opportunity to consult with counsel and to submit a statement in writing to the separation authority. The respondent must be afforded at least two days to act on the notice.

3. Homosexuality

a. If the board recommends retention, the separation authority will:

(1) Approve the finding and direct retention; or

(2) forward the case to the Secretary of the Navy with a recommendation that the Secretary separate the member in the best interest of the service.

b. If the board recommends separation, the separation authority will:

(1) Approve the finding and direct separation; or

(2) disapprove the finding on the basis that:

(a) There is insufficient evidence to support the finding; or

(b) there is sufficient evidence to warrant a finding that supports retention under the limited circumstances described in chapter VI of this study guide.

c. If there has been a waiver of board proceedings, the separation authority disposes of the case in accordance with the following provisions:

(1) If the separation authority determines that there is insufficient evidence to support separation, the separation authority should direct retention -- unless there is another basis for separation of which the member has been duly notified.

(2) If the separation authority determines that one or more of the circumstances authorizing separation has occurred, the member will be separated -- unless retention is warranted under the limited circumstances described in chapter VI of this study guide.

d. Presuming evidence supporting the finding of homosexuality, the burden of proving that retention is warranted rests with the member -- except in cases where the member's conduct was solely the result of a desire to avoid or terminate military service.

e. Findings regarding the existence of the limited circumstances warranting a member's retention are required only if:

(1) The member, either personally or through counsel, asserts to the board -- or when there has been a waiver of board proceedings, to the separation authority -- that one or more such limited circumstances exists; or

(2) the board or separation authority relies upon such circumstances to justify the member's retention.

f. Suspension of a separation by reason of homosexuality or fraudulent enlistment is not authorized. Retention of a member for a limited period of time in the interests of national security may be authorized by the Secretary of the Navy.

0705 NAVAL DISCHARGE REVIEW BOARD

A. General. The Naval Discharge Review Board (NDRB) was established pursuant to 10 U.S.C. § 1553 (1982), and operates in accordance with SECNAVINST 5420.174 *series, Subj: Review at the level of the Navy Department* of discharges from the Naval Service. MILPERSMAN, art. 5040200; MARCORSEPMAN, fig. 1-2. The NDRB is composed of five-member panels of active-duty Navy and Marine Corps officers in grades O-4 or higher. The NDRB panels sit regularly in Washington, D.C., and also travel periodically to other areas within the continental United States.

B. Petition. The NDRB may begin its review process based on:

1. Its own motion;

2. the request of a surviving member; or

3. the request of a surviving spouse, next of kin, legal representative or guardian (if the former member is deceased or incompetent).

C. Scope of review. The NDRB is authorized to change, correct, or otherwise modify a discharge -- except that, by statute, it may not review punitive discharges awarded as a result of general court-martial nor may it review a *discharge executed more than 15 years before* the application to NDRB. In addition, the NDRB is not authorized to do any of the following:

1. Change any document other than the discharge document;

2. revoke a discharge;

3. reinstate a person in the naval service;

4. recall a former member to active duty;

5. change reenlistment codes;

6. cancel reenlistment contracts;

7. change the reason for discharge from, or to, physical disability;

8. determine eligibility for veterans' benefits; or

9. review a release from active duty until a final discharge has been issued.

In order to change, correct, or otherwise modify a discharge certificate or issue a new certificate, the NDRB must be convinced that the original certificate was "improperly or inequitably" given. In making its determination, the board is usually confined to evidence in the former member's record during the particular period of naval service for which the discharge in question had been issued -- including any information disclosed to, or discovered by, the naval service at the time of enlistment or other entry into the service. This evidence may, and indeed should, include facts "found" by a factfinding body (such as a court-martial, a court of inquiry, or an investigation in which the former member was a defendant or interested party and which were properly approved either on appeal or during review). Unless this former member can show that coercion was exercised on him, the foregoing evidence should include charges and specifications to which guilty pleas were appropriately entered in court or which prompted the former member to request separation in lieu of trial by court-martial. A discharge is deemed to be improper when an error of fact, law, procedure, or discretion at the time of issuance prejudiced the applicant's rights or when a change in policy of the applicant's branch of service is made expressly retroactive to the type of discharge he was awarded. Like the Board for Correction of Naval Records, which will be discussed next, the NDRB is not empowered to change any discharge to one more favorable solely because the applicant has demonstrated exemplary conduct and character since the time of his/her discharge (which is the subject matter of the present application), regardless of the length of time that has elapsed since that discharge.

D. Secretarial review. Action taken by the NDRB is administratively reviewable only by the Secretary of the Navy. If newly discovered evidence is presented to the NDRB, it may recommend to the Secretary of the Navy reconsideration of a case formerly heard but may not reconsider a case without the prior approval of the Secretary.

E. Mailing address. Applications and other information may be obtained from:

Naval Discharge Review Board
Department of the Navy
801 North Randolph Street
Arlington, Virginia 22203

In July 1975, in order to reduce the inconvenience and expense of application, additional NDRB panels were established at Great Lakes, Illinois; New Orleans, Louisiana; and Treasure Island, California.

0706 THE BOARD FOR CORRECTION OF NAVAL RECORDS

A. General. The Board for Correction of Naval Records (BCNR) was established pursuant to 10 U.S.C. § 1552 (1982). MILPERSMAN, art. 5040200; MARCORSEPMAN, fig. 1-2. It consists of at least three civilian members and considers all applications properly before it for the purpose of determining the existence of an error or an injustice and making appropriate recommendations to the Secretary of the Navy.

B. Petition. Application may be made by a former member or any other person considered by the board to be competent to make an application. When a "no change" decision has been rendered by the NDRB, and a request for reconsideration by that board has been denied, a petition may then be filed with the BCNR. The law requires that the application be filed with the BCNR within three years of the date of discovery of the error or injustice. The board is authorized to excuse the fact that the application was filed at a later date if it finds it to be in the interest of justice. The board is empowered to deny an application without a hearing if it determines that there is insufficient evidence to indicate the existence of probable material error or injustice.

C. Scope of review

1. Applications to BCNR are subject to several qualifications which should be stressed in the advice given to members being processed for OTH discharges. First, in addition to its power to consider applications concerning discharges adjudged by GCM's -- something the NDRB may not do -- the BCNR may also review cases *involving inter alia*:

a. Requests for physical disability discharge and, in lieu thereof, retirement for disability;

b. requests to change character of discharge or eliminate discharge and restore to duty;

c. removal of derogatory materials from official records (such as fitness reports, performance evaluations, nonjudicial punishments, failures of selection, and marks of desertion);

d. changing dates of rank, effective dates of promotion or acceptance/commission, and position on the active-duty list for officers;

e. correction of "facts" and "conclusions" in official records (such as lost time entries or line of duty/misconduct findings);

f. restoration of rank; and

g. pay and allowances items (such as special pays, incentive pay, readjustment pay, severance pay, and basic allowance for quarters).

2. In no event will an application be considered before other administrative remedies have been exhausted.

3. In determining whether or not material error or an injustice exists, the board will consider all evidence available including, among other things:

a. All information contained in the application;

b. documentary evidence filed in support of the application;

c. briefs submitted by, or on behalf of, the applicant;

d. all available military records including, of course, the applicant's service record.

D. Secretarial action. Cases considered by the board are forwarded to, and reviewed by, the Secretary of the Navy for final action -- except that, in the following ten categories, the board is empowered to take final action without referral of the matter to the Secretary of the Navy:

1. Leave adjustments;

2. retroactive advancements for enlisted personnel;

3. enlistment/reenlistments in higher grades;

4. entitlement to basic allowances for subsistence, family separation allowances, and travel allowances;

5. Survivor Benefit Plan/Retired Serviceman's Family Protection Plan election;

6. physical disability retirements/discharges;

7. service reenlistment/variable reenlistment and proficiency pay entitlements;

8. changes in home of record;

9. Reserve participation/retirement credits; and

10. changes in former members' reenlistment codes.

E. Mailing address. The mailing address for filing applications or requesting other information is:

The Board for Correction of Naval Records
Department of the Navy
Washington, D.C. 20370

SAMPLE LETTER OF COUNSELING/WARNING FORMAT

THE FOLLOWING FORMAT IS RECOMMENDED FOR MEMBERS WHO ARE BEING WARNED IN ACCORDANCE WITH THE COUNSELING REQUIREMENTS FOR SEPARATION BY REASON OF ENTRY LEVEL PERFORMANCE AND CONDUCT, UNSATISFACTORY PERFORMANCE, AND/OR MISCONDUCT DUE TO MINOR DISCIPLINARY INFRACTIONS OR PATTERN OF MISCONDUCT.

1. You are being retained in the naval service; however, the following deficiencies in your performance and/or conduct are identified:

_____

_____

2. The following are recommendations for corrective action:

_____

_____

3. Assistance is available through _____

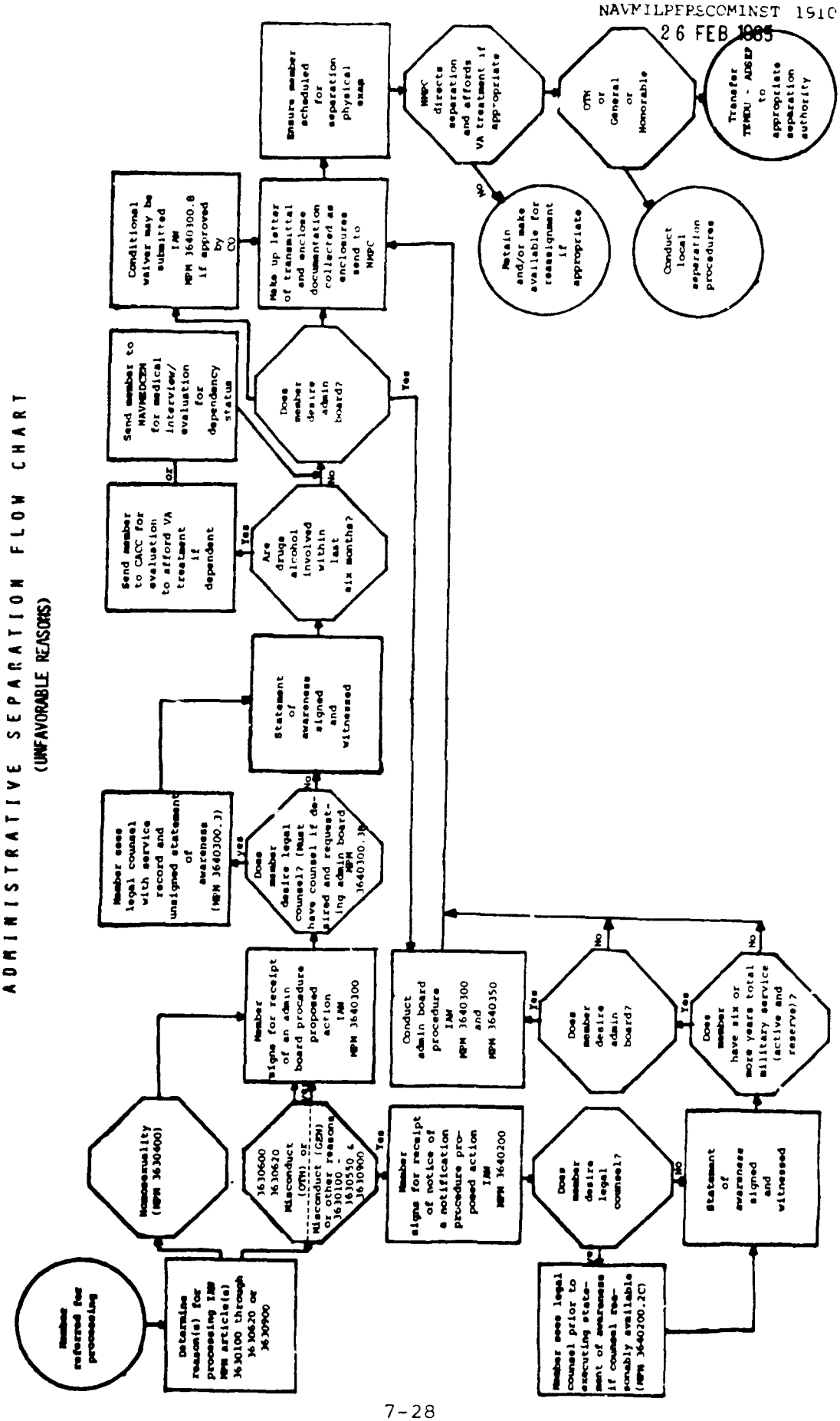
4. Any further deficiencies in your performance and/or conduct will terminate the reasonable period of time for rehabilitation that this counseling/warning entry infers and may result in disciplinary action and in processing for administrative separation. All deficiencies and/or misconduct during your current enlistment, both prior to and subsequent to the date of this action, will be considered. Subsequent violation(s) of the UCMJ or conduct resulting in civilian conviction could result in an administrative separation under other than honorable conditions.

5. This counseling/warning entry is made to afford you an opportunity to undertake the recommended corrective action. Any failure to adhere to the guidelines cited above, which is reflected in your future performance and/or conduct, will make you eligible for administrative separation action.

NOTE: THIS COUNSELING/WARNING MAY BE A PAGE 13 ENTRY OR A LETTER. IT MUST BE DATED AND SIGNED BY THE MEMBER. IF THE MEMBER REFUSES TO SIGN THE PAGE 13 OR LETTER ENTRY, A NOTATION TO THAT EFFECT IS TO BE INDICATED ON THE PAGE 13 OR LETTER ENTRY AND SIGNED AND DATED BY AN OFFICER. A COPY OF THE COUNSELING/WARNING MUST BE INCLUDED AS AN ENCLOSURE IN LETTER OF TRANSMITTAL OR IN CO'S COMMENTS IN MESSAGE SUBMISSION.

For USMC form, see MARCORSEPMAN, para. 6105

ADMINISTRATIVE SEPARATION FLOW CHART
(UNFAVORABLE REASONS)



CHAPTER VIII

OFFICER PERSONNEL MATTERS

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CHAPTER VIII

OFFICER PERSONNEL MATTERS

0801 INTRODUCTION

A. General. Commissioned officers hold positions of special trust and confidence. The United States Constitution provides that the President:

> [s]hall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, ... and all other Officers of the United States ... but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone ... or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2. The Constitution further provides that the President shall "Commission all the Officers of the United States." U.S. Const. art. II, § 3. The appointment and commissioning of officers in the armed forces is prescribed by title 10, United States Code, which includes the Defense Officer Personnel Management Act [hereinafter DOPMA]. The transition provisions of DOPMA can be found in small print immediately following section 611 of title 10, United States Code.

B. Chapter content. This chapter is divided into two parts. Part A provides a brief overview of selected officer personnel matters including appointments, promotions, resignations, retirements, continuation on active duty, and detachments for cause. Part B discusses the bases for, characterization of, and procedures for separation of officers for cause (e.g., substandard performance of duty, misconduct, etc.).

PART A - OFFICER APPOINTMENTS, PROMOTIONS, RESIGNATIONS, RETIREMENTS, CONTINUATION ON ACTIVE DUTY, AND DETACHMENTS FOR CAUSE

0802 APPOINTMENTS

A. Entry-grade credit. Many officers, particularly those in the staff corps, receive credit upon appointment in the Navy or Marine Corps for prior commissioned service or advanced education and training completed while not in a commissioned status. Where the entry-grade credit is not properly computed, the officer concerned may be disadvantaged since his/her placement on the active-duty list and subsequent consideration for promotion is dependent on his entry grade and date of rank in grade. The only way to check entry-grade-credit computations is to review the Secretarial appointment regulations.

B. Appointment regulations. The Secretarial regulations on initial appointment in the various staff corps or as judge advocates include the following (with highlights on their entry-grade provisions):

1. Chaplain Corps - SECNAVINST 1120.4 series (3 to 7 years credit);

2. Civil Engineer Corps - SECNAVINST 1120.7 series (credit for prior commissioned service only);

3. Judge Advocate General's Corps (JAGC) - SECNAVINST 1120.5 series (direct commissions and JAGC student program - prior commissioned service credit plus law school time while not in a commissioned status) and SECNAVINST 1520.7 series (Law Education Program - prior commissioned service credit only);

4. Marine judge advocates - SECNAVINST 1120.9 series (credit for prior commissioned service, plus constructive service credit for time in law school while not in a commissioned status);

5. Medical and Dental Corps - SECNAVINST 1421.5 series (4 to 14 years entry-grade credit for certain types of training, education, experience, and prior commissioned service);

6. Medical Service Corps - SECNAVINST 1120.8 series (0 to 6 years entry-grade credit for certain types of professional experience, training, education and prior commissioned service); and

7. Nurse Corps - SECNAVINST 1120.6 series (0 to 5 years entry-grade credit for certain types of professional experience, training, education, and prior commissioned service).

C. Placement on the active-duty list

1. General. The active-duty list is utilized for determining eligibility for consideration for promotion by an active-duty promotion board and for determining precedence. There is a separate active-duty list for each -- the Navy and the Marine Corps. An officer's position on the active-duty list is fixed based on: (a) Grade; (b) date of rank within that grade; and (c) tie-breaker rules set forth in SECNAVINST 1427.2 series, Subj: RANK, SENIORITY, AND PLACEMENT OF OFFICERS ON THE ACTIVE-DUTY LISTS OF THE NAVY AND MARINE CORPS.

2. Reserve officers recalled to active duty. A Reserve officer recalled to active duty after a break in active service of over six months may have his/her date of rank in grade adjusted to a later date of rank (more junior in precedence) to reflect more appropriately his/her qualifications and level of experience attained in the competitive category in which being placed on the active-duty list. This authority is generally utilized to ensure that recalled Reserve officers have sufficient time to compensate for their break in active service before consideration by an active-duty promotion board.

0803 PROMOTIONS. The basic reference source for promotions is SECNAVINST 1420.1 series, Subj: Selection boards for the promotion, continuation, and selective early retirement of officers on the active-duty list.

A. Competitive categories. Officers in the same competitive category (i.e., unrestricted line, Judge Advocate General's Corps, Supply Corps, etc.) compete among themselves for promotion.

B. Promotion plans. Each year the Secretary of the Navy approves a master promotion plan, with specific selection opportunities for each competitive category and grade, based upon projected vacancies and requirements in that competitive category and grade. The promotion zones are established with a view toward providing relatively similar opportunities for promotion over the next five years. For grades O-4 through O-6, the legislative history of DOPMA and the Secretary of Defense have suggested the following promotion windows:

Grade	Years of Commissioned Service (Including Entry-Grade Credit)	Selection Opportunity
O-6	22 years + or - 1 year	50%
O-5	16 years + or - 1 year	70%
O-4	10 years + or - 1 year	80%

C. Notice of convening and communication with selection boards. The convening of a promotion selection board is publicized by ALNAV at least 30 days in advance. Each officer eligible for consideration by the board may communicate in writing with the board (including endorsements or enclosures prepared by another), but the communication must arrive by the date of the board's convening. See SECNAVINST 1420.1 series, para. 5h.

D. Reserve officer deferrals. A Reserve officer recalled to active duty and placed on the active-duty list may request deferral of his consideration for promotion by an active-duty promotion board for up to one year from the date the officer enters on active duty and is subject to placement in the active-duty list. See SECNAVINST 1420.1 series, para. 5b.

E. Promotion boards

1. Membership. The membership of selection boards is constituted in accordance with 10 U.S.C. § 612 and paragraph 5e of SECNAVINST 1420.1 series.

2. Precept. A precept signed by the Secretary of the Navy is utilized to convene each selection board and to furnish it with pertinent statutory, regulatory, and policy guidelines -- including skill-needs information.

3. Selection criteria. Each officer selected by a board must be fully qualified and the best qualified for promotion within each competitive category, giving due consideration to the needs of the armed force for officers with particular skills.

4. Board reports. The report of selection board, including the list of eligible officers and selectees, is forwarded to the Secretary of the Navy for approval and subsequent publication of the selectees' names by message.

5. Failure of selection. An officer has failed of selection when he/she is considered for promotion to grade O-6 or below as an officer in or above the promotion zone and is not selected. Counseling of failed-of-select officers is required by paragraph 6 of SECNAVINST 1420.1 series and MILPERSMAN, art. 2220210.

F. Promotion timing

1. Promotion to O-2. Two years' time in grade is required for promotion to O-2 under SECNAVINST 1412.6 series. Under the instruction, these promotions may be delayed for cause and an officer who is found not qualified for promotion to O-2 may be discharged.

2. Promotions to O-3 and above. Backdating of regular active-duty-list promotions is not permitted under DOPMA. Instead, the date of rank of an officer promoted under DOPMA is the date of appointment published in the ALNAV or ALMAR.

3. Delay of promotions. The promotion of an officer on the active-duty list may be delayed under 10 U.S.C. § 624(d) and paragraph 7b of SECNAVINST 1420.1 series, if:

a. Sworn charges against the officer have been received by the officer's GCM convening authority and the charges have not been disposed of;

b. an investigation is being conducted to determine whether disciplinary action of any kind should be brought against the officer;

c. a board of officers has been convened to determine whether the officer should be required to show cause for retention on active duty;

d. a criminal proceeding in a Federal or state court is pending against the officer; or

e. there is cause to believe that the officer is mentally, physically, morally, or professionally unqualified to perform the duties of the grade for which selected for promotion.

The officer must be afforded notice of the delay and an opportunity to submit a statement. Under 10 U.S.C. § 624(d)(4), there are certain time limitations imposed on the delay of a promotion under the foregoing provisions which necessitate that such cases be processed expeditiously.

4. Removal from promotion list. Removal of the name of an officer from a promotion list for cause must be approved by the Secretary of the Navy or the President, as appropriate.

G. Special promotion selection boards

1. General. Special promotion-selection boards provide an avenue of relief for officers who through an error or omission were not considered, or not properly considered, by a regularly scheduled active-duty-list selection board. Detailed guidelines concerning these boards are contained in SECNAVINST 1401.1 series, Subj: Special promotion selection boards for officers on the active-duty lists of the Navy and Marine Corps. It should be pointed out that this instruction is prospective only in nature and applies only to errors or omissions which occurred under DOPMA after 15 September 1981. There is no provision in law for special selection boards for Reserve inactive-duty promotions.

2. Grounds. The Secretary of the Navy must convene a special promotion-selection board when an eligible officer who was in, above, or below the promotion zone was not considered, through administrative error, for promotion by a regularly scheduled promotion-selection board for his competitive category and grade. In addition, the Secretary may convene a special promotion-selection board when an officer who was an in- or above-zone eligible was considered, but not selected, by a regularly scheduled selection board and:

a. The action of the board was contrary to law;

b. the action of the board involved material error of fact or material administrative error; or

c. the board did not have material information before it for its consideration.

Special-promotion-selection-board procedures basically involve comparing the record of an officer seeking relief from a selection-board error or omission to a sampling of records of officers who were selected and not selected by the regularly scheduled selection board before whom the error or omission occurred.

H. Reserve officers not on the active-duty list

1. Running mates. Reserve officers not on the active-duty list, serving in a Reserve component in grades O-2 or above, are assigned running mates from the active-duty list in the same competitive category and are placed on a Reserve precedence list comparable to the active-duty list.

2. Competitive categories. Reserve competitive categories, in addition to those which match the competitive categories for active-duty-list officers, include TARs and Special Duty Officers (Merchant Marine).

0804 RESIGNATIONS. The Secretary of the Navy may accept an officer's resignation which satisfies the criteria enunciated in enclosure (2) of SECNAVINST 1920.6 series, Subj: Administrative Separation of Officers, as well as the amplifying criteria set forth in MILPERSMAN, art. 3830340 or MARCORSEPMAN, paras. 5002-5004, as appropriate. The reasons for voluntary separation include: Expiration of obligated service; change of career intentions; and

convenience of the government (dependency or hardship, pregnancy or childbirth, conscientious objector, surviving family member, alien status, and separation to accept public office or to attend college). Requests for resignation may be denied if the officer has not completed all obligated service or has not met established procedures as regards tour lengths, contact relief, timeliness of requests, etc.

0805 VOLUNTARY RETIREMENTS. The policy guidelines concerning consideration of voluntary retirement requests are set forth in SECNAVINST 1811.3 series, Subj: Voluntary retirement of members of the Navy and Marine Corps serving on active duty; policy governing. See also MILPERSMAN, arts. 3860100, 3860260-3860300; MARCORSEPMAN, paras. 2003-2004.

0806 PHYSICAL DISABILITY SEPARATION/RETIREMENT. Officers in the naval service found unfit for continued active service may be separated with severance pay or retired, by reason of their physical disability, in accordance with the Disability Evaluation Manual. See also MARCORSEPMAN, ch. 8; MILPERSMAN, arts. 3860340-3860400.

0807 INVOLUNTARY RETIREMENT FOR YEARS OF SERVICE OR FAILURES OF SELECTION

A. DOPMA. The DOPMA provisions concerning involuntary retirement or discharge of Regular commissioned O-2's through O-6's (other than LDO's), who are not covered by the savings provisions discussed in paragraph B immediately below, for failures of selection or years of service are as follows:

Grade	Grounds for discharge or, if eligible, retirement
O-2	2 failures of selection
O-3	2 failures of selection
O-4	2 failures of selection
O-5	28 years of active commissioned service*
O-6	30 years of active commissioned service*

* Under section 624(a) of DOPMA, active commissioned service for officers serving on active duty before 15 September 1981, for purposes of these statutes, may include time spent in a Reserve component and/or constructive service credit for their service through 15 September 1981 since their pre-DOPMA service date carries forward.

Those officers subject to involuntary separation for failures of selection for promotion with 5 or more, but less than 20, years of service on active duty may be entitled to separation pay not to exceed $30,000 under SECNAVINST 1900.7 series, if the conditions of his/her discharge or release from active duty warrants separation pay. An officer subject to discharge as an O-2, O-3, or O-4 for two failures of selection -- who is within 2 years of attaining eligibility for voluntary retirement for 20 years of active service-- is retained on active duty until eligible for retirement. Six months' time in grade is generally required for involuntary retirement of a Regular officer in the highest grade in which satisfactorily served.

B. Savings provision. Section 613(a) of the transition provisions of DOPMA provide that Regular officers serving in grades O-4, O-5, or O-6, or on a promotion list to such grades on 14 September 1981, shall be retired under pre-DOPMA laws unless they are selected for promotion to a higher grade or continuation on active duty by a board convened under DOPMA; in which case, they become subject to the DOPMA involuntary-retirement provisions. There are additional savings provisions in DOPMA for women officers in the line, Supply Corps, Civil Engineer Corps, and Chaplain Corps serving in grades O-2 and O-3 and for pre-DOPMA flag and general officers. See SECNAVINST 1920.6 series, encl. (3), para. 3. The computation of years of service for purposes of involuntary retirement was an exceedingly complicated subject under the pre-DOPMA statutory scheme. Some statutes (such as those pertaining to the Nurse Corps and women line officers) counted only active commissioned service in determining an officer's years of service. Other statutes (such as those pertaining to male line officers and officers in the Medical Corps, Dental Corps, Judge Advocate General's Corps, Medical Service Corps, and Chaplains Corps) included commissioned service in a Reserve component not on active duty in an officer's total commissioned service for purposes of involuntary retirement. The base date from which those officers' years of service for purposes of involuntary retirement was computed was referred to as an officer's service date. Many officers in the Medical Corps, Dental Corps, Judge Advocate General's Corps, Chaplain Corps, and Medical Service Corps had no service date prior to DOPMA because there was no means by which to compute their commissioned service under the statutory scheme. Their service dates must be computed under DOPMA, §§ 613, 624, and SECNAVINST 1821.1 series, Subj: Regulations to govern the computation of total commissioned service for purposes of involuntary retirement or discharge of certain Staff Corps Officers (NOTAL). Briefly stated, service dates under that instruction are computed by assigning the staff corps officer the same service date as an NROTC or USNA graduate who is a due-course officer with continuous active service and who is immediately junior to the staff corps officer being matched. The service date is then adjusted to a later date to reflect constructive service credit the officer received upon appointment in the staff corps. Regular officers in the Judge Advocate General's Corps are generally covered by that instruction with the exception of those individuals who were SDO (Law) Regular officers when the JAGC was created on 8 December 1967. Those officers retained their service dates as line officers under the transition provisions of the JAGC Act (Act of Dec 8, 1967, Pub. L. No. 70-179, 81 Stat. 545).

0808 CONTINUATION ON ACTIVE DUTY. A Regular O-3 or above subject to involuntary retirement or discharge for failure of selection or years of service may, if selected by a continuation board, be continued on active duty. The decision to convene a continuation board for a particular competitive category and grade is discretionary with the Secretary of the Navy. This management tool is designed for use when there is shortfall in manning in a particular competitive category and grade or in a skill area within a competitive category. For O-4's selected and promoted to that grade after 15 September 1981, who twice fail of selection to O-5 within six years of qualifying for a 20-year retirement, there are contradictory policy pronouncements that address the officer's automatic continuation on active duty until retirement eligible. Compare 10 U.S.C. § 637(d) ("The Secretary of Defense shall prescribe regulations for continuation on active duty.") and DoD Dir. 1320.8, Subj: Continuation of Regular Commissioned Officers on Active Duty (mandating the continuation on active duty of all O-4's within six years of qualifying for retirement) with 10 U.S.C. § 637(a)(1)(C) (reserving to the Secretary of the Navy, whenever the needs of the service require, continuation on active duty of officers otherwise subject to discharge or retirement) and SECNAVINST 1920.7 series, Subj: Continuation on active duty of Regular commissioned officers in the Navy and Marine Corps (reserving the discretion to convene continuation boards to the Secretary based on the needs of the service, but mandating that an officer selected for continuation on active duty, who is within six years of qualifying for retirement, be continued until eligible for retirement).

0809 DETACHMENT FOR CAUSE

A. General. In the Navy, the detachment of an officer for cause is the administrative removal of an officer from his or her current assignment by reason of misconduct or unsatisfactory or marginal performance of duty. It has a serious effect in the Navy on the officer's future naval career, particularly with regard to promotions, duty assignments, selections for schools, and special assignments. While the Navy has detailed regulations laid out in the MILPERSMAN which are briefly discussed in the paragraphs below concerning detachment of a naval officer for cause, the Marine Corps has no comparable regulations other than a brief passing reference to such transfers in the ACTSMAN, due in large part to the fact that detachments for cause are normally handled by a marine base commander instead of referring the matter to Headquarters, U.S. Marine Corps.

B. References

1. MILPERSMAN, art. 3410100.5

2. NAVMILPERSCOMINST 1611.1 series

3. MCO P1000.6 series (ACTSMAN), para. 2209

C. Procedures

1. Counseling. The officer concerned must be counseled by the command. If, after a reasonable period of time, the officer has not achieved a satisfactory level of performance, the use of a letter of instruction issued by the command to the officer concerned is considered appropriate.

2. Documentation. All factual allegations of misconduct or unsatisfactory or marginal performance of duty should be adequately documented (e.g., fitness reports, criminal investigations).

3. Command correspondence. The command's request for detachment of an officer for cause is sent to Commander, Naval Military Personnel Command, via the addressees listed in MILPERSMAN, art. 3410100.5. The request shall contain, inter alia, a reasonably detailed statement of the specific incidents of misconduct or performance; corrective action taken to improve inadequate performance including counseling; any disciplinary action taken, in progress, or contemplated. A special report of fitness is no longer submitted in conjunction with a request for detachment for cause. See NAVMILPERSCOMINST 1611.1 series.

4. Officer's statement. The officer concerned shall be afforded a reasonable period of time, normally 10 working days, in which to prepare his/her response to the detachment-for-cause request. See MILPERSMAN, art. 3410100.5h(2).

5. Review. Adherence to the regulations on detachment for cause is mandatory in order to safeguard the individual officer's rights and preclude judicial challenges by the officer concerned to the detachment for cause. See Arnheiter v. Ignatius, 292 F. Supp. 911 (N.D. Cal. 1968), aff'd, 435 F.2d 691 (9th Cir. 1970).

PART B - SEPARATION OF OFFICERS FOR CAUSE

0810 INTRODUCTION

A. General. The separation of an officer for cause by reason, inter alia, of misconduct, or moral or professional dereliction, may be effected by administrative action or by courts-martial. Dismissals of officers from the naval service are authorized punishments of general courts-martial. Administrative separation of officers for cause may be effected for a wide variety of reasons, as discussed in section 0813 below, involving performance or conduct identified not more than 5 years prior to the initiation of processing using the notification procedure (section 0814 below) or administrative board procedure (section 0815 below), as appropriate, with a characterization of service as discussed in section 0812 below. The analysis that follows is not exhaustive and any questions that arise should be resolved by utilizing SECNAVINST 1920.6 series, Subj: Administrative Separation of Officers; MILPERSMAN, art. 3830160; and MARCORSEPMAN, ch. 4.

B. Provision of information during separation processing. During separation processing, the purpose and authority of the NDRB and the BCNR shall be explained in a fact sheet. It shall include an explanation that a discharge under other than honorable conditions, resulting from a period of continuous unauthorized absence of 180 days or more, is a conditional bar to benefits administered by the Department of Veteran's Affairs -- notwithstanding any action by the NDRB. These requirements are a command responsibility and not a procedural entitlement. Failure on the part of a member to receive or to understand the explanation required by this paragraph does not create a bar to separation or characterization.

0811 DEFINITIONS. The definitions of characterization of service, discharge, and separation (discussed in sections 0601 and 0604A above) are equally applicable to officer separations. Additional definitions follow:

A. Active commissioned service. This term refers to service on active duty as a commissioned officer (including as a commissioned warrant officer).

B. Convening authority. The Secretary of the Navy or his delegates are empowered to convene boards in conjunction with separation of officers for cause.

C. Continuous service. This term refers to military service unbroken by any period in excess of 24 hours.

D. Drop from the rolls. This refers to a complete severance of military status pursuant to specific statutory authority without characterization of service.

E. Nonprobationary officers. Regular commissioned officers (other that commissioned warrant officers or retired officers) with five or more years of active commissioned service, and Regular commissioned officers (other than commissioned warrant officers or retired officers) who were on active duty on 14 September 1981 and who have completed more than three years' continuous service since their dates of appointment as Regular officers.

F. Probationary officers. Regular commissioned officers (other than commissioned warrant officers or retired officers) with less than five years of active commissioned service, and Regular commissioned officers (other than commissioned warrant officers or retired officers) who were on active duty on 14 September 1981 and who have completed less than three years' continuous service since their dates of appointment as Regular officers.

G. Retention on active duty. This refers to continuation of an individual in his/her active-duty status as a commissioned officer in the naval service.

0812 CHARACTERIZATION OF SERVICE. Separations are characterized as either honorable, general (under honorable conditions), or under other than honorable conditions. Characterization of service is determined based upon the following Secretarial guidelines:

A. Honorable. An officer whose quality of service has generally met the standards of acceptable conduct and performance of duty for officers of the naval service, or is otherwise so meritorious that any other characterization would be clearly inappropriate, shall have his or her service characterized as honorable. Service must be characterized as honorable when the grounds for separation are based solely on:

1. Preservice activities;

2. substandard performance of duty;

3. removal of ecclesiastical endorsement; or

4. personal abuse of drugs (the evidence of which was developed as a result of officer's volunteering for treatment under the self-referral program).

B. General (under honorable conditions). If an officer's service has been honest and faithful, it is appropriate to characterize that service under honorable conditions. Characterization of service as general (under honorable conditions) is warranted when significant negative aspects of the officer's conduct or performance of duty outweigh positive aspects of the officer's military record.

C. Other than honorable. This characterization is appropriate when the officer's conduct or performance of duty, particularly the acts or omissions that give rise to reasons for separation, constitute a significant departure from that required of an officer of the naval service. Examples of such conduct or performance include acts or omissions which under military law are punishable by confinement for six months or more; abuse of a special position of trust; an act or acts which bring discredit upon the armed services; disregard by a superior of customary superior-subordinate relationships; acts or omissions that adversely affect the ability of the military unit or the organization to maintain discipline, good order, and morale or endanger the security of the United States or the health and welfare of other members of the armed forces; and deliberate acts or omissions that seriously endanger the capability, security, or safety of the military unit or health and safety of other persons.

D. Limitations

1. Reserve officers. Conduct in the civilian community of a member of a Reserve component, who is not on active duty or on active duty for training and was not wearing the military uniform at the time of such conduct giving rise to separation, may form the basis for characterization of service as other than honorable only if the conduct directly affects the performance of military duties and the conduct has an adverse impact on the overall effectiveness of the service (including military morale and efficiency).

2. Homosexuality. The criteria for characterization of service for officers being separated by reason of homosexuality are identical to those for enlisted personnel. Service must be characterized as honorable or general consistent with the guidance in paragraphs A and B above, unless aggravated acts are included in the findings. Aggravated acts are defined in section 0604B8a(1) of chapter VI above.

3. Preservice misconduct. Whenever evidence of preservice misconduct is presented to a board, the board may consider it only for the purpose of deciding whether to recommend separation or retention of the respondent. Such evidence shall not be used in determining the recommendation for characterization of service. The board shall affirmatively state in its report that such evidence was considered only for purposes of determining whether it should recommend retention or separation of the officer.

0813 BASES FOR SEPARATION. This section lists the bases or specific reasons for involuntary separation of officers for cause as discussed in enclosure (3) of SECNAVINST 1920.6 series.

A. Substandard performance of duty. This ground for separation refers to an officer's inability to maintain adequate levels of performance or conduct, as evidenced by one or more of the following reasons:

1. Failure to demonstrate acceptable qualities of leadership required of an officer in the member's grade;

2. failure to achieve or maintain acceptable standards of prcficiency required of an officer in the member's grade;

3. failure to properly discharge duties expected of officers of the member's grade and experience;

4. failure to satisfactorily complete any course of training, instruction, or indoctrination which the officer has been ordered to undergo;

5. a record of marginal service over an extended time as reflected in fitness reports covering two or more positions and signed by at least two reporting seniors;

6. personality disorders, when such disorders interfere with the officer's performance of duty and have been duly diagnosed by a physician or clinical psychologist;

7. failure, through inability or refusal, to participate in, or successfully complete, a program of rehabilitation for personal abuse of drugs or alcohol to which the officer was formally referred (nothing in this provision precludes separation of an officer, who has been referred to such a program, under any other provision of this instruction in appropriate cases);

8. failure to conform to prescribed standards of dress, weight, personal appearance, or military deportment; or

9. unsatisfactory performance of a warrant officer, not amounting to misconduct, or moral or professional dereliction.

B. Misconduct, or moral, or professional dereliction. Performance or personal or professional conduct (including unfitness on the part of a warrant officer) which is unbecoming an officer as evidenced by one or more of the following reasons:

1. Commission of an offense. Processing may be undertaken for commission of a military or civilian offense which, if prosecuted under the UCMJ, could be punished by confinement of six months or more, and any other misconduct which, if prosecuted under the UCMJ, would require specific intent for conviction.

2. Unlawful drug involvement. Processing for separation is mandatory. An officer shall be separated if an approved finding of unlawful drug involvement is made. Exception to mandatory processing or separation may be made on a case-by-case basis by the Secretary when the officer's involvement is limited to personal use of drugs and the officer is judged to have potential for future useful service as an officer and is entered into a formal program of drug rehabilitation.

3. Homosexuality. The basis for separation may include pre-service, prior service, or current service conduct or statements. Processing for separation is mandatory. No officer shall be retained without the approval of the Secretary of the Navy when an approved finding of homosexuality is made. An officer shall be separated under this provision if one or more of the following approved findings is made:

a. The member has engaged in, attempted to engage in, or solicited another to engage in, a homosexual act or acts -- unless there are further approved findings that:

(1) Such conduct is a departure from the member's usual and customary behavior;

(2) such conduct under all the circumstances is unlikely to recur;

(3) such conduct was not accomplished by use of force, coercion or intimidation by the member during any period of military service;

(4) under the particular circumstances of the case, the member's continued presence in the naval service is consistent with the interest of the naval service in proper discipline, good order and morale; and

(5) the member does not desire to engage in, or intend to engage in, homosexual acts.

b. The member has stated that he or she is a homosexual or bisexual or has married or attempted to marry a person known to be of the same biological sex (as evidenced by the external anatomy of the persons involved), unless there are further findings that the member is not homosexual or bisexual or that the purpose of the claim or the marriage was the avoidance or termination of military service; in which case, the officer shall be processed for separation for misconduct by reason of intentional misrepresentation of material fact in official written documents or official oral statements.

4. Sexual perversion.

5. Intentional misrepresentation or omission of material fact in obtaining appointment.

6. Fraudulent entry into an armed force or the fraudulent procurement of commission or warrant as an officer in an armed force.

7. Intentional misrepresentation or omission of material fact in official written documents or official oral statements.

8. Failure to complete satisfactorily any course of training, instruction, or indoctrination which the officer has been ordered to undergo when such failure is willful or the result of gross indifference.

9. Marginal or unsatisfactory performance of duty over an extended period, as reflected in successive periodic or special fitness reports, when such performance is willful or the result of gross indifference.

10. Intentional mismanagement or discreditable management of personal affairs, including financial affairs.

11. Misconduct or dereliction resulting in loss of professional status, including withdrawal, suspension, or abandonment of license, endorsement, certification, or clinical medical privileges necessary to perform military duties in the officer's competitive category of Marine Corps Occupational Field.

12. A pattern of discreditable involvement with military or civilian authorities, notwithstanding the fact that such misconduct has not resulted in judicial or nonjudicial punishment under the UCMJ.

13. Conviction by civilian authorities (foreign or domestic) or action taken which is tantamount to a finding of guilty, which, if service connected, would amount to an offense under the UCMJ.

C. Retention is not consistent with the interests of national security. An officer (except a retired officer) may be separated from the naval service when it is determined that the officer's retention is clearly inconsistent with the interests of national security. This provision applies when a determination has been made (under the provisions of SECNAVINST 5510.30 series, Subj: Department of the Navy Personnel Security Program) that administrative separation is appropriate. An officer considered for separation under the provisions of SECNAVINST 5510.30 series will be afforded all the rights provided in this part.

D. Limitations on multiple processing

1. An officer may be processed for separation for any combination of the reasons specified in paragraphs A-C above.

2. Subject to paragraph D4 below, an officer who is processed for separation because of substandard performance of duty or parenthood, and who is determined to have established that he or she should be retained on active duty, may not again be processed for separation for the same reasons within the one-year period beginning on the date of that determination.

3. Subject to paragraph D4 below, an officer who is processed for separation for misconduct, moral, or professional dereliction or in the interest of national security, and who is determined to have established that he or she should be retained on active duty, may again be required to show cause for retention at any time.

4. An officer may not again be processed for separation under paragraphs D2 or D3 above solely because of performance or conduct which was the subject of previous proceedings, unless the findings and recommendations of the board that considered the case are determined to have been obtained by fraud or collusion.

E. Separation in lieu of trial by court-martial

1. Basis. An officer may be separated in lieu of trial by court-martial upon the officer's request if charges have been preferred with respect to an offense for which a punitive discharge is authorized. This provision may not be used as a basis for separation when the escalator clause of R.C.M. 1003(d) of Manual for Courts-Martial, 1984, provides the sole basis for a punitive discharge, unless the charges have been referred to a court-martial authorized to adjudge a punitive discharge.

2. Characterization of service. The characterization of service is normally under other than honorable conditions, but a general discharge may be warranted under the guidelines in section 0812 above. Characterization of service as honorable is not authorized, unless the respondent's record is otherwise so meritorious that any other characterization would be clearly inappropriate.

3. Procedures

a. The request for discharge shall be submitted in writing and signed by the officer.

b. The officer shall be afforded an opportunity to consult with qualified counsel. If the member refuses to do so, the commanding officer shall prepare a statement to this effect which shall be attached to the file, and the officer shall state that he/she has waived the right to consult with counsel.

c. Unless the officer has waived the right to counsel, the request shall also be signed by counsel.

d. In the written request, the officer shall state that he/she understands the following:

(1) The elements of the offense or offenses charged;

(2) that characterization of service under other than honorable conditions is authorized; and

(3) the adverse nature of such a characterization and possible consequences.

e. The request shall also include:

(1) An acknowledgement of guilt of one or more of the offenses charged, or of any lesser included offense, for which a punitive discharge is authorized; and

(2) a summary of the evidence or list of documents (or copies thereof) provided to the officer pertaining to the offenses for which a punitive discharge is authorized.

f. Statements by the officer or the officer's counsel submitted in connection with a request under this subsection are nct admissible against the member in a court-martial except as provided by Military Rule of Evidence 420, Manual for Courts-Martial, 1984.

F. Removal of ecclesiastical endorsement. Officers on the active-duty list in the Chaplain Corps, who can no longer continue professional service as a chaplain because an ecclesiastical endorsing agency has withdrawn its endorsement of the officer's continuation on active duty as a chaplain, shall be processed for separation (in accordance with SECNAVINST 1900.10 series, Subj: Administrative Separation of Chaplains Upon Removal of Professional Qualifications, and this instruction) using the Notification Procedures contained in SECNAVINST 1900.10 series. Processing solely under this paragraph is not authorized when there is reason to process for separation for cause under any other provision of this instruction, except when authorized by the Secretary in unusual circumstances based upon a recommendation by the Chief of Naval Personnel.

G. Parenthood. An officer may be separated by reason of parenthood if it is determined that the officer is unable to perform his/her duties satisfactorily or is unavailable for worldwide assignment or deployment.

H. Reserves. Other bases for involuntary separation of Reserve officers are set forth in enclosure (3) to SECNAVINST 1920.6 series including, inter alia:

1. General mobilization or reduction in authorized strength;

2. age-in-grade restrictions;

3. lack of mobilization potential;

4. release from active duty of Naval Reserve officers on the active-duty list by reason of retirement eligibility; and

5. elimination of Reserve officers from an active status in a Reserve component to provide a flow of promotion.

I. Dropping from the rolls. A Regular or Reserve officer may be summarily dropped from the rolls of an armed force without a hearing or a board, if the officer:

1. Has been absent without authority for at least three months; or

2. has been sentenced to confinement in a Federal or state penitentiary after having been found guilty by a civilian court and whose sentence has become final. See SECNAVINST 1920.6 series, encl. (4), para. 8.

0814 NOTIFICATION PROCEDURES

A. When required. The notification procedure shall be used when:

1. A probationary Regular officer or a Reserve officer above CWO-4 with less than three years of commissioned service, or a permanent Regular or Reserve warrant officer with less than three years of service as a warrant officer, is processed for separation for substandard performance of duty (as defined in section 0813A above) or for parenthood (as defined in section 0813G above);

2. a temporary LDO or temporary warrant officer is processed for termination of his/her temporary appointment for substandard performance of duty, misconduct or moral or professional dereliction, retention not consistent with national security, or parenthood under section 0813A, B, C, D, G above (an officer whose temporary appointment is terminated reverts to his/her permanent status as a warrant officer or enlisted member);

3. a probationary officer is processed for separation for misconduct, or moral or professional dereliction, retention not consistent with national security, or parenthood (as defined in section 0813B, C, G above) and a separation with an honorable or general characterization of service is recommended by a board of officers to the Secretary of the Navy;

4. a Reserve officer is processed for removal from an active status due to age or lack of mobilization potential; or

5. a Regular or Reserve officer is processed for separation for failure to accept appointment to O-2.

B. Letter of notification. The commanding officer shall notify the officer concerned in writing of the following:

1. The reason(s) for which the action was initiated (including the specific factual basis supporting the reason);

2. the recommended characterization of service is honorable (or general, if such a recommendation originated with a board of officers as discussed in section 0814A3 above);

3. that the officer may submit a rebuttal or decline to make a statement;

4. that the officer may tender a resignation in lieu of separation processing;

5. that the officer has the right to confer with appointed counsel as provided in paragraph C below;

6. that the officer, upon request, will be provided copies of the papers to be forwarded to the Secretary to support the proposed separation (Classified documents may be summarized.);

7. that the officer has the right to waive the rights enumerated in paragraphs 3, 4, 5, and 6 above, and that failure to respond shall constitute waiver of these rights; and

8. that the officer has a specified period of time (normally five working days) to respond to the notification.

C. Right to counsel. A respondent has the right to consult with qualified counsel when the notification procedure is initiated, except when the commanding officer determines that the needs of the naval service require processing and access to qualified counsel is not anticipated for at least the next five days because the vessel, unit, or activity is overseas or remotely located relative to judge advocate resources. Nonlawyer counsel shall be appointed whenever qualified counsel is not available. The respondent may also consult with a civilian counsel at the respondent's own expense.

D. Response. The respondent shall be provided a reasonable period of time -- normally five working days, but more if in the judgment of the commanding officer additional time is necessary -- to act on the notice. An extension may be granted by the commanding officer upon a timely showing of good cause by the officer. If the respondent declines to respond as to the selection of rights, even if notice is provided by mail as authorized for the Reserves, such declination shall constitute a waiver of rights and an appropriate notation will be made in the case file. If the respondent indicates that one or more of the rights will be exercised, but declines to sign the appropriate notification statement, the selection of rights will be noted and notation as to the failure to sign will be made.

E. Submission to the Secretary. The commanding officer shall forward the case file with the letter of notification and response, supporting documentation, and any tendered resignation via the Chief of Naval Personnel or the Commandant of the Marine Corps, as appropriate, to the Secretary of the Navy.

F. Action of the Secretary. The Secretary shall determine whether there is sufficient evidence supporting the allegations set forth in the notification for each of the reasons for separation. The Secretary may then:

1. Retain the officer;

2. order the officer separated or retired, if eligible (if there is sufficient factual basis for separation);

3. accept or reject a tendered resignation; or

4. direct, if the Secretary determines that an honorable characterization is not appropriate, that the case of a Regular O-1 or above be reviewed by a board of officers under section 0815E below or that the case of any other officer be reviewed by a board of inquiry under section 0815F below (if the case had originally been initiated by a board of officers and the Secretary determines that the recommended honorable or general characterization of service is inappropriate, he may then refer it directly to a board of inquiry).

0815 ADMINISTRATIVE BOARD PROCEDURES

A. When required. The administrative board procedure refers to a three-tiered board system consisting of a board of officers, board of inquiry, and board of review, which must be utilized to remove certain Regular O-1's or above from active duty for cause. Other officers who are entitled to a hearing before an administrative board before separation for cause are referred to a board of inquiry only for a hearing.

1. Three-tiered board system. The following Regular O-1's or above are processed for separation in accordance with the administrative board procedures by referral of their cases first to a board of officers:

a. A probationary officer (not recommended to SECNAV for an honorable or general discharge) or a nonprobationary officer being processed for misconduct, or moral or professional dereliction, or because retention is not consistent with the interests of national security (as defined in section 0813B, C above); and

b. a nonprobationary officer being processed for substandard performance of duty or parenthood (as defined in section 0813A, G above).

2. Board of inquiry only. The following officers are processed for separation by referral of their cases to a board of inquiry:

a. Reserve officers (including Reserve warrant officers) and permanent Regular warrant officers being processed for termination of appointment or separation because of misconduct, moral or professional dereliction, or retention inconsistent with the interests of national security (as defined in section 0813B, C above); and

b. Reserve officers with more than three years of commissioned service, Reserve warrant officers with more than three years of service as a warrant officer, and permanent Regular warrant officers with three or more years of continuous active service from the date they accepted their original appointment as warrant officers, being processed for separation or termination of his/her appointment for substandard performance of duty or parenthood (as defined in section 0813A, G above);

c. any case not specifically provided for involving discharge under other than honorable conditions; and

d. any other cases the Secretary considers appropriate (e.g., retired-grade determinations in certain voluntary retirement cases).

If proceedings by a board of inquiry are mandatory in order to release an officer from active duty or discharge, such action will not be taken except upon the approved recommendation of such a board.

B. Board memberships. Boards of officers, boards of inquiry, and boards of review shall consist of not less than three officers in the same armed force as the respondent.

1. In the case of Regular commissioned officers (other than temporary LDO's and WO's), members of the board shall be highly qualified and experienced officers on the active-duty list in the grade of O-6 or above and senior in grade to the respondent.

2. In the case of Reserve, temporary limited duty, and warrant officers, the members constituting the board of inquiry (the only board that hears such cases) shall be senior to the respondent -- unless otherwise directed by the Secretary. If the respondent is a Reserve officer, at least one member of the board shall be a Reserve officer -- unless otherwise directed by the Secretary.

3. At least one member shall be an unrestricted line officer. Such officer will have command experience whenever possible. One member shall be in the same competitive category as the respondent. However, if the respondent's competitive category does not include O-6's or above, an O-6 from a closely related designator shall be used to satisfy this membership requirement. If there is not a designator closely related to that of the respondent, then an unrestricted line officer shall be used. The Chief of Naval Personnel or the Commandant of the Marine Corps, as appropriate, may waive each of these requirements on a case-by-case basis when compliance would result in undue delay. The purpose of these representation requirements is not to serve the interest of any specific group, but to increase the knowledge and experience of the board as a whole.

4. When sufficient highly qualified and experienced officers on the active-duty list are not available, the convening authority shall complete board membership with available retired officers who meet the criteria of paragraphs B1-B3 above (other than the active-duty-list requirement) and who have been retired for less than 2 years.

5. Officers with personal knowledge pertaining to the particular case shall not be appointed to the board considering the case. No officer may be a member of more than one board convened under this instruction to consider the same officer.

6. The senior member of a board of officers or board of inquiry shall be the presiding officer and rule on all matters of procedure and evidence, but may be overruled by a majority of the board. If appointed, the legal advisor shall rule finally on all matters of procedure and evidence.

7. For boards of inquiry, the convening authority is not limited to officers under his or her direct command in selecting qualified board members.

C. Recorder. The convening authority shall appoint a nonvoting recorder to perform such duties as appropriate, but the recorder shall not participate in closed sessions of any board.

D. Legal advisor. The convening authority may appoint a nonvoting legal advisor to perform such duties as the board desires, but the legal advisor shall not participate in closed sessions of any board. The convening authority shall rule finally on all challenges for cause against the legal advisor.

E. Board of officers

1. Convening. The Chief of Naval Personnel or the Commandant of the Marine Corps, as appropriate, shall convene boards of officers for Regular O-1's or above when referred by the Secretary, or when they receive information of incidents involving officers whose performance or conduct is such that processing for separation by board procedures is appropriate or required. The purpose of the board is to review the record of the officer and determine whether the officer shall be required, because of substandard performance of duty, misconduct, moral or professional dereliction or national security interests, to show cause for his/her retention on active duty.

2. Notification and board review. An officer shall be advised of impending proceedings by a board of officers which considers all record information available prior to making its determination. The board has no independent investigative function and may not hear testimony or depositions from witnesses or the respondent.

3. Board decisions. The board of officers, after deliberations, shall determine by majority vote one of the following:

a. That there is sufficient evidence that the respondent should be required to show cause for retention for one or more of the reasons specified (this determination is mandatory when a preponderance of the evidence supports a finding of homosexual conduct or unlawful drug involvement); or

b. that none of the reason(s) are supported by sufficient evidence of record to warrant referral to a board of inquiry and that the case is, therefore, closed.

When, in the case of a probationary officer, the board determines that the record supports separation of the respondent and that the circumstances warrant an honorable or general discharge consistent with section 0812 above, it may supplement its findings with a nonbinding recommendation for separation for stated reason(s) and an honorable or general characterization, as appropriate.

4. Board report. The report of the board, signed by all members, shall state that its findings were by majority vote and include:

a. A finding on each of the reason(s) for separation specified, together with a summary of the relevant facts;

b. a conclusion that the case should be closed or the respondent required to show cause for retention for reasons specified; and

c. a recommendation, in the case of a probationary officer, if the circumstances warrant, that the officer be separated with an honorable or general characterization of service and the facts supporting that recommendation.

5. Action on the board report. The report of the board shall be reviewed by the Chief of Naval Personnel or the Commandant of the Marine Corps, as appropriate. In the absence of relevant matters which may reasonably be deemed to have escaped the full appreciation of the board members, a report shall not be returned to the board for reconsideration of findings, opinions, or recommendations going to the substantial merits of the case. If the board of officers closes the case, no further proceedings are conducted. If the board finds sufficient evidence to require the respondent to show cause for retention, the Chief of Naval Personnel or the Commandant of the Marine Corps shall, upon approval of the findings of the board of officers, convene a board of inquiry. If the board recommends direct separation of a probationary officer with an honorable or general characterization of service, the case shall be processed under the notification procedures discussed in section 0814 above.

F. Board of inquiry

1. Convening. The Chief of Naval Personnel or the Commandant of the Marine Corps, or an officer exercising general court-martial jurisdiction when so directed, shall convene a board of inquiry (when required in paragraph A above). The purpose of this board is to give the officer a full and impartial hearing at which he or she may respond to, and rebut, the allegations which form the basis for separation for cause and/or retirement in a paygrade inferior to that held and present matters favorable to his/her case on the issues of separation and/or characterization of service.

2. Notification to, and rights of, a respondent. The respondent shall be notified in writing at least 30 days before the hearing of his/her case by a board of inquiry of the following:

a. The reasons for which he is being required to show cause for retention in the naval service or retirement in the grade next inferior to that currently held;

b. the least favorable characterization of service authorized;

c. the right to request reasonable additional time from the convening authority or board of inquiry to prepare his/her case;

d. the right to counsel (as provided in paragraph F3 below);

e. the right to present matters in his/her own behalf;

f. the right to obtain copies of records relevant to the case (except information withheld in the interests of national security, in which case a summary will be provided to the extent that national security permits);

g. the right to notice of all witnesses in advance of the board's proceedings;

h. the right to challenge any member for cause;

i. the right to request from the convening authority or the board of inquiry the appearance before the board of any witness whose testimony is considered to be pertinent to the case;

j. the right to submit evidence before or during the proceedings (including service record entries, depositions, stipulations, etc.);

k. the right to examine or cross-examine witnesses;

l. the right to give sworn or unsworn testimony;

m. the right to appear in person, with or without counsel, at all open proceedings of the board;

n. the right to present argument;

o. the right to a copy of the record of proceedings, findings, and recommendations of the board;

p. the right to submit a statement in rebuttal to the findings and recommendation of the board of inquiry for consideration by the board of review;

q. the right to waive the rights in subparagraphs 2c-p above; and

r. failure of the respondent to respond after being afforded a reasonable opportunity to consult with counsel constitutes a waiver of these rights.

3. Counsel. A respondent is entitled:

a. To have qualified military counsel appointed;

b. to request military counsel of his/her own choice, provided the requested counsel is reasonably available (as prescribed in the JAG Manual for individual military counsel for courts-martial); and

c. to engage civilian counsel at no expense to the government, in addition to, or in lieu of, military counsel.

4. Witnesses. The respondent may request in a timely manner the attendance of witnesses in his behalf at the hearing. Material witnesses located within the immediate geographical area of the board shall be invited to appear or, in the case of Federal government employees (military or civilian), directed to appear. If production of a witness will require expenditure of funds because the witness is located outside the immediate geographical area of the board, the rules prescribed for submission of the respondent's witness request, the convening authority's action on the request, and the postponement or continuance of the board's proceedings to await the witness's appearance or, absent that, preparation of the witness' written statement, are identical to the guidelines enunciated in section 0705G on witness requests in enlisted administrative separation cases.

5. Hearings. Hearings must be conducted in a fair and impartial manner, but the Military Rules of Evidence for courts-martial are not strictly applicable. Oral or written matter may, however, be subject to reasonable restrictions as to authenticity, relevance, materiality, and competency as

determined by the board of inquiry. If suspected of an offense, the officer should be warned against self-incrimination under Article 31, UCMJ, before testifying as a witness. Failure to so warn the officer may not preclude consideration of the testimony of the officer by the board of inquiry.

6. Board decisions. The board shall make the following determinations, by majority vote, based on the evidence presented at the hearing:

a. A finding on each of the reason(s) for separation specified, based on the preponderance of evidence;

b. a recommendation for separation of the respondent from the naval service for specified reason(s) with a characterization of service and for referral of the case to the board of review, when required (a recommendation for separation is mandatory when a preponderance of the evidence supports a finding of homosexual conduct or unlawful drug involvement);

c. a finding that none of the reasons specified are supported by sufficient evidence prescribed to warrant separation for cause and the case is, therefore, closed; or

d. a recommendation, in the case of a retirement-eligible officer, to retire the officer in the grade currently held or, if the officer has not satisfactorily served in that grade, the next junior grade.

7. Board report. The report of the board, signed by all members (including any separate, minority reports), shall include a verbatim transcript of the board's proceedings for Regular commissioned officers, when directed by the convening authority, and a summarized transcript for all other officers. The transcript shall be provided to the respondent for examination prior to signature by the board members, and a statement reflecting that fact -- plus any deficiencies noted by the respondent -- shall be attached to the report. The report shall also include:

a. The individual officer's service and background;

b. each of the specific reasons for which the officer is required to show cause for retention;

c. each of the acts, omissions, or traits alleged and the findings on each of the reasons for separation specified;

d. the position taken by the respondent with respect to the allegations, reports, or other circumstances in question and the acts, omissions, or traits alleged;

e. the recommendations of the board that the respondent be separated and receive a specific characterization of service, or. if retirement eligible, that the officer be retired in the grade currently held or in the next inferior grade; or

f. the finding of the board that separation for cause is not warranted and that the case is closed; and

g. a copy of all documents and correspondence relating to the convening of the board (e.g., witness request).

The respondent shall be provided a copy of the report of proceedings and the findings and recommendations of the board and shall be provided an opportunity to submit written comments for consideration by the board of review.

8. Action on the report. The report of the board shall be submitted via the convening authority to the Chief of Naval Personnel or Commandant of the Marine Corps, as appropriate, for termination of proceedings or further action, as appropriate. Further action includes:

a. In the case of Reserve, limited duty, and warrant officers recommended for separation, review and endorsement of the case to the Secretary for final determination;

b in the case of Regular O-1's or above recommended for removal from active duty, delivery of the case to the board of review; and

c. in the case of a retirement-eligible officer whose case was referred to the board solely to determine his/her retired grade, review and endorsement of the case to the Secretary.

G. Board of review

1. Convening. Boards of review are convened by the Chief of Naval Personnel or the Commandant of the Marine Corps, as appropriate, to review the reports of boards of inquiry which recommend separation for cause of permanent Regular O-1's and above and make recommendations to the Secretary.

2. Respondent's rights. The respondent does not have the right to appear before a board of review or to present any statement to the board, except the statement of rebuttal to the findings and recommendations of the board of inquiry.

3. Board's review and report. The board shall make the following determinations by majority vote, based on a review of the report of the board of inquiry:

a. A finding that the respondent has failed to establish that he/she should be retained on active duty, together with a recommendation as to characterization of service not less favorable than that recommended by the board of inquiry (a recommendation for separation is mandatory when a preponderance of the evidence supports a finding of homosexual conduct or unlawful drug involvement); or

b. a finding that the respondent should be retained on active duty and the case is, therefore, closed.

The report of the board shall be signed by all members including any separate, minority reports.

4. Action on the report of the board. The report of the board of review which recommends separation shall be delivered with any desired recommendations by the Chief of Naval Personnel or the Commandant of the Marine Corps, as appropriate, to the Secretary who may direct:

a. Retention; or

b. discharge with a characterization of service not less favorable than that recommended by the board of inquiry.

H. Retirement and resignation. An officer who is being considered for removal from active duty who is eligible for voluntary retirement may, upon approval by the Secretary, be retired in the highest grade in which he/she served satisfactorily as determined by the Secretary under the guidelines of 10 U.S.C. § 1370. Enclosure (6) to SECNAVINST 1920.6 series, allows the Secretary to reduce an officer only one grade for not serving "satisfactorily," even if he meets the time-in-grade requirements. 10 U.S.C. § 1370 authorizes more than a one-grade reduction, but the Secretary is restricted to a one-grade reduction. An officer who is not eligible for retirement may submit an unqualified resignation (honorable discharge), qualified resignation (general or honorable discharge acceptable), or resignation for the good of the service (any characterization of service acceptable) to the Secretary.

0816 PROCESSING TIME GOALS. The Secretary has established the following time goals for processing officer separations for cause:

A. 30 days from the date a command notifies an officer of the commencement of separation proceedings in cases where no board of inquiry or board of review is required;

B. 90 days from the date a command notifies an officer of the commencement of separation proceedings in cases where only a board of inquiry is required; and

C. 120 days from the date a command notifies an officer of the commencement of separation proceedings in cases where a board of officers, a board of inquiry, and a board of review are all required.

0817 SEPARATION PAY

A. Reference. SECNAVINST 1900.7 series, Subj: Eligibility for separation pay upon involuntary discharge or release from active duty.

B. Eligibility. Regular and Reserve officers and Reserve enlisted members involuntarily discharged or released from active duty with 5 or more, but less than 20, years of active service are entitled to separation pay, except when discharged or dismissed by sentence of a court-martial, dropped from the rolls, discharged under other than honorable conditions, released from active duty for training, or, upon discharge or release from active duty, are eligible for retainer or retired pay.

C. Computation. The amount of separation pay is:

1. 10% X member's years of active service (rounded off) X 12 X one month's basic pay to which the member was entitled at the time of discharge or release from active duty, or $30,000, whichever is less (This formula is utilized generally for Regular officers discharged for failure of selection for promotion or loss of ecclesiastical endorsement and Reserve personnel, officer and enlisted, involuntarily released from active duty or not accepted for an additional tour of duty for which the member volunteered.); or

2. one half of the amount computed under paragraph 1 above, but in no event more than $15,000. (This formula is utilized generally for Regular or Reserve officers discharged or released from active duty for cause, as discussed in section 0813 above, characterized as honorable or under honorable conditions, and Reserve enlisted personnel discharged or released from active duty for misconduct, homosexuality, drug abuse, security, etc., with a characterization as honorable or under honorable conditions.)

CHAPTER IX

LEGAL ASSISTANCE

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CHAPTER IX

LEGAL ASSISTANCE

PART A - LEGAL ASSISTANCE PROGRAM

0901 GENERAL. Few problems are as frustrating for military members as unresolved legal difficulties. Since 1943, the Department of the Navy has sought to maintain a legal assistance program to assist military personnel, their dependents, and other authorized persons in obtaining adequate legal advice and services from within the naval service. Until recently, legal assistance was provided not from any legislative compulsion, but rather from the perceived need for such services. The 1985 DoD Authorization Bill, Pub. L. No. 98-525, has provided a statutory basis for legal assistance and essentially has codified the existing program. The assets devoted to legal assistance by naval legal service offices or Marine law centers necessarily varies with the ebb and flow of military justice at the command. The JAG Manual in Chapter 19 provides that legal assistance officers shall: counsel, advise, and assist persons eligible for assistance or refer such persons to a civilian lawyer; prepare and sign correspondence and all types of legal documents on behalf of a client; negotiate with another party or his lawyer; where appropriate, serve as advocate and counsel for--and provide legal representation in court to--persons eligible for such assistance; establish, contact, and maintain liaison with local organizations interested in providing legal assistance; and render advice with respect to discrimination complaints. JAGMAN, § 1906.

0902 PERSONS ELIGIBLE FOR LEGAL ASSISTANCE. Legal assistance is a service which is intended to benefit active-duty servicemembers. While each legal field command is required to provide legal assistance, the scope of those services has been left to individual command discretion as dictated by the workload of the office. The following groups of persons are eligible for legal assistance:

A. Active-duty personnel;

B. dependents of active-duty personnel;

C. military personnel of allied nations serving in the U.S., its territories or possessions;

D. retired military personnel;

E. dependents of retired military personnel;

F. survivors of members of the armed forces who would be eligible were the servicemember alive; and

G. civilians, other than local-hire employees, who are in the employ of, serving with, or accompanying the U.S. forces in overseas areas and their dependents. JAGMAN, § 1905.

In addition, Appendix 19 of the JAG Manual provides for the Expanded Legal Assistance Program (ELAP), which allows legal assistance officers to represent certain military personnel in civilian court at no expense to the member. The personnel eligible for this program are paygrades E-3 or below, married E-4 personnel, or any member that cannot afford the services of a civilian attorney and, therefore, would be forced to go into court without adequate representation. The types of cases covered by the ELAP program include:

1. Adoptions;

2. name changes;

3. routine or "short form" statutory probates of small estates;

4. divorce, separation, and child-custody matters;

5. paternity;

6. nonsupport and Uniform Reciprocal Enforcement of Support Act cases;

7. collection of security deposits and debts;

8. actions involving conditional-sales contracts or warranties;

9. minor tort cases, in particular where there is a clear claim and an unjustified refusal to pay;

10. defense of disputed indebtedness; and

11. criminal defense in traffic and minor misdemeanor cases.

Services under the Expanded Legal Assistance Program are not intended to deprive civilian attorneys of sources of income. To the contrary, they are intended to provide needed legal services for eligible personnel who cannot provide a source of income to the civilian bar.

0903 LIMITATIONS ON SERVICE PROVIDED: SPECIAL PROBLEMS FOR THE ACTIVE-DUTY JUDGE ADVOCATE

A. Assistance in official military matters. Generally, legal assistance duties are separate and apart from the duties of a trial counsel, defense counsel, or other officer involved in the processing of courts-martial, non-judicial punishment, administrative boards, investigations, or other such official military matters. Whenever a member suspected or accused of an offense under the UCMJ requests consultation with a legal assistance officer/lawyer, he should ordinarily be advised of the proper procedures for obtaining counsel or advice, which in practice means that he should be referred to an officer regularly performing defense counsel duties. See United States v. Gunnels, 8 U.S.C.M.A. 130, 23 C.M.R. 354 (1957). Legal offices at large commands normally have one or more judge advocates assigned full-time to the legal

assistance program, thereby keeping their duties separate from the responsibilities of others involved in the processing of court-martial cases. At small commands, one lawyer may perform both legal assistance and military justice functions. In either situation, an accused or suspect may request advice or wish to consu c the lawyer who acts as legal assistance officer. Additionally, there may be circumstances whereby the regularly detailed defense counsel is unavailable (e.g., absence or conflict of interest), so that referral of a military justice problem to the legal assistance officer will furnish the most satisfactory service. In all such circumstances, advice or consultation to the accused, although not really a legal assistance function, should be rendered by the legal assistance officer. In like manner and subject to the usual "reasonable availability" criteria, the legal assistance officer may serve in court-martial proceedings as individual defense counsel. JAGMAN, § 1907a.

B. Nonlegal advice. While giving legal advice, the legal assistance officer may also determine that the client needs or desires advice on related but nonlegal matters (e.g., financial counseling or family counseling). Faced with this situation, the legal assistance officer should provide legal advice only or defer giving such advice and refer the client to the appropriate person or agency for nonlegal counseling. JAGMAN, § 1907b.

C. Domestic relations cases. It is generally accepted that the same lawyer should not represent both parties in a domestic relations case. However, in the military in many remote locales there is only one lawyer assigned in the area. This would leave one party without adequate representation. Therefore, a legal assistance officer can counsel both parties if both parties have knowledge of the dual representation and both parties give their consent. It is advisable to get the consent in writing from both parties. JAGMAN, § 1907b.

D. Proceedings involving the United States. A legal assistance officer may not advise on, assist in, or become involved with, individual interests opposed to, or in conflict with, the interests of the United States without the specific approval of the Judge Advocate General. JAGMAN, § 1907d.

E. Fees and compensation. Military and civilian employees of the Department of the Navy on active duty are prohibited from accepting, directly or indirectly, any fee or compensation of any nature for legal services rendered to any person entitled to legal assistance, whether or not the service is normally provided or available to such persons as part of a legal assistance program, and whether or not the service is rendered on or off duty. Reserve judge advocates on inactive duty are prohibited from receiving compensation of any kind for legal services provided any person entitled to legal assistance with respect to matters about which they consulted or advised said person in an official capacity (unless a waiver is first obtained from the Judge Advocate General). JAGMAN, § 1910.

F. Telephone advice. In the absence of unusual or compelling circumstances, legal advice should not normally be given over the telephone. JAGMAN, § 1907e.

G. Professional legal advice. Only legal assistance officers, who by definition are qualified lawyers and members of one or more state bars, are authorized to render services that call for the professional judgment of a

lawyer. Servicemembers not assigned duties as a judge advocate--especially those assigned duties as a collateral or additional duty legal officer--must avoid the unauthorized practice of law. JAGMAN, § 1906d.

0904 CONFIDENTIAL AND PRIVILEGED CHARACTER OF SERVICE PROVIDED. All information and files of legal assistance officers pertaining to persons served will be treated as confidential and privileged in the legal sense, as outlined in Canon 4 of the Code of Professional Responsibility. These privileged matters may not be disclosed to anyone, except upon the specific permission of the person concerned, and disclosure may not be lawfully ordered by superior military authority. Maintenance of the strictest confidence is essential to the proper functioning of the legal assistance program in order to assure individuals that they may disclose completely all material facts of their problem without fear that their confidence will be abused or used against them. Legal assistance case files maintained by the legal assistance office are not subject to the control of the Department of the Navy and, therefore, do not constitute a "system of records" within the meaning of the Privacy Act of 1974. JAGMAN, § 1908.

0905 REFERRAL TO CIVILIAN LAWYERS. If it is determined that the legal assistance that is needed is beyond either the scope of assistance authorized to be provided or the capabilities of the legal assistance officer, the client should be referred to a civilian lawyer. If the client does not know a lawyer whom he/she wishes to represent him/her, the case may be referred to an appropriate bar organization, lawyer referral service, legal aid society or other organization for obtaining counsel. If a lawyer referral service is not used or available, there is no required minimum number of lawyers' names that should be given to the client for referral purposes, but care should be taken to avoid the appearance of impropriety in consistently referring cases to an unreasonably small number of attorneys. JAGMAN, § 1909. Both active duty and inactive duty military personnel acting in an official capacity, are prohibited from advising any person entitled to legal assistance to seek legal services from themselves in their private capacities, or from any law firm with which they are associated, or from any attorney with whom they share office space. See SECNAVINST 5370.2 series, Subj: Standards of Conduct and Government Ethics.

0906 MALPRACTICE LIABILITY. Disciplinary Rule 6-101(A) of the American Bar Association Code of Professional Responsibility provides in pertinent part: "A lawyer shall not: (1) Handle a legal matter which he knows or should know he is not competent to handle without associating with a lawyer who is competent to handle it [; or] (2) handle a legal matter without preparation adequate in the circumstances." Prior to the passage of the Department of Defense Authorization Act for Fiscal Year 1987 (Pub. L. No. 99-661), there was some question about whether judge advocates performing legal assistance might be subject to personal financial liability for legal malpractice. This thinking was based primarily on the existence of statutes that specifically exempted medical and dental personnel of the Department of Defense from personal liability for malpractice (see 10 U.S.C. § 1089) as compared to the absence of such a statutory provision for lawyers and paralegals. Indeed,

strong arguments could be made under the Feres Doctrine for active duty claimants that no tort remedy exists and under scope of employment that the Federal Tort Claims Act provides an exclusive remedy as against other claimants. Nevertheless, to ensure that Department of Defense attorneys and paralegals performing legal assistance received the same protection as DOD medical and dental personnel, the FY-87 DOD Authorization Act adds section 1054 of Title 10 of the United States Code to provide that the Federal Tort Claims Act shall be the exclusive remedy in cases of legal malpractice.

Samuel T. Currin, U.S. Attorney for the Eastern District of North Carolina and a Reserve Army judge advocate, offers the following advice to judge advocates on how to avoid malpractice:

> 1. Use office checklists to ensure that all possible needs/issues are routinely covered during interviews;
>
> 2. attend local and state Continuing Legal Education courses, especially in the areas of wills, trusts, estate planning and family law;
>
> 3. know whether the client is, or is not, entitled to legal assistance;
>
> 4. know the limitations placed on the scope of legal assistance by the DoD, DoN and local directives and policies; and
>
> 5. when the complexity or scope of the legal issue is beyond your expertise, do not attempt it, regardless of who requests it.

Sullivan, "Legal Malpractice: Pitfalls and Prevention," ABA Legal Assistance Newsletter, Vol. 19, April 1984, at pp. 31-32.

0907 REFERENCES. There are many references available to legal assistance officers. Since the law on any subject will vary from state to state, it is critical that all legal assistance officers obtain whatever resources are available locally. Available resources include the following items.

A. Headquarters, Department of the Army, DA Pam. 27-12, Legal Assistance Handbook (Dec. 1974)

B. Headquarters, Department of the Army, DA Pam. 27-166, Soldiers' and Sailors' Civil Relief Act (Jul. 1971)

C. The Judge Advocate General's School, U.S. Army, All States Guide to Garnishment Laws and Procedures

D. The Judge Advocate General's School, U.S. Army, All States Marriage and Divorce Guide (Jan. 1984)

E. The Judge Advocate General's School, U.S. Army, All States Will Guide (Sep. 1983)

F. The Judge Advocate General's School, U.S. Army, All States Consumer Law Guide (Sep. 1983)

G. Office of the Judge Advocate General, Headquarters USAF, All States Income Tax Guide (1985)

H. OPNAVINST 5801.1 series, Subj: Legal Checkup Program

I. JAGINST 5801.1 series, Subj: Legal Checkup Program

J. Department of the Treasury, IRS, Publication 17/Package X -- Your Federal Income Tax (1984)

K. Department of the Navy, Office of the Judge Advocate General, Legal Assistance Bulletin

L. American Bar Association, Legal Assistance for Military Personnel (LAMP) Committee, Legal Assistance Newsletter

M. Special Assistant to the President and Director, U.S. Office of Consumer Affairs, Consumer Resource Handbook (1983)

N. Headquarters, Department of the Army, DA Pam. 27-50, The Army Lawyer

O. Off The Record, Office of the Judge Advocate General of the Navy

P. Office of the Judge Advocate General of the Air Force, AFRP 110-2, The Reporter

Q. 7 Martindale-Hubbell Law Directory: Law Digests, Uniform Acts, A.B.A. Codes (1984)

R. Marine Corps Manual for Legal Administration, MCO P5800.8 (Dec 1984)

S. The Judge Advocate General's School, U.S. Army, All States Guide to State Notarial Laws (1984)

T. The Judge Advocate General's School, U.S. Army, All States Guide to Garnishment Laws and Procedures (Jan. 1982)

U. Department of the Navy, Office of the Judge Advocate General, Legal Assistance Deskbook

V. Department of the Navy, Office of the Judge Advocate General (Code 124), Legal Assistance Memoranda

W. ALNAV 048/89 of 2 May 89, Subj: Test Program for the Reimbursement of Adoption Expenses

If resource materials are needed at your command, one should first contact the field library section of the Office of the Judge Advocate General of the

Navy to ascertain what is available for field libraries. Secondary sources are: Department of the Army, U.S. Army AG, Publications Center, 2800 East Boulevard, Baltimore, Maryland, 21220 (DA Pamphlets); the Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22901; and Consumer Resource Handbook, Handbook Consumer Information Center, Pueblo, Colorado 81009.

PART B - DOMESTIC RELATIONS PROBLEMS

0908 NONSUPPORT OR INSUFFICIENT SUPPORT OF DEPENDENTS GENERALLY. Nonsupport complaints are among the more common problems handled by the Navy and Marine Corps legal assistance program. The typical case involves an accusation by a servicemember's spouse, made either in person or by letter, that the servicemember has neglected his/her legal and/or moral obligation to his/her spouse and their children. Other instances concern an allegation by the member's former spouse that he/she has failed to make child support payments in accordance with the divorce decree. In still other circumstances, the servicemember may require assistance to handle a spendthrift spouse or one who insists that family support payments must be increased. The Navy and Marine Corps recognize that every person has a moral and legal obligation to support his/her dependents and, further, that failure to provide adequate support brings discredit upon the naval service. Moreover, persistent support difficulties divert a servicemember's attention from service duties and thereby decrease job performance. It must be remembered that support obligations apply to all members regardless of sex. It should be further noted that the obligations discussed herein refer only to those expected of a member by the military, which may not necessarily coincide with a member's moral obligations or the legal obligations which may be imposed by the laws of any particular state.

0909 POLICY. "The Navy will not act as a haven for personnel who disregard or evade obligations to their legal dependents. All members shall provide adequate and continuous support for their lawful dependents .... Any failure to do so which brings discredit upon the naval service may be cause for administrative ... action ... which may include ... separation... " MILPERSMAN art. 6210120.1. See also LEGADMINMAN, para. 8001.

0910 OBLIGATIONS

A. Spouse. The member has a continuing obligation to provide adequate and continuous support to a dependent spouse unless:

1. A court order relieves the member of the obligation;

2. the dependent spouse relinquishes the support, preferably in writing;

3. there is mutual agreement of the parties that no support will be paid (e.g., a separation agreement); or

4. a waiver granted by the Navy Family Allowance Activity (Navy) or Commandant of the Marine Corps (Code MSPA-2) (Marine Corps) on grounds of desertion (without cause), infidelity, or physical abuse.

B. Waiver of military obligation to support spouse. (MILPERSMAN, art. 6210120.4; LEGADMINMAN para. 8004.4)

1. Grounds. The servicemember's obligation to support a dependent spouse may be waived, at the request of the servicemember, for desertion without cause, infidelity, or physical abuse by the dependent spouse.

2. Procedure. The servicemember must submit a written request for waiver of the obligation to support the dependent spouse--including substantiating evidence, such as:

a. An affidavit based on personal knowledge of any affiant (although documents from the servicemember or relatives should be supported by corroborative evidence); or

b. written admissions made by the spouse contained in letters written by him/her to the servicemember or other persons.

3. Effect. The support obligation does not terminate until the waiver has been granted. Such a waiver does not relieve the member of any court-ordered obligation to the spouse. A court order as a general rule must always be followed by the member. If the amount of support ordered by the court is excessive, or if the dependent spouse is acting irrationally, the remedy for the member is not a waiver but rather to seek modification of the court order.

C. Children

1. General. The obligation of a parent to support his/her minor children, whether natural or adopted, is unaffected by desertion or other misconduct on the part of the spouse. In the event of divorce, the support obligation continues--except in the rare case of a decree specifically negating the parent's obligation to provide child support. A decree silent as to child support is not construed as relieving the servicemember of the obligation. Any obligation to support one's natural children terminates upon their adoption by others. Care of the child by someone under a custody agreement is not adoption and does not in itself relieve the natural parent of the duty to support.

2. Withholding action for child support. A Navy command may withhold action for alleged failure to support a child/children if:

a. The whereabouts of the child/children is unknown; or

b. the person requesting support does not have physical custody of the child/children. Note: If some person other than the parent has legitimate custody, payments may be made to that person.

0911 AMOUNT OF SUPPORT

A. Significant factors. Factors that many courts consider in determining the amount of the support to be ordered are:

1. The member's pay;

2. other private income of the member;

3. income of the dependent(s);

4. cost for the necessities of life of the dependent(s); and

5. other financial obligations of the member and dependent(s) in relation to his/her income.

B. Specific support guidelines. Support amounts acceptable to the naval service are determined according to one of the following:

1. Court order. A court order for support payments normally takes into account the factors listed in paragraph A above. Where such an order has fixed the amount of support due a spouse and/or children, the servicemember will be expected to comply with the order.

2. Mutual agreement. Any mutual agreement of the parties should preferably be in writing.

3. Absence of court order or mutual agreement. In the absence of a court order or mutual agreement, article 6210120.3a of the MILPERSMAN and paragraph 8002 of the LEGADMINMAN provide guidelines that may be used until such time as an appropriate order or agreement is obtained. These guidelines are only interim measures and are not a permanent solution to nonsupport or insufficient support problems. The scale amounts are not intended as fixed standards, but may be increased or decreased as the factors of any particular case warrant.

a. Navy

Relationship and number of dependents	Support to be provided
Spouse only	1/3 gross pay
Spouse and one minor child	1/2 gross pay
Spouse and two or more children	3/5 gross pay
One minor child	1/6 gross pay
Two minor children	1/4 gross pay
Three minor children	1/3 gross pay

For the purposes of this table, gross pay includes basic pay and BAQ, but does not include hazardous duty pay, sea and foreign duty pay, incentive pay, or basic allowance for subsistence. Some uncertainty presently exists as to the status of variable housing allowance. It is recommended that it not be included in the definition of gross pay.

b. Marine Corps

Relationship and number of dependents	Support to to be provided
Spouse only	BAQ plus 20% of basic pay
Spouse and one minor child	BAQ plus 25% of basic pay
Spouse and two or more minor children	BAQ plus 30% of basic pay
One child	one-sixth of basic pay
Two minor children	one-fourth of basic pay
Three or more minor children	one-third of basic pay

In no event, however, should the amount of support be less than the applicable rate of basic allowance for quarters.

0912 COMPLAINTS OF NONSUPPORT OR INSUFFICIENT SUPPORT

A. Interview. Upon receipt of a complaint alleging nonsupport or insufficient support of dependents, the command must arrange for an interview of the servicemember concerned. Normally, such an interview is conducted by the member's division officer or command legal officer.

B. Action

1. Undisputed failure of support. If the member acknowledges his/her obligation and admits a support delinquency, he/she will be informed of the policy concerning support of dependents, including the potentially adverse consequences an unsatisfactory response may have upon his/her service career. In the absence of a determination by a civil court or mutual agreement of the parties, the support guidelines previously mentioned will be applied.

2. Disputes. Disputed complaints should be referred to the nearest legal assistance officer. In no case, though, will a servicemember be allowed to suspend support payments while resolution of a dispute is pending. If he/she cannot produce satisfactory evidence of an agreement or order substantiating a claim that some amount less than demanded is due, the support guidelines previously mentioned will be applied.

3. Command's response. Correspondence should be directed to the complainant indicating that the matter has been referred to the servicemember reflecting his/her intended action on the complaint.

C. Repeated complaints

1. Possible penalties and other action for noncompliance. The member who refuses to carry out his support obligation, or upon whom numerous justifiable complaints have been received, should be counseled that one or more of the following actions could occur:

a. Lower evaluations;
b. administrative separation for a pattern of misconduct;
c. nonjudicial punishment under UCMJ, art. 134, dishonorable failure to support dependents;

d. BAQ will be withheld and/or recouped;
e. loss of tax exemption for the dependent;
f. garnishment of pay;
g. removal from sensitive duties (e.g., PRP); and
h. involuntary allotment.

2. Administrative separation. Article 3630600 of the MILPERSMAN and para. 6210.3 of the MARCORSEPMAN authorize administrative separation processing for misconduct by reason of, inter alia, an established pattern of dishonorable failure to contribute adequate support to dependents or failure to comply with orders, decrees, or judgments of a civil court concerning support of dependents. Before processing, the member concerned must be counseled and given a reasonable opportunity to begin making adequate support payments. MILPERSMAN, art. 3630600; MARCORSEPMAN, paras. 6210.3, 6105. At the time such counseling is rendered, an appropriate warning entry should be made on page 11 (USMC)/page 13 (USN) of the member's service record book.

D. Garnishment

1. General. Garnishment is a legal proceeding by which a court orders the employer to withhold all or a portion of an individual's pay and to pay the withheld amount to the court to satisfy a court-ordered judgment. Section 659 of title 42 United States Code, authorizes the garnishment of wages paid to employees of the Federal Government, including active-duty and retired military members, for the purpose of enforcing child support and alimony obligations. The Uniformed Services Former Spouses' Protection Act (USFSPA) 1002(a), 10 U.S.C.A. § 1408 (West Supp. 1984), also provides for garnishment to enforce the terms of a property settlement incident to divorce if certain requirements are met. See section 0930 of this text for a discussion of the USFSPA.

2. References. SECNAVINST 7200.16 series, Subj: Garnishment of pay of naval military and civilian personnel for collection of child support and alimony; DoDPM, pt. 7, ch. 7, B; 3 NAVCOMPTMAN, ch. 3; LEGADMINMAN, para 8006.

3. Procedures. The spouse of the servicemember must first obtain an order of a court of competent jurisdiction ordering child support or alimony. This will normally be a decree of divorce, although it does not necessarily need to be. If the servicemember fails to comply with this court order, the spouse then may go to the same or a different court seeking an order in garnishment to enforce the original order. Upon a showing of an order awarding support or alimony and a failure to comply, the second court will then issue an order garnishing the servicemember's pay.

4. Service of process. Process affecting the military pay of active-duty, Reserve, Fleet Reserve, or retired members, wherever serving or residing, may be served personally or by registered or certified mail as indicated below:

a. Navy: Director
Navy Family Allowance Activity
A. J. Celebrezze Federal Building, Rm 967
Cleveland, OH 44199

b. Marine Corps: Commanding Officer (Code AA)
Marine Corps Finance Center
Kansas City, MO 64197

Process affecting the pay of active civilian employees of the Department of the Navy shall be forwarded to the designated officials listed in paragraph 4a(3) of SECNAVINST 7200.16, cited above.

5. Pay subject to garnishment. Only pay that is "remuneration for employment" is subject to garnishment. Those entitlements designated "pay" are generally subject to garnishment, while "allowances" are not. (As a result of garnishment, many allotments such as "B," "C," "D," "I," and "L" may be involuntarily stopped.)

6. Command responsibility. Upon receipt of a writ or order of garnishment (also called a wage assignment, an order to withhold and deliver, or a writ or order of attachment), the command will forward all correspondence to the action officer mentioned in paragraph D4 above. Simultaneously, the command receiving the request will send a letter to the requester advising of such forwarding action. The commanding officer of the member or employee shall ensure that the member or employee has written notice of the action and that he/she is afforded counseling. The command will then receive and comply with instructions from the cognizant finance activity. See The Judge Advocate General's School, U.S. Army, All States Guide to Garnishment Laws and Procedures (Jan. 1982).

E. Involuntary allotments. A member's pay may be subject to involuntary allotments, without the need for garnishment proceedings, in several situations.

1. Under the Uniformed Services Former Spouses' Protection Act 1002(a), 10 U.S.C. § 1408 (1982 & Supp. II 1984), 10 U.S.C. § 1072 (1982 & Supp. II 1984), a court order to pay a portion of retired or retainer pay to a spouse or a former spouse is enforceable by payments directly from the military finance center without the need for periodic garnishment proceedings, provided the marriage lasted at least 10 years while the servicemember was performing service creditable for purposes of retired or retainer pay. See section 0930 of this text.

2. Under the Tax Equity and Fiscal Responsibility Act of 1982 172(a), 42 U.S.C.A. § 665 (West Supp. 1984), if a member is two or more months in arrears on child or spousal support, the member's spouse may file a complaint with appropriate state authorities. Upon notification by the state authorities, military authorities are required to notify the member to begin payments within 30 days or suffer automatic deductions of the payments from his/her pay.

0913 FAMILY ADVOCACY PROGRAM (FAP)

A. General. The Family Advocacy Program is designed to address prevention, evaluation, identification, intervention, treatment, and reporting of child and spouse maltreatment, sexual assault, and rape. The primary goal of FAP is the prevention of abuse. (For further information on this program, see chapter 5 of this study guide.)

B. References. SECNAVINST 1752.3 series, Subj: Family Advocacy Program; NAVMEDCOMINST 6320.22 series, Subj: Family Advocacy Program.

C. Organization

1. Central Family Advocacy Committee (CFAC). A committee appointed by the Commander, Naval Medical Command, for the purpose of assisting the Commander in overseeing the functioning of the FAP within the Department of the Navy health-care system.

2. Family Advocacy Representative (FAR). A person designated by health-care-treatment commanding officers to implement and manage the FAP at medical facilities.

3. Family Advocacy Committee (FAC). A team of professionals--including representatives from command, legal, NIS, base security, health care, chaplains, Family Service Centers, child-care centers, recreation services youth programs, schools, and Navy Relief--who work at the station/base level and are tasked with the evaluation and determination of maltreatment cases and the submission and coordination of treatment and disposition recommendations.

D. Program guidance

1. Referral. Many cases are referred to the FAC through the employees or workers at the different base facilities. For example, the battered spouse who walks into the Navy Relief office or the abused child who is left at the base child-care center would be referred to the FAC as a case for consideration.

2. Voluntary self-referral. Any active-duty member may obtain counseling or treatment services through voluntary self-referral to a FAP representative. The case will be referred to the appropriate FAR for counseling and treatment, as required.

3. Treatment. Where justified by positive previous performance, individual motivation and positive rehabilitative potential, administrative action in the form of counseling/education is the preferred course of action.

4. Administrative separation. Military members who refuse treatment or are not able to modify their abusive behavior during a one-year treatment program shall be processed for administrative separation from the service by reason of the offense committed. However, disclosure of offenses to a FAP representative during voluntary self-referral may not be used against the member in any disciplinary action under the UCMJ or as the basis for characterizing a discharge.

E. Confidentiality. An allegation of abuse, neglect or sexual assault can place professional standing, social acceptance and career progression in jeopardy. Therefore, all records of the FAP shall be treated with the highest degree of professional confidentiality. The Privacy Act guidelines should be scrupulously applied in these cases.

0914 GENERAL. MILPERSMAN, art. 6210125; LEGADMINMAN, para. 8005. Complaints alleging that a servicemember is the father of an illegitimate child may be received by the command before, as well as after, the birth of the baby. Neither civil law nor naval regulations require a man to marry the mother of his child. Local law, however, generally requires that a father support his illegitimate offspring and Navy and Marine Corps policy concerning support of dependents applies equally to illegitimate children. In many cases, a proper solution to a paternity problem involves not only the legal assistance officer who will advise the member as to his legal obligations and liabilities, but also the chaplain who may advise the member concerning the moral aspects of the situation.

0915 PROCEDURES

A. Interview and action. Upon receipt of a paternity complaint, the command concerned will arrange for the interview of the servicemember and action will be taken as follows:

1. Judicial order or decree of paternity or support. If a judicial order or decree of paternity or support is rendered by a state or foreign court of competent jurisdiction, the member shall be advised that he is expected to provide financial assistance to the child regardless of any doubts of paternity he may have. Questions concerning the competency of the court to enter such a decree against the servicemember, particularly one not present in court at the time the order or decree was rendered, should be directed to a legal assistance officer.

2. Acknowledgement of paternity. If, in the absence of legal action declaring him the father, a member admits to paternity or the legal obligation to support the child, he shall be informed that he is expected to furnish support payments for the child and he should be counseled as to his moral obligation to assist in the payment of prenatal expenses. He should be advised to consult with the nearest legal assistance officer before making the first support payment or before corresponding with the child's mother. The member should be advised that, once support payments are begun, the child will probably qualify for an armed forces dependents' identification card. See NAVMILPERSCOMINST 1750.1 series.

3. Disputed or questionable cases. In instances where no legal action has fixed the paternity of the child and the servicemember disputes or is uncertain of the accusation of the child's mother, he should be referred immediately to the nearest legal assistance officer. Since many states construe an offer of, or actual payment of, any support for the child as an admission of paternity, the servicemember should not be advised or directed to make any payments or give any indication of intent to provide financial support before he has consulted with the legal assistance officer.

4. *Correspondence.* Replies to individuals concerning paternity cases should be as kind and sympathetic as circumstances permit. MILPERSMAN, art. 6201025; LEGADMINMAN, para. 8005. Article 6210125.5 of the MILPERSMAN sets out sample replies which may be appropriate in some cases.

B. Amount of support: alternatives. MILPERSMAN, art. 6210125.3a; LEGADMINMAN, para. 8002.

1. Court decree. If a court order specifying an amount of support to be provided has issued from a court of competent jurisdiction, the servicemember will be expected to comply therewith.

2. Reasonable agreement with mother or legal guardian of child. If agreement can be reached by the natural mother and father, that amount should be paid. The legal assistance officer can help determine a reasonable and fair amount.

3. Support guidelines. The support guidelines for illegitimate children are identical to those discussed for legitimate and adopted children in section 0911B3, above.

4. Lump-sum settlements. In many states, "paying off" the mother of the child--even where she agrees in writing to forego pursuing any claims of paternity or child support--is ineffective as well as against public policy. The naval service has no stated policy concerning this practice apart from its firm directive that servicemembers will provide "adequate and continuous support for their lawful dependents." Cases involving lump-sum payment offers from either party, or paternity complaints following "payoffs," should be immediately referred to a legal assistance officer.

5. Basic allowance for quarters (BAQ). Note that support of an illegitimate child may entitle a member to BAQ at the "with dependents" rate.

C. Marriage. Since there is no legal requirement for a father to marry the mother of his child, the matter is one for the personal determination of the servicemember. Questions that he may have concerning his moral obligation may be resolved by and with the assistance of the chaplain.

PART D - INDEBTEDNESS

0916 GENERAL. In this age of expanded credit opportunities, the servicemember's regular and relatively secure source of gradually increasing income has made him attractive to installment retailers, loan companies, and other consumer credit operations. Unfortunately, the ease with which credit is made available sometimes results in the tendency to overextend and, in some cases, the inability to pay. In cases of default, disappointed creditors frequently correspond with the commanding officer of the member concerned in hopes that official pressure will be exerted to make the debts good.

0917 POLICY. MILPERSMAN, art. 6210140; LEGADMINMAN, para. 7001. From inception to final settlement, a monetary obligation is regarded as a private matter between the servicemember and his/her creditor. A member of the naval service, however, is expected to settle his/her just financial obligations in a proper and timely manner. The failure to pay just debts or the repeated undertaking of obligations beyond one's ability to pay is regarded as evidence of irresponsibility which must be considered in retaining security

clearances, making advancements in rate or special duty assignments, recommending reenlistments, or authorizing extensions. In aggravated circumstances, indebtedness problems may become grounds for disciplinary action or administrative separation. Accordingly, although the naval service has no authority to require a member to pay any private debt or to divert any portion of his salary in payment thereof, and no commanding officer may adjudicate claims or arbitrate controversies respecting alleged financial defaults, all commanding officers should cooperate with creditors to the limited extent of referring "qualified correspondence" to the member concerned. Particular situations evidencing continued or consistent financial irresponsibility should be dealt with as outlined above and in section 0912C.1 of this text.

0918 THE MILITARY AND CONSUMER CREDIT PROTECTION

A. Truth in lending

1. General. The Federal Truth in Lending Act, title I, 15 U.S.C. §§ 1601-1613, 1631-1641, 1671-1677 (1982), is designed to assure "a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various terms available to him and avoid the uninformed use of credit." To this end, the Act requires that credit terms and costs be explained to the consumer in a uniform manner by revealing "the annual percentage rate of the total finance charge." Implementation of the Act is the responsibility of the Federal Reserve Board, currently fulfilled through the terms of the board's "Regulation Z," which details such things as the disclosures required, the relative size of type which must be used in credit contracts, provisions for evidencing the customer's acknowledgment of credit terms, and so forth.

2. Coverage. The Act applies to virtually everyone who extends consumer credit--including loan credit, credit extended by sellers, real estate credit, chattel credit, retail revolving credit, and bank and other credit card arrangements. It affects individual purchase transactions "primarily for personal, family, household or agricultural purposes." In lieu of the Federal requirements, state disclosure regulations apply whenever the Federal Reserve Board has determined that the state in question has imposed substantially similar requirements together with adequate enforcement measures.

B. DoD Directive 1344.9. In outlining service policies regarding indebtedness of military personnel, DoD Dir. 1344.9 of 7 May 1979, Indebtedness of Military Personnel, provides that creditors seeking to have indebtedness complaints administratively referred to the allegedly defaulting servicemember must first demonstrate compliance with the disclosure requirements of the Truth in Lending Act and also show that the military "Standards of Fairness" have been applied to the transactions.

C. Standards of Fairness. These "Standards of Fairness," published as enclosure (3) to DoD Dir. 1344.9 cited above and in appendix E of this text, include provisions ensuring that the nature and elements of a credit transaction will be fair, equitable, and ethical. For example:

1. Usury. No finance charge contracted for, made, or received under any contract shall be in excess of the charge which could be made for such contract under the law of the place in which the contract is signed in

the United States by the servicemember. In the event a contract is signed with a United States company in a foreign country, the lowest interest rate of the state or states in which the company is chartered or does business shall apply.

2. Attorney's fee. No contract or loan agreement shall provide for an attorney's fee in the event of default unless suit is filed, in which event the fee provided in the contract shall not exceed 20% of the obligations found due.

3. Prepayment. There shall be no "penalty charge" for prepayment of an installment obligation. Moreover, in the event of prepayment, the creditor may collect only a portion of the potential finance charges prorated to the date of prepayment.

4. Late payments. No late charge shall be made in excess of 5% of the late payment, or $5.00, whichever amount is the lesser; and only one late charge may be made for any tardy installment. Late charges will not be levied where an allotment has been timely filed, but payment of the allotment has been delayed.

5. Assignment to escape defenses. In loan transactions, defenses which the servicemember may have against the original lender may not be "cut off" through the assignment of his obligation to a third party. As an example, consider the case of Roilo having purchased on credit a television set from Department Store M. If M sells Rollo's agreement to pay for the television to collection agency B, and the television breaks down, B may not insist upon the fact that the breakdown is M's responsibility and therefore has nothing to do with Rollo's obligation to pay B.

D. Fair Debt Collection Practices Act

1. General. The Federal Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692o (1982), prohibits contact by a debt collector with third parties (such as a commanding officer) for the purpose of aiding debt collection unless there has been prior consent by the debtor, or a court order has been obtained. The Act carefully defines what a debt collector is and is not. Generally, those prohibited from contacting the commanding officer are those firms who are engaged in the collection of debts as their primary purpose; in other words, the original creditor has given up trying to collect and turned it over to a "professional." The Act does not prohibit the original creditor from contacting the command.

2. State law. While the Federal Fair Debt Collection Practices Act is a law with application in every locale, many states have enacted state laws covering the same subject. These state laws may be more strict than the Federal law and, when inconsistent, the more strict provisions must be complied with.

3. Action. If it is determined that the debt collector is in violation of the Fair Debt Collection Practices Act or a state statute regulating debt collection practices, the correspondence will be returned to the sender, along with a letter similar to sample letter No. 1 set forth in article 6210140.13 of the MILPERSMAN or fig 7-5, LEGADMINMAN. If a letter is in compliance with the appropriate Federal or state law in this regard, the indebtedness complaint will be processed as set forth below.

0919 PROCESSING OF INDEBTEDNESS COMPLAINTS IN THE NAVAL SERVICE

A. General. Complaints of indebtedness are generally referred to the servicemember when the creditor correspondence is accompanied by: (1) Evidence that the debt complained of has been reduced to judgment; or (2) a "Certificate of Compliance," or its equivalent, that the credit transaction was made in accordance with the Truth in Lending Act and the Standards of Fairness. A nonjudgment creditor must also submit a statement of "Full Disclosure" showing the terms of the transaction disclosed to the servicemember at the time the contract was executed. See appendix E of this text. Marine Corps procedure for processing of indebtedness complaints, which is outlined in paragraph 7002 of the LEGADMINMAN, is essentially the same as that detailed in article 6210140 of the MILPERSMAN. Significant variations will be discussed at the end of this section.

B. Qualified indebtedness complaints

1. Types. The types of indebtedness complaints which qualify for referral to the servicemember, include:

a. Creditor correspondence evidencing that the alleged debt has been reduced to judgment by a court of competent jurisdiction;

b. correspondence from a nonjudgment creditor that includes copies of the statement of Full Disclosure and the Certificate of Compliance showing execution by both parties prior to the consummation of the contract;

c. correspondence from a nonjudgment creditor who has not executed a Certificate of Compliance prior to the consummation of the contract, or who cannot produce the certification provided that such correspondence includes:

(1) Certification by the creditor that the Standards of Fairness have been complied with and the unpaid balance adjusted accordingly, if necessary; and

(2) a statement of Full Disclosure.

d. correspondence from a creditor not subject to the Truth in Lending Act (e.g., a public utility company) that includes a certification that no interest, finance charge, or other fee is in excess of that permitted by the law of the state involved; and

e. correspondence from creditors declared exempt from certification of compliance with the Standards of Fairness and Full Disclosure by article 6210140.8 of the MILPERSMAN. Examples include:

(1) Companies furnishing services such as milk, laundry, etc., in which credit is extended solely to facilitate the service, as distinguished from inducing the purchase of the product or service;

(2) contracts for the purchase, sale, or rental of real estate;

(3) claims in which the total unpaid amount does not exceed $50;

(4) claims for the support of dependents;

(5) purchase money mortgages on real property; and

(6) claims based on a revolving or open-end credit account, if the account shows the periodic rate and its annual equivalent and the balance to which it is applied to compute the charge (e.g., credit cards, department store charge accounts).

NOTE: Above exemptions do not apply in Marine Corps.

2. Action

a. Referral to debtor servicemember. Normally, referral of a qualified indebtedness complaint to the debtor servicemember is accomplished by a division-officer or command-legal-officer conference at which the member is confronted with the allegation of default. If, after confrontation, the servicemember acknowledges the debt and his/her ability to pay, he/she should be instructed that he/she is expected to make good the debt as soon as possible. In the event the servicemember disputes the debt or indicates his/her inability to pay, he/she should be referred to the nearest legal assistance officer. Such a referral should also be made in the case of a judgment debt apparently obtained in violation of the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. app. 501-591 (1982). In all cases, the servicemember should be warned of the potential adverse consequences the continued nonpayment of a just debt may have upon his/her service status. See section 0912C.1 of this text.

b. Correspondence with the creditor. In the case of a complaint referred to a servicemember-debtor, it is expected that the creditor will receive notification of the referral and some indication of the debtor's intentions. Accordingly, the command should forward a letter, as set forth in sample letter number 3 in article 6210140.13 of the MILPERSMAN or figure 7-4 of the LEGADMINMAN t the creditor and ensure that the member's intentions will reach the creditor either directly or through a legal assistance officer.

C. Unqualified or questionably qualified indebtedness complaints

1. Initial reply. Where the correspondence indicates the complaining creditor has no judgment, is subject to the Truth in Lending Act, is not exempt under MILPERSMAN 6210140.8, and contains no evidence of the compliance-disclosure requirements already discussed, the command shall forward a letter, as set forth in sample letter number 2 of article 6210140.13 of the MILPERSMAN or figure 7-5 of LEGADMINMAN, enclosing a copy of the Standards of Fairness and forms for Full Disclosure and the Certificate of Compliance as printed in appendix E of this text. The complaint should be held in abeyance pending reply from the creditor.

2. Action on reply from creditor. If the creditor resubmits his complaint and includes the completed, required forms, or their equivalent, the

complaint will be considered qualified and processed accordingly. If the resubmitted complaint contains neither form, or a set incompletely or insufficiently accomplished, the command shall return the creditor's correspondence with a cover letter patterned on sample letter number 4 of article 6210140.13 of the MILPERSMAN and a copy thereof in the Navy to the Commander, Naval Military Personnel Command.

3. Questionable qualified indebtedness complaints. Cases of questionable qualification should be referred to a legal assistance officer, or specially designated command representative, for review and opinion. In such instances, correspondence to the creditor should be tailored appropriately.

4. Congressional inquiries. Occasionally, a disgruntled creditor who has failed to qualify his complaint for referral writes to his Congressman. In the event of a congressional inquiry based on such an event, sample letter number 5 in article 6210140.13 of the MILPERSMAN may be used.

D. Marine Corps variations

1. In the Marine Corps, complaints of indebtedness are processed under Chapter 7 of the LEGADMINMAN. The Marines consider qualified correspondence to be that which either certifies compliance with DOD Standards of Fairness, comes from creditors not subject to the Truth in Lending Act, or relates to indebtedness reduced to judgment in accordance with state law. The Marine Corps recognizes none of the exemptions from compliance with the DOD standards set forth in MILPERSMAN 6210140.8 and discussed on the preceding page of this study guide, and these exemptions should be considered applicable to naval personnel only.

2. As in the Navy, qualified correspondence is referred to the Marine and he is counseled concerning his obligations as well as being advised as to his rights. If appropriate, he may also be referred to additional financial, legal, or credit-counseling on base. See LEGADMINMAN § 7002.5.

3. Special procedures for detached marines. In cases where the commander receives an indebtedness complaint regarding a marine no longer a member of his command, he shall forward the address of the new duty station of the debtor to the creditor, if available from local records. If the present location of the debtor is unknown, the commander will correspond with the creditor referring him/her to the locator at CMC. If the complaint regarding a detached member has come from CMC rather than directly from the creditor, the commander will readdress and forward it or return it to CMC, as appropriate. See fig. 7-6, LEGADMINMAN. (The Navy follows the same sort of procedure, although it is not specified in the MILPERSMAN.)

0920 ADMINISTRATIVE OR DISCIPLINARY ACTION BECAUSE OF INDEBTEDNESS

A. General. Actions discussed by this section are usually reserved for aggravated cases of servicemembers who persist in demonstrating no inclination to settle qualified obligations that have been referred to them through their commands. Such cases involve members who continually overextend themselves

despite prior difficulties from, and warnings regarding, living beyond their means. Normal indications of these problems are repeated complaints from the same creditor or multiple complaints from different sources.

B. Administrative separations. MILPERSMAN, art. 3630600; MARCORSEPMAN, para. 6210.3. Servicemembers may be separated for misconduct due to a pattern of misconduct when they exhibit an established pattern of dishonorable failure to pay just debts. Processing for misconduct could result in an other than honorable separation with attendant loss of service benefits. In each case, the member concerned must have received prior counseling and been afforded a reasonable opportunity to overcome his deficiencies. Following such counseling, an appropriate warning entry should be made on page 11 (USMC)/ page 13 (USN) of the member's service record.

C. Disciplinary action. Article 134, UCMJ, includes the offense of "dishonorable failure to pay a just debt," which carries a maximum punishment of six months' confinement, forfeiture of all pay, and a bad-conduct discharge. Deceit, willful evasion, false promise, or other circumstances indicating gross indifference must be proved to establish the offense. Nonjudicial punishment or court-martial action may be initiated under article 134 at the discretion of the command. It should be remembered, however, that disciplinary action is never an appropriate vehicle for assisting creditors in the collection of debts. Moreover, disciplinary action not resulting in discharge is likely to produce financial hardship in the form of reduction or forfeiture, an end hardly likely to rehabilitate the debtor. Accordingly, in most cases, administrative actions, rather than disciplinary measures, offer more appropriate solutions to aggravated indebtedness situations.

0921 NOTE ON BANKRUPTCY

A. Policy. The Navy neither encourages nor discourages the filing of a petition in bankruptcy. The circumstances prompting bankruptcy proceedings are considered officially since they may reflect adversely on the military character of the petitioner. A discharge in bankruptcy does not give a member immunity from prosecution for offenses of dishonorable failure to pay just debts committed prior to a petition of bankruptcy. MILPERSMAN, art. 6210140.3k.

B. Action. Bankruptcy involves a complex and relatively expensive legal process. Members contemplating personal bankruptcy proceedings frequently entertain misconceptions concerning the ease with which the project may be carried through and the actual rehabilitative effect bankruptcy will have on their financial status. Accordingly, servicemembers considering bankruptcy should be referred to a legal assistance officer for counseling.

PART E - SOLDIERS' AND SAILORS' CIVIL RELIEF ACT

0922 BACKGROUND. It has long been recognized that a person's entry into the armed service carries with it a potentially burdensome disruption of personal affairs. The servicemember's assignment far from home and occupation with military duties may impair that person's ability to attend to personal financial, and legal matters; his/her financial situation may be affected by a

substantial reduction in income; and the member's presence in states other than that of his/her domicile could subject him/her to multiple taxation of his/her income and property. During the Civil War period, many states enacted stay laws which imposed absolute moratoria on enforcement of legal rights against servicemembers. Experience soon taught, however, that such arbitrary and rigid prohibitions of suits against servicemembers were not only unnecessary but, in truth, a self-defeating kindness to the soldier. Most servicemembers can if given time and opportunity, attend to their affairs and meet their obligations, making the total prohibition upon enforcing rights against servicemembers unnecessary while having the untoward effect of denying credit to him/her and his/her family at a time when it may be most needed. The first nationwide legislation designed to protect the servicemember, the Soldiers' and Sailors' Civil Relief Act of 1918, Act of Mar. 8, 1918, ch. 20, 40 Stat. 440, rejected the absolute prohibition approach of the early states' stay laws. This Act provided protection in the form of suspension of legal proceedings and transactions which may prejudice the "civil rights" of a servicemember during the time that a person is in the military service, when, and if, his/her opportunity and capacity to perform his/her obligations are materially impaired by reason of his/her being in the military service. This general approach of suspending proceedings and transactions based upon the determination of material impairment is carried forward into the Soldiers' and Sailors' Relief Act of 1940, 50 U.S.C. app. 501-591 (1982) [hereinafter the 1940 Act or the Act] which is largely a reenactment of the Soldiers' and Sailors' Civil Relief Act of 1918. Except for specific relief provisions deemed necessary to the Act's objectives, this approach is embodied in most of the remedies afforded by the 1940 Act. Additionally, criminal penalties are added for actions evading or frustrating the relief provisions of the 1940 Act.

0923 ARTICLE I: GENERAL PROVISIONS

A. Purpose and scope of the Act. The 1940 Act is intended to enable persons on active duty with the armed forces of the United States to devote their attention exclusively to the defense needs of the nation by providing for the temporary suspension of civil proceedings which might prejudice the civil rights of such persons. 50 U.S.C. app. 510 (1982). It should be noted that the 1940 Act does not extinguish any liabilities or obligations, but merely suspends action and enforcement until such time as the ability of the servicemember to answer or comply is no longer materially impaired by reason of military service. Therefore, the Act is not a "shield" that the servicemember picks up when he enlists and then puts down only when he retires or chooses not to reenlist. The Act offers protection only when military duties materially interfere with the member's ability to adequately defend or represent himself/herself in civil court proceedings.

B. Persons entitled to benefits and protections of the Act

1. Persons in the military service defined

a. Members of the United States military establishment, whether officer or enlisted, volunteer or inductee (from the date of receipt of the induction order), who are on active duty with any armed force, or who are in training or education under supervision of the United States preliminary to

induction, are entitled to the protections and benefits of the 1940 Act. 50 U.S.C. app. 511 (1982). The definition encompasses full-time training at a service school so designated by law or the Secretary of the military department concerned. It does not cover retired personnel not on active duty or Reserve personnel not on active duty. In some circumstances, a servicemember absent from duty for other than "sickness, wounds, leave or other lawful cause" may be considered not on active duty and hence divested of his/her rights under the 1940 Act. In Mantz v. Mantz, 69 N.E.2d 637 (Ohio C.P. 1946), the court held that a soldier sentenced by a general court-martial to five years' confinement at hard labor, total forfeitures, and a dishonorable discharge at the termination of his confinement was not a soldier on "active duty" or "active service" and hence not entitled to the immunities and benefits under the 1940 Act. The court reasoned that commitment for any violation of the Army's rules and regulations would not necessarily divest the soldier of his rights under the Act, but the gravity of the offense charged and the sentence of the court-martial are factors to be considered in determining the situation. Thus, in Shayne v. Burke, 158 Fla. 61, 37 So.2d 751 (1946), it was held that a soldier who overstayed his authorized leave by 16 days, because of his wife's condition upon the birth of their first child, was entitled to the benefits of the 1940 Act. As for deserters, the Judge Advocate General of the Army has often expressed his advisory opinion that they are not "persons in the military service of the United States" for purposes of the 1940 Act. See, e.g., JAGA 1952/3654 (22 Apr. 1952). Persons reported missing are also afforded certain safeguards under the 1940 Act. 50 U.S.C. app. 581 (1982).

b. Merchant seamen, civilian employees, contract surgeons, and others accompanying one of the services have been held not to be "persons in the military service" and hence not entitled to the benefits of the Act.

c. Public Health Service (PHS) officers qualify if the PHS has been designated by the President as a military service, a move allowable only in time of war or national emergency.

2. Persons secondarily liable. The enforcement of any liability or obligation against any person primarily or secondarily liable with a servicemember may be subject to the same delays and vacations available to the servicemember. In other words, the courts enjoy considerable discretion in granting stays, postponements, or suspensions of suits or proceedings to sureties, guarantors, endorsers, accommodation makers, and others.

The 1940 Act further provides that, whenever the military service of a principal on a criminal bail bond prevents the sureties from enforcing the servicemember's attendance, the court shall not enforce the provisions of the bond during the principal's military service and may even, either during or after his/her service, discharge the sureties and exonerate the bail. 50 U.S.C. app. 513(3) (1982). In the codefendant situation, however, the 1940 Act provides that as to stays "where the person in military service is a codefendant with others the plaintiff may nevertheless by leave of court proceed against the others." 50 U.S.C. app. 524 (1982).

3. Dependents of servicemembers. Dependents of military personnel may apply to a court for the benefits of the 1940 Act concerning rent, installment contracts, mortgages, liens, assignments and leases under section 0925A of this chapter. 50 U.S.C. §§ 530-536 (1982).

4. U.S. citizens serving with allied forces. Persons serving with an allied force who were, prior to that service, citizens of the United States are entitled to the benefits and protections of the 1940 Act unless dishonorably discharged therefrom. 50 U.S.C. app. 512, 572 (1982).

C. Scope. The Act applies within the United States, in all states and territories subject to U.S. jurisdiction, and to proceedings in all courts--Federal, state, or municipal -- therein. Except as discussed in section 0924C below concerning the statute of limitations, the 1940 Act contains no reference to administrative proceedings. 50 U.S.C. app. 525 (1982). In the few cases where the issue has been raised, it has been held that administrative proceedings (such as hearings before area rent directors and departmental police hearings) are not covered.

D. Waiver of benefits. An exception to the 1940 Act enables servicemembers to waive in writing the protections given them in other provisions of the Act in the case of contracts and security agreements executed during their military service. 50 U.S.C. app. 517 (1982). It was not meant to prohibit servicemembers or their duly authorized representatives from entering into any verbal agreement when such agreement did not waive any rights guaranteed by the Act. Pailet v. Ald, Inc., 194 So.2d 420 (La. App. 1967).

0924 ARTICLE II: GENERAL RELIEF

A. Default judgments

1. General. In "any action or proceeding commenced in any court" where there is a "default of any appearance by the defendant, the plaintiff, before entering judgment, shall file in the court an affidavit setting forth facts showing that the defendant is not in military service." 50 U.S.C. app. 520 (1982). Without an affidavit showing that the defendant is not in the military service, no default judgment may be entered without an order of the court, and the court concerned must first appoint an attorney to represent and protect the interests of any servicemember-defendant. The purpose of this section, then, is to ensure that default judgments are not entered against servicemembers without their knowledge. "[I]t does not prevent entry of such a judgment when there has been notice of pendency of the action and adequate time and opportunity to appear and defend." United States v. Kaufman, 453 F.2d 306 (2d Cir. 1971).

2. "Action or proceeding commenced in any court" defined. This includes actions based on transactions occurring both before and during the period of military service. The reach of default judgment protection is comprehensive in blanketing all civil actions or proceedings, whatever their nature, but not administrative proceedings. There seems to be little reported controversy on this point apart from the position of the Ohio court which, in Case v. Case, 124 N.E.2d 865 (Ohio P.Ct. 1955), decided to the contrary respecting the presentation of a will for probate (the minor son of the decedent was in the military at the time). The great majority of decisions have included probate cases within the scope of the default judgment protections.

3. "Any appearance" defined. The courts are agreed that "any appearance" whatsoever by the servicemember-defendant will operate to obviate the default judgment protections and thereby render him/her subject to a default judgment. The words embrace the concept of voluntary submission to the court's jurisdiction in whatever form. Any act before the court by the defendant or by his/her retained, as distinguished from court-appointed, attorney will generally constitute a disqualifying appearance. Courts dealing with the issue have decided the cases based on motions to dismiss for lack of jurisdiction, motions to quash service, and motions for continuance. In some states, servicemembers receiving service of process may write a letter or send a telegram to the court asking for protection under the Act, and such informal communication has not been classified as an "appearance." Rutherford v. Bentz, 354 Ill. App. 532, 104 N.E.2d 343 (1952). The same status was afforded to a legal-appearing document prepared by a military legal assistance officer and mailed to the court. Bowery Savings Bank v. Pellegrino, 185 Misc. 912, 58 N.Y.S.2d 771 (1945). Before advising a servicemember to write his/her own letter or preparing a document for him/her, however, a legal assistance officer must be certain that such informal communication with the trial court or the clerk of such a court will not be construed as an "appearance" by the servicemember.

4. Action by the court

a. Where affidavit shows defendant is in the military, no default judgment may be entered until the court has appointed an attorney to represent the servicemember-defendant. In addition, the power of the court to enter default judgment will depend upon state law on in personam jurisdiction. Upon application, the court shall make such an appointment; but no such appointed attorney has the power to waive any right of the servicemember or to bind the servicemember by his acts. In addition, the court may require as a condition of judgment that the plaintiff file a bond approved by the court to indemnify the servicemember-defendant or make such "further order or enter such judgment as in its opinion may be necessary" to protect the rights of the defendant under the Act.

b. Where no affidavit has been filed, technically, no default judgment should be entered; however, some courts treat this situation as if an affidavit showing the defendant were in the military has been filed and proceed accordingly. Default judgments entered in violation of the Act are voidable. See paragraph 5 infra.

c. Where a false affidavit has been filed, the person filing the false affidavit may be punished as a misdemeanant subject to a maximum punishment of imprisonment for one year and a $1000 fine. 50 U.S.C. app. 520(2) (1982). If brought to the attention of the court, a false statement that the defendant is not in the military should result in action as in subparagraph a above. The matter should then be referred to a U.S. attorney for criminal prosecution.

5. Servicemember's remedy. Any default judgment entered against a servicemember, under whatever circumstances, is merely voidable and not void. Davison v. General Finance Corporation, 295 F. Supp. 878 (D.D.C. 1968). This rule appears to apply, even for the situation involving default entered based on

a false affidavit. See Hudson v. Hightower, 307 Ky. 295, 210 S.W.2d 933 (1948). Accordingly, any default judgment entered against a servicemember is valid unless the servicemember moves to have the judgment vacated within ninety days after the termination of his/her service. 50 U.S.C. app. 520(4) (1982). In every case, however, the servicemember must show both that he/she was prejudiced by reason of his/her military service in making a defense to the judgment, and that a meritorious or legal defense lies to the action or some part of it. Thompson v. Lowman, 108 Ohio App. 453, 155 N.E.2d 258 (1958). In a circumstance involving a false affidavit, the servicemember might also seek Federal prosecution of the offender. No criminal or other penalty is provided for those situations where a default judgment was entered against the servicemember absent the filing of any affidavit, with or without the appointment of an attorney, or with an affidavit showing military service but without the appointment of an attorney.

B. Stay of proceedings and executions

1. General. The general stay provision of the 1940 Act declares that, at any stage of any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, the court in which the action is pending may, on its own motion, and shall, on application by the servicemember-party or someone on behalf of the servicemember, stay the action or proceeding unless, in the opinion of the court, the ability of the servicemember-party to participate is not materially affected by reason of his/her military service. This protection is available throughout the period of service and for sixty days thereafter, and covers actions or proceedings based on both preservice and inservice transactions. 50 U.S.C. app. 521 (1982).

a. In every case, the grant of a stay is discretionary with the trial court. This is so despite the apparent mandatory direction for cases involving applications since, in each instance, application or not, the grant depends upon the opinion of the court as to whether military service has materially affected the servicemember's ability to participate in the proceedings. Boone v. Lightner, 319 U.S. 561, reh'g. denied, 320 U.S. 809 (1943).

b. Factors going to "material effect" generally include such things as:

(1) The relationship of the servicemember to the action (e.g., whether his/her presence will add to the action or may actually be necessary to protect his rights). See Gross v. Williams, 149 F.2d 84 (8th Cir. 1945); Royster v. Lederle, 128 F.2d 197 (6th Cir. 1942).

(2) The servicemember's diligence with regard to the action (e.g., whether he applied for leave [Semler v. Oerturg, 234 Iowa 233, 12 N.W.2d 265 (1943)], was denied leave [Simpson v. Swinehart, 122 Ind. App. 1, 98 N.E.2d 509 (1951)], or applied and was denied leave [Graves v. Bednar, 167 Neb. 847, 95 N.W.2d 123 (1959)], and his geographical availability to the court [Smith v. Smith, 222 Ga. 246, 149 S.E.2d 468 (1966)].

(3) The servicemember's good faith in asserting the act. See Boone v. Lightner, 319 U.S. 561, reh'g denied, 320 U.S. 809 (1943) (a servicemember is not entitled to a stay in proceedings where he/she uses the provision of the Act as a shield for his/her wrongdoing).

2. Special provisions allowing for stays of specific proceedings. In actions on certain installment contracts, mortgages, trust deeds, and other secured obligations entered into by the servicemember prior to his entering the military service, the grant of a stay is discretionary with the court depending upon a finding that the servicemember's ability to comply with the terms of the transaction or obligation is materially affected by reason of his/her military service. 50 U.S.C. app. 531-532 (1982).

3. Stays or vacations of judgments, orders, etc. The execution of judgments or orders against a servicemember may be stayed, and attachments or garnishments against his/her property, money, or debts may be vacated or stayed at the discretion of the court depending upon its opinion as to whether the servicemember's ability to comply with the judgment or order is materially affected by reason of his/her military service. 50 U.S.C. app. 523 (1982). Bowsman v. Peterson, 45 F. Supp. 741 (D. Neb. 1942).

4. Duration and terms of stays. Ideally, a servicemember can obtain a stay based on the foregoing provisions for the entire period of his/her military service plus three months thereafter. 50 U.S.C. app. 524 (1982). The actual duration of stays allowed, when less than this permissible maximum, may depend upon the equities of each case.

C. Statutes of limitation. Periods of military service shall not be included in computing any period of limitation prescribed for the bringing of any action or proceeding in any court, by or against a servicemember or his/her heirs, whether such action or proceeding accrued prior to, or during, such military service. This includes the computing of any period provided by law for various types of redemptions of real property. This provision is applicable to administrative proceedings as well as court actions. It is inapplicable, though, to the statutes of limitation under the Federal Internal Revenue laws. Allen v. United States, 439 F. Supp. 463 (C.D. Cal. 1977). Unlike other general relief provisions, there is no requirement that material effect as to the servicemember's ability or inability to participate in the proceedings be shown. Since it is always self-executing, courts have no discretion in applying it. 50 U.S.C. app. 525 (1982).

0925 ARTICLES III, IV AND V: SPECIFIED TRANSACTIONS AND OBLIGATIONS. Articles III, IV, and V of the 1940 Act, 50 U.S.C. app. 530-574 (1982), contain extensive provisions conferring certain benefits, protections, and status for enumerated specific transactions and both private and governmental (tax) obligations.

A. Article III: rent, installment contracts, mortgages, liens, assignments, leases. A servicemember's dependents may not be evicted from a dwelling the rent for which does not exceed $150 per month except upon a court order. 50 U.S.C. app. 530 (1982). It directs the stay of any application for such an order for a maximum of three months, unless it appears that the tenant's ability to pay rent is not materially affected by his/her military service. Moreover, the Secretary of the Navy is empowered "to order allotments in reasonable proportion to discharge the rent of premises occupied for dwelling purposes" by the dependents of a servicemember. Provision is also made for (1) the resolution of

installment contracts for the purchase, lease, or bailment of real or personal property; (2) mortgages, trust deeds, and certain secured transactions accomplished prior to entry into military service; and (3) settlement of cases involving stayed proceedings to foreclose mortgage on, resume possession of, or terminate contracts for purchase of personal property. Provisions for the termination of leases executed prior to entry into military service are also covered. 50 U.S.C. app. 534 (1982). Protective restrictions placed upon the operation of certain preservice life insurance policy assignments, as well as upon enforcement of specified storage liens, is also handled. 50 U.S.C. app. 535 (1982).

B. Article IV: insurance. A servicemember may apply to the Veterans' Administration for a Government guarantee of premium and interest payments on life insurance policies for a total not to exceed $10,000 face value in order to prevent lapse or forfeiture. This protection covers the duration of the servicemember's military service and two years beyond termination of that military service. During the effective period of the protection, unpaid premiums are treated as policy loans. If, at the expiration of the time allowed, the unpaid amount of the policy exceeds the cash surrender value of the policy, the policy lapses and the Government pays the difference to the insurer, collecting in turn from the insured. 50 U.S.C. app. 540-548 (1982).

C. Article V: taxes and public land. Article V of the 1940 Act deals with the taxation of a servicemember's personal and real property and to the suspension of his/her rights and claims upon certain public lands. For example, payments of Federal income taxes may be deferred if the member's ability to pay such tax is "materially impaired" by such service. 50 U.S.C. app. 573 (1982). Moreover, the sale of property owned by the servicemember prior to his/her military service for the purpose of enforcing the collection of unpaid taxes or assessments is restricted by the Act. 50 U.S.C. app. 560 (1982). By declaring that a servicemember's residence for tax purposes is not affected by military assignment, the 1940 Act reserves the right of taxing his/her military income and personal property to the state of his/her domicile. 50 U.S.C. app. 574 (1982). This exemption does not cover personal property used in or arising from a trade or business and otherwise subject to the taxing jurisdiction of the state where the servicemember is stationed. The section does apply to the taxation of motor vehicles. It requires the servicemember who has not registered and licensed his/her vehicle in his/her home state to do so in the host state, but the "license fee or excise" imposed in connection with such a host state registration and licensing must be limited to "those taxes which are essential to the functioning of the host state's licensing and registration laws in their application to motor vehicles of nonresident servicemen." See California v. Buzard, 382 U.S. 386 (1966). Other sections of Article V of the 1940 Act preclude forfeiture of rights and claims to public lands as a result of absence due to military service, and suspend for the period of service, and six months thereafter, certain requirements necessary for the preservation of certain rights.

0926 ARTICLE VI: ADMINISTRATIVE REMEDIES. To prevent abuse of the 1940 Act, the courts are directed to give no effect to transfers or acquisitions made to delay just enforcement of rights by persons taking advantage of the 1940 Act's benefits. 50 U.S.C. app. 580 (1982). For example, in Radding v.

Ninth Federal Savings and Loan Association, 55 F. Supp. 361 (D.N.Y. 1944), the court precluded relief under the 1940 Act where it was found that property was transferred to the applicant on the day of his induction into the military, and the facts and circumstances made it appear that the transfer was for the purpose of obtaining the benefit of the statute. By statute, though, certification of military service by the Commander, Naval Military Personnel Command, or the Commandant of the Marine Corps constitutes prima facie evidence of a person's military status. 50 U.S.C. app. 581 (1982).

0927 ARTICLE VII: FURTHER RELIEF. A servicemember, upon application to a court, may seek anticipatory relief from obligations or liabilities incurred prior to service or taxes falling due before service. The court may, unless the servicemember's ability to satisfy the obligation or tax has not been materially impaired by military service, grant relief by staying enforcement and extending payments over a period equal to the remaining period of military service. Interest accrues at the agreed rate or at a rate prescribed for such taxes or obligations when due. No other fines or penalties accrue so long as the terms and conditions of the stay are met. 50 U.S.C. app. 590 (1982).

PART F - NOTARY AND NOTARIAL ACTS

0928 GENERAL.The office of notary public originated in the days of the Roman Empire and continues today in basically the same form. The duties of the notary, however, have undergone substantial change. Most notarial powers today are governed by state law. JAG Manual, ch. 25 is the main reference source in the Navy and Marine Corps for notarial powers.

0929 NOTARIAL ACTS

A. Oaths. Section 936 of title 10, United States Code authorizes certain military members on active duty to administer oaths for certain Federal purposes. Article 136, UCMJ allows the Secretary of the Navy by departmental regulations to extend notarial powers to certain other military members for limited purposes. JAGMAN, § 2502 lists those members authorized to administer oaths. The oaths are valid only for those situations described in section 2502. For example, a person designated to conduct an investigation is given the authority to administer oaths to any person when it is necessary in the performance of his or her duties as an investigating officer. An oath administered by the investigating officer, which had no connection with the investigation, would be invalid unless authorized by some other provision of chapter 25.

B. Acknowledgements. An acknowledgement is a formal declaration to an authorized official that a certain act or deed was the free and knowing act of the defendant. Often used in relation to deeds of real property, the acknowledgement affirms the genuineness of the owner's intent to convey title to property and that the execution of the deed is the free and knowing act of the owner. The purpose of acknowledgments generally is to entitle the instrument to be recorded or to authorize its introduction in evidence without further proof of its execution. Acknowledgements are governed by state laws. JAGMAN, § 2508.

C. Sworn instruments. Sworn instruments are written declarations signed by a person who declared under oath before a properly authorized official that the facts set forth in the document are true to the best of his knowledge and belief. They normally include affidavits, sworn statements, and depositions. The purpose of sworn instruments is to make a formal statement under oath of certain facts which are known to the person making the statement. JAGMAN, § 2509.

D. Authority to perform. JAGMAN, § 2502 discusses the authority for performing certain notarial acts for Federal purposes. To varying extends, all fifty states, the District of Columbia, and the U.S. possessions have granted limited notarial powers to all commissioned officers (O-1 or above) of the armed forces. The statutes are so diverse that it is advisable to consult in every case the alphabetical listing of state statutes contained in JAGMAN, § 2510. Many states have recently passed amendments to their notary laws, so individual state codes should also be consulted. Another excellent reference source is the All States Guide to State Notarial Law published by the Judge Advocate General's School, U.S. Army, Charlottesville, Virginia.

E. Effectiveness of the notarial acts. If the somewhat ritualistic procedure is meticulously followed for each notarial act, the document or oath should be legally effective in the vast majority of cases. A key point to keep in mind, however, is that some states require strict adherence to their particular procedures. Additionally, many states do not accept a military notary in situations involving dependents. Other states will only accept a military notary for a dependent's declaration if the dependent is outside of the United States. An officer attempting to perform a notarial act must first ascertain if the act will be accepted in the state for which it is intended. Especially in the case of real estate transactions, a servicemember's or dependent's interests could be seriously jeopardized by their reliance upon an ineffective notarial act.

PART G - UNIFORMED SERVICES FORMER SPOUSE'S PROTECTION ACT

0930 GENERAL. The Uniformed Services Former Spouse's Protection Act [hereinafter the Act] was passed on 8 September 1982, took effect on 1 February 1983 and is codified at 10 U.S.C. § 1408 (Supp. II 1984). The Act was a reaction by Congress to the case of McCarty v. McCarty, 453 U.S. 210 (1981), where the Supreme Court held that Congress intended a military pension to be the separate property of the retiree and not a property interest subject to division by the states upon dissolution of the retiree's marriage. The Act does not mandate that former spouses be given a portion of a military retiree's pension but, rather, permits state courts to treat the pension either as separate property of the retiree or as divisible property of the marriage.

0931 PROVISIONS OF THE ACT

A. Jurisdiction. In many cases the active-duty military member and the spouse may have a choice of states in which to file an action for dissolution of marriage. The question then becomes whether the chosen state can acquire jurisdiction over the other spouse in order to enter a lawful order. In the case

of the active-duty military member, the Act requires that the state attempting to divide a military pension gain jurisdiction over the member by: (1) the member's consent to the jurisdiction of the court; (2) the member's domicile within the state; or (3) the member's residence within the state other than because of his military orders. This jurisdiction provision does not apply to retirees.

B. Division of a "vested" and/or potential pension. It is important to realize that there is a trend among some state courts to award a spouse an interest in the potential pension of the military member. This interest is valid, but payments will not be made directly to the spouse unless he/she qualifies for an automatic allotment under section 0931C below and then only after the member retires. Many other courts will award a spouse an interest in a pension that has "vested" with the member -- in other words, he/she is past twenty years of service and is eligible to retire. The member may be ordered to pay that interest to the spouse even though he/she has not yet retired. The Act specifically prohibits states from ordering a member to retire so that the spouse can collect a portion of the pension. Even if the spouse is awarded such an interest and qualifies for an automatic allotment, the automatic allotment will not begin until 90 days after the member retires. See section 0931C below.

C. Automatic allotment. Certain former spouses are entitled to have their court-ordered portion of a retiree's pension paid directly to them from the applicable military finance center. If the award to the spouse is made as a separate property award and if the former spouse was married to the member or retiree for at least ten years, during which time the servicemember performed at least ten years of service creditable toward retirement, then the spouse is entitled to an automatic allotment. The Act places a limit on the amount of 50% of gross pay that can be paid under this provision.

D. Garnishment. The Act gives the former spouse the right to garnish a retiree's pension where the retiree has failed to comply with a court ordered property settlement.

E. Medical, commissary, and exchange privileges. The Act has granted to unremarried former spouses who were married to a servicemember or retiree for at least twenty years, during which time the servicemember or retiree served at least twenty years of creditable service toward retirement, or the servicemember was in the service for at least 15 years while married to this former spouse if divorced before 1 April 1985 (divorces after this date for other qualified former spouses carry military benefits for up to 2 years from the date of the divorce), the right to medical (if the spouse does not have an employer-sponsored health plan), commissary, and exchange privileges.

F. Retroactivity of the Act. A lot of interest focused on the retroactive application of the Act. Following the McCarty decision, many retirees sought modification to pre-McCarty orders (i.e., before 26 June 1981) which would relieve them of the obligation to pay part of their pensions to former spouses. The Act provides that former spouses subject to pre McCarty orders who qualify for the automatic allotment provision will have any post McCarty modifications disregarded and the automatic payment will be made. All final orders entered after 26 June 1981 are subject to judicial modification. The former spouse must initiate the modification action, however.

PART H - SURVIVOR BENEFIT PLAN (SBP)

0932 GENERAL

The Survivor Benefit Plan was enacted by Pub. L. No. 92-425 on 21 September 1972, codified at 10 U.S.C. §§ 1447-1455, and replaces two former plans -- the Retired Serviceman's Family Protection Plan and the U.S. Contingency Option Act. The SBP provides all members of the uniformed services who are entitled to retired pay with the opportunity, in the event of their death, to provide up to 55% of their gross retired pay as an annuity payable to their designated beneficiaries. The primary references are NAVMILPERSCOMINST 1750.2 series, Subj: Survivor Benefits, including the Retired Servicemembers Family Protection Plan (RSFPP) (10 U.S.C. §§ 1431 et seq.) and the Survivor Benefit Plan (SBP) (10 U.S.C. §§ 1447 et seq.) as amended; and NAVEDTRA 4660D, Subj: Survivor Benefit Plan for the Uniformed Services, (stock number 0503-LP-003-0290).

0933 PROVISIONS OF THE SURVIVOR BENEFIT PLAN

A. Automatic enrollment. Unless a retiree elects not to participate in SBP, or elects to participate at less than the maximum level (full gross retired pay) before the first day on which he or she becomes entitled to retired pay, each member with a spouse and/or a dependent child or children on the date of retirement will automatically be enrolled at the maximum rate. The DOD Authorization Act for Fiscal Year 1986 (Pub. L. No. 99-145) provided in pertinent part that consent of the present spouse is required in order for the member: (1) To opt out of the program; (2) to participate at less than the maximum amount; or (3) to provide an annuity for a dependent child, but not for the spouse.

B. Former spouses. The Uniformed Services Former Spouse's Protection Act, discussed in section 0931 of this text, provides that former spouses may be beneficiaries under SBP. A former spouse election must be voluntary and can not be ordered by a court contrary to the wishes of the member. The election must be accompanied by a written statement signed by the member and the former spouse indicating the former spouse as the SBP beneficiary. The written statement must set forth whether the election is being made to carry out the terms of a written agreement that resulted from divorce, dissolution or annulment proceedings and whether the written agreement is a part of a court order. The written statement must also state whether there is a present spouse who must be notified that he/she is not covered under SBP.

C. Amount of annuity. The monthly annuity payments shall equal 55% of the retiree's base pay. The annuity is payable to the eligible children if the spouse becomes ineligible due to remarriage before age 60 or death. The annuity will be reduced by any dependency and indemnity compensation (DIC) or social security payments received by the beneficiaries.

D. Tax consequences. The amount deducted from the retiree's gross retired pay for participation in this plan is not included as gross income derived from retired pay for Federal income tax purposes. Payments to the beneficiaries after the death of the retiree, however, are included in gross

income for Federal income tax purposes. The value of the survivor annuity shall not, in most cases, be included as part of the estate in the computation of Federal estate tax.

PART I - EDUCATION OF HANDICAPPED CHILDREN IN DOD DEPENDENT SCHOOLS (DODDS)

0934 GENERAL

DoD Instructions 134.12 of 17 Dec 81, and 1342.14 of 25 August 1986, implemented in the Department of the Navy by JAGNOTE 5860 of 1 May 1987, provides procedures for compliance by DoD Dependent Schools with the mandate of Pub. L. No. 94-142, the Education of All Handicapped Children Act of 1975. This Act requires that all necessary educational and medically related services be provided to children who are physically or mentally handicapped. The Act requires identification, diagnosis, and provision of a program that fully meets the needs of the child. Since DODDS are overseas, parents often will have no off-base alternative to the DODDS-proposed programs, even if they disagree with the program or course of instruction. For this reason, DoD Instruction 1342.12 provides for an administrative law disputes process. Under the instruction, counsel is provided for the parents of the child at no expense. In the overseas communities, this lawyer counsel will presumedly be a judge advocate. Trial-type hearings are held, followed by an appeals process.

CHAPTER X

RELATIONS WITH CIVIL AUTHORITIES

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CHAPTER X

RELATIONS WITH CIVIL AUTHORITIES

1001 INTRODUCTION

A. Sovereignty defined. Relations between the United States and a foreign government are governed by the concept of "sovereignty." Sovereignty is the exercise of governmental power over all persons and things within a defined area. A sovereign nation has the capacity to conduct its relations with other sovereign nations independent of external control (subject to certain rules imposed by international law). In this regard, all sovereign nations are considered to be equals.

B. Jurisdiction defined. The exercise of this sovereign power is usually expressed in the term "jurisdiction." Jurisdiction may be either territorial or personal. Territorial jurisdiction is that governmental control exercised over all persons and things in a specific geographical area, while personal jurisdiction is that governmental control exercised over certain persons (usually citizens) regardless of their physical location.

C. State and Federal Governments. Within the United States, there is a system of dual sovereignty where both the state and Federal Governments exercise a certain degree of sovereignty. The Federal Government has the greater authority in most areas in the event of conflict between the two sovereigns. In some areas, the Federal Government is granted exclusive jurisdiction (e.g., matters affecting interstate commerce).

D. Federal supremacy. As a result of this supremacy of Federal over state law, the armed forces are not subject to many of the restraints imposed by state laws. Likewise, when acting in the performance of official duties, a member of the armed forces may also be free of restraints which would otherwise be imposed by state law. For example, state law has no power to regulate the type of weapons which may be carried by military members while on duty. Military personnel in their private capacity, on the other hand, are generally subject to the laws of the state in which they are located -- except for legislatively created exceptions such as the Soldiers' and Sailors' Civil Relief Act.

E. International law. Since relations with foreign countries is one of the areas reserved for the Federal Government, it follows that relations between U.S. military personnel and foreign governments or authorities are regulated completely between the Federal Government in this country and the authorities in the other countries. These relations are usually in the form of customary relationships or written treaties. Regardless of form, these relations are considered binding on the sovereign states and are known as international law. Since the armed forces are part of the Federal Government, they are subject to this international law as well as Federal and state law.

A. Aboard U.S. warships. A warship is considered an instrumentality of a nation in the exercise of its sovereign power. Therefore, a U.S. warship is considered to be an extension of U.S. territory. As such, it is under the exclusive jurisdiction of the United States, and is thus immune from any other nation's jurisdiction during its entry and stay in foreign ports and territorial waters as well as on the high seas. Attachment or libel in admiralty may not be taken or effected against a warship for recovery of possession, for collision damage, or for salvage charges. The commanding officer of a ship shall not permit his ship to be searched by foreign authorities nor shall he allow personnel to be removed from the ship by foreign authorities. If the foreign authorities use force to compel submission, the commanding officer should resist with the utmost of his power. Except as provided by international agreement, the rules for a shore activity are the same. U.S. Navy Regulations, 1973, art. 0740 In addition, the laws, regulations, and discipline of the United States may be enforced on board a U.S. warship (personal and territorial jurisdiction) within the territorial precincts of a foreign nation without violating that nation's sovereignty. A warship present in a foreign port is expected to comply voluntarily with applicable health, sanitation, navigation, anchorage, and other regulations of the territorial nation governing her admission to the port. Failure to comply may result in the lodging of a diplomatic protest by the host nation and the possible ordering of the warship to leave the port and territorial sea. If such sanctions were imposed, immunity from seizure, arrest or detention by any legal means would remain in force.

B. Overseas ashore

1. Servicemembers. Military personnel visiting or stationed ashore overseas are subject to the civil and criminal laws of the particular foreign state ("territorial jurisdiction"). The United States has negotiated agreements, generally known as status of forces agreements (SOFAs), with all countries where its forces are stationed. Under most SOFAs, the question of whether the United States servicemember will be tried for crimes committed by United States authorities or by foreign authorities depends on which country has "exclusive" or "primary" jurisdiction. Exclusive jurisdiction exists when the act constitutes an offense against only one of the two states (e.g., unauthorized absence). Those areas constituting violations under both the UCMJ and foreign law are subject to concurrent jurisdiction. This situation raises the question of which state has "primary" jurisdiction. The United States will normally have primary jurisdiction over military personnel for:

a. Offenses solely against the property or security of the United States;

b. offenses arising out of any act or omission done in the performance of official duty; and

c. offenses solely against the person or property of another servicemember, a civilian employee, or a dependent.

The host country will retain the primary right to exercise jurisdiction in all other concurrent jurisdiction situations. If a servicemember

commits a crime in which the host country has primary jurisdiction, the accused will be prosecuted under the laws and procedures of that country's criminal justice system and, if convicted, the accused will be punished in accordance with those laws. This rule exists unless the host country waives its primary right to exercise jurisdiction. This is possible because the United States always retains criminal jurisdiction under the UCMJ over all military personnel as an exercise of personal jurisdiction.

2. Civilians. Special privileges and exceptions from the application of foreign local law to U.S. bases overseas are governed by a "Base Rights Agreement" between the two governments. Such agreements may provide for the exercise of police power by the United States within the confines of the base, with said exercise usually being concurrent with that of the foreign sovereign. Residual sovereignty over the base usually is retained by the foreign government, and criminal offenses committed by U.S. non-military personnel while on the base are generally triable in foreign criminal courts. It is questionable whether any United States court has jurisdiction to try U.S. civilians for crimes committed overseas with the exception of crimes committed by civilian personnel while accompanying U.S. military forces into declared war zones.

C. United States policy. It is the policy of the United States to maximize its jurisdiction and seek waivers in cases where it does not have primary jurisdiction. SECNAVINST 5820.4 series, Subj: Status of Forces Policies, Procedures, and Information, directs in paragraph 1-4(a) that "[c]onstant efforts will be made to establish relationships and methods of operation with host country authorities which will maximize US jurisdiction to the extent permitted by applicable agreements." This means that requests for waiver of jurisdiction should be made for all serious offenses committed by servicemembers regardless of the lack of a status agreement or exclusive jurisdiction by the host country.

D. Reporting. Whenever a servicemember is involved in a serious or unusual incident, it will be reported to the Judge Advocate General. Serious or unusual incidents will include any case in which one or more of the following circumstances exist:

1. Pretrial confinement by foreign authorities;

2. actual or alleged mistreatment by foreign authorities;

3. actual or probable publicity adverse to the United States;

4. congressional, domestic or foreign public interest is likely to be aroused;

5. a jurisdictional question has arisen;

6. the death of a foreign national is involved; or

7. capital punishment might be imposed.

The reporting provisions of OPNAVINST 3100.6 series (OPREP-3 Navy Blue Reports) apply in appropriate circumstances.

E. Custody rules. When a servicemember is arrested and accused of a crime, which country retains custody of the individual is determined by the existing SOFA with the host country. General rules in this area follow:

ARRESTED BY	PRIMARY JURISDICTION	CUSTODY
U.S. Authorities	U.S.	U.S.
Foreign Authorities	U.S.	Turn over to U.S.
U.S. Authorities	Foreign Country	U.S. custody until officially charged or agreement provides for U.S. custody until criminal proceedings completed
Foreign Authorities	Foreign Country	Host country may maintain custody or turn over to U.S. authorities until criminal proceedings completed

Commanding officers should be aware that, except when provided by agreement between the United States and the foreign nation concerned, there is no authority to deliver persons in the Department of the Navy to foreign authorities. JAGMAN, § 1307. Where a U.S. servicemember is in the hands of foreign authorities and is charged with the commission of a crime, regardless of where it took place, the commanding officer should report the matter to JAG and other higher authorities for guidance. Since expeditious release from foreign incarceration is a matter of utmost interest, delay should be avoided at all cost. To secure the release of U.S. military personnel held by foreign authorities, U.S. military authorities may give assurances that the servicemember will not be removed from the host country except on due notice and adequate opportunity by the foreign authorities to object to that action. In appropriate cases, military authorities may order pretrial restraint of the servicemember in a U.S. facility to ensure his or her presence at trial on foreign charges.

F. Procedural safeguards. If a servicemember is to be tried for an offense in a foreign court, he is entitled to certain safeguards. The rights guaranteed under the NATO SOFA include the following:

1. A prompt and speedy trial;

2. to be informed in advance of trial of the specific charge or charges made against him;

3. to be confronted with the witnesses against him;

4. to compel the appearance of witnesses in his favor if they are within the jurisdiction of the state;

5. to have legal representation of his own choice;

6. to have the services of a competent interpreter if necessary; and

7. to communicate with representatives of the U.S. Government and, when the rules permit to have such representatives present at his trial.

These rights are also provided for in most nations where status agreements exist. The in-court observer is not a participant in the defense of the servicemember, but rather reports to higher authority as to whether the safeguards guaranteed by the SOFA were followed and whether or not a fair trial was received. Section 1037 of title 10, United States Code, authorizes the armed forces to pay counsel fees, bail, court costs and other related expenses (such as interpreter's fees) for servicemembers tried in foreign courts.

1003 FEDERAL JURISDICTION OVER LAND IN THE UNITED STATES

A. References

1. U.S. Const., art. I, § 8, cl. 17

2. Interdepartmental Committee for the Study of Jurisdiction over Federal Areas within the States, The Facts and Committee Recommendations, in Jurisdiction over Federal Areas within the States (Part I 1956)

3. Interdepartmental Committee for the Study of Jurisdiction over Federal Areas within the States, A Text of the Law of Legislative Jurisdiction, in Jurisdiction over Federal Areas within the States (Part II 1957)

4. 40 U.S.C. § 255 (1982)

5. Dept. of the Army Pamphlet 27-21, Military Administrative Law, ch. 6

B. Federal legislative jurisdiction. Areas of land originally acquired by the United States or, if subsequently acquired, to which a state has made a complete cession of sovereignty to the Federal Government are known as exclusive Federal reservations. As to this land, the Federal Government possesses the exclusive right to legislate with respect to the particular land area and may enact general municipal laws applying within that area. This "area" concept of Federal jurisdiction must be distinguished from other legislative authority possessed by Congress which is dependent not upon "area" but upon "subject matter" and "purpose" and is predicated upon a specific grant of power to the Federal Government by the Constitution. Federal jurisdiction should be distinguished from Federal ownership of land. Federal jurisdiction is a sovereign power, whereas the ownership of land is a proprietorial action. Thus, it is possible for the United States to exercise jurisdiction over land it does not own.

C. Acquisition of jurisdiction

1. Methods. There are three methods whereby the Federal Government may acquire legislative jurisdiction over land areas within a state.

The first is by purchase of the land with the consent of the state. This is specifically provided for in the U.S. Constitution, art. I, § 8, cl. 17. Condemnations by the Federal Government are included in the term "purchase," but land leased by the Federal Government is not. The second method is cession by the state. This method, while not specifically provided for by the Constitution, developed by means of case law. The third method of Federal acquisition occurs when the Federal Government reserves to itself certain jurisdiction when the State is admitted to the union. The Federal Government, in effect, maintains the legislative jurisdiction it held when the state was a territory.

2. Federal policy. As a general rule, the Federal Government will not seek Federal jurisdiction over land. Concurrent jurisdiction may only be accepted where it is found necessary that the Federal Government furnish or augment the law enforcement otherwise provided by a state or local government. Exclusive jurisdiction may be accepted in those few instances where the peculiar nature of the military operation necessitates greater freedom from the state and local law, or where the operation of state or local laws may unduly interfere with the mission of the installation.

D. Concurrent, partial, and proprietary jurisdiction. There are three forms of jurisdiction, other than exclusive Federal jurisdiction, that the Federal Government may exercise over land area: Concurrent legislative jurisdiction, partial legislative jurisdiction, and proprietary interest. The type of jurisdiction the Federal Government maintains determines the legislative authority that is exercised over the land area. Concurrent legislative jurisdiction exists when the state grants to the Federal Government the rights of exclusive jurisdiction over the land area, while reserving to itself the same authority it granted to the Federal Government. Due to the supremacy clause of the Constitution, the Federal Government has the superior right to carry out Federal functions without state interference. Nevertheless, state laws may be applicable within a concurrent jurisdiction area. Partial legislative jurisdiction refers to the situation where the state grants a certain measure of legislative authority over the area to the Federal Government but reserves to itself the right to exercise -- either alone or concurrently with the Federal Government -- other authority constituting more than the right to serve civil or criminal process in the area. In this instance, each sovereign maintains partial legislative authority. The Federal Government has proprietary interest only in land when it acquires the degree of ownership similar to that of a landowner, but has not attained any portion of the state legislative authority over the area.

1. State criminal laws. State criminal law normally extends throughout land areas in which the United States has only a proprietorial interest, throughout areas under concurrent jurisdiction, and in areas under partial jurisdiction to the extent covered by the retention of state authority under its grant of power.

2. Federal criminal laws

a. Congress has enacted a comprehensive body of Federal criminal law applicable to lands within the exclusive or concurrent jurisdiction of the United States or the partial jurisdiction of the U.S. to the extent not

precluded by the reservation of state authority. Most major crimes within such areas are covered by individual provisions of title 18, United States Code. (Note, however, that many offenses under title 18 are not dependent upon "legislative" jurisdiction.) In addition, the Uniform Code of Military Justice is applicable to military personnel wherever they may be, so long as the offense is service connected.

b. Many minor Federal offenses are not provided for in specific terms through Federal legislation. Instead, Congress has adopted the provisions of state law as Federal substantive law through the Assimilative Crimes Act, 18 U.S.C. § 13 (1982). The overwhelming majority of offenses committed by civilians (employees and dependents) in areas under the exclusive criminal jurisdiction of the United States are misdemeanors (e.g., traffic violations, drunkenness). Since these offenses are not specifically covered by Federal statutory law, the civilian offender can usually be punished by a Federal magistrate or Federal district court under the Assimilative Crimes Act. In the case of civilian employees, applicable civilian personnel regulations should also be consulted. Prosecutions under the Assimilative Crimes Act do not enforce state law as such, but enforce Federal criminal law, the substance of which has been adopted from state law. With respect to military personnel, the third clause of Article 134, UCMJ assimilates state criminal law and permits prosecution by court-martial for violations to the extent that state law becomes Federal law of local application to the area under Federal legislative jurisdiction. Inasmuch as it is Federal law which is being enforced within an exclusive Federal reservation, state and municipal police authorities and other local law-enforcement officials generally have no jurisdiction within the particular exclusive Federal reservation. Thus, on such a military base, it is the base police and Federal marshals who have power to arrest offenders. Prosecution of a civilian for any offense is within the cognizance of the United States attorney acting before a United States magistrate or a United States district court. The Assimilative Crimes Act adopts state legislation only where there is no Federal statute defining a certain offense or providing for its punishment. Furthermore, when an offense has been defined and prohibited by Federal law, the Assimilative Crimes Act cannot be applied to redefine and enlarge or narrow the scope of the Federal offense. In general, a state criminal law which is contrary to Federal policy and regulation is not adopted under the Assimilative Crimes Act. Not all Federal regulations, of whatever type, however, will prevent the assimilation of state criminal law. On the other hand, the Assimilative Crimes Act may not necessarily adopt those state administrative or regulatory requirements that are legislative in nature (i.e., a regulatory commission making it a crime to pass a stop sign).

E. Federal Magistrates Act. Minor offenses committed by individuals within Federal reservations may be tried by Federal magistrates. The Department of Justice is primarily responsible for the prosecution of such offenses. When no representation of that Department is available, qualified Navy and Marine Corps judge advocates -- with the approval of the cognizant U.S. Attorney -- may serve as Special Assistant U.S. Attorneys and conduct prosecutions of minor offenses committed aboard Navy or Marine Corps installations. SECNAVINST 5822.1 series addresses the implementation of the Federal Magistrates Act by the Department of the Navy. See also JAGMAN, ch. XIII, Part E.

A. Delivery of personnel

1. Federal civil authorities. Members of the armed forces will be released to the custody of U.S. Federal authorities (FBI, DEA, etc.) upon request by an agent of the Federal agency. The only requirements which must be met by the requesting agent is that the agent display proper credentials and represent that a Federal warrant has been issued for the arrest of the servicemember. Actual production of the warrant is not required. A judge advocate of the Navy or Marine Corps should be consulted before delivery is effected, if reasonably practicable. When military personnel are released to U.S. Federal authorities, agreements are not required but the individual will be returned, if desired, and the costs of the return will be paid by the Justice Department. JAGMAN, § 1306.

2. State civil authorities. Procedures to be followed where custody of a member of the armed forces is sought by state, local or U.S. territorial officials depend upon whether the servicemember is within the geographical jurisdiction of the requesting authority. Unlike the instance where custody is requested by Federal authorities, the requesting agent must not only identify himself through proper credentials but must also display the actual warrant for the servicemember's arrest. Additionally, state, local and U.S. territory officials must sign a delivery agreement providing for the no-cost return of the servicemember after civilian proceedings have terminated. JAGMAN, §§ 1302c, 1305. A sample agreement appears in appendix A-13-b of the JAG Manual. Subject to these requirements, the following examples illustrate the procedures to be followed:

a. E-3 Jones is stationed ashore or afloat in a command within the geographical territory of the requesting authority. Generally, the request will be complied with by the commanding officer. JAGMAN, § 1301.

b. E-3 Jones is stationed ashore or afloat outside of the territorial jurisdiction of the requesting authority but not overseas. The servicemember must be informed of his right to require extradition. If he does not waive extradition, the requesting authority must complete extradition proceedings before the Navy will release the individual. In any event, release under these conditions must be made by an officer exercising general court-martial jurisdiction (OEGCMJ) or someone designated by him. JAGMAN, § 1302. If the servicemember waives extradition in writing after consultation with military or civilian legal counsel, then the OEGCMJ may release the man without an extradition order. If the state in which E-3 Jones is located requests delivery of a servicemember wanted by another state (usually based upon a fugitive warrant or other process from authorities of the other state), the OEGCMJ is authorized to release Jones to the local authorities and normally will do so; however, absent waiver by Jones, he will then have the opportunity to contest extradition within the courts of the local state. JAGMAN, § 1302.

c. E-3 Jones is stationed ashore overseas or is deployed and is sought by U.S., state, territory, commonwealth or local authorities. In this case, the request must be by the Department of Justice or the governor of the

state addressed to SECNAV (JAG). If received by the command, it must be forwarded to JAG. The request must allege that the man is charged, or is a fugitive from that state, for an extraditable crime. When all the requirements are met, the Secretary will issue the authorization to transfer the servicemember to the military installation in the U.S. most convenient to the Department of the Navy, where he will be held until the requesting authority is notified and complies with the provisions of sections 1301 or 1302 of the JAG Manual, as appropriate. JAGMAN, § 1303.

3. Restraint of military offenders for civilian authorities. R.C.M. 106, MCM (1984) provides that a servicemember may be placed in restraint by military authorities for civilian offenses upon receipt of a duly-issued warrant for the apprehension of the servicemember or upon receipt of information establishing probable cause that the servicemember committed an offense, and upon reasonable belief that such restraint is necessary. Such restraint may continue only for such time as is reasonably necessary to effect the delivery. This provision provides express authority for restraining a military offender to be delivered to law enforcement authorities of the United States or its political subdivisions, but only when such restraint is justified under the circumstances. For delivery of a servicemember to foreign authorities, the applicable treaty or status of forces agreement should be consulted. The provision does not allow the military to restrain a servicemember on behalf of civilian authorities pending trial or other disposition. The nature and extent of restraint imposed is strictly limited to that reasonably necessary to effect the delivery. Thus, if the civilian authorities are dilatory in taking custody, the restraint must cease. An analogous situation is when civilian law enforcement authorities temporarily confine a servicemember, pursuant to a DD-553, pending delivery to or receipt by military authorities.

4. Circumstances in which delivery is refused

a. If a servicemember is alleged to have committed several offenses -- including major Federal offenses and serious, but purely military, offenses -- the military offenses may be investigated and the accused servicemember retained for prosecution. This must be reported immediately to JAG and to the cognizant OEGCMJ. JAGMAN, § 1308b. When military disciplinary proceedings are pending, guidance from a judge advocate of the Navy or Marine Corps should be obtained, if reasonably practicable, before delivery to Federal, state or local authorities. JAGMAN, § 1308a.

b. Where a servicemember is serving the sentence of a court-martial, the servicemember may be retained. JAGMAN, § 1315. If a request for delivery from civil authorities properly invokes the Interstate Agreement on Detainers Act, delivery is mandatory unless denied by the Director of the Bureau of Prisons. JAGMAN, § 1315b(1). If the Detainers Act is not invoked, Article 14, UCMJ, and JAGMAN, § 1315c, permit refusal to deliver a servicemember only if "there is an overriding reason for retaining the accused in military custody (e.g., situations where additional courts-martial are to be convened or the delivery would severely prejudice the prisoner's appellate rights").

c. If a commanding officer considers that extraordinary circumstances exist which indicate that delivery should be denied, then such denial is authorized by JAGMAN, § 1308b(2). This provision is rarely invoked.

d. In any case where it is intended that delivery will be refused, the commanding officer shall report the circumstances to the Judge Advocate General and the area coordinator by message (or by telephone if circumstances warrant). The initial report shall be confirmed by letter setting forth a full statement of the facts. JAGMAN, § 1310, app. A-13-c.

B. Recovery of military personnel from civil authorities

1. General rule. For the most part, civil authorities will be able to arrest and detain servicemembers for criminal misconduct committed within their territorial jurisdiction and proceed to a final disposition of the case without interference from the military. Military authorities have no legal right or power to interfere with the civil proceedings.

2. Official duty exception. There is one exception to the general rule that military authorities lack legal standing to interfere with state prosecutions of military personnel for violations of state law. That exception is that no state authority may arrest or detain for trial a member of the armed forces for a violation of state law done necessarily in the performance of official duties. This exception arises from the concept that, where the Federal Government is acting within an area of power granted to it by the Constitution, no state government has the right to interfere with the proper exercise of the Federal Government's authority. It follows that members of the armed forces acting pursuant to lawful orders or otherwise within the scope of their official duties are not subject to state authority. It should be noted that this freedom from interference by the state applies only when the proper performance of a military duty requires violation of a state law -- so that if one is driving a Navy vehicle on state highways on normal government business, the driver is subject to state traffic laws.

a. Whenever an accused is in the custody of civil authorities charged with a violation of local or state criminal laws as a result of the performance of official duties, the commanding officer should make a request to the nearest U.S. attorney for legal representation. This should be accomplished via the area coordinator, or naval legal service office, if practicable.

b. A full report of all circumstances surrounding the incident and any difficulties in securing the assistance of the U.S. attorney should be forwarded to JAG.

c. Where the U.S. attorney declines or is unable to provide legal services, the Judge Advocate General shall be advised of the circumstances. In those cases in which the date set by the court for answer or appearance is such that time does not permit communication of the U.S. attorney's refusal or inability through usual methods, the Judge Advocate General shall be contacted immediately by telephone.

3. Local agreements. In many areas where major naval installations are located, local arrangements and agreements have been negotiated between naval commands and the local civilian officials with regard to the release of servicemembers to the military before trial. These agreements are local and informal. There is no established Navy-wide procedure. Their success depends upon the practical relationships in the particular area. It is

the duty of all commands within the area to comply with the local procedures and make such reports as may be required. Normally, details of the local procedures can be obtained from the area shore patrol headquarters, base legal officer, staff judge advocate, or similar official.

4. Command representatives. The command does not owe an accused who is held by civil authorities in the U.S. legal advice and should not take any action which could be construed as providing legal counsel to represent an accused. The command, however, may send a representative to contact the civil authorities for the purpose of obtaining information for the command. While this representative may provide information to the court, prosecutor or defense counsel concerning the accused's military status, the quality of his service, and any special circumstances that may aid the civil authorities in reaching a just and proper result, care must be taken not to violate the Privacy Act. Although more complete guidance is given in chapter 14 of this text, as a general rule, it is improper to release any personal information from the records of the accused (such as NJP results or enlisted performance marks) without either the servicemember's voluntary written consent or an order from the court trying the case.

5. Conditions on release of accused to military authorities

a. If the release of the member is on his personal recognizance or on bail to guarantee his return for trial, there is little difficulty and there is no objection to a command receiving the servicemember. The commanding officer upon verification of the attending facts, date of trial and approximate length of time that should be covered by leave of absence, should normally grant liberty or leave to permit appearance for trial. See JAGMAN, § 1312. Personal recognizance is an obligation of record entered into before a court by an accused in which he promises to return to the court at a designated time to answer the charge against him. Bail involves the accused's providing some security beyond his mere promise to appear at the time and place designated and submit himself to the jurisdiction of the court. Service in the armed forces does not release an accused of the duty to conform to the requirements of release on bond or recognizance.

b. Accepting custody of an accused upon any conditions which would bind naval authorities is not advised. There are dangers in receiving an accused and at the same time promising to return him for trial, since military authorities are without power to place an accused in any sort of pretrial restraint based on the civilian charges. Further, there is no authority for accepting an accused subject to any conditions whatsoever. Commands may inform civilian authorities of the Navy's customary policy of granting leave or liberty to permit attendance at civilian trials (JAGMAN, § 1312), but the JAG Manual states only that Navy policy is to permit servicemembers to attend their trials, not to force such attendance.

c. An accused should not be accepted from civil authorities on the condition that disciplinary action will be taken against him. While the Supreme Court eliminated barriers to subject-matter jurisdiction in the Solorio v. United States, 483 U.S. 2924 (1987) decision, there are other factors that weigh against promising swift and certain justice. Issues such as accuser concepts or selective prosecutions could stop a command from acting.

Evidentiary problems may exist. These matters could prevent disciplinary action, subsequently hurting command/community relationships. If a case is taken, the staff judge advocate and the trial counsel must work closely with the local prosecutor's office.

C. Special situations

1. Interrogation by Federal civil authorities. Requests to interrogate suspected military personnel by the FBI or other Federal civilian investigative agencies should be honored promptly. Any refusal and the reasons therefor must be reported immediately to JAG. JAGMAN, § 1313

2. Writs of habeas corpus or temporary restraining orders. JAGMAN, § 1314. Upon receipt of a writ of habeas corpus, temporary restraining order or similar process, or notification of a hearing on such, the nearest U.S. attorney should be notified immediately and assistance requested. A message or telephone report of the delivery of the process or notification of the hearing must be made to SECNAV (JAG) and confirmed by speed letter. An immediate request for assistance is necessary because such matters frequently require a court appearance with an appropriate response by the Government in a very short period of time. When the hearing has been completed and the court has issued its order in the case, a copy of the order should be promptly forwarded to JAG.

3. Consular notification. Within the territory of the United States, whenever a foreign national who is a member of the U.S. armed forces is apprehended under circumstances likely to result in confinement or trial by court-martial, or is ordered into arrest or confinement, or is held for trial by court-martial with or without any form of restraint, or when court-martial charges against him are referred for trial, notification to his nearest consular office may be required. When any of the above circumstances occur, the foreign national shall be advised that notification will be given to his consul unless he objects and, in case he does object, JAG will determine whether an applicable international agreement requires notification irrespective of his wishes. SECNAVINST 5820.6 series provides guidance and details on consular notification including specifically the contents of the notice.

1005 SERVICE OF PROCESS AND SUBPOENAS

A. Service of process. This is generally defined as the establishing of the court's jurisdiction over a person by the handing of a court order to the person which advises him of the subject of the litigation and orders him to appear or answer the plaintiff's allegations within a specified period of time or else be in default. When properly served, the process will make the person subject to the jurisdiction of a civil court.

1. Overseas. A servicemember's amenability to service of process issued by a foreign court depends on international agreements (such as the NATO SOFA). Where there is no agreement, guidance should be sought from JAG. JAGMAN, § 1320d.

2. Within the United States

a. Within the jurisdiction. Where the member is within the jurisdiction of the court issuing the process, the commanding officer shall permit the service except in unusual cases where he concludes that compliance with the mandate of the process would seriously prejudice the public interest. Personnel serving on a vessel within the territorial waters of a state are considered within the jurisdiction of that state for the purpose of service of process. Process should not be allowed within the confines of the command until permission of the commanding officer first has been obtained. Where practicable, the commanding officer shall require that process be served in his or her presence or in the presence of an officer designated by the commanding officer. Commanding officers are required to ensure that the nature of the process is explained to the member. This can be accomplished by a legal assistance officer. JAGMAN, § 1320a.

b. Beyond the jurisdiction. Where the member is beyond the jurisdiction of the court issuing the process, commanding officers will permit the service under the same conditions as within the jurisdiction, but shall ensure that the member is advised that he need not indicate acceptance of service. Furthermore, in most cases, the commanding officer should advise the person concerned to seek legal counsel. JAGMAN, § 1320b. When a commanding officer has been forwarded process with the request that it be delivered to a person within the command, it may be delivered if the servicemember voluntarily agrees to accept it. When the servicemember does not voluntarily accept the service, it should be returned with a notation that the named person has refused to accept it.

c. Arising from official duties. Whenever a servicemember or civilian employee is served with Federal or state court civil or criminal process arising from activities performed in the course of official duties, the commanding officer should be notified and provided copies of the process and pleadings. The command shall ascertain the pertinent facts, notify JAG (Code 14) immediately by telephone, and forward the pleadings and process to that office. A military member may remove civil or criminal prosecutions from state court to Federal court when the action is on account of an act done under color of office or when authority is claimed under a law of the United States respecting the armed forces. 28 U.S.C. § 1442a (1982). The purpose of this section is to ensure a Federal forum for cases when servicemembers must raise defenses arising out of their official duties. If a Federal employee is sued in his or her individual capacity, that employee may be represented by Justice Department attorneys in state criminal proceedings and in civil and congressional proceedings. When an employee believes he or she is entitled to representation, a request -- together with pleadings and process -- must be submitted to the Judge Advocate General via the individual's commanding officer. The commanding officer shall endorse the request and submit all pertinent data as to whether the employee was acting within the scope of employment at the time of the incident out of which the suit arose. If the Justice Department determines that the employee's actions reasonably appear to have been performed within the scope of employment, and that representation is in the interest of the United States, representation will be provided.

3. Service not allowed. In any case where the commanding officer refuses to allow service of process, a report shall be made to SECNAV (JAG) as expeditiously as the circumstances allow or warrant. JAGMAN, § 1320f.

4. Leave/liberty. In those cases where personnel either are served with process or voluntarily accept service of process, leave or liberty should be granted in order to comply with the process, unless it will prejudice the best interests of the naval service. JAGMAN, § 1320e.

B. Subpoenas. A subpoena is a court order requiring a person to testify in either a civil or criminal case as a witness. The same considerations exist in this instance as apply in the case of service of process, except for special rules where testimony is required on behalf of the U.S. in criminal and civil actions, or where the witness is a prisoner.

1. Witness on behalf of the Federal Government. Where Department of the Navy interests are involved and departmental personnel are required to testify for the Navy, the Naval Military Personnel Command or CMC will direct the activity to which the witness is attached to issue TAD orders. Costs of such orders shall be borne by that same command. In the event Department of Navy interests are not involved, the Navy will be reimbursed by the concerned Federal agency. JAGMAN, §§ 1321, 1322a.

2. Witness on behalf of accused in Federal court. When naval personnel are served with a subpoena and the appropriate fees and mileage are tendered, commanding officers should issue no-cost permissive orders unless the public interest would be seriously prejudiced by the member's absence from the command. In those cases where fees and mileage are not tendered as required by the Federal Rules of Criminal Procedure, but the person subpoenaed still desires to attend, the commanding officer is authorized to issue permissive orders at no cost to the Government. The individual should be advised that an agreement as to reimbursement for any expenses should be effected with the party desiring their attendance and that no reimbursement should be expected from the Government. JAGMAN, § 1322b(1).

3. Witness on behalf of party to civil action or state criminal action with no Federal Government interest. The commanding officer normally will grant leave or liberty to the person provided such absence will not prejudice the best interests of the naval service. If the member is being called as a witness for a nongovernmental party only because of performance of official duties, the commanding officer is authorized to issue the member permissive orders at no expense to the Government.

4. Witness is a prisoner. JAGMAN, § 1323.

a. Criminal cases. SECNAV (JAG) must be contacted for permission which normally will be granted. Failure to produce the prisoner as a witness may result in a court order requiring such production.

b. Civil action. The member will not be released to appear regardless of whether it is a Federal or state court making the request. A deposition may be taken at the place of confinement subject to reasonable conditions and limitations imposed by the prisoner's command.

5. Pretrial interviews concerning matters arising out of official duties. Requests for interviews and/or statements by parties to private litigation must be forwarded to the commanding officer/officer in charge of the cognizant naval legal service office or Marine Corps staff judge advocate. When practicable, arrangements will be made to have all such individuals interviewed at one time by all interested parties. These interviews will be conducted in the presence of an officer designated by the commanding officer/officer in charge, naval legal service office, or Marine Corps staff judge advocate who will ensure that no line of inquiry is permitted which may disclose or compromise classified information or otherwise prejudice the security interests of the U.S. These requests will not be granted where the U.S. is a party to any related litigation or where its interests are involved, including cases where U.S. interests are represented by private counsel by reason of insurance or subrogation arrangements. Where U.S. interests are involved, records and witnesses shall be made available only to Federal Government agencies. JAGMAN, § 1324.

6. Release of official information for litigation purposes and testimony by Department of Navy personnel. SECNAVINST 5820.8 series prescribes what information -- testimonial and documentary -- is releasable to courts and other government proceedings and the means of obtaining approval for the release of such information.

C. Jury duty. Active-duty servicemembers are exempted by 28 U.S.C. § 1863(b)(6) (1982) from service on Federal juries. Congress passed a similar exemption for state jury duty in the Defense Authorization Act of 1986 (to be codified at 10 U.S.C. § 982), but imposed a two-part test. Servicemembers may be excused if mission readiness is affected by the absence or if the absence unreasonably interferes with military job performance. SECNAVINST 5822.2 series, Subj: Service on State and Local Juries by Members of the Naval Service, gives all commanders the authority to invoke the exemption for their personnel. If members do serve on a jury, they shall not be charged leave or lose pay. All fees, with the exception of actual expenses, will be turned over to the U.S. Treasury.

1006 GRANTING OF ASYLUM AND TEMPORARY REFUGE

A. References

1. U.S. Navy Regulations, 1973, article 0940

2. SECNAVINST 5710.22 series, Subj: Procedures for handling requests for political asylum and temporary refuge

B. Synopsis of provisions

1. The provisions of the basic references for granting asylum or temporary refuge to foreign nationals depend on where the request is made. Basically, if the request is made either in U.S. territory (the 50 states, Puerto Rico, territories or possessions) or on the high seas, the applicant will be received aboard the naval installation, aircraft or vessel where he seeks asylum. If a request for asylum or refuge is made in territory or territorial

seas under foreign jurisdiction, the applicant normally will not be received aboard and should be advised to apply in person at the nearest American consulate or Embassy. Under these circumstances, an applicant may be received aboard and given temporary refuge only under extreme or exceptional circumstances where his life or safety is in imminent danger (e.g., where he is being pursued by a mob).

2. Regardless of the location of the unit involved, any action taken upon a request for asylum or refuge must be reported to CNO or CMC, as appropriate, by the fastest available means. Telephone or other voice communication is preferred but, in any case, an immediate precedence message (info: SECSTATE) must be sent confirming the telephone or voice radio report. All requests from foreign governments for release of the applicant will be referred to CNO/CMC and the requesting authorities shall be advised of the referral.

3. In any case, once an applicant has been received aboard an installation, aircraft or vessel, he will not be turned over to foreign officials without personal permission from the Secretary of the Navy or higher authority, regardless of where the accepting unit is located.

4. Personnel of the Department of the Navy are prohibited from directly or indirectly inviting persons to seek asylum or temporary refuge. No information concerning a request for political asylum or temporary refuge will be released to the public or media without the prior approval of the Assistant Secretary of Defense for Public Affairs.

1007 POSSE COMITATUS

A. References

1. Posse Comitatus Act, 18 U.S.C. § 1385 (1982).

2. Military Cooperation with Civilian Law Enforcement Officials, 10 U.S.C. §§ 371-380 (1982), as amended.

3. DoD Dir. 5525.5 of 15 Jan 1986, DoD Cooperation with Civilian Law Enforcement Officials.

4. SECNAVINST 5820.7 series, Subj: COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS

B. Statutory authority. The Posse Comitatus Act, 18 U.S.C. § 1385 (1982), provides that:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years or both.

C. Navy policy. Although not expressly applicable to the Navy and Marine Corps, the Act is regarded as a statement of Federal policy which has been adopted for the Department of the Navy by Secretarial regulation (i.e., SECNAVINST 5820.7 series).

D. Direct participation. Military personnel are prohibited from providing the following forms of direct assistance:

1. Interdiction of a vehicle, vessel, aircraft, or other similar activity;

2. a search or seizure;

3. an arrest, stop and frisk, or similar activity;

4. use of military personnel for surveillance or pursuit of individuals, or as informants, undercover agents, investigators, or interrogators; and

5. any other activity which subjects civilians to the exercise of military power that is regulatory, proscriptive, or compulsory in nature.

E. "Armed forces" defined. The prohibitions are applicable to members of the Navy and Marine Corps acting in an official capacity. Accordingly, it does not apply to:

1. A servicemember off duty, acting in a private capacity, and not under the direction, control or suggestion of DoN authorities;

2. a member of a Reserve component not on active duty or active duty for training; or

3. civilian special agents of the Naval Investigative Service performing assigned duties under SECNAVINST 5520.3 series.

F. Exceptions

1. Use of information collected during military operations. All information collected during the normal course of military operations which may be relevant to a violation of Federal or state law shall be forwarded to the local Naval Investigative Service field office or other authorized activity for dissemination to appropriate civilian law-enforcement officials pursuant to SECNAVINST 5320.3 series. The planning and execution of compatible military training and operations may take into account the needs of civilian law-enforcement officials for information when the collection of information is an incidental aspect of training performed for a military purpose. The needs of civilian law-enforcement officials may even be considered in scheduling routine training missions. This does not, however, permit the planning or creation of missions or training for the primary purpose of aiding civilian law-enforcement officials, nor does it permit conducting training or missions for the purpose of routinely collecting information about U.S. citizens.

2. Use of equipment and facilities. Navy and Marine Corps activities may make available equipment, base facilities, or research facilities to Federal, state or local civilian law-enforcement officials for law-enforcement purposes when approved by proper authority under SECNAVINST 5820.7 series.

3. Use of Department of the Navy personnel

a. Military/foreign affairs purposes. Actions that are taken for the primary purpose of furthering a military or foreign affairs function of the United States (e.g., enforcement of the UCMJ, maintenance of law and order on a military installation, protection of classified military information or equipment) are not restricted by the Posse Comitatus Act regardless of incidental benefits to civilian law-enforcement authorities. Any vehicle or aircraft used for transport of drugs and seized for a legitimate military purpose is subject to forfeiture by the Drug Enforcement Administration under 21 U.S.C. § 881(a)(4) (1982).

b. Express statutory authority. Laws that permit direct military participation in civilian law enforcement include, inter alia, suppression of insurrection or domestic violence [10 U.S.C. §§ 331-334(1982)], protection of the President, Vice President and other designated dignitaries [18 U.S.C. § 1751 (1982)], assistance in the case of crimes against members of Congress [18 U.S.C. § 351 (1982)], and foreign officials and other internationally protected persons [18 U.S.C. §§ 112, 1116 (1982)].

c. Operation and maintenance of equipment. Where the training of non-DoD personnel is infeasible or impractical, Department of the Navy personnel may operate or maintain, or assist in operating or maintaining, equipment made available to civilian law-enforcement authorities. The request for assistance must come from agencies such as the Drug Enforcement Administration, Customs Service, or Immigration and Naturalization Service. Those agencies in an emergency situation, determined to exist by the Secretary of Defense and the Attorney General, may use Department of the Navy vessels and aircraft outside the land area of the U.S. as a base of operations to facilitate the enforcement of laws administered by those agencies, so long as such equipment is not used to interdict or interrupt the passage of vessels or aircraft.

d. Training and expert advice. Navy and Marine Corps activities may provide training on a small scale and expert advice to Federal, state and local civilian law-enforcement officials in the operation and maintenance of equipment.

e. Secretarial authorization. The DoN Posse Comitatus Act policy is subject to Secretarial exceptions on a case-by-case basis.

4. Reimbursement. As a general rule, reimbursement is required when equipment or services are provided to agencies outside DoD. When DoN resources are used in support of civilian law-enforcement efforts, the costs shall be limited to the incremental or marginal costs incurred by DoN.

1008 TERRORISM

A. References

1. Memorandum of Understanding Between Department of Defense, Department of Justice, and the Federal Bureau of Investigation, Subj: Use of Federal Military Force in Domestic Terrorist Incidents.

2. DoD Dir. 2000.12 of 12 Feb 1982 and 16 July 1986, Protection of DoD Personnel and Resources Against Terrorist Acts.

3. MCO 3302 of 23 Nov 1984, Subj: COMBATTING TERRORISM

B. Background. History is replete with examples of individuals, groups, and other national leaders who have employed terror tactics for one reason or another. Intimidation is not a new phenomenon. Robespierre used terror tactics to destroy the French aristocracy in the eighteenth century when an estimated 40,000 people were put to death by one means or another. The Russian Socialist Revolutionaries attempted to use terror tactics to overthrow the Tzar at the beginning of this century only to be thwarted by the Bolsheviks who combined the strategy of mass with terror to succeed where pure terrorism had failed. But pure terrorism has been remarkably successful in the twentieth century. The exploits of the Irgun Zvai Leumi and the Stern Gang in Palestine, the Eoka B Group in Cyprus, and the FLM in Algeria are only some examples of that success. In recent years, terrorism has become a worldwide phenomenon. From 1968 through 1981, more than 3,800 people died in international terrorist incidents. The principal target was the United States, and over one-third of all incidents were directed at Americans (both domestically and overseas), including a significant and growing percentage of attacks on American military personnel. Such acts of terrorism directed at naval personnel, activities, or installations have the potential to destroy critical facilities, injure or kill personnel, and impair and delay accomplishment of a command's mission. Significantly, the fact that acts of terrorism may claim innocent bystanders or victims is of little consequence to the pure terrorist who is ideologically or politically motivated and employs violence or force for effect; in essence, for its dramatic impact on the audience. The phenomenon of terrorism today has been influenced to a large degree by a number of factors, such as: (1) Highly efficient newsprint media and prime time television; (2) modern global transportation; and (3) technological advances in weaponry. Terrorist tactics include, primarily, bombing (67% of all terrorist incidents) and, secondarily, arson, hijacking, ambush, assassination, kidnapping and hostage-taking. One Rand Corporation survey shows that terrorists, who use kidnapping and hostage-taking for ransom or political bargaining purposes, have:

1. An 87% probability of seizing hostages;

2. a 79% chance that all members of the terrorist team will escape punishment or death, whether successful in their endeavors or not;

3. a 40% chance that all or some of their demands would be met in operations when something more than just safe passage or exit permission was demanded;

4. a 29% chance of compliance with such demands;

5. an 83% chance of success where safe passage or exit for terrorists or others was the sole demand;

6. a 67% probability that, if the principal demand were rejected, all or nearly all of the terrorist team could still escape by going underground, accepting safe passage in place of their original demands, or surrendering to a sympathetic government; and

7. virtually a 100% probability of gaining major publicity.

The terrorist, then, must be considered a formidable adversary.

C. "Terrorism" and "terrorists" defined. Terrorism is defined in DoD Dir. 2000.12 of 12 Feb 1982 as the "unlawful use or threatened use of force or violence by a revolutionary organization against individuals or property, with the intention of coercing or intimidating governments or societies, often for political or ideological purposes." Among these "crusaders," there are today minority nationalist groups, Marxist revolutionary groups, anarchist groups, and neofascist and extreme right-wing groups, many of whose operations transcend national boundaries in the carrying out of their acts, the purposes of their acts or the nationalities of their victims. Frederick J. Hacker in his book, Crusaders, Criminals and Crazies, has grouped terrorists into three distinct groups: (1) The politically or ideologically motivated crusader; (2) the criminal who commits terrorist acts for personal, rather than ideological, gain; and (3) crazies or mentally ill people who commit terrorist acts during a period of psychiatric disturbance (such as Charles Manson, Son of Sam, and the Hillside Strangler). Only the first group falls clearly within the DoD definition of terrorism.

D. United States policy. U.S. policy on terrorism is clear: All terrorist acts are criminal. The U.S. Government will make no concessions to terrorists. Ransom will not be paid, and nations fostering terrorism will be identified and isolated. Defensive measures taken to combat terrorism are referred to as antiterrorism and are used by DoD to reduce the vulnerability of DoD personnel, their dependents, facilities and equipment to terrorist acts. Counterterrorism, meanwhile, refers to offensive measures taken to respond to a terrorist act, including the gathering of information and threat analysis in support of those measures. Since a consistent objective of terrorists is to achieve maximum publicity, a principal objective of the U.S. Government is to thwart the efforts of terrorists to gain favorable public attention and, in doing so, to clearly identify all terrorist acts as criminal and totally without justification for public support. Further, when U.S. military personnel are identified as victims of terrorism, it is DoD policy to limit release of information concerning the victim, his or her biography, photographs, lists of family members or family friends, or anything else which might create a problem for the victim while in captivity. Withholding such information, which will be made public at a later date, may well be the action that saves the victim from additional abuse or even death. It is a case where protection of the potential victims, operational security considerations, and counterterrorism efforts override standard public affairs procedures.

E. Agency responsibilities

1. General. In responding to terrorist incidents, the lead agency in the Department of Defense is the Department of the Army. Within the United States, the Department of Justice (FBI) is assigned the role of lead agency for the Federal Government -- with the exception of acts that threaten the safety of persons aboard aircraft in flight, which are the responsibility of the Federal Aviation Administration.

2. Outside military installations in U.S. The use of DoD equipment and personnel to respond to terrorist acts outside military installations is governed generally by the legal restrictions of the Posse Comitatus Act, discussed in section 1007 above. The direct involvement of military personnel in support of disaster relief operations or explosive ordnance disposal is permissible. Moreover, the loan of military equipment, including arms and ammunition, to civilian law-enforcement officials responding to terrorist acts viewed as a form of civil disturbance is also considered permissible, subject to the approval of proper military authority. Under the Memorandum of Understanding (MOU) Between Department of Defense, Department of Justice and the Federal Bureau of Investigation concerning the use of Federal military forces in domestic terrorist incidents, the use of DoD personnel to respond to terrorist acts outside military installations in the United States is authorized only when directed by the President of the United States. One organization available for such action is the Counter Terrorism Joint Task Force, composed of selected units from all of the armed forces.

3. On military installations in U.S. When terrorist activities occur on a military installation within the United States, its territories and possessions, the FBI's Senior Agent in Charge (SAC) for the appropriate region must be promptly notified of the incident. The SAC will exercise jurisdiction if the Attorney General or his designee determines that such an incident is a matter of significant Federal interest. Military assistance in such an event may be requested without Presidential approval, but such assistance must be provided in a manner consistent with the provisions of the MOU, including the requirement that military personnel remain under military command. If the FBI declines to exercise its jurisdiction, the military commander must take appropriate action to protect and maintain security of his command as required by articles 0702, 0713 and 0736 of U.S. Navy Regulations, 1973. Regardless of whether or not the FBI assumes jurisdiction, the base commander may take such immediate action in response to a fast-breaking terrorist incident (such as utilizing a Crisis Response Force (OPNAVINST 5530.14 series)] as may be necessary to protect life or property.

4. Outside U.S. Outside the United States, its territories and possessions, where U.S. military installations are located, the host country has the overall responsibility for combatting and investigating terrorism. Within the U.S. Government, the Department of State has the primary responsibility for dealing with terrorism involving Americans abroad and for handling foreign relations aspects of domestic terrorist incidents. The planning, coordination, and implementation of precautionary measures to protect against, and respond to, terrorist acts on U.S. military installations remains a local command responsibility. Contingency plans will necessarily have to address the use of installation security forces, other military forces, and host nation resources

and must be coordinated with both host country and State Department officials. Outside U.S. military installations located in a foreign country, U.S. military assistance, if any, may be rendered only in accordance with the applicable SOFA after coordination with State Department officials. Applicable international law in this area, in addition to the SOFA and other memorandums of understanding or agreement, include the Tokyo, Hague, and Montreal Conventions on aircraft hijacking, the 1977 European Convention on the Suppression of Terrorism, the U.N. Convention on Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents, the OAS Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion That are of International Significance, and customary international-law norms such as self-help (Entebbe Raid).

F. Judge advocate's role. The judge advocate's role in combatting terrorism is severalfold. First, he may get involved in the proactive phase of reviewing contingency plans. For example, each command -- under physical security regulations -- is required to publish an instruction dealing with hostage situation procedures. Second, when a potential terrorist incident arises, the judge advocate may become involved in the reactive phase by providing advice on issues (such as when the FBI must be called in) or "negotiating" with the terrorists or civil law-enforcement authorities in the U.S., or the State Department and host country representatives abroad.

CHAPTER XI

FREEDOM OF EXPRESSION IN THE MILITARY

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CHAPTER XI

FREEDOM OF EXPRESSION IN THE MILITARY

1101 INTRODUCTION. The purpose of this chapter is to discuss the right of active-duty servicemembers to exercise freedom of expression and the extent to which a military commander may limit civilians who seek to exercise their freedom of expression in areas over which the military has jurisdiction. We will first briefly consider the constitutional basis for freedom of expression and several doctrines fashioned by the Supreme Court to test the validity of limitations on the exercise of freedom of expression. An appreciation of these doctrines is necessary, since the courts will employ them in reviewing military regulations that limit expression. We will then consider freedom of expression as it applies to the armed forces.

PART A - CONSTITUTIONAL BASIS AND SUPREME COURT DOCTRINES

1102 FIRST AMENDMENT

A. Specific freedoms. The first amendment to the U.S. Constitution states:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

There are five freedoms explicitly listed: (1) religion, (2) speech, (3) press, (4) assembly, and (5) petition for redress of grievances. In addition to these five freedoms, other provisions of the Bill of Rights (such as the requirement for due process, the privilege against self incrimination, and the prohibition against unreasonable search and seizures) are significant elements in maintaining a system of freedom of expression. Nevertheless, the first amendment is considered the main source of constitutional protection in this area.

B. Importance. The importance accorded freedom of expression by the courts is reflected in the following excerpts from Abrams v. United States, 250 U.S. 616, 630-31 (1919):

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart, you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do

> not care whole heartedly for the result, or that you doub either your power or your premises. But when men hav realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system, I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.... Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, "Congress shall make no law ... abridging the freedom of speech."

and Whitney v. California, 274 U.S. 357, 375-376 (1927):

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression, that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law -- the argument of force in its worst form.

Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

1103 SCOPE OF FREEDOM OF EXPRESSION

A. Penumbra theory. The scope of the first amendment extends beyond the five expressly stated freedoms. The Supreme Court has said that the specific guarantees of the Bill of Rights have penumbras, or fringe areas of protection, that are formed by emanation from the specific guarantees and which help give them life and substance. The right of association is one such right, created in the shadow of the first amendment. This is more than a right to attend a meeting. It includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it, or by other lawful means. Association in this context is a form of expression of opinion and, while it is not expressly included in the first amendment, its existence is necessary in making the express guarantees fully meaningful. In the same manner, the rights of freedom of speech and press include not only the right to utter and to print, but also the rights to distribute, to receive, to read, to inquire, to think, to teach, and to privacy.

B. States. The rights protected against Federal encroachment by the first amendment are entitled to the same protections from infringement by the state. Moreover, the safeguards of the first amendment are not confined to any particular fields of human interest (such as political or religious causes), but rather extend to secular causes. United Mine Workers v. Illinois State Bar Assoc., 389 U.S. 217 (1967).

C. Symbolic speech. The scope of the protection of freedom of expression is further expanded by the recognition of forms of symbolic speech as being protected. For example, it has been held that a school could not prohibit students from wearing armbands to protest U.S. involvement in Vietnam. The wearing of the armbands was held to be symbolic speech, akin to "pure speech," and not subject to limitation in the absence of a showing of a sufficient threat to a significant government interest to justify abridgement of freedom of expression. Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969).

1104 LIMITATION OF FREEDOM OF EXPRESSION

A. General. Freedom of expression is not an unlimited right. The Supreme Court has said that the first amendment embraces two concepts: freedom to believe and freedom to act. The first is absolute; the second cannot be, since society must regulate conduct for its own protection. Cantwell v. Connecticut, 310 U.S. 296 (1940). There are at least two ways in which constitutionally protected freedom of expression is narrower than a totally unlimited license to talk. First, certain forms of speech, or speech in certain contexts, has been considered outside the scope of constitutional protection. Second, general regulatory statutes not intended to control the content of expression, but incidentally limiting its unfettered exercise, have been found to be justified by valid governmental interests.

B. Unprotected speech. Examples of types of speech which are not constitutionally protected are:

1. Libelous utterances or "fighting" words [Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)];

2. obscenity [Ginsberg v. New York, 390 U.S. 629, reh'g denied, 391 U.S. 971 (1968) (defining what is obscene is a separate problem)]; and

3. incitement to commit a crime if the speech is in fact directed to inciting or producing imminent lawless action and is likely to incite or produce such action, as opposed to an abstract teaching of the moral propriety or even necessity for resorting to force and violence [Brandenberg v. Ohio, 395 U.S. 444 (1969) (conviction of a leader of Ku Klux Klan under Ohio criminal syndicalism statute reversed where statute failed to distinguish between actual incitement and abstract advocacy); Bond v. Floyd, 385 U.S. 116 (1966) (stated opposition to the war in Vietnam and approval of those attempting to avoid the draft held not to be such incitement to crime as will permit a state legislature to bar a duly elected representative from occupying his seat)].

C. Lawful regulation of free speech. In handling cases in this area, the court has noted a distinction between expression by pure speech and expression by conduct (such as patrolling, picketing, and marching on streets and highways), saying that the constitutional guarantees do not afford the same kind of freedom to the latter as they do to the former. Walker v. Birmingham, 388 U.S. 307, reh'g denied, 389 U.S. 894 (1967).

1. Trespassing. In Adderley v. Florida, 385 U.S. 39, reh'g denied, 385 U.S. 1020 (1966), a statute provided for prosecution of trespass upon property of another committed with a malicious and mischievous intent. A number of students gathered on jail grounds to protest the previous arrest of other students. The court noted that the students were on part of the jail grounds not open to the public and were blocking a jail driveway.

2. Administration of justice. A state statute prohibiting picketing or parading in or near a courthouse for the purpose of interfering with, obstructing, or impeding the administration of justice or influencing the court was held not to be an unconstitutional infringement of freedom of expression. Cox v. Louisiana, 379 U.S. 559, reh'g denied, 380 U.S. 926 (1965).

3. Televising and broadcasting of trials. Freedom of the press may be limited where it conflicts with maintenance of absolute fairness in the judicial process. Estes v. Texas, 381 U.S. 532, reh'g denied, 382 U.S. 875 (1965); Sheppard v. Maxwell, 384 U.S. 333 (1966).

4. Public employment. In Goldwasser v. Brown, 417 F.2d 1169 (D.C. Cir. 1969), the appellant was a civilian employee of the Air Force who served as a language instructor in the Air Force Language School at Lackland Air Force Base, Texas. His duty was to give quick training in basic English to foreign military officers who were in this country on invitational travel orders. He was dismissed for statements he made to his students concerning the Vietnam war and anti-Semitism in the United States. The court held that the dismissal did not violate appellant's right to freedom of speech, since public employment may properly encompass limitations on persons that would not survive constitutional challenge if directed at a private citizen.

5. Draft cards. In United States v. O'Brien, 391 U.S. 367, reh'g denied, 393 U.S. 900 (1968), a conviction was affirmed for one who had burned his selective service registration certificate in violation of a Federal statute making the knowing destruction or mutilation of such a certificate a criminal offense. The Court stated that not every kind of conduct can be labeled "speech," and thereby be constitutionally protected, whenever the person engaging in the conduct intends thereby to express an idea. When both "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify an incidental limitation on t - speech element. To justify such incidental limitation on the freedom of expression, it is necessary that an important and substantial government interest be involved which is unrelated to the suppression of free expression, and that the inciden - tal limitation on free expression be no greater than absolutely essential in furtherance of the legitimate governmental interest.

1105 PRESUMPTION IN FAVOR OF RIGHTS GUARANTEED BY THE FIRST AMENDMENT. In attempting to strike a balance between freedom of expression on the one hand and justifiable governmental limitations on the other, members of the Supreme Court have stated that first amendment rights are "preferred freedoms" which should be given "the broadest scope that could be construed in an orderly society." Follett v. Town of McCormick, 321 U.S. 573, 575 (1944).

> Moreover, the likelihood, however great, that a substan - tive evil will result [from the exercise of freedom of expression] cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be "substantial"...; it must be "serious".... And even the expression of "legislative preferences or beliefs" cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression.

Bridges v. California, 314 U.S. 252, 262-63 (1941). An example of the application of this doctrine is found in Cohen v. California, 403 U.S. 15, reh'g denied, 404 U.S. 876 (1971), where the defendant, while in the corridor of a county courthouse, was wearing a jacket bearing the plainly visible words "Fuck the Draft." On the basis of having done this, he was convicted by a California court for disturbing the peace by offensive conduct. The Supreme Court reversed, stating that, absent a more particularized and compelling reason for its actions, the state could not make the defendant's simple public display of this single four-letter expletive a criminal offense.

1106 TESTS USED TO JUDGE LIMITATIONS ON FREE EXPRESSION

A. "Clear and present danger" test. Throughout its history, the Supreme Court has adopted a number of tests to be used in judging the validity of a governmental limitation on unfettered expression. Under the "clear and present danger" rule, first set forth by Justice Holmes in Schenck v. United States, 249 U.S. 47 (1919), freedom of expression may not be limited unless it creates a clear and present danger of bringing about a substantial evil which the state has a right to prevent. Justice Holmes gave the famous

example of a person falsely shouting "fire" in a crowded theater as being speech that could be punished because of the time, place, and circumstances in which the words were uttered. An example of the application of this doctrine in found in Feiner v. New York, 340 U.S. 315 (1951), where a conviction for disorderly conduct of one who addressed a crowd through a loudspeaker system from a box on a sidewalk was upheld on the ground, among others, that a clear danger of disorder was threatened.

B. "Gravity of the evil" test. At other times, the Court has tested a limitation of expression by asking whether the gravity of the evil, discounted by its probability, justifies such invasion of free speech as is necessary to avoid the danger. Under this approach, where the public interest to be protected is substantial and the limitation on expression is relatively small, a showing of imminent danger -- as might be required by the clear and present danger rule -- may not be necessary. Dennis v. United States, 341 U.S. 494 (1951) (conviction under Smith Act affirmed for conspiracy to organize the Communist Party of the United States as a group and to teach and advocate the overthrow of the government of the United States by force and violence).

C. Balancing test. During a recent period of the Court's history, a five-member majority adopted Justice Frankfurter's "weighing-of-interests" or "balancing" test, in which the public interest sought to be protected was measured against the individual's right to free expression and the infringement thereof. Under this standard, the Court often found a sufficiently compelling governmental interest to justify limited freedom of expression, particularly in the area of subversive activities. Barenblatt v. United States, 360 U.S. 109, reh'g denied, 361 U.S. 854 (1959) (inquiries by a Subcommittee of the House Committee on Un-American Activities into a witness' membership in the Communist Party found not to offend the first amendment).

D. "Absolutist" approach. Another viewpoint is the so-called "absolutist" approach, propounded by Justice Black, who argued that the first amendment's unequivocal command that there shall be no abridgement of the rights of free speech and assembly shows that the men who drafted the Bill of Rights did all the "balancing" that was to be done in that field, and that the very object of adopting the first amendment was to put the freedoms protected there completely out of the area of any legislative control which might be attempted through the exercise of precisely those powers which were being used to "balance" the Bill of Rights out of existence. See Konigsberg v. State Bar of California, 366 U.S. 36, 61, reh'g denied, 368 U.S. 869 (1961) (Black, J., dissenting). Under this approach, the only room left for interpretation is in determining whether particular conduct qualifies as "speech" under the first amendment.

1107 DOCTRINE AGAINST PRIOR RESTRAINTS

A. General. There are basically two means of limiting freedom of expression. The first is a prior restraint; that is, preventing the expression of ideas before they are in fact expressed. The classic example is censorship. The second means is the punishment of someone after he has expressed his thoughts. An example would be the prosecution of a servicemember for having

made statements disloyal to the United States. As regards the former, the imposition of prior restraints on freedom of expression carries a heavy burden of justification in the courts. The following remarks of one commentator illustrate one reason for this, in addition to the historical experience of the framers of the Constitution with censorship in the colonies:

> A second major element in the problem is the inherent difficulty of framing limitations on expression. Expression in itself is not normally harmful, and the objective of the limitation is not normally to suppress the communication as such. Those who seek to impose limitation on expression do so ordinarily in order to forestall some anticipated effect of expression in causing or influencing other conduct. It is difficult enough to trace the effect of the expression after the event. But it is even more difficult to calculate in advance what its effect will be. The inevitable result is that the limitation is framed and administered to restrict a much broader area of expression than is necessary to protect against the harmful conduct feared. In other words, limitations of expression are by nature attempts to prevent the possibility of certain events occurring rather than a punishment of the undesired conduct after it has taken place. To accomplish this end, especially because the effect of the expression is so uncertain, the prohibition is bound to cut deeply into the right of expression.

Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 889 (1963).

B. Immediate and irreparable harm. The Supreme Court has made it clear that, in order to justify a prior restraint, the governmental authority must be able to demonstrate on the record that the expression to be restrained will immediately and irreparably cause serious injury to the public welfare. One such example of the application of this doctrine comes from the Pentagon Papers cases, in which the Court ruled that the government failed to show that the nation's security would be sufficiently jeopardized by the publication of the papers and therefore refused to enjoin their publication. Their refusal to exercise prior restraint by enjoining publication of the papers did not mean, though, that they would disapprove a prosecution to punish any violations of security laws which might result from such publication. New York Times Co. v. United States, 403 U.S. 713 (1971).

C. Future publication. For a state to empower its courts to enjoin the dissemination of future issues of a publication because its past issues have been found offensive is the essence of censorship and hence unconstitutional. Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957).

D. Censorship and procedural safeguards. In Freedman v. Maryland, 380 U.S. 51 (1965), the Supreme Court reversed the conviction of a motion picture exhibitor for violation of a film censorship statute. While refusing to condemn all systems of prior restraints of expression, the Court reiterated the principle that there is a heavy presumption against their constitutional validity and held that a system which required submission of a film to a censor would

be valid only if it provided procedural safeguards designed to obviate the dangers of censorship. These safeguards are: first, that the burden of proving that the particular expression involved is not protected by the first amendment must rest on the censor; second, that while the state may require advance submission of all films in order to proceed effectively to bar the showing of unprotected films, the requirement of submission could not be administered in such a manner as to give finality to the censor's determination of whether or not a film constituted protected expression; and third, that the procedure must assure a prompt, final judicial decision.

1108 DOCTRINE AGAINST BROADNESS. The Court has consistently held that regulatory measures in the area of expression cannot be employed in purpose or effect to broadly stifle, penalize, or curb the exercise of free expression. To be valid the measure must be highly selective, even though the government purpose in regulating the activity is legitimate and substantial, and that purpose cannot be pursued by means which broadly stifle personal liberties when the end can be effectively achieved by "narrow" means. See Shelton v. Tucker, 364 U.S. 479 (1960) (state statute, requiring teachers in public schools to file affidavits giving names and addresses of all organizations to which they had belonged or contributed within the preceding five years as a prerequisite of employment, held invalid) and cases cited therein. See also Cox v. Louisiana, 379 U.S. 559, reh'g denied, 380 U.S. 926 (1965) (a state breach-of-the-peace statute which was broad in scope could not constitutionally be employed to limit the rights of free speech and assembly, while another state statute prohibiting picketing in, or near, a courthouse for the purpose of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing the court, was considered not too broad since it was narrowly drawn and appropriate for vindicating the state's interest in assuring justice under law) and Board of Airport Commissioners of Los Angeles v. Jews for Jesus Inc., 482 U.S. 569 (1987) (airport authority resolution declaring central terminal area not open to first amendment activities struck down as overbroad; court notes that, as drafted, regulation would ban nearly every person who enters area from all first amendment activities -- including talking or reading).

1109 "VOID FOR VAGUENESS" DOCTRINE. Closely related to the broadness doctrine, this rule requires that regulations infringing on freedom of expression specifically define the proscribed conduct. Vague laws in any area are constitutionally infirm but, when first amendment rights are involved, the courts are especially stringent in requiring that the regulation clearly define the proscribed conduct. For example, in Cox v. Louisiana, 379 U.S. 559, reh'g denied, 380 U.S. 926 (1965), dealing with the statutes regulating demonstrations "in or near" the courthouse, the Supreme Court found the term "near" to be vague.

PART B - FREEDOM OF EXPRESSION IN THE MILITARY

1110 INTRODUCTION

A. The courts. Having briefly considered some of the doctrines employed by the courts in considering the constitutional protection of freedom of expression, we now consider the status of first amendment freedoms in the military. The United States Court of Military Appeals has stated on several occasions that military personnel are entitled to first amendment protections. See United States v. Gray, 20 C.M.A. 63, 42 C.M.R. 255 (1970); United States v. Howe, 17 C.M.A. 165, 37 C.M.R. 429 (1967); United States v. Voorhees, 4 C.M.A. 509, 16 C.M.R. 83 (1954). But the protection afforded is not absolute. It must be accommodated with the requirement for an effective military force. This latter requirement creates substantial legitimate government interests that are not present in the civilian context for, as the Supreme Court has stated, there are: "inherent differences in values and attitudes that separate the military establishment from civilian society. In the military, by necessity, emphasis must be on the security and order of the group rather than on the value and integrity of the individual." Reid v. Covert, 354 U.S. 1, 39 (1957). Justice Douglas, in criticizing the military justice system in the majority opinion in O'Callahan v. Parker, 395 U.S. 258 (1969), stated that the commander should exert the least possible power necessary to accomplish his mission and maintain good order and discipline within his command -- thereby impliedly recognizing the legitimate interests that justify limitations on free expression in the military service.

B. Department of Defense. The balance between the servicemember's right of expression and the needs of national security is the subject of DoD Directive 1325.6 of 12 September 1969, Guidelines for Handling Dissent and Protest Activities Among Members of the Armed Forces, (transmitted by OPNAVINST 1620.1 series and MCO 5370.4 series) [hereinafter DoD Directive 1325.6], which states:

> It is the mission of the Department of Defense to safeguard the security of the United States. The service member's right of expression should be preserved to the maximum extent possible, consistent with good order and discipline and the national security. On the other hand, no commander should be indifferent to conduct which, if allowed to proceed unchecked, would destroy the effectiveness of his unit. The proper balancing of these interests will depend largely upon the calm and prudent judgment of the responsible commander.

This directive provides general guidance, significant portions of which have withstood judicial scrutiny by the Supreme Court. See e.g., Brown v. Glines, 444 U.S. 348 (1980); Secretary of the Navy v. Huff, 444 U.S. 453 (1980); Greer v. Spock, 424 U.S. 828 (1976).

C. Criminal sanctions. Before considering the various contexts in which questions of freedom of expression may arise in the military, attention is directed again to the distinction drawn between prior restraints and subsequent punishment. With regard to subsequent punishment, a particular

exercise of expression could bring a servicemember within the prohibition of a criminal statute. Statutory provisions that could apply, assuming they continue to withstand attack on constitutional grounds under the doctrines discussed in part A of this chapter, include:

1. Uniform Code of Military Justice [10 U.S.C. §§ 877-934 (1982)]:

a. Attempt to commit an offense (UCMJ, art. 80);

b. conspiracy to commit an offense (UCMJ, art. 81);

c. soliciting desertion, mutiny, sedition, etc. (UCMJ, art. 82);

d. any commissioned officer using contemptuous words against the President, Vice President, Congress, Secretary of Defense, Secretary of a military department, Secretary of the Treasury, or the governor or legislature of the state, territory, commonwealth, or possession in which the officer is present (UCMJ, art. 88);

e. disrespect toward a superior commissioned officer (UCMJ, art. 89);

f. willfully disobeying a lawful command of a superior commissioned officer (UCMJ, art. 90);

g. disrespect toward a warrant officer, noncommissioned officer, or petty officer (UCMJ, art. 91);

h. failure to obey a lawful order or regulation (UCMJ, art. 92);

i. mutiny or sedition (UCMJ, art. 94);

j. betrayal of a countersign (UCMJ, art. 101);

k. corresponding with the enemy (UCMJ, art. 104);

l. causing or participating in a riot or breach of peace (UCMJ, art. 116);

m. provoking speeches or gestures (UCMJ, art. 117);

n. extortion (UCMJ, art. 127);

o. use of writing knowing it to contain false statements (UCMJ, art. 132);

p. conduct unbecoming an officer (UCMJ, art. 133); and

q. conduct undermining good order, discipline, and loyalty (e.g., criminal libel, disloyal statements) (UCMJ, art. 134); and

2. Federal criminal code:

a. Polling armed forces in connection with political activities [18 U.S.C. § 596 (1982)];

b. enticing desertion or harboring deserters [18 U.S.C. § 1381 (1982)];

c. assisting or engaging in rebellion or insurrection [18 U.S.C. § 2383 (1982)];

d. two or more persons engaging in seditious conspiracy [18 U.S.C. § 2384 (1982)];

e. advocating overthrow of the government by force or violence [18 U.S.C. § 2385 (1982)];

f. interference with morale, discipline, or loyalty of the armed forces [18 U.S.C. § 2387 (1982)];

g. interference with armed forces during war [18 U.S.C. § 2388 (1982)];

h. counseling evasion of the draft [50 U.S.C. app. 462 (1982)];

i. mailing writings or other publications containing matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States [18 U.S.C. § 1717 (1982)]; and

j. organizing a "military labor organization" or participating as part of such an organization in a strike or other concerted labor activity against the Federal government [10 U.S.C. § 976 (1982)].

D. Prefatory comment. The next four sections of this chapter discuss the freedoms of speech, press, assembly, and petition as they apply in the military. In each instance, the existence of any prior restraints under DoD Directive 1325.6, or otherwise, is discussed -- followed by examples of subsequent punishment under the foregoing statutes.

1111 FREEDOM OF SPEECH AND PRESS

A. Speech

1. Prior restraints. There are none provided for in DoD Directive 1325.6. Sections 401 and 404 of SECNAVINST 5720.44 series, Subj: Department of the Navy Public Affairs Regulations, provide for "policy review" of certain public statements, whether oral or written, pertaining to foreign or military policy. In United States v. Wysong, 9 C.M.A. 249, 26 C.M.R. 29 (1958), the accused attempted to persuade other servicemembers not to give information in an official investigation concerning alleged misconduct involving the accused's wife and minor stepdaughter and several members of his company. The accused's company commander became aware of these efforts and

gave the accused a direct order "not to talk to or speak with any of the men in the company concerned with this investigation except in line of duty," thereby imposing a prior restraint on the accused's freedom of speech. The accused again tried to persuade members of the company not to relate information concerning his stepdaughter. The accused was then convicted under Article 92 of the Uniform Code of Military Justice for failure to obey the lawful order of his company commander, and he appealed. The Court of Military Appeals reversed the conviction, holding that the order was illegal even though in furtherance of a valid purpose, (e.g., protecting the official investigation) because it was both too broad (the Court said that "a literal reading could be interpreted to prohibit the simple exchange of pleasantries between the accused and those 'concerned' with the investigation") and void for vagueness (the Court pointed out that everyone in the company was in some way "concerned" with the investigation since the incidents which gave rise to the investigation had become a matter of common knowledge in the company).

2. Subsequent punishment. There are several cases in which servicemembers have been prosecuted for violation of a criminal statute when they exercised what they regarded as their right to freedom of speech.

a. In United States v. Howe, 17 C.M.A. 165, 37 C.M.R. 429 (1967), the accused was a second lieutenant stationed at Fort Bliss, Texas, who participated in a peaceful antiwar demonstration in El Paso, while off duty and out of uniform, by carrying a placard that read, "LET'S HAVE MORE THAN A CHOICE BETWEEN PETTY IGNORANT FACISTS [sic] in 1968," on one side, and "END JOHNSON'S FACIST [sic] AGGRESSION IN VIETNAM" on the other. He was convicted of using contemptuous words against the President under Article 88 of the Uniform Code of Military Justice, and of conduct unbecoming an officer under Article 133 of the Uniform Code of Military Justice. In affirming the convictions, the Court of Military Appeals held that neither article 88 nor article 133 affronted first amendment freedoms. One point of interest in the decision was the standard used by the court in weighing the limitation on expression imposed by article 88: "That in the present times and circumstances such conduct by an officer constitutes a clear and present danger to discipline within our armed services, under the precedents established by the Supreme Court, seems to require no argument." Id. at 174, 37 C.M.R. at 438.

b. In United States v. Gray, 20 C.M.A. 63, 42 C.M.R. 255 (1970), the accused was assigned to the Crash Crew section at Marine Corps Air Station, Kaneohe Bay, Hawaii. One evening he absented himself without authority, after first writing the following message in the "rough" log kept in the Crash Crew office:

> Dear fellow member's of crash crew
>
> As I write this I have but a few hours left on this island. Surely you know why, but where did I go? I'm not to [sic] sure right now but I have hopes of Canada, then on to Sweden, Turkey, or India.
>
> It sounds silly to you? Let me ask you this: do you like the Marine Corps? The American policy or foreign affairs. [sic]

> Have you ever read the constitution of the United States? IT'S A FARCE. Everything that is printed there is contradicted by 'amendments'. is [sic] this fair [to] the U.S. people? I believe not. Why sit [sic] back and take these unjust Rules and do nothing about it. If you do nothing will change.
>
> This is what I'm doing, A Struggle for Humanity. But it takes more than myself. We must all fight.
>
> /s/ Mr. Gray

The accused later surfaced at a church near the University of Hawaii, where he and ten others made speeches and handed out a leaflet generally derogatory of the Marine Corps and the war in Vietnam. The accused was thereafter convicted under Article 134 of the Uniform Code of Military Justice of having made statements disloyal to the United States. The Court of Military Appeals upheld the conviction insofar as it pertained to the entry in the Crash Crew log, but set aside the conviction based on the leaflet handed out at the church. In reply to the accused's assertion of his right to freedom of speech, the Court stated:

> [The] public making of a statement disloyal to the United States, with the intent to promote disloyalty and disaffection among persons in the armed forces and under circumstances to the prejudice of good order and discipline, is not speech protected by the First Amendment and is conduct in violation of Article 134....

Id. at 66, 42 C.M.R. at 258.

c. In United States v. Daniels, 19 C.M.A. 529, 42 C.M.R. 131 (1970), the accused was convicted at trial for interference with the morale, discipline, or loyalty of members of the armed forces in violation of 18 U.S.C. § 2387 (1970) when he exhorted other Marines to refuse orders to Vietnam. The conviction was reversed by the Court of Military Appeals due to the failure of the military judge to instruct the members of the court that they must find beyond a reasonable doubt that the accused's statements had created a clear and present danger of impairing the loyalty, morale, or discipline of the servicemembers involved before they could reach a finding as such. Again, the court adopted the "clear and present danger" rule. The court did, however, affirm a conviction for a lesser offense of soliciting the commission of a military offense (e.g., refusal of the performance of duty). In United States v. Harvey, 19 C.M.A. 539, 42 C.M.R. 141 (1970), a companion case to Daniels, a conviction for making disloyal statements was set aside due to instructional error (the term "disloyal statement" was too broadly defined), but a conviction for the lesser offense of soliciting the commission of an offense was affirmed.

d. In United States v. Levy, 39 C.M.R. 672 (ABR 1968), petition denied, 18 C.M.A. 627 (1969), the accused was convicted in part for publicly uttering statements with the design to promote disloyalty and disaffection among troops. The Army Board of Review affirmed the conviction and

rejected the contention that the accused's statements were protected by the first amendment. In so doing, the board applied a "reasonable tendency" test regarding the likelihood that the accused's statements would cause disaffection and disloyalty among the troops. Id. at 677-78.

3. Summary. As the above cases dealing with freedom of speech indicate, the Court of Military Appeals, like the Supreme Court, prefers subsequent punishment over prior restraints. It is far easier for the Court to scrutinize a case dealing with a subsequent criminal prosecution, with the facts, circumstances and effects of the free expression clearly defined. It is likewise easier to apply the constitutional doctrines discussed in part A to an incident that has in fact occurred. In a subsequent prosecution, the government also has the advantage of being able to base the prosecution on a specific, narrowly drawn criminal statute rather than a prior restraint regulation.

B. Possession of printed materials

1. Prior restraints. Paragraph III.A.2. of DoD Directive 1325.6 states: "[T]he mere possession of unauthorized printed material may not be prohibited..." (emphasis added). The term "unauthorized" as used in the above provision could be misleading. A reasonable reading of the provision is considered to be that it was not intended to apply to classified security material since unauthorized possession of such material is prohibited by other regulations. Rather, the provision incorporates the rule of Stanley v. Georgia, 394 U.S. 557 (1969), where the Supreme Court held constitutionally invalid a criminal statute prohibiting mere possession of obscene material in one's own home based on the rationale that a man has a right to be left alone and to read what he wants without being subject to criminal sanctions. Stanley makes it clear that the prohibition of article 510.68 of OPNAVINST 3120.32 series, Subj: Standard Organization and Regulations of the U.S. Navy, against possession on board a naval unit of pornography is constitutionally infirm. It should be noted, however, that, if one possesses material for the purpose of making an illegal distribution, it may be seized. DoD Directive 1325.6, para. III.A.2., states that: "[P]rinted material which is prohibited from distribution shall be impounded if the Commander determines that an attempt will be made to distribute." What types of distributions can be prohibited are discussed below in section 1111C. Since a seizure of material would constitute a prior restraint, a commanding officer should be prepared to justify such action by pointing to the facts that led him to conclude that there was a clear and present danger that an unauthorized distribution would occur. Such a determination would be made in the same manner that a commanding officer decides there is probable cause to order a search. One relevant factor would be how many copies of a particular publication were involved, since it is reasonable to assume that an individual is not going to read multiple copies of the same material himself. Another factor would be whether the material is addressed to any particular group. The rules regarding what constitutes a distribution which can be prohibited are discussed below in section 1111C.

2. Subsequent punishment. Since mere possession of unauthorized material may not be prohibited, an individual could not be successfully prosecuted for such possession. See United States v. Schneider, 27 C.M.R. 566 (ABR 1958), where the Army Board of Review disapproved a conviction under Article 134, UCMJ, based on evidence showing only that some obscene photographs were found during a routine inspection of the accused's belongings.

There was no evidence of any effort by the accused to either show the photographs to anyone or to distribute them. The court held that such evidence does not show conduct either directly or inherently prejudicial to good order and military discipline.

C. Distribution of printed material

1. Prior restraints. DoD Directive 1325.6 distinguishes between distribution through official channels (such as base exchanges or libraries) and "other" channels (such as handing out materials on the sidewalks).

a. Official outlets. Paragraph III.A.1. of DoD Directive 1325.6 states: "A Commander is not authorized to prohibit the distribution of a specific issue of a publication distributed through official outlets such as post exchanges and military libraries." This provision is designed to preclude the possibility of a commander becoming embroiled in a controversy over supposed censorship of materials that have been accepted for distribution through official outlets. Article 4314f of the Navy Exchange Manual contains very broad guidelines for screening pornographic or other offensive materials not acceptable for sale within the military establishment. The DoD Directive does not prohibit the commander from completely removing a publication from an outlet as opposed to censuring a specific issue. However, a commander may not have unlimited discretion to arbitrarily refuse distribution of materials through official channels; he may be required to apply with equality a constant standard to all publications. For example, in Overseas Media Corp. v. McNamara, 385 F.2d 308 (D.C. Cir. 1967), the court held that a justifiable claim was made out by a publisher who claimed that the military, acting without criteria, had barred his newspaper from sale at newsstands of post exchanges while admitting others.

b. Unofficial outlets. Paragraph III.A.1. of DoD Directive 1325.6 provides for a prior restraint and specifies the standard to be used in imposing such prior restraint:

> In the case of distribution of publications through other than official outlets, a Commander may require that prior approval be obtained for any distribution on a military installation in order that he may determine whether there is a clear danger to the loyalty, discipline, or morale of military personnel, or if the distribution of the publication would materially interfere with the accomplishment of a military mission. When he makes such a determination, the distribution will be prohibited. (Emphasis added).

These guidelines are designed to preclude condemnation of the regulation as being too broad. Local regulations that are promulgated to implement DoD Directive 1325.6 should themselves be carefully drafted, incorporating the above language. In Greer v. Spock, 424 U.S. 828 (1976), the Supreme Court upheld the commander's right to require that prior approval be given before civilians are permitted to distribute campaign literature on a military reservation. In upholding the requirement that prior approval be

obtained before distributing campaign literature, the Court took pains to note that the regulation did not purport to authorize a commander to prohibit distribution of conventional campaign materials if he determines that the materials do not constitute a clear danger to the loyalty, discipline, or morale of troops on the base under his command.

(1) Regulatory specificity. As an example of restrictive judicial interpretation of a regulation imposing a prior restraint, consider United States v. Bradley, 418 F.2d 688 (4th Cir. 1969), where three students were convicted in Federal district court of the offense of entering a Federal installation for an unlawful purpose. They had entered Ft. Bragg, N.C., and distributed handbills without prior approval. The government argued that such activity was unlawful due to a base regulation prohibiting "picketing, demonstrations, sit-ins, protest marches, and political speeches, and similar activities" without prior approval. The court held that the base regulation did not cover handbilling, and therefore reversed the conviction.

(2) Protected interests. A commanding officer should be prepared to point to facts in support of his determination that a clear danger to the loyalty, discipline, or morale of military personnel would result or that the distribution would materially interfere with the accomplishment of a military mission. An unsupported conclusion may not be sufficient to withstand challenge in Federal court. "The fact that a publication is critical of Government policies or officials is not, in itself, a ground upon which distribution may be prohibited." DoD Dir. 1325.6, para. III.A.3. In this connection, see Yahr v. Resor, 431 F.2d 690 (4th Cir. 1970), where servicemembers at Ft. Bragg, N.C., published an underground newspaper called the "Bragg Briefs" and distributed it off base. They then requested permission to distribute the publication in certain areas on base that are normally open to the public. The commanding general refused permission, stating that the distribution would present a clear and present danger to the loyalty, discipline, or morale of the troops. The servicemembers then sought an injunction in Federal district court forbidding the commanding general from preventing the distribution. The district judge refused to issue the injunction and the servicemembers appealed. The court of appeals ruled that the district judge had not abused his discretion in refusing to issue the injunction, but it also remanded the case for a further hearing to determine whether the commanding general was justified in concluding that the distribution would present a clear and present danger. Thus, the court was prepared to look behind the commander's decision and see if there was any basis in fact for it.

(3) Case-by-case decisionmaking. The decision whether to permit distribution of a publication must be made on a case-by-case basis; the June issue of a publication could not be prohibited solely because the March issue was objectionable. Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957). Some grounds upon which distribution might be prohibited are the contents of the publication may be unlawful (e.g., enticing desertion, violating security regulations, containing disloyal statements); or the particular state of events at the command may make distribution objectionable, for example, a history of violence, as in Dash v. Commanding General, 307 F. Supp. 849 (D.S.C. 1969), where a commanding officer prohibited a meeting from taking place because a prior impromptu discussion on base had led to a fist fight.

(4) Adequate procedural safeguards. DoD Directive 1325.6 is silent as to any procedures to be followed in deciding whether or not to permit distribution of a publication via unofficial sources. The Supreme Court, however, attaches great importance to the procedure employed in making an administrative determination to impose a prior restraint as discussed in section 1107. For example, in Blount v. Rizzi, 400 U.S. 410 (1971), the Supreme Court struck down a Federal statute authorizing the Postmaster General to prevent use of mail or postal money orders in connection with allegedly obscene materials because of a lack of adequate procedural safeguards. Those safeguards in military context should provide for a hearing to afford the persons desiring to distribute the material an opportunity to present their material for review and state how they wish to distribute the material. Such a hearing could be informal in nature and could be conducted by anyone designated by the commanding officer. The local regulation should then provide for a speedy review of the hearing by the commanding officer who would be well advised to seek the advice of his staff judge advocate as to the legal sufficiency of the record for making a determination whether or not to permit distribution. Reasonable speed in these procedures is essential, for unwarranted delay on the part of the command in replying to a request for permission to distribute could itself result in successful recourse to the Federal courts. The commanding officer should then inform the applicants of his decision. Applicants could then be informed that they are free to forward an appeal through the chain of command. By having had a hearing at the outset, the commanding officer now has a record he can forward to explain his decision. Further, if the applicants decide to seek relief in the Federal courts, a record again is available to support the decision.

(5) What constitutes "distribution." Questions will inevitably arise concerning the fringe area of "distribution." While each case must be considered on its own facts, the following cases may provide some guidelines:

(a) In United States v. Ford, 31 C.M.R. 353 (ABR 1961), the Army Board of Review, citing no authority, held that the showing of an obscene photograph to a fellow officer friend in the privacy of the accused's house did not constitute conduct unbecoming an officer in violation of article 133. On the other hand, the court did approve the conviction and dismissal from the service of the accused for having loaned a lewd and lascivious book to another.

(b) In United States v. Jewson, 1 C.M.A. 652, 5 C.M.R. 80 (1952), the Court of Military Appeals upheld an officer's conviction under Article 133, UCMJ, where he permitted and assisted in the showing of an obscene film to officers and senior noncommissioned officers in his command. See also United States v. White, 37 C.M.R. 791 (AFBR 1965) (affirming a conviction under article 134 for showing an obscene film).

2. Subsequent punishment. Written materials could violate any of the criminal statutes listed in section 1110C above. In this connection, if a commander permits distribution of a publication on base, he should advise the person making the distribution, in writing, that he does not in any way condone any material in the publication and that the persons making the distribution could be subject to prosecution for any criminal violations resulting from the distribution.

D. Writing or publishing materials

1. Prior restraints

a. Paragraph III.D of DoD Directive 1325.6 prohibits the use of duty time or government property for personal vice official writing. Such a restriction is clearly valid. The same provision notes that publication of "underground newspapers" by military personnel off base, on their own time and with their own money and equipment, is not in itself prohibited.

b. Sections 401.2 and 403.4 of SECNAVINST 5720.44 series, Subj: Department of the Navy Public Affairs Regulations, provide for prior security and policy review of certain materials originated by naval personnel. The case of United States v. Voorhees, 4 C.M.A. 509, 16 C.M.R. 83 (1954) dealt with an Army regulation which the court construed to provide for censorship of material for reasons of national security. The accused was a lieutenant colonel in the Army who wrote a book about the Korean conflict. He submitted the book for review in accordance with regulations, and soon became embroiled with the reviewing authorities over some parts of the book. While this was happening, a newspaper (which planned a series of articles on the book) asked the accused to write some articles for the newspaper's series. The accused wrote two such articles and submitted them to the newspaper without first obtaining clearance. The accused did inform the newspaper that clearance would have to be obtained before publication of the articles. Clearance was never obtained, and the articles were never published. The Court of Military Appeals held that the accused had been properly convicted of failure to obey the Army regulation requiring clearance of the material before it was submitted to the newspaper. The court was willing to assume that there was nothing in the articles that violated national security. That, however, did not relieve the accused of the obligation to comply with the censorship regulation. No case has been found which deals with the requirement of censorship of materials on the grounds of possible conflict with established governmental policy as compared to national security grounds.

2. Subsequent punishment. Depending on the content of a writing, publication could violate any of the criminal statutes listed in section 1110C, above, as well as security regulations. Article 1116.2 of U.S. Navy Regulations, 1973, prohibits: "any public speech or . . . publication of any article . . .which is prejudicial to the interests of the United States." For example, in United States v. Priest, 21 C.M.A. 64, 44 C.M.R. 118 (1971), the Court of Military Appeals affirmed a conviction under Article 134, UCMJ, for making disloyal statements with the design to promote disloyalty and disaffection among the troops, based on articles the accused had published in his underground newspaper. Although the court did not have the constitutional issue presented on appeal, it is clear (from the prior decisions discussed in section 1111A(2) above) that disloyal statements are not protected by the first amendment.

1112 RIGHT TO PEACEABLE ASSEMBLY

A. Demonstrations. DoD Directive 1325.6 distinguishes between on-base and off-base demonstrations:

1. On base

a. Prior restraint. A commanding officer should prohibit an on-base demonstration which "could result in interference with or prevention of orderly accomplishment of the mission of the installation, or present a clear danger to loyalty, discipline, or morale of the troops." DoD Directive 1325.6, para. III.E. This test is narrowly drawn, both to protect substantial governmental interests and withstand judicial scrutiny. In Dash v. Commanding General, 307 F. Supp. 849 (D.S.C. 1969), the commanding general had refused permission for a group meeting on base to discuss the Vietnam war. The servicemembers then sought a declaratory judgment in Federal court stating that they could hold the meeting. The court declined, stating that the commanding general's decision was justified by reason of the peculiar circumstances of the military. The government had presented evidence that a prior impromptu discussion on base had led to a fist fight. The court pointed to such evidence as clearly demonstrating the reasonableness of the post commander's decision. The court then was presented with, and accepted, facts to justify the commander's decision. By presenting such facts, the government was able to rebut the argument that the commander had acted arbitrarily.

b. Subsequent punishment. As with other forms of expression, persons participating in a demonstration on base may violate any number of the criminal statutes set out in section 1110C above.

2. Off base

a. Prior restraints. Paragraph III.F. of DoD Directive 1325.6, prohibits participation by servicemembers in off-base demonstrations in the five following situations:

(1) On duty. The phrase "on duty" in this context refers to actual working hours, as opposed to authorized leave or liberty. A servicemember attending an off-base demonstration during working hours would therefore most likely be in an unauthorized absence status.

(2) In a foreign country. The justification here is to avoid embarrassing incidents to the United States government that could result from servicemembers becoming embroiled in local disputes in a foreign country. In some instances (such as article II of the NATO Status of Forces Agreement), regulations implementing international agreements forbid servicemembers from becoming so involved. In United States v. Culver, A.C.M. 20972 (1971), the accused, a captain, participated in civilian clothing in a meeting at Hyde Park, London, with some 50-100 persons. The meeting then broke up into groups of 5-6 people each. The accused went with one of these groups to the American Embassy, where he presented a petition concerning American involvement in Vietnam. The groups then returned individually to Hyde Park and reconvened. The accused argued that he had not participated in a demonstration within the meaning of the regulation but, rather, that he had exercised his first amendment right to petition his government. The general court-martial rejected this argument and convicted the accused of violation of a lawful general order. Because the sentence involved was only a fine, there was no automatic review by the Court of Military Review or the Court of Military Appeals. Subsequently, the District Court for the District of Columbia dismissed an action filed by Culver finding that:

> For a member of the armed forces stationed in a foreign country to encourage and participate in a mass gathering, in a public place, for the announced purpose of demonstrating against U.S. military policies, and with engineered publicity, cannot be squared with conventional concepts of good order, discipline and morale indoctrinated and ingrained in the military establishment since the founding of the Republic.

The court then concluded that the regulation was not over-broad, but rather "reasonably necessary and appropriate to the maintenance of morale and discipline." Culver v. Secretary of the Air Force, 389 F. Supp. 331 (D.D.C. 1975).

(3) Activities constitute a breach of law and order. Effectively, this directs servicemembers not to break the law. In United States v. Bratcher, 19 C.M.A. 125, 39 C.M.R. 125 (1969), the court stated "an order to obey the law can have no validity beyond the limit of the ultimate offense committed." Id. at 128, 39 C.M.R. at 128. Thus, if a servicemember did participate in a demonstration which somehow violated the law, he should be prosecuted for the underlying violation committed rather than a violation of the regulation implementing DoD Directive 1325.6 series. Further, the maximum authorized punishment for a particular offense cannot be increased by ordering someone not to commit the offense and then prosecuting him for violation of both a lawful order and the particular criminal misconduct. See Part IV, para. 16e(2) Note, MCM, 1984.

(4) Violence is likely to result. This reflects the traditional responsibility of the commander to preserve the health and welfare of his troops. The commander who invokes his authority should be prepared to cite the factual basis for his determination that violence is likely to result.

(5) Overtly discriminatory organizations. New policy prohibits participation (defined as taking part in public demonstrations, recruiting or training members, or organizing or leading such organizations) in organizations that overtly discriminate on the basis of race, creed, color, sex, religion, or national origin (such as Neo-Nazi or white supremacy groups).

b. In uniform. DoD Directive 1334.1 series, Wearing of the Uniform, prohibits wearing the uniform:

(1) At any subversive-oriented meeting or demonstration;

(2) in connection with political activities;

(3) when service sanction could be implied from such conduct;

(4) when wearing the uniform would tend to bring discredit to the armed forces; or

(5) when specifically prohibited by the regulations of the department concerned.

While some of these provisions lack specificity and are somewhat broad in scope, the courts are generally inclined to concede that the military can dictate how and when its uniforms shall be worn. For example, in Locks v. Laird, 300 F. Supp. 915 (N.D. Cal. 1969), aff'd, 441 F.2d 479 (9th Cir. 1971), the court refused to enjoin the Air Force from enforcing a general order prohibiting servicemembers from wearing the uniform "at any public meeting, demonstration, or interview if they have reason to know that a purpose of the meeting ... is the advocacy, expression or approval of opposition to the employment or use of the Armed Forces of the United States." The court did, however, add a caveat concerning the constitutionality of such an order in time of peace rather than war. A few years earlier, the Air Force Board of Review, in United States v. Toomey, 39 C.M.R. 969 (A.F.B.R. 1968), had upheld the same general order and the accused's conviction for participating in an antidraft demonstration in uniform.

c. Subsequent prosecution. If a servicemember violates a criminal statute during an off-base demonstration, it is possible the military would not have jurisdiction over the offense of the violation of a local law under the "service connection" doctrine of O'Callahan v. Parker, 395 U.S. 258 (1969).

B. Off-base gathering places

1. Prior restraint. Paragraph III.B. of DoD Directive 1325.6 states:

> Off-Post Gathering Places. Commanders have the authority to place establishments "off-limits", in accordance with established procedures, when, for example, the activities taking place there, including counselling members to refuse to perform duty or to desert, involve acts with a significant adverse effect on members' health, morale or welfare.

Under OPNAVINST 1620.2 series, Subj: Armed Forces Disciplinary Control Boards/Off-Base Military Law Enforcement Activities/ Joint Law Enforcement Operations and MCO 1620.2 series, Subj: Armed Forces Disciplinary Control Boards and Off-Installation Military Enforcement, armed forces disciplinary control boards, operating under the cognizance of the area coordinator have the authority to declare places "off-limits" where conditions exist that are detrimental to the good discipline, health, morals, welfare, safety and morale of armed forces personnel. The commanding officer also has authority to act independently in emergency situations. The Federal courts will consider the decision to declare an establishment "off limits" as final and not subject to review by the courts, providing the command has followed the procedures established in the regulations. Harper v. Jones, 195 F.2d 705 (10th Cir.), cert. denied, 344 U.S. 821 (1952); Ainsworth v. Barn Ballroom Co., 157 F.2d 97 (4th Cir. 1946). Those procedures include notification and a hearing for the affected parties. See Treants and Assoc., Inc. v. Cooper, No. 82-57-CIV-4 (E.D.N.C. Oct. 28, 1982). Note that the AFDCB requirements do not apply in foreign countries. In such cases, commanders may declare establishments or places off limits at their discretion. Typically, such action is taken by the area coordinator (e.g., Commander, U.S. Naval Forces, Japan).

2. Subsequent punishment. Servicemembers frequenting an establishment duly declared "off limits" would be subject to prosecution for violation of a lawful order.

C. Membership in organizations

1. General rule. Passive membership in any organization by servicemembers cannot be prohibited. In United States v. Robel, 389 U.S. 258 (1967), the Supreme Court set aside a conviction, under the Subversive Activities Control Act of 1950, which made it unlawful for members of Communist-action organizations to engage in any employment in any defense facility. The Court struck down the statute as too broad, finding that it prohibited employment by members of organizations without regard to whether the particular member concerned subscribed to any illegal goals the organization might have, and without regard to whether the employee's membership in a proscribed organization in fact threatened the security of a defense installation. This was considered too broad an incursion into the freedom of association protected by the first amendment. Organizational activities (such as distribution of material, recruitment of new members, or an on-base meeting) may, however, be proscribed by a commanding officer when they present a clear danger to security of the installation, orderly accomplishment of the command's mission, or preservation of morale, discipline, and readiness. Organizations which actively advocate racially discriminatory policies with respect to their membership (such as the Ku Klux Klan) may be restricted by the commanding officer from the formation of affiliations aboard a naval ship or shore facility and the attendant solicitation of members.

2. Servicemembers' unions. Membership in, organizing of, and recognition of military unions is criminally proscribed by section 976 of title 10, United States Code, and SECNAVINST 1600.1 series, Subj: Relationships with organizations which seek to represent or organize members of the Armed Forces in negotiation or collective bargaining.

a. Military labor organization. An organization that engages, or attempts to engage, in:

(1) Negotiating or bargaining with any military member or civilian employee on behalf of military members concerning the terms or conditions of service;

(2) representing military members before a civilian employee, or any military member, concerning a military member's grievances or complaints arising out of terms or conditions of military service; or

(3) striking, picketing, marching, demonstrating or similar action intended to induce military members or civilian employees to participate in military union activity.

b. Prohibited activities. Activities now prohibited in the military include:

(1) Military members knowingly joining or maintaining membership in a military labor organization;

(2) military members and civilian employees of the military negotiating or bargaining on behalf of the United States concerning terms or conditions of military service with person(s) representing or purporting to represent military members;

(3) anyone enrolling a military member in a military labor organization or soliciting or accepting dues/fees for such organization from any military member;

(4) military members and civilian employees attempting to organize, organizing or participating in strikes or similar job-related actions that concern the terms or conditions of military service; and

(5) anyone using military facilities for military labor union activities.

c. Permissible activities. Activities permitted in the military include:

(1) Request mast;

(2) participation in command-sponsored or -authorized counsels, committees, or organizations;

(3) seeking relief in Federal court;

(4) joining or maintaining in any lawful organization or association not constituting a military labor organization;

(5) filing a complaint of wrongs as discussed in section 1113B below; and

(6) seeking or receiving information or counseling from any source.

1113 RIGHT TO PETITION FOR REDRESS OF GRIEVANCES

A. Request mast. Article 0727.6 of U.S. Navy Regulations, 1973, provides that the commanding officer shall: "Afford an opportunity, with reasonable restrictions as to time and place, for the personnel under his command to make requests, reports, or statements to him, and shall ensure that they understand the procedures for making such requests, reports, or statements." Article 1107.1 adds: "The right of any person in the naval service to communicate with the commanding officer at a proper time and place is not to be denied or restricted."

B. Complaint of wrongs

1. Against the commanding officer. Article 138, Uniform Code of Military Justice, states:

> Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

Proceedings on the complaint held by the officer exercising general court-martial jurisdiction will depend on the seriousness of the allegations; the whereabouts of the complainant, the respondent, and witnesses; the available time; and the exigencies of the service. Implementing instructions are set forth in chapter XI of the JAG Manual.

2. Against another superior. Article 1106 of U.S. Navy Regulations, 1973, provides that a servicemember who considers himself wronged by a person superior in rank or command, not his commanding officer, may report the wrong to the proper authority for redress. The officer exercising general court-martial jurisdiction shall inquire into the matter and take such action as may be warranted, including generally adhering to chapter XI of the JAG Manual.

C. Inspector General. A position of Inspector General exists on the staff of Headquarters, U.S. Marine Corps, and of inspector at most major commands in the Marine Corps. Article 0308 of U.S. Navy Regulations 1973, charges the Naval Inspector General with the inquiry "into and the report upon any matter which affects the discipline or military efficiency of the Department of the Navy." The Office of the Naval Inspector General, though, would become involved in the investigation of an individual grievance only collaterally, as part of a broader investigation (such as, for example, an investigation into safety conditions at a command).

D. Relief in Federal court. A servicemember may seek relief from a Federal court if he believes his constitutional or statutory rights have been infringed by the military. An example would be the servicemember who petitions for a writ of habeas corpus when he feels the military authorities have improperly denied his application for conscientious objector status. Normally, Federal courts are reluctant to become involved in military affairs. The servicemember seeking relief in Federal court may be required first to exhaust the administrative remedies such as those discussed in section 1113A-C above. Thus, in Berry v. Commanding General, Third Corps, Ft. Hood, Texas, 411 F.2d 822 (5th Cir. 1969) and Levy v. Dillon, 286 F. Supp. 593 (D. Kan. 1968), applications for writs of habeas corpus by servicemembers challenging the legality of post-trial confinement after conviction by courts-martial were denied because the applicants had not exhausted the procedures available to them within the military system. The Supreme Court, in Orloff v. Willoughby, 345 U.S. 83 (1952), stated that judges shall not get involved in running the

military. More recently, the Supreme Court granted certiorari in the case of Chappell v. Wallace, 103 S.Ct. 2362 (1983), to once again confirm the Federal courts' reluctance to interfere with the discretionary decisions of the military chain of command. The petitioners were five minority crewmembers of the USS DECATUR (DDG-31). The respondents included the commanding officer, four lieutenants, and three noncommissioned officers in the chain of command. Petitioners alleged discrimination by the respondents in making duty assignments, writing performance evaluations, and imposing administrative penalties and punishments. The Court used the reasoning in Feres v. United States, 340 U.S. 135 (1950), as a guide in deciding this case and refused to find a remedy in money damages as was found in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). The Court cited "special factors counseling hesitation" which exist when enlisted military personnel attempt to sue their superior officers.

E. Right to petition any Member of Congress

1. Congressional correspondence. Section 1034 of title 10, United States Code, entitled "Communicating with a Member of Congress," provides: "No person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States." This provision is repeated in Article 1148 of U.S. Navy Regulations, 1973. In United States v. Schmidt, 16 C.M.A. 57, 36 C.M.R. 213 (1966), the accused felt he was being harassed by his first sergeant for complaining to his senator about food and living conditions. He, therefore, requested mast and told his commanding officer that he was going to send a press release entitled "FT RILEY SOLDIER RECEIVES PUNISHMENT FOR EXERCISING RIGHTS" to the newspapers if the alleged harassment did not stop. The accused was then court-martialed and convicted of extortion and wrongful communication of a threat. The Court of Military Appeals reversed in three separate opinions. Judge Furguson emphasized the accused's right to free speech, saying that discipline had been "perverted into an excuse for retaliating against a soldier for doing only that which Congress has expressly said it wishes him to be free to do...." Id. at 61, 36 C.M.R. at 217.

2. Group petitions. In Brown v. Glines, 444 U.S. 348 (1980) and Secretary of the Navy v. Huff, 444 U.S. 453 (1980), the Supreme Court upheld regulations requiring servicemembers to obtain the base commander's approval before circulation on base of petitions addressed to members of Congress. The Court held the that statutory bar in 10 U.S.C. § 1034 (1976) applied only to an individual servicemember's ability to submit a petition directly to Congress, and not to group petitions.

F. Preferring charges. If the circumstances warranted, a servicemember could voice a grievance by swearing out charges against another servicemember. UCMJ, art. 30.

1114 CIVILIAN ACCESS TO MILITARY INSTALLATIONS

A. Regulatory authority. Article 0702.1 of U.S. Navy Regulations, 1973, provides: "The responsibility of the commanding officer for his command is absolute.... "Authority commensurate with that responsibility has been widely recognized. Section 765.4 of title 32, Code of Federal Regulations, reads:

> Access to any naval activity afloat or ashore is subject to (a) the authorization and control of the officer or person in command or charge and (b) restrictions prescribed by law or cognizant authority to safeguard (1) the maximum effectiveness of the activity, (2) classified information (E.O. 10501, 18 F.R. 7049, as amended, 50 U.S.C. § 401 note), (3) national defense or security, and (4) the person and property of visitors as well as members of the Department of Defense, and Government property.

The Department of the Navy Information Security Program Regulation and the Navy's Physical Security and Loss Prevention Manual should also be consulted for provisions dealing with the responsibility of the commanding officer for maintaining security.

B. Visitors. It is a Federal offense for any person to enter a military reservation for any purpose prohibited by law or lawful regulations, or for any person to enter or reenter an installation after having been barred by order of the commanding officer. 18 U.S.C. § 1382 (1982).

1. In Weissman v. United States, 387 F.2d 271 (10th Cir. 1967), the conviction of civilians who reentered Ft. Sill, Oklahoma, after being excluded by the commanding officer was upheld. The defendants had attended a court-martial as spectators and participated in a demonstration which included chanting, making noises, and singing certain phrases -- all to the disruption of the court. The defendants were expelled, reentered, and were arrested and prosecuted under 18 U.S.C. § 1382. Defendants argued they were freelance journalists and that the expulsion order violated the first amendment guarantee of freedom of the press. The court found no constitutional infirmity in the conviction.

2. In Holdridge v. United States, 282 F.2d 302 (8th Cir. 1960), the defendants had reentered the Mead Ordnance Depot, Mead, Nebraska, after being removed as trespassers and ordered not to reenter. The defendants offered proof that the reentering had been motivated by religious beliefs with respect to the immorality of war and by a desire to persuade the military authorities to cease construction of the missile base. Their prosecution, they argued, therefore infringed upon their freedom of religion, speech, and assembly. The court found no violation of first amendment rights.

3. In Flower v. United States, 407 U.S. 197 (1972), it was held that civilians had a right to distribute printed matter on a military installation where the road on which they were distributing the material was a highway extending through the military installation with no guard at either end. For all practical purposes, this was a public highway to which everyone had access. Subsequently, in Greer v. Spock, 424 U.S. 828 (1976), the Supreme Court held that a commanding officer has the unquestioned power to exclude civilians from the area of his command and that the enforcement of regulations barring political activities on post, including those areas generally open to the public, was not an unconstitutional infringement of first amendment rights.

4. In United States v. Albertini, 472 U.S. 675 (1985), defendant was convicted in Federal district court of violating 18 U.S.C. § 1382 (1976) by reentering Hickam Air Force Base, Hawaii, in defiance of an earlier debarment order. Albertini reentered the base during an "open house" to engage in peaceful antiwar and antinuclear activities. He contended that his activities were protected by the first amendment and the Ninth Circuit Court of Appeals agreed. United States v. Albertini, 710 F.2d 1410 (9th Cir. 1983). The court found that Hickam AFB had become a public forum during the open house. The court distinguished Greer, cited above, primarily on the grounds that the Air Force had made the open portions of the base into a public forum and that Albertini's activities were directed mainly at civilian visitors and not active-duty military personnel. Thus, the government's traditional argument regarding a threat to the loyalty, discipline, or morale of troops was unpersuasive. The Supreme Court reversed, holding that Hickam did not become a public forum merely because the base was used by the military to communicate ideas or information during the open house. Further, even if the base was a public forum on the day in question, Albertini still had no right to reenter in violation of his debarment order, merely because other members of the public were free to enter. In spite of the ultimate outcome of the case, the Albertini litigation has prompted a change in how military open houses and visit ships are conducted and advertised. In general, these changes involve a tightening of restrictions on visitors and an approach in advertising which shuns the open house concept in favor of an invitation to the public to visit an installation or ship as the guests of the commanding officer. The invitation will be withdrawn if unauthorized or undesirable conduct ensues. In this way, the commanding officer maintains the traditional controls over his command.

C. Dependents/retirees/civilian employees. Civilian dependents of active-duty personnel have a statutory right to receive certain medical care in military facilities. 10 U.S.C. §§ 1071-1085 (1982). Similarly, certain disabled veterans have a statutory right to use commissaries and exchanges. 10 U.S.C. § 7603 (1982). Civilian employees have a vested interest in their jobs and cannot be denied access to their jobs without due process of law. What requirements exist for commanding officer's debarment orders? Are hearings and appeal rights guaranteed?

Absent entitlement by statute or regulation, persons have no constitutionally protected interest in entering military installations and are not constitutionally entitled to any procedural, due process protections. This would extend to hearings or appeals. Ampleman v. Schlesinger, 534 F.2d 825 (8th Cir. 1976) (no due process requirement to provide an honorably discharged Air Force Reserve officer with an in-person hearing or a statement of reasons for discharge); U.S. Navy Regulations, 1973, art. 0715 (denying admittance to a command to tradesmen and their agents except as authorized by CO). Berry v. Bean, 796 F.2d 713 (4th Cir. 1986) (military dependent barred from base after found to be in possession of marijuana cannot demand review of his case - CO discretion upheld).

1. In Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886, reh'g denied, 368 U.S. 869 (1961), a civilian employee of a restaurant operated on the premises of the Naval Gun Factory, Washington, D.C., was barred from the installation, and thereby from her civilian employment, without a hearing by the commanding officer on the grounds that she failed to meet the security requirements of the installation.

On review, Justice Stewart, speaking for the five-man majority, stated: "We may assume that [Appellant] could not constitutionally have been excluded from the Gun Factory if the announced grounds for her exclusion had been patently arbitrary or discriminatory -- that she could not have been kept out because she was a Democrat or a Methodist." Id. at 898. The Court then held that exclusion for security reasons was not arbitrary or discriminatory and therefore affirmed the judgment for the government. The Court did not require any evidence regarding why the worker had been classified a security risk; rather, the Court accepted the determination of the commanding officer at face value. Two things should be noted concerning the Cafeteria Workers decision. First, the case did not present an issue concerning freedom of expression to the Supreme Court. The issue presented to the Court was whether the worker had been deprived of access to her job without due process of law. Second, the exclusion was based on reasons of security, as opposed to a possible threat to good order and discipline or to the health, welfare, or morale of the troops.

2. In Kiiskila v. Nichols, 433 F.2d 745 (7th Cir. 1970), a civilian was employed at the Fort Sheridan Military Reservation as office manager of a credit union. She was a former WAC and a member of Veterans for Peace in Vietnam. On October 26, 1968, she had been seen talking to an active-duty lieutenant about a rally to be held off base and had given him a ticket to attend the meeting. On October 24, 1968, she had distributed literature concerning the rally at locations near, but not on, the Great Lakes Naval Station. That evening, when she returned to Fort Sheridan, her car was searched at the gate and approximately fifty pounds of anti-Vietnam War literature discovered. The commanding officer thereafter excluded her from the post without a hearing on the grounds that she had engaged in conduct prejudicial to good order and discipline and the accomplishment of the commanding officer's military mission. She then obtained an injunction to prevent the commanding officer from excluding her. The Court distinguished Cafeteria Workers, first, on the grounds that Kiiskila's first amendment rights were involved, as was not the case in Cafeteria Workers, and second, on the ground that Cafeteria Workers involved exclusion for security reasons, whereas Kiiskila did not. The Court also scrutinized the commanding officer's determination that she had engaged in conduct prejudicial to good order and discipline and required the government to justify that determination, which the Court decided the government failed to do. In response to the government's argument that she had been excluded, not because of her past antiwar activities, but because the commanding officer feared that she would engage in similar conduct on the base in violation of a base regulation, the Court stated:

> Such assertions must be viewed with caution for as the Supreme Court recently noted in Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 508, 89 S.Ct. 733, 737, 21 L.Ed. 2d 731 (1969): "[I]n our system undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." Thus, unless we are to permit the deprivation of constitutional rights through subterfuge, the validity of a commanding officer's exclusion of a civilian employee from a military installation must turn upon more than his own subjective statements of the reason for his action.

Id. at 750. Thus, the exclusion order in Kiiskila, unlike the one in Cafeteria Workers, was presented to the Court as punishment for, and a prior restraint of, the exercise of first amendment rights. A different case might have been presented in Kiiskila if the materials in violation of the base regulation had been distributed before she was excluded.

D. Bibliography. For articles on this subject, see Duncan, Criminal Trespass on Military Installations: Recent Developments in the Law of Entry and Re-Entry, 28 JAG J. 53 (1975); Lloyd, Unlawful Entry and Reentry into Military Reservations in Violation of 18 U.S.C. § 1382, 53 Mil.L.Rev. 137 (1971); Lieberman, Cafeteria Workers Revisited; Does the Commander Have Plenary Power to Control Access to His Base?, 25 JAG J. 53 (1970).

1115 POLITICAL ACTIVITIES BY SERVICEMEMBERS

A. General. A member of the armed forces is expected and encouraged to carry out his obligation as a citizen, but while on active duty, in certain circumstances, he is prohibited from becoming a candidate for or holding partisan civil office and engaging in partisan political activities.

B. References

1. DoD Directive 1344.10 series, Political Activities by Members of the Armed Forces.

2. MILPERSMAN, art. 6210140.

3. MCO 5370.7 series, Subj: Political Activities.

C. Definitions

1. Partisan political activity. Partisan political activity is activity in support of, or related to, candidates representing, or issues specifically identified, with national or state political parties and associated or ancillary organizations.

2. Active duty. Active duty is full-time duty in the active military service of the United States for a period of more than 30 days.

3. Civil office. Civil office is an office, not military in nature, that involves the exercise of the powers or authority of civil government. It may include either an elective office or an office that requires an appointment by the President, by and with the advice and consent of the Senate, that is a position in the Executive Schedule.

D. Permissible activities. A member on active duty may engage in the following types of political activity:

1. Register, vote, and express a personal opinion on political candidates and issues, but not as a representative of the armed forces;

2. promote and encourage other military personnel to exercise their franchise, provided such promotion does not constitute an attempt to influence or interfere with the outcome of an election;

3. join a political club and attend its meetings when not in uniform;

4. serve as a nonpartisan election official out of uniform with the approval of the Secretary of the Navy;

5. sign a petition for specific legislative action, provided the signing thereof does not obligate the member to engage in partisan political activity and is taken as a private citizen;

6. write a nonpartisan letter to the editor of a newspaper expressing the member's personal views concerning public issues;

7. write a personal letter, not for publication, expressing preference for a specific political candidate or cause;

8. make monetary contributions to a political party or committee, subject to the limitations of paragraph E below; and

9. display a political sticker on his/her private automobile.

E. Prohibited activities. A member on active duty may not engage in the following types of political activity:

1. Use official authority or influence for the purpose of interfering with an election, affecting the outcome thereof, soliciting votes for a particular candidate or issue, or requiring or soliciting political contributions from others;

2. campaigning as nonpartisan (as well as partisan) candidate or nominee;

3. participate in a partisan campaign or make public speeches in the cause thereof;

4. make, solicit or receive a campaign contribution for another member of the armed forces or for a civilian officer or employee of the United States promoting a political cause;

5. allow or cause to be published political articles signed or authored by the member for partisan purposes;

6. serve in any official capacity or be listed as a sponsor of a partisan political club;

7. speak before a partisan political gathering of any kind to promote a partisan political party or candidate;

8. participate in any radio, television, or other program or group discussion as an advocate of a partisan political party or candidate;

9. conduct a partisan political opinion survey or distribute partisan political literature;

10. perform clerical or other duties for a partisan political committee during a campaign or an election day;

11. solicit or otherwise engage in fund-raising activities in Federal offices or facilities for a partisan political cause or candidate;

12. march or ride in a partisan political parade;

13. display a large political sign on top of his/her private automobile, as distinguished from a political sticker;

14. participate in any organized effort to provide voters with transportation to the polls;

15. sell tickets for or otherwise actively promote political dinners;

16. be a partisan candidate for civil office during initial active duty tours or tours extended in exchange for schools;

17. for a Regular officer on active duty, or retired Regular officer or Reserve officer on active duty for over 180 days, hold or exercise the functions of any civil office in any Federal, state, or local civil office -- unless assigned in a military status or otherwise authorized by law [10 U.S.C.A. 973(b) (West Supp. 1984)];

18. hold U.S. government elective office, Executive schedule position or position requiring Presidential appointment with the advice and consent of Congress; or

19. serve as civilian law enforcement officers or members of a reserve civilian police organization.

1116 FREEDOM OF RELIGION

A. References

1. 10 U.S.C. § 6031 (1982)

2. U.S. Navy Regulations, 1973, article 0722

3. SECNAVINST 1730.8 series, Subj: ACCOMODATION OF RELIGIOUS PRACTICES

4. DoD Dir 1300.17 series, Subj: ACCOMMODATION OF RELIGIOUS PRACTICES WITHIN THE MILITARY SERVICES

B. General. Nothwithstanding the "establishment clause" of the first amendment, which has been interpreted as preventing Congress from enacting any law intended to promote religion, or which might unduly "entangle" the government with religious practices, Federal law not only provides for the existence of a Navy Chaplain's Corps, but requires commanding officers to "cause divine services to be conducted on Sunday." 10 U.S.C. § 6031(b) (1982).

The statute also permits a chaplain to conduct divine services according to the manner and form of his own church. Thus, for example, a Catholic chaplain presiding at divine services may offer Mass; an Episcopal chaplain would be free to conduct Morning Prayer; a Jewish chaplain may conduct Jewish religious services.

C. Reasonable accomodation of religious practices. The accomodation of a member's religious practice depends upon military necessity, and that determination of military necessity rests entirely with the commanding officer.

1. For example, if a servicemember who is scheduled to stand duty on Friday evening requests, based on his religious principles, that he not be directed to stand duty between sundown Friday and Sundown Saturday, the commanding officer should carefully consider granting that accomodation request if others are available to stand duty during those hours. However, if no other person is reasonably available to stand duty at that time, the commanding officer could order that member to stand duty based on his determination of military necessity.

2. SECNAVINST 1730.8 provides guidelines to be used by the naval service, in the exercise of command discretion, concerning the accomodation of religious practices -- including requests based on religious and dietary observances, requests for immunization waivers, and requests for the wearing of religious items or articles other than religious jewelry (which is the subject to the same uniform regulations as nonreligious jewelry) with the uniform.

3. The issue of religious accomodation and the military uniform has been an area of particular concern in recent years. In that regard, this SECNAVINST provides a basis for determining a member's entitlement to wear religious apparel with the uniform. It provides that:

a. Religious items or articles which are not visible may be worn with the uniform as long as they do not interfere with the performance of the member's military duties; and that

b. religious items or articles which are visible may be authorized for wear with the uniform if:

(1) The item or article is "neat and conservative," meaning that it is discreet and not showy in style, color, design or brightness, that it does not replace or interfere with the proper wearing of any authorized article of the uniform, and that it is not temporarily or permanently affixed or appended to any article of the member's uniform;

(2) the wearing of the item or article will not interfere with the performance of the member's military duties due to either the characteristics of the item or article, the circumstances of its intended wear, or the particular nature of the member's duties; and

(3) the item or article is not worn with historical or ceremonial uniforms, or while the member is participating in review formations, honor or color guards and similar ceremonial details and functions, or during basic and initial military skills or speciality training except during off-duty hours designated by the cognizant commander.

4. For example, within the guidelines given above, a skullcap (yarmulke) may be worn:

a. Whenever a military cap, hat, or other headgear is not prescribed; or

b. it may be worn underneath military headgear as long as it does not interfere with the proper wearing, function, or appearance of the prescribed headgear.

5. This is in accord with a 1986 Supreme Court decision which addressed a conflict between Air Force dress regulations concerning the visible wearing of religious apparel with the uniform, and the wearing of a yarmulke, without a service cap, by an Air Force officer. Goldman v. Weinberger, 475 U.S. 503 (1986). In that case, the Court held that the first admendment does not require the military to accomodate the wearing of religius apparel such as a yarmulke if it would detract from the uniformity sought by the service dress regulations. Id. at 1314.

6. According to this SECNAVINST, several factors for commanding officers to consider when examing requests for religious accomodations are:

a. The importance of military requirements, including individual readiness, unit cohesion, health, safety, morale and discipline;

b. the religious importance of the accomodation by the requester;

c. the cumulative impact of repeated accomodations of a similar nature;

d. alternative means available to meet the requested accom modation; and

e. previous treatment of the samej or similar requests made for other than religious reasons.

7. This SECNAVINST also provides that any visible item or article of religious apparel may not be worn with the uniform until approved, and that, in any case in which a commanding officer denies a request to wear an item or article of religious apparel with the uniform, the member must be advised that he has a right to request a review of the refusal by CNO or CMC. That review will normally occur within 30 days following the request for review for cases arising in the United States, and within 60 days for all other cases.

8. Administrative action, including reassignment, reclassification or separation, consistent with SECNAV and service regulations, is authorized by this SECNAVINST if:

a. Requests for accomodation are not in the best interests of the unit; and

b. continued tension is apparent between the unit's require ments and the individuals religious beliefs.

CHAPTER XII

CLAIMS

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CHAPTER XII

CLAIMS

1201 CHAPTER OVERVIEW

A. Purpose of the chapter. Claims involving the United States government and its military activities are governed by a complex system of statutes, regulations, and procedures. This chapter provides a basic understanding of how the claims system works and is also a convenient reference outline. Although this chapter is not a substitute for official departmental claims regulations, which are published in the JAG Manual, it is a useful starting point for research into claims problems.

B. Summary of chapter contents. This chapter is organized to reflect the various claims statutes and their respective functions in the claims system. Claims involving the Federal government are of two types:

1. Claims in behalf of the government by which the Federal government is a claimant seeking compensation; and

2. claims against the government by which a claimant seeks compensation from the government which can be divided further into two functional categories:

a. General claims statutes, such as the Federal Tort Claims Act and Military Claims Act, which provide for payment of claims arising out of a broad range of incidents and situations; and

b. specialized claims statutes, such as the Military Personnel and Civilian Employees' Claims Act and the Foreign Claims Act, which provide for payment of claims arising out of specific types of incidents or to only specific classes of claimants.

C. The claims system. Claims law may appear confusing at first. One can become easily disoriented by the intricacies of each claims statute, and thus fail to notice how the statutes, regulations, and procedures interact in a larger system. The various claims against the government demonstrate this system at work. Claims that are not covered by one of the general claims statutes (Federal Tort Claims Act or Military Claims Act) are frequently payable under one of the specialized statutes, such as the Military Personnel and Civilian Employees' Claims Act. Thus, specialized statutes can fill gaps in the coverage provided by the general statutes. Also, some claims are not cognizable under one of the general statutes because one of the specialized statutes may apply to the claim. Likewise, classes of persons barred by statute or regulation from collecting under a general claims statute often can be compensated under one of the specialized statutes.

Examples in this chapter will demonstrate the interaction of the various claims statutes, regulations, and procedures. The key to understanding claims law is to realize that it involves a logical system of interacting provisions and not just a perplexing labyrinth of seemingly unrelated rules.

PART A

CLAIMS AGAINST THE GOVERNMENT: GENERAL CLAIMS STATUTES

1202 FEDERAL TORT CLAIMS ACT

A. Overview. The Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-2680 (1982) [hereinafter FTCA] was a product of many years of congressional deliberations and considerations. Before 1946, if a person had been injured wrongfully by a Federal employee who had acted within the scope of his Federal employment, the doctrine of "sovereign immunity" barred that injured party from suing the government for compensation. This doctrine often denied fair compensation to persons with meritorious claims. At that time, the only available form of redress was the "private bill" -- a system whereby the injured party could be compensated for his injury by a special act of Congress. This system was cumbersome. It resulted in yearly counts of private bills numbering in the thousands. Also, the system was unfair to those who lacked sufficient influence to have a representative introduce a private bill on their behalf. The FTCA was enacted with the intent of providing a more equitable, comprehensive system. The Act provides for compensation for damage and injuries caused by the negligent conduct of Federal employees acting within the scope of Federal employment. It also covers certain intentional, wrongful acts. (Such negligent or intentional wrongful acts resulting in personal injury, death, or property damage to another are called "torts.") There are, however, three general types of exceptions from government liability under FTCA. First, the government is protected from liability arising out of certain types of governmental actions. Second, FTCA will not provide compensation when one of the specialized claims statutes (discussed in part B of this chapter) covers the claim. Third, certain classes of claimants, such as active-duty military personnel, are precluded from recovering under FTCA, although they may be compensated under other statutes.

B. Statutory authority. The scope of the government's liability under FTCA is described in the following two statutes:

> Section 1346. United States as defendant.
>
> ....
>
> (b) ... [T]he district courts ... shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages ... for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred....

....

Section 2674. Liability of the United States.

> The United States shall be liable ... in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages....

C. Scope of liability

1. Negligent conduct

a. "Negligence" defined. The law defines "negligence" as the failure to exercise the degree of care, skill, or diligence that a reasonable person would exercise under the same circumstances. Negligent conduct can arise either from an act or a failure to act. It can be either acting in a careless manner or failing to do those things that a reasonable person would do in the same situation. The determination of whether or not certain conduct was negligence is made after considering all of the circumstances and after applying those legal tests for negligence that are used by the jurisdiction wherein the alleged negligent conduct occurred. Jurisdiction over claims that have as their gravamen a theory of liability other than negligence (implied warranty or strict liability) does not lie under the FTCA. Laird v. Nelms, 406 U.S. 797 (1972); Dalehite v. United States, 346 U.S. 15 (1952).

b. Applicable law. Whether certain conduct was negligence -- and, therefore, whether the government is liable -- will be determined by the tort law of the place where the conduct occurred. JAGMAN, § 2036b. Questions, such as whether the violation of a local law, by itself, constitutes negligence, will be answered by applying the doctrines of the local tort law. For a discussion of the applicability of specific tort law concepts (such as res ipsa loquitur), to FTCA cases, see 1 L. Jayson, Handling Federal Tort Claims 214.02 (1979).

(1) Example: Seaman Jones, while performing his duties in Virginia, injures Mr. Smith. Under Virginia law, Jones' conduct is not negligence. Therefore, Mr. Smith's FTCA claim will be denied.

(2) Example: Seaman Jones, while performing his duties in North Carolina, engages in exactly the same conduct that injured Mr. Smith in the previous example. This time Jones injures Mr. Johnson. Under North Carolina law, Jones' acts constitute negligence. Therefore, Mr. Johnson's FTCA claim will be paid.

2. Limited range of intentional torts. The FTCA will compensate for intentional wrongful acts under very limited circumstances. On or after 16 March 1974, FTCA applies to any claim arising out of the following intentional torts committed by Federal law enforcement officers: assault, battery, false imprisonment, false arrest, abuse of process, and malicious prosecution. A Federal law enforcement officer, for purposes of the FTCA, is any officer of the United States empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law. Since Article 7, UCMJ, extends the authority to apprehend to commissioned officers and petty officers,

these officers would be considered law enforcement officers for FTCA purposes when they are actually engaged in law enforcement duties. All other intentional tort claims are not payable under FTCA. JAGMAN, § 2036c(7). Under very limited circumstances, however, the Government may be liable for an intentional tort committed by a Federal employee overseas under the Foreign Claims Act discussed in section 1206 of this study guide. Federal employees have been held individually liable to the injured party for intentional torts committed while the employees are acting beyond the proper limits of their authority. Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971). Military personnel are restricted from using the Bivens remedy against either their superiors or civilian personnel for violations of constitutional rights arising out of, or in the course of, activity incident to service. In United States v. Stanley, 483 U.S. 669 (1987), the Supreme Court turned down a damages action brought by an Army sergeant who was given lysergic acid diethylamide, without his knowledge, as part of a military experiment. The court applied the same rationale expressed in Chappell v. Wallace, 462 U.S. 296 (1983). There, the court counseled against the Bivens remedy, stating that the unique disciplinary structure of the military and congressional action in this area (barring military causes of action) dictates against the claim.

3. Government employees

a. Definitions. Under the FTCA, the government is liable only for the wrongful acts of its employees. The term "government employee" is defined to include the following:

(1) Officers or employees of any Federal Agency; or

(2) members of the military or naval forces of the United States; or

(3) persons acting on behalf of a Federal Agency in an official capacity, either temporarily or permanently, and either with or without compensation.

The term "Federal Agency" includes not only the departments and agencies of the executive, legislative, and judicial branches of the Federal government, but also independent entities that function primarily as Federal Agencies (e.g., U.S. Postal Service, Commodity Credit Corporation).

b. Government contractors. A government contractor and its employees are not usually considered government employees under the FTCA. When, however, the government exercises a high degree of control over the details of the contractor's activities, the courts will find that the government contractor is, in fact, a government employee. The standard personnel qualification and safety standards provisions in government contracts are not enough to turn a government contractor into a government employee. By contrast, where the contract requires the contractor to follow extensive, detailed instructions in performing the work, the contractor will usually be considered a government employee and the contractor's employees who work on the Federal job will likewise be treated as government employees for FTCA purposes. (For an extensive discussion, see 1 L. Jayson, Handling Federal Tort Claims 202.07 (1979).)

c. Nonappropriated fund activities. See JAGMAN, ch. XXIII.

(1) Defined. A nonappropriated fund activity is one that, while operating as part of a military installation, does not depend upon, and is not supported by, funds appropriated by Congress. Examples of nonappropriated fund activities would include the Navy Exchange and officers' clubs.

(2) Liability. Whether liability is incurred depends upon a two-pronged test. The FTCA applies to a nonappropriated fund activity if:

(a) The activity is charged with an essential function of the Federal government; and

(b) the degree of control and supervision by the Federal government is more than casual or perfunctory. JAGMAN, § 2301a.

Every facet of the activity's operations must be examined. Is the activity entirely self-supporting? Does it own its own property? Does it use government property, equipment, or personnel in its operations? What control does the command have over the activity's operations? Does the activity provide essential services or benefits to military personnel? Applying the two-pronged test and considering the specific points mentioned above, the Navy Exchange would clearly be a nonappropriated fund activity subject to the FTCA. On the other hand, an equestrian club, sponsored by a command but operating entirely independently of the command, would not be subject to FTCA. Each case must be determined on its own merits.

(3) Insurance. Many nonappropriated fund activities carry commercial liability insurance to protect them against claims for property damage or personal injury attributable to their operations. Therefore, many FTCA claims against nonappropriated fund activities will be handled by commercial insurance carriers. The procedures for negotiating and settling FTCA claims against nonappropriated fund activities covered by liability insurance are set forth in sections 2303b and 2304 of the JAG Manual.

4. Scope of employment. The government is liable under the FTCA for its employees' conduct only when the employees are acting within the scope of their employment. The scope-of-employment requirement is viewed by the courts as "the very heart and substance" of the Act. Whether or not a government employee's acts were within the scope of employment will be determined by the law of the state, including principles of respondeat superior, where the incident occurred. This has led to many different results on the question of applicability of the FTCA involving permanent change of station (PCS) and temporary duty (TDY). One must look to state law to determine the proper test or criteria for determining scope of employment based upon the principles of respondeat superior. While scope-of-employment rules vary from state-to-state, the issue usually turns on the following factors: The degree of control the government exercises over the employee's activities on the job; and the degree to which the government's interests were being served by the employee at the time of the incident.

a. FTCA/LOD interface. For the purposes of the FTCA only, the terms of art "acting in the scope of employment" and "acting in the line of duty" are synonymous. See JAGMAN, § 2031b. However -- and this point cannot be emphasized strongly enough -- the two terms definitely are not synonymous in the context of line of duty/misconduct determinations. See generally JAGMAN, ch. VIII.

b. Example. Consider the following hypothetical situation which serves to emphasize the fact that the term "scope of employment" is synonymous with the term "acting in the line of duty" only in the limited context of the FTCA. Seaman Baker, the command duty driver, is making an authorized run in the command vehicle. On the way back to the base, he stops at a local bar and drinks himself into a stupor. Barely able to stand, he gets back into the command vehicle and continues on toward the base. In his drunken state, he fails to see a stop sign and crashes into an automobile driven by a civilian. Both Baker and the civilian are seriously injured. For the purposes of the FTCA, Baker could be considered in at least some jurisdictions to have been acting within the "scope of his employment" (i.e., he was completing an authorized run when he was involved in the accident). Accordingly, the claims of the civilian would be cognizable under the FTCA. Baker's injuries, however, would almost certainly be determined to be the result of his own "misconduct" and, therefore, would not be in the line of duty. In this regard, it is essential that the reader refer to sections 0802-0804 of the JAG Manual for further explanation of the "in-the-line-of-duty" concept.

c. Example. Seaman Baker, the command duty driver, is making an authorized run in the command sedan. While daydreaming, he becomes inattentive, fails to keep a lookout for pedestrians, and hits Mr. Jones. Seaman Baker's negligence occurred within the scope of his employment.

d. Example. Seaman Baker, the command duty driver, is making an authorized run in the command sedan. However, he stops on the way back to the base and enjoys six unauthorized boilermakers, which render him too drunk to drive. Nonetheless, he continues on his trip, and his drunken state causes him to strike a pedestrian. Even though Baker is not permitted to drink on the job, he was running a government errand at the time of the incident. Therefore, Baker's negligence occurred within the scope of his employment.

e. Example. Seaman Baker, the command duty driver, takes the command sedan after hours on an unauthorized trip to the ballgame. After the game, he and some buddies stop at several taverns, and all become roaring drunk. Because of his drunken condition, while driving back to the base, Baker runs over Mr. Smith. In this case, Baker's negligence occurred outside the scope of his employment. He and his friends were off on a frolic of their own and their activities were entirely unrelated to the performance of a governmental or military function. Therefore, Mr. Smith will not be able to recover under the FTCA. Since a government vehicle is involved, however, Smith may be entitled to limited compensation under the "nonscope" claims procedures discussed in section 1208 of this chapter.

5. Territorial limitations. FTCA applies only to claims arising in the United States, or in its territories or possessions (i.e., where a U.S. district court has jurisdiction). Any lawsuit under the FTCA must be brought in the U.S. district court in the district where the claimant resides or where the incident giving rise to the claim occurred. JAGMAN, § 2032c.

D. Exclusions from liability. Statutes and case law have established three general categories of exclusions from FTCA liability. The following specific exclusions are encountered frequently in claims practice in the military. A complete list of FTCA exclusions is set forth in sections 2036c-d of the JAG Manual. In each of the following situations, the government will not be liable under FTCA, although it may be liable under some other claims statute.

1. Exempted governmental activities

a. Execution of statute or regulation. The FTCA does not apply to any claim based on an act or omission of a Federal employee who exercises due care while in the performance of a duty or function required by statute or regulation. The government will be exempt from liability even if the statute or regulation is invalid. 28 U.S.C. § 2680(a) (1982); JAGMAN, § 2036c(1). For a detailed discussion, see 2 L. Jayson, Handling Federal Tort Claims 247 (1979).

b. Discretionary governmental function. The FTCA does not apply to any claim based upon the exercise or performance of, or the failure to exercise or perform, a discretionary governmental function. This is true even where the government or the Federal employee has abused the discretion with which it or he has been vested under section 2680 of title 28, United States Code, and section 2036c(1) of the JAG Manual. Perhaps no single exclusion under FTCA has generated as much litigation as the "discretionary function" exclusion. The key issue will usually be whether the governmental activity involved in the claim was a discretionary function. The problem is complicated by the fact that neither the FTCA nor any court has ever formulated a comprehensive definition of "discretionary function." Each case must be decided on its own facts. See, e.g., Dalehite v. United States, 365 U.S. 15 (1953); Birnbaum v. United States, 588 F.2d 319 (2d Cir. 1978). A detailed discussion of the extensive case law on this problem is contained in Liuzzo v. United States, 508 F. Supp. 923 (E.D. Mich. 1981). See 2 L. Jayson, Handling Federal Tort Claims 249 (1979).

c. Postal claims. The FTCA does not apply to claims for the loss, miscarriage, or negligent transmission of letters or postal matters. 28 U.S.C. § 2680(b) (1982); JAGMAN, § 2036c(2). Such claims, under limited circumstances, may be payable under the Military Claims Act (which is discussed in section 1203 of this study guide). JAGMAN, § 2055c(1).

d. Detention of goods. The FTCA does not apply to claims arising out of the detention of any goods or merchandise by a Federal law-enforcement officer, including customs officials. 28 U.S.C. § 2680(c) (1982); JAGMAN, § 2036c(3). A common application of this exception is in situations where the claimant seeks compensation for property seized during a search for evidence. This exclusion also prevents compensation under the FTCA for alleged contraband seized by law-enforcement officers. For a detailed discussion, see 2 L. Jayson, Handling Federal Tort Claims 256.03 (1979).

e. Combatant activities in time of war. 28 U.S.C. § 2680(j) (1982); JAGMAN, § 2036c(9). The "combatant activities" exclusion has three requirements:

(1) Combatant activities [For the FTCA exclusion to prevent government liability, the claim must arise out of combatant activities; that is, activities directly involving engagement with the enemy. "Combatant activities" is given a very strict meaning by the courts. It does not include practice or training maneuvers, nor any operations not directly involving engagement with an enemy. See Johnson v. United States, 170 F.2d 767, 769-70 (9th Cir. 1948)];

(2) conducted by the armed forces; and

(3) during time of war [The combatant activity exclusion applies to both declared and undeclared wars. See, e.g., Rotko v. Abrams, 338 F. Supp. 46 (D.Conn. 1971); Morrison v. United States, 316 F. Supp. 78 (M.D. Ga. 1970)].

f. Intentional torts. The government is not liable under the FTCA for the following intentional torts: assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. 28 U.S.C. § 2680(h) (1982); JAGMAN, § 2036c(7). As discussed in section 1202c(2) of this study guide, this exclusion will not protect the government from liability for assaults, batteries, false imprisonments, false arrests, abuse of process, or malicious prosecution committed by Federal law-enforcement officers. For a detailed discussion of the Federal government's liability under the FTCA for intentional torts committed by Federal law-enforcement officers, see 2 L. Jayson, Handling Federal Tort Claims 260.01(2) (1979).

2. Claims cognizable under other claims statutes. Certain claims cannot be paid under the FTCA because they are cognizable under some other claims statute. Although the government may still be liable to the claimant under another statute, the amount the claimant can recover under the other statute may be significantly less than under the FTCA. Also, the claimant may not have the right under the other claims statute to sue the government if the claim is denied. Examples of claims cognizable under other statutes -- and therefore not payable under the FTCA -- include the following:

a. Personnel claims. Claims by military personnel or civilian Federal employees for damage or loss of personal property incident to service are cognizable under the Military Personnel and Civilian Employees' Claims Act (which is discussed in section 1205 of this text).

b Admiralty claims. Admiralty claims, arising from incidents such as ship collisions, are usually governed by the Suits in Admiralty Act, 46 U.S.C. § 741-752 (1982) and the Public Vessels Act, 46 U.S.C. §§ 781-790 (1982) (which are discussed in section 1207 of this text).

c. Overseas claims. Claims arising in a foreign country are not cognizable under the FTCA, but may be allowed under either the Military Claims Act (which is discussed in section 1203 of this text) or the Foreign Claims Act (which is discussed in section 1206 of this text).

d. Injury or death to civilian Federal employees. Claims arising out of personal injury or death of a civilian Federal employee, while on the job, are usually covered by the Federal Employees' Compensation Act (FECA), 5 U.S.C. §§ 7901-7903, 8101-8193 (1982). Nonappropriated fund activity employees are compensated under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 (1982).

3. Excluded claimants

a. Military personnel

(1) The Feres Doctrine. In Feres v. United States, 340 U.S. 135 (1950), the U.S. Supreme Court held that military personnel cannot sue the Federal government for personal injury or death occurring incident to military service. The Supreme Court reasoned that Congress did not intend the FTCA to apply to military personnel because it had already provided medical care, rehabilitation, and disability benefits for them. Since 1950, the Feres doctrine has been applied consistently by Federal courts at all levels and was reaffirmed by the Supreme Court in United States v. Johnson, 107 U.S. 2063 (1987). In Johnson, the widow of a deceased Coast Guard helicopter pilot was precluded from bringing a wrongful action death action under the FTCA. The Supreme Court held that the Coast Guard officer, during a rescue mission on the high seas, was incident to service and that the alleged negligent action(s) of a civilian Federal air traffic controller was subject to the Feres doctrine, and the FTCA action was barred. The Court thereby extended the Feres doctrine to encompass alleged negligent actions on the part of civilian employees of the Federal government. See Aviles v. United States, 696 F. Supp. 217 (E.D.La. 1988), a case in which the Feres doctrine was held to bar an action by a former Coast Guard member who sought to recover damages due to his forced retirement following a positive HIV test. The Court found that Feres prohibited judicial inquiry, and that the Court therefore lacked subject matter jurisdiction because his alleged injuries were incident to service. It was expanded by case law to bar FTCA claims by military personnel for property damage occurring incident to service. See, e.g., Preferred Insurance Co. v. United States, 222 F.2d 942 (9th Cir. 1955); Zoula v. United States, 217 F.2d 81 (5th Cir. 1954); United States v. United Services Auto. Ass'n, 238 F.2d 364 (8th Cir. 1956). Such claims may be payable under the Military Claims Act, the Military Personnel and Civilian Employees' Claims Act, or the nonscope claims statute. A third party plaintiff may not implead the government in a suit by a Feres disqualified plaintiff. The third party plaintiff gains no additional rights beyond those available if the plaintiff had brought a direct action against the government. Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977).

(2) Rationale for Feres. The rationale for the Feres doctrine can be explained by examining the policy reasons underlying the doctrine proscribing governmental liability.

(a) Effect on military discipline. The Court noted that there is a special relationship of "soldier to his superiors." The right to bring an action would have an adverse effect upon discipline as well as resulting in a judicial intrusion into the general area of military performance.

(b) Other available statutory compensation. Congress had already provided a system of uniform compensation for injuries or death of those in the armed services. This system was established to provide adequate and comprehensive benefits for service personnel and compared favorably with workman's compensation statutes. To allow individual suits would circumvent the statutory schemes of veterans' benefits.

(c) No private liability in like circumstances. Arguably, there is no like circumstance whereby a private individual would be liable, since only a government has the power to conscript or mobilize an army. Under workmen compensation schemes, a private person would not have a cause of action; thus, the FTCA does not remove the sovereign immunity bar for active-duty personnel seeking to bring an action under the FTCA.

(d) Lack of continuity of local law. The Court in Feres recognized the relationship existing between the United States and its military personnel as distinctively Federal in character, so that it would be inappropriate to apply local law to that relationship by way of the FTCA. The application of the state law of the area where the injury took place, given the wide variety of local laws, would be unfair to the military member who has no choice as to his or her duty station.

(3) The "not incident to service" exception. A major exception to the Feres doctrine exists when the injury, death, or loss of the military member did not occur incident to military service. Under such circumstances, the Feres doctrine will not prevent FTCA recovery by a military claimant. The value of benefits received from the government, such as medical care, rehabilitation, and disability payments, however, will be deducted from the compensation paid to the claimant. Brooks v. United States, 337 U.S. 49 (1949).

(4) "Incident to military service" defined. The central issue in determining whether the Feres doctrine will prevent a military member from recovering under FTCA is whether the injury or loss occurred incident to military service. Courts decide this issue only after considering all the facts and circumstances of each case. As a general rule, however, all of the following factors must be present for an injury, death, or loss of a military member to be held "not incident to military service":

(a) The member must have been off duty;

(b) the member must not have been aboard a military installation;

(c) the member must not have been engaged in any military duty or mission; and

(d) the member must not have been directly subject to military orders or discipline.

If any of the above four factors are absent, the claim usually will be held by the courts to be incident to military service. See 1 L. Jayson, Handling Federal Tort Claims 155.02, 155.03, and 155.07 (1979) (has an extensive discussion of the principles and case law on this point).

(5) Claims by representatives. The Feres doctrine does not apply to claims by military members who are acting solely in a representative capacity (e.g., guardian, executor of an estate). It will bar FTCA claims by nonmilitary persons acting as legal representatives of injured or deceased military members. The following examples demonstrate these principles:

(a) Example: Johnny Smith, the minor child of LTJG Smith, was the victim of medical malpractice at a military hospital. LTJG Smith presents a $100,000 claim on behalf of Johnny. The Feres doctrine will not apply. LTJG Smith is presenting the claim solely as the parent and legal representative of his minor son and the Feres doctrine does not apply to injuries, death, or loss suffered by a military dependent -- only to military members themselves.

(b) Example: While on duty, LTJG Smith was negligently killed by a Marine Corps officer acting within the scope of Federal employment. The executor of LTJG Smith's estate, Mr. Jones, presents an FTCA claim for wrongful death. The Feres doctrine will bar this claim. Although Mr. Jones is a civilian, he is claiming only in his capacity as LTJG Smith's legal representative. Because LTJG Smith's death occurred incident to service the claim will be denied, just as if LTJG Smith had presented it himself.

(6) Legislation. Both the House and the Senate continue to introduce bills that would amend Chapter 171 of Title 28, United States Code, and allow active duty members to sue for injuries or death caused by negligent medical care during peacetime. Both the Department of Defense and the Department of Justice oppose the bills based on the impact to discipline and the existing compensation system.

b. Civilian Federal employees. As discussed in section 1202D2d above, civilian Federal employees usually cannot recover under the FTCA for injuries or death that occur on the job because of FECA compensation benefits.

c. Intra-agency claims. One Federal Agency usually may not assert an FTCA claim against another Federal Agency. Government property is not owned, for FTCA purposes, by any specific agency of the government. Therefore, the Federal government will not normally reimburse itself for the loss of its own property. JAGMAN, § 2036d(6).

E. Measure of damages

1. How the amount of compensation is determined. The phrase "measure of damages" refers to the method by which the amount of a claimant's recovery is determined. In FTCA cases, the measure of damage will be determined by the law of the jurisdiction where the incident occurred. For example, the measure of damages for a claim arising out of a tort that occurred in Maryland will be determined by Maryland law. When the local law conflicts with applicable Federal law, however, the Federal statute will govern. JAGMAN, § 2037a.

2. Exclusion from claimant's recovery. The following amounts will be excluded from a claimant's recovery under the FTCA:

a. Punitive damages. Many states permit the plaintiff in a tort action to recover additional money from the defendant beyond the amount required to compensate the plaintiff for his or her loss. Such damages are known as "punitive damages" because they are awarded to punish a defendant who has engaged in conduct that is wanton, malicious, outrageous, or shocking to the court's conscience. Under the FTCA, the government is not liable for any punitive damages which might otherwise be permitted by state law. JAGMAN, § 2037c.

b. Interest prior to judgment. JAGMAN, § 2037c.

c. Value of government benefits. When the government is liable to pay an FTCA claim by a military member, and the claim is not barred by the Feres doctrine, the value of government benefits (such as medical care, rehabilitation, and disability benefits) will be deducted from the military member's recovery. JAGMAN, § 2037e.

3. No dollar limit on recovery under the FTCA. While there is no maximum to the amount of recovery permitted under the FTCA, any FTCA payment in excess of $25,000 requires the prior written approval of the Attorney General of the United States or his or her designee. JAGMAN, § 2040-14.6.

F. Statute of limitations. The FTCA contains several strict time limits.

1. Two-year statute of limitations. The claimant has two years from the date the claim against the government accrued in which to present a written claim. If the claimant fails to present his or her claim within two years, it will be barred forever. Section 2040-14.2 of the JAG Manual explains what constitutes proper presentment of a claim. Federal law governs the accrual of a cause of action under the FTCA. A claim accrues when the act or incident giving rise to the claim occurs, or when the claimant learns or reasonably should have learned about the wrongful nature of the government employee's conduct. Thus, a claim arising out of an automobile accident would normally accrue when the accident occurred. A claim arising out of medical malpractice will not accrue, however, until the claimant learns or reasonably should have learned about the malpractice. United States v. Kubrick, 444 U.S. 109 (1979). The fact that the injured person is an infant or incompetent does not toll the running of the statute of limitations.

2. Six-month waiting period. When a claimant presents an FTCA claim to a Federal Agency, the Agency has six months in which to act on the claim. During this waiting period, unless the Agency has made a final denial the claimant may not file suit on the claim in Federal court. If, after months, the Agency has not taken final action on the claim, the claimant may then file suit under the FTCA in Federal district court without waiting any longer for the Agency to act. 28 U.S.C. § 2401(b) (1982), JAGMAN, § 2038a.

3. Six-month time limit for filing suit. After the Federal Agency mails written notice of its final denial of the claim, the claimant has six months in which to file suit on the claim in Federal district court. If suit is not filed within six months, the claim will be barred forever. 28 U.S.C. § 2401(b) (1982); JAGMAN, § 2038b. However, before this six-month time limit expires, the claimant may request reconsideration of the denial of his or her claim. The Agency then has six months in which to reconsider the claim. If the claim is again denied, the claimant has another six months in which to file suit. JAGMAN, § 2034i.

G. Procedures. The procedures discussed below apply not only to FTCA claims, but also, in large part, to claims cognizable under other claims statutes. Significant variations in procedures under other claims acts will be noted in the sections of this chapter dealing with those other statutes.

1. Presentment of the claim. The first step is usually the "presentment" of the claim to a Federal Agency of the government. When a claim is properly presented, the statute of limitations (as discussed in section 1202F1 above) stops running.

a. Defined. A claim against the government is "presented" when a Federal Agency receives a written claim for money damages. JAGMAN, § 2040-14.2(a).

b. Who may present a claim? JAGMAN, §§ 2011, 2034a, 2040-14.3. A claim may be presented by:

(1) The injured party for personal injury;

(2) the owner of damaged or lost property;

(3) the claimant's personal or legal representative (such as parents or guardians of minors; executors or administrators of a deceased person's estate; authorized agents or attorneys in fact, such as officers of corporations and persons holding a power of attorney from the claimant); or

(4) a subrogee who assumed the legal rights of another person. (For example, an insurance company that compensates its policyholder for damages caused by a government employee becomes subrogated to -- or assumes -- the policyholder's claim against the government. Therefore, the insurer can present a claim against the government to recover the amount it paid its insured.)

c. Contents of the claim

(1) Requirements for presentment. As discussed above, when a claim is properly presented, the statute of limitations stops running. To be properly presented, the claim must satisfy the following requirements:

(a) In writing. The claim must be in writing. Standard Form 95, Claim for Damage or Injury, a copy of which is reproduced in appendix A-20-a of the JAG Manual should be used whenever practicable. JAGMAN, § 2012a.

(b) Signed. The claim must be signed by a proper claimant, as discussed in section 1202G1b above of this study guide. JAGMAN, § 2040-14.2(a).

(c) Claims money damages "in a sum certain." The claim must demand a specific dollar amount. JAGMAN, § 2040-14.2(a). The courts have consistently held that a claim is not presented until it states "a sum certain." If the claimant fails to state a "sum certain, "then the claim does not constitute a claim for purposes of complying with the jurisdictional prerequisites of the FTCA. See, e.g., Bailey v. United States, 642 F.2d 344 (8th Cir. 1981); Kielwien v. United States, 540 F.2d 676 (4th Cir. 1976); Allen v. United States, 517 F.2d 1328 (6th Cir. 1975). Observance of the "sum certain" requirement does not prevent the claimant from recovering more than the amount originally claimed. The claimant may amend the claim at any time prior to final agency action on the claim. JAGMAN, §§ 2034e, 2040-14.2(b). Once an action is initiated under the FTCA, the plaintiff is limited to the damage amount specified in the claim presented "except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the agency, or upon allegation and proof of intervening facts, relating to the amount of the claim." 28 U.S.C. § 2675(b) (1982). The plaintiff has the burden of proving the existence of the "newly discovered evidence" or "intervening facts." 28 U.S.C. § 2675(b) (1982).

(d) Submitted to a Federal Agency. The claim is not properly presented until it is submitted to a Federal Agency. See Hejl v. United States, 449 F.2d 124 (5th Cir. 1971). The claim should be submitted to the Agency whose activities gave rise to the claim. If the claim is submitted to the wrong Federal Agency, that Agency must promptly transfer it to the appropriate one. Although submission to any Federal Agency will stop the running of the statute of limitations, the six-month waiting period (discussed in section 1202F2 above) does not begin until the claim is received by the appropriate agency. JAGMAN, §§ 2034b, 2040-14.2(a). The fact that the United States is aware of the potential claim or has actual notice does not relieve the claimant of the requirement of presenting the claim to a Federal Agency; failure to formally present the claim can result in the dismissal of an action in court. Avril v. United States, 461 F.2d 1090 (9th Cir. 1972). Some courts have indicated that they will not allow a "technical defect" in form to defeat the substantive rights of claimant where the defect does not bear upon the ability of the agency to adjudicate the claim. Hunter v. United States, 417 F. Supp. 272 (N.D. Cal. 1976).

(2) Information and supporting documentation. Although the FTCA itself does not specify what information and supporting documentation are required for validating of the claim, administrative regulations promulgated by the Attorney General of the United States and the Judge Advocate General of the Navy require that the claim include information such as:

(a) A reasonably detailed description of the incident on which the claim is based;

(b) the identity of the Federal agencies, employees, or property involved;

(c) a description of the nature and extent of personal injury or property damage; and

(d) documentation of loss such as physicians' reports, repair estimates, and receipts.

A complete listing of documentation can be found at sections 2013, 2034c and 2040-14.4 of the JAG Manual. In some instances, failure to provide the required information may result in a court ruling that the claim was never properly presented. See, e.g., Swift v. United States, 614 F.2d 812 (1st Cir. 1980); Johnson v. United States, 404 F.2d 22 (5th Cir. 1968); Rothman v. United States, 434 F. Supp. 13 (C.D. Cal. 1977). Minor technical failures will not nullify the claim. See Lunsford v. United States, 418 F. Supp. 1045 (D.S.D. 1976), aff'd on other grounds, 570 F.2d 221 (8th Cir. 1977).

d. Command responsibility when claim presented. Prompt action is necessary when a command receives a claim. The following steps must be taken:

(1) Record date of receipt on the claim (JAGMAN, § 2015a);

(2) determine which military activity is most directly involved (JAGMAN, § 2015b);

(3) when the receiving command is the activity most directly involved, immediately convene an investigation in accordance with sections 2002 through 2007 of the JAG Manual and, when the investigation is complete, promptly forward the report and the claim to the appropriate claims adjudicating authority (JAGMAN, § 2015c);

(4) when the receiving command is not the activity most directly involved, immediately forward the claim to the activity that is most directly involved (JAGMAN, § 2015d); and

(5) report to the Judge Advocate General of the Navy, if required by section 2003b of the JAG Manual.

2. Investigation

a. When required. A JAG Manual investigation is required whenever a claim against the Navy is filed or is likely to be filed. An informal investigation usually will suffice. Responsibility for convening and conducting the investigation usually lies with the command most directly involved in the incident upon which the claim is based. When circumstances make it impractical for the most directly involved command to conduct the investigation, responsibility may be assigned to some other command. See JAGMAN, §§ 2004, 0207.

b. Importance of prompt action. Because the government usually will have only six months in which to investigate and take final action on the claim, the investigation must be done promptly. Witnesses' memories fade quickly and evidence can become mislaid. Moreover, failure to investigate promptly could prejudice the government's ability to defend against

the claim. A claim involving a command is an urgent and important matter involving substantial amounts of money. Therefore, section 2005 of the JAG Manual states that, when a person is appointed to investigate a claim, the investigation ordinarily shall take priority over all his or her other duties.

c. Scope and contents of the investigation. The general duties of the claims investigating officer include the following:

(1) Consider all information and evidence already compiled about the incident;

(2) conduct a thorough investigation of all aspects of the incident in a fair, impartial manner (The investigation must not be merely a whitewash job intended to protect the government from paying a just claim.);

(3) interview all the witnesses as soon as possible;

(4) inspect property damage and interview injured persons; and

(5) determine the nature, extent, and amount of property damage or personal injury and obtain supporting documentation. JAGMAN, § 2006.

In addition to these general duties, the investigating officer also must make specific findings of fact. Great care must be used to ensure that all relevant, required findings of fact are made. Sections 2006 and 2007, and appropriate sections from chapter IX of the JAG Manual, provide a complete list of required findings of fact. Under certain circumstances, only a limited investigation may be required. See JAGMAN, § 2007b. A major purpose of the claims investigation is to preserve evidence for use months, and even years, in the future. An incomplete investigation can prejudice the government's ability to defend against the claim. It could also deny a deserving claimant fair compensation.

d. Action on the report. Upon completion, the commanding officer or officer in charge will take action on the report of investigation in accordance with section 2008 of the JAG Manual. Depending on the circumstances, either the original report (JAGMAN, § 2008b) or a complete copy (JAGMAN, § 0910d), together with all claims received, must be promptly forwarded to the appropriate claims adjudicating authority. Appendix A-20-f of the JAG Manual sets forth a list of adjudicating authorities and their respective geographical responsibilities.

3. Adjudication

a. Adjudicating authority. An adjudicating authority is an officer designated by the Judge Advocate General to take administrative action (i.e., pay or deny) on a claim. In the Navy and Marine Corps, adjudicating authorities include certain senior officers in the Office of the Judge Advocate General and commanding officers of naval legal service offices. A complete list of adjudicating authorities appears in appendix A-20-e of the JAG Manual.

(1) Geographic responsibility. Naval legal service offices and certain other commands have been assigned responsibility for adjudicating claims in their respective geographic areas. Claims usually will be forwarded by the command to the adjudicating authority serving the territory in which the claim arose. For example, Naval Legal Service Office, Newport, Rhode Island, is the adjudicating authority for claims arising in the six New England states and New York state. Appendix A-20-f of the JAG Manual lists the geographic areas served by each adjudicating authority.

(2) Dollar limits on adjudicating authority. There is no maximum limit on the amount that can be paid under an FTCA claim. Payments in excess of $25,000 require prior written approval by the Attorney General or his or her designee. Adjudicating authorities other than those in the Office of the Judge Advocate General are limited, however, in the amounts they can pay. Appendix A-20-e of the JAG Manual lists the FTCA payment authority of each adjudicating authority. For example, the commanding officer of a naval legal service office may approve payment of FTCA claims up to $20,000. Payments in excess of the amount may be authorized only by an adjudicating authority within the Office of the Judge Advocate General. An adjudicating authority finally can deny FTCA claims up to twice the amount he or she is authorized to pay. Therefore, if an adjudicating authority can pay FTCA claims up to $20,000, he or she can deny FTCA claims up to $40,000. Claims in excess of $40,000 could be denied only by an adjudicating authority in the Office of the Judge Advocate General. Even though a claim may demand more than the payment or denial limits of an adjudicating authority serving a particular area, the command receiving the claim should forward it to the appropriate local adjudicating authority, who can attempt to compromise the claim for an amount within his or her payment limits.

b. Adjudicating authority action. The adjudicating authority can take the following actions:

(1) Approve the claim, if within the payment limits;

(2) deny the claim, if within the denial limits;

(3) compromise the claim for an amount within payment limits;

(4) refer the claim to the Office of the Judge Advocate General if:

(a) Payment is recommended in an amount above the adjudicating authority's payment limits; or

(b) denial is recommended, but the amount claimed is above the adjudicating authority's denial limits. See JAGMAN, §§ 2035, 2040-14.6.

c. Effect of accepting payment. When a claimant accepts a payment in settlement of an FTCA claim, the acceptance releases the Federal government from all further liability to the claimant arising out of the incident on which the claim is based. Any Federal employees who were involved are also released from any further liability to the claimant.

JAGMAN, § 2018. Therefore, if a claimant is not satisfied with the amount the adjudicating authority is willing to pay on an FTCA claim, the entire claim will be denied. The claimant then will have to bring suit in Federal district court to recover on the claim. A claimant who accepts payment on a FTCA claim, even though he or she is unhappy with its amount, will be barred from recovering any additional amounts on that claim from the government or from any Federal employee who was involved. The courts have held that acceptance of payment for property damage does not preclude a subsequent action for personal injury, unless the government can demonstrate that a settlement of all claims was contemplated by the parties. Macy v. United States, 557 F.2d 391 (3d Cir. 1977).

4. Reconsideration. Within six months of a final denial of an FTCA claim by an adjudicating authority, the claimant may request reconsideration of the denial. Section 2040-14.9(a) of the JAG Manual explains what constitutes "final denial." Reconsideration procedures are set forth in section 2020b-c of the JAG Manual.

5. Claimant's right to sue. Within six months after final denial of an FTCA claim by the adjudicating authority, the claimant may bring suit in Federal district court. JAGMAN, § 2038b. There is no right to a jury trial in an FTCA case. 28 U.S.C. § 2402 (1982); JAGMAN, § 2032d. Although the Department of Justice will represent the Department of the Navy in court, naval judge advocates will assist by preparing litigation reports summarizing the pertinent facts in the case. JAGMAN, § 2016e.

a. Removal. Actions under the FTCA may be brought only in Federal district courts and not state courts. If suits are brought personally against a Federal employee in state court, consideration should be given to removing the action to Federal district court. Removal is controlled by statute and is a matter of Federal law. The general removal statutes are found in 28 U.S.C. §§ 1441-1451 (1982). Section 1442a gives members of the armed forces a right to remove either a civil or a criminal action from state to Federal court if being sued for acting under the "color of such office." Section 1442a has been liberally construed in favor of allowing Federal officer removal. Willingham v. Morgan, 395 U.S. 402 (1976). Venue for all removal actions is the Federal district court and division wherein the state action is pending. If the United States is sued in state court, with jurisdiction resting on the FTCA, the action may be removed and dismissed. On removal the Federal district court acquires only that jurisdiction possessed by the state court. Since the state court has no jurisdiction under FTCA, the Federal district court acquires none.

b. The Federal Drivers' Act. The Federal Drivers' Act [28 U.S.C. § 2679 (b)-(e) (1982)], enacted by Congress in 1961, provides that "the exclusive remedy against a Federal employee based on a claim arising out of the employee's operation of a motor vehicle within the scope of employment" is an action against the United States under the FTCA. If a Federal driver is served with process from a Federal or state court, the driver shall immediately deliver all process and papers to his/her commanding officer who will promptly notify the Judge Advocate General (Code 14). JAGMAN, § 1320c(2). The Navy will then forward all papers to the office of the U.S. Attorney, where the decision is made on whether or not it will certify that the employee was acting within the scope of his or her employment at the time of the incident

out of which the suit arose. The case will then be removed to Federal district court if it was brought in state court. The Drivers' Act provides a personal immunity to Federal drivers for their actions in operating a motor vehicle while acting within the scope of their employment.

c. Medical personnel. Section 1089 of title 10, United States Code, provides, in part, that the exclusive remedy for personal injury, including death, caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, paramedic, or other assisting personnel of the armed forces, acting within the scope of their duties, shall be against the United States. This statute provides personal immunity against civil liability for military medical personnel acting within the scope of their employment. The procedures for removal of the suit from state court to Federal district court parallel those of the Federal Drivers' Act. (See Chapter IX for discussion of legal malpractice).

d. Venue. The term "venue" refers to the place where the judicial power to adjudicate may be exercised. Section 1402(b) of title 28, United States Code, provides that an action may be brought only in the "judicial district where the plaintiff resides or wherein the act or omission complained of occurred."

H. Examples. The following examples demonstrate the operation of legal principles governing FTCA claims.

1. Example

a. Facts. YN3 Daytona, the command's duty driver, was on an authorized run in Honolulu, Hawaii, when he was involved in an auto accident with Mr. DeStroyd, a civilian. The police report clearly indicates that the accident was caused by Daytona's negligent failure to stop at a red light and that there was nothing Mr. DeStroyd could have done to avoid the collision. Mr. DeStroyd has filed, within two years of the accident, an FTCA claim for $75,000 damage -- including property damage to his automobile, medical expenses, and punitive damages. Can he collect?

b. Solution. YES (except for the punitive damages). The accident was caused by the negligence of a government employee, YN3 Daytona, who was acting within the scope of his Federal employment. None of the exclusions from liability discussed in section 1202D above, apply. The claim does not arise out of an excluded governmental activity. It is not cognizable under any other claims statute and the claimant is not a member of any excluded class of claimants. Therefore, this claim is cognizable under the FTCA. Punitive damages are excluded from FTCA compensation. Because the claim is for $75,000, it can be paid by a local adjudicating authority (such as a naval legal service office) only if Mr. DeStroyd is willing to accept $20,000 or less in full settlement of his claim. Otherwise, an adjudicating authority in the Office of the Judge Advocate General will approve the claim.

2. Example

a. Facts. Mrs. Shimmy, the dependent wife of an active-duty naval officer, underwent surgery at Naval Regional Medical Center, San Diego, California. The surgeon, CDR Badknife, negligently severed a nerve in her neck. At first, Mrs. Shimmy was paralyzed from the neck down but, after

five months' treatment and rehabilitation at the NRMC she regained complete use of her arms, legs, and trunk. She has lost five months' wages from her civilian job, for which she was ineligible for state disability compensation. Also, she suffers from slight residual neurological damage which causes her shoulders to twitch involuntarily. This twitching is permanent. Mrs. Shimmy has presented an FTCA claim. Can she collect?

b. Solution. YES (from the U.S., but not from Dr. Badknife). The paralysis and lasting damage were caused by the negligent acts of CDR Badknife, a Federal employee acting in the scope of his employment. None of the three general types of exclusions from FTCA liability apply. The Feres doctrine does not apply to this claim because it involves personal injury to a military dependent, not to active-duty military personnel. Therefore, this claim is payable under the FTCA. The value of medical care and rehabilitation services Mrs. Shimmy received at the NRMC will be deducted from her compensation; however, she will be compensated for all other nongovernmental medical services as well as for the pain and suffering she endured, the wages she has lost already (and likely will lose in the future), and the permanent nature and disfigurement of her injury. Because of 10 U.S.C. § 1089 (1982), no claim will lie against Dr. Badknife individually.

1203 MILITARY CLAIMS ACT

A. Overview

1. Similarities to FTCA. Like the FTCA, the Military Claims Act, 10 U.S.C. § 2733 (1982) [hereinafter MCA] compensates for personal injury, death, or property damage caused by activities of the Federal government. MCA claims are limited to two general types of claims:

a. Injury, death, or property damage caused by military personnel or civilian employees acting within the scope of their employment; nd

b. injury, death, or property damage caused by noncombat activities of a peculiarly military nature.

As with FTCA claims, there are three general categories of exclusions from liability under the MCA: (a) certain excepted activities; (b) claims cognizable under other claims statutes; and (c) certain excluded classes of claimants.

2. Differences from FTCA. The MCA provides compensation for certain claims that are not payable under the FTCA. Unlike the FTCA, its application is worldwide. Also, the claimant has no right to sue the government if his or her MCA claim is denied by the adjudicating authority. Finally, unlike the FTCA, which creates statutory rights for claimants, the MCA is operative only "under such regulations as the Secretary of a military department may prescribe." 10 U.S.C. § 2733(a) (1982). Each service Secretary is required to promulgate regulations stating under what circumstances claims will be paid by his or her department under the MCA. A claimant has no greater rights than what is prescribed by each service's regulations. Therefore, the regulations promulgated in part C of chapter XX of the JAG Manual are of paramount importance.

B. Statutory authority. The MCA provides in pertinent part:

> a. Under such regulations as the Secretary concerned may prescribe, he, or subject to appeal to him, the Judge Advocate General of an armed force under his jurisdiction, or the Chief Counsel of the Coast Guard, as appropriate, if designated by him, may settle, and pay in an amount not more than $100,000, a claim against the United States for
>
> (1) Damage to or loss of real property, including damage or loss incident to use and occupancy;
>
> (2) Damage to or loss of personal property, including property mailed to the United States and including registered or insured mail damaged, lost or destroyed by a criminal act while in the possession of the Army, Navy, Air Force, Marine Corps or Coast Guard, as the case may be; or
>
> (3) Personal injury or death; either caused by a civilian official or employee of that department, or the Coast Guard or a member of the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be, acting within the scope of his employment, or otherwise incident to noncombat activities of that department, or the Coast Guard.

C. Scope of liability. The MCA is limited to two rather broad categories of claims: (1) Those arising from the acts of military employees in the scope of their employment; and (2) those incident to noncombat activities of a peculiarly military nature. Section 2055c of the JAG Manual provides examples of claims commonly paid under the MCA.

1. Caused by military member or employee acting within scope of employment. Section 2055a of the JAG Manual indicates that the Department of the Navy is liable under the MCA for injury, death, or property damage "caused by" its military members or civilian employees acting within the scope of their employment. In this regard, it should be noted that, although the MCA regulations do not indicate that a claimant is required to establish that the act of a military member or civilian employee, which caused death, bodily injury, or property damage, was negligent in order to be able to recover damages under the MCA, the Office of the Judge Advocate General has opined informally that the term "caused by," as used in section 2055a, has been interpreted historically to mean "... [negligently] caused by...." The concept, then, of causation under the MCA is the same as that required under the Federal Tort Claims Act as discussed in section 1202C1a of this study guide. Also, the scope-of-employment concept under MCA is identical to that required under the FTCA claims (as discussed in section 1202C4 of this study guide).

2. Noncombat activities of a peculiarly military nature. The Department of the Navy also is liable under the MCA for injury, death, or property damage incident to noncombat activities of a peculiarly military nature. Examples include claims such as those arising out of maneuvers, artillery and bombing exercises, naval exhibitions, aircraft and missile operations, and sonic booms. Such activities have little parallel in civilian society or they involve incidents for which the government has traditionally assumed liability for resulting losses. Under this second theory of MCA liability, the claimant need not show that the activities were negligently conducted. In fact, the claimant's losses need not be traced to the conduct of any specific Federal employees. The scope-of-employment concept does not apply. JAGMAN, § 2055b.

3. No territorial limitations. Unlike the other general claims statute (the FTCA) the MCA applies worldwide. If a claim arising in a foreign country is cognizable under the Foreign Claims Act, however, it shall be processed under that statute and not as an MCA claim. JAGMAN, § 2052e.

D. Exclusions from liability

1. Exempted governmental activities. A claim will not be payable under the MCA if it involves an exempted governmental activity. Section 2055d of the JAG Manual provides a complete list of such excluded activities. The most frequent examples include the following:

a. Combat activities or enemy action [JAGMAN, § 2055d(2)];

b. certain postal activities [JAGMAN, § 2055d(10)-(12)]; and

c. property damage claims based on alleged contract violations by the government [JAGMAN, § 2055d(7)].

2. Claims cognizable under other claims statutes. Claims that are governed by one of the following claims statutes are not payable under the MCA:

a. Federal Tort Claims Act, which is discussed in section 1202 of this study guide [JAGMAN, § 2055d(15)];

b. Military Personnel and Civilian Employees' Claims Act, which is discussed in section 1205 of this study guide [JAGMAN, § 2055d(4)];

c. Foreign Claims Act, which is discussed in section 1206 of this study guide [JAGMAN, § 2055d(5)]; and

d. certain admiralty claims (JAGMAN, § 1202a, 1204).

3. Excluded classes of claimants

a. Naval personnel. Military members and civilian employees of the Department of the Navy may not recover under the MCA for personal injury or death occurring incident to service or employment. JAGMAN, § 2055d(14). Compensation may be recovered for property damage under

MCA if it is not covered by another claims statute. As a practical matter, however, when a military member suffers property damage incident to service, it will usually be compensated under the Military Personnel and Civilian Employees' Claims Act (discussed in section 1205 of this study guide).

b. Foreign nationals of a country at war with the United States. Nationals of an ally of a country at war with the United States, unless the individual claimant is determined to be friendly to the United States, are excluded from MCA coverage. JAGMAN, § 2055d(13).

c. Negligent claimants. A claim may not be paid under the MCA if the injury, death, or property damage was caused in whole or in part by the claimant's own negligence or wrongful acts. Such negligence is known as "contributory negligence" and is a complete bar to tort recovery in many states. However, if the law of the jurisdiction where the claim arose would allow recovery in a lawsuit, even though the claimant was negligent, the MCA claim can be paid. Under such circumstances, the negligent claimant will only recover that portion of the amount claimed that the local law would permit a negligent claimant to recover in its courts. This partial recovery concept is known as the "comparative negligence" doctrine. JAGMAN, § 2055d(1).

E. Measure of damages. The rules for determining the amount of a claimant's recovery under the MCA are similar to those governing other claims.

1. General rules.

a. Property damage. The amount of compensation for property damage is based on the estimated cost of restoring the property to its condition before the incident. If the property cannot be repaired economically, the measure of damage will be the replacement cost of the property minus any salvage value. The claimant also may recover compensation for loss of use of the property (e.g., cost of a rental car while the damaged vehicle is being repaired). JAGMAN, § 2056a.

b. Personal injury or death. Compensation under the MCA for personal injury or death will include items such as medical expenses, lost earnings, diminished earning capacity, pain and suffering, and permanent disability. Usually, local standards are applied. JAGMAN, § 2056b.

2. Exclusions from recovery. The following amounts will be excluded under section 2056c of the JAG Manual from a claimant's MCA recovery:

a. Interest;

b. cost of preparing claim;

c. attorney's fees; and

d. compensation for inconvenience to the claimant.

3. Amount of recovery. The Department of the Navy may pay MCA claims up to $100,000. If the Secretary of the Navy considers that a claim in excess of $100,000 is meritorious, he or she may make a partial payment of $100,000 and refer the balance to the General Accounting Office for payment from appropriations provided therefore. 10 U.S.C. § 2733 (1982).

F. Statute of limitations. A claim under the MCA may not be paid unless it is presented in writing within two years after it accrues. The statute of limitations may be suspended during time of armed conflict. JAGMAN, § 2057. The rules governing presentment of the claim are substantially similar to those under the FTCA (discussed in section 1202G1 of this study guide). See JAGMAN, § 2053.

G. Procedures. The investigation and adjudication procedures for MCA claims are substantially similar to those for FTCA claims discussed in section 1202G of this study guide. In fact, many claims paid under the MCA were initially presented as FTCA claims. The significant procedural differences under MCA are as follows:

1. Advance payments. Pursuant to section 2736 of title 10, United States Code, the Secretary of the Navy, or a designee, is authorized to make an advance payment not in excess of $1,000 to, or on behalf of, any person suffering injury, death, or property damage resulting from an incident covered by the Military Claims Act or the Foreign Claims Act. This payment may be made before the claimant presents a written claim. JAGMAN, § 2071. Advance payments may be made only when the claimant or the claimant's family is in immediate need of funds for necessities (such as shelter, clothing, medical care, or burial expenses). Other resources must not be available. JAGMAN, § 2073d. An advance payment is not admission of government liability. The amount of the advance payment shall be deducted from any settlement subsequently authorized. JAGMAN, § 2073e.

2. Dollar limits on adjudicating authorities. FTCA adjudicating authorities also adjudicate MCA claims. Adjudicating authorities other than the Judge Advocate General of the Navy may authorize payment or deny MCA claims only up to $5,000. All adjudicating authorities may make advance payments. JAGMAN, app. A-20-e.

3. Claimant's right to appeal. There is no right to sue under the MCA after an administrative denial of an MCA claim. JAGMAN, § 2052d. If an MCA claim is denied, in whole or in part, the claimant may appeal to the Judge Advocate General within 30 days after the denial. JAGMAN, §§ 2020c, 2053b.

H. Examples

1. Example

a. Facts. A Navy aircraft crashed, utterly demolishing an automobile owned by Mr. Rubble, a civilian. Mr. Rubble has presented an MCA claim for the fair market value of his car. Can he recover?

b. Solution. YES. This claim falls under the second theory of MCA liability -- an incident arising out of noncombat activities of a peculiarly military nature. JAGMAN, § 2055b. None of the exclusions from liability applies. This incident does not involve an exempted governmental activity. It is not covered by any other claims statute. The FTCA would not apply because the facts do not indicate any negligence by any Federal employee. (If the crash had been caused by the Navy pilot's negligence, it would be compensable under the FTCA). Mr. Rubble does not belong to an excluded class of claimants. There is no evidence that his actions in any way caused the incident; therefore, Mr. Rubble can recover the value of his car -- less any salvage value.

2. Example

a. Facts. While conducting gunnery exercises aboard USS SHOTINTHEDARK, naval personnel miscalculated and accidentally shot a shell into the fleet parking lot. The shell utterly demolished an automobile owned by ENS DeMolish, who was on duty aboard one of the ships tied up at a nearby pier. ENS DeMolish has filed an MCA claim. Is this claim payable under the MCA?

b. Solution. NO. Although this incident involves noncombat activities of a peculiarly military nature (JAGMAN, § 2055b) and was also caused by naval personnel acting within the scope of employment (JAGMAN, § 2055a), the MCA does not apply. More specifically, section 2055d(4) of the JAG Manual provides that a claim which is "cognizable" under the Military Personnel and Civilian Employees' Claims Act is not payable under the MCA. Therefore, because section 2103i of the JAG Manual provides for compensation for this motor vehicle loss as a "personnel claim," it is not payable under the MCA. Alas, ENS DeMolish's recovery will be limited to the $1000 amount prescribed under the personnel claims regulations and not the greater amounts payable under the MCA. JAGMAN, § 2103i.

c. Special point. Perhaps you were thinking that, since section 2103i limits payments for automobile claims to $1000, the MCA could be used to pay the amount of ENS DeMolish's loss which is in excess of the $1000 limit prescribed under the personnel claims regulation. No such luck. The Judge Advocate General has interpreted the phrase "cognizable under the Military Personne' and Civilian Employees' Claims Act" to mean "payable under the Military Personnel and Civilian Employees' Claim Act." JAGMAN, § 2055d(4) (emphasis supplied). Accordingly, in this particular situation, the Military Personnel and Civilian Employees' Claims Act is considered to be the exclusive remedy available to pay for the damage to ENS DeMolish's automobile.

PART B

CLAIMS AGAINST THE GOVERNMENT: SPECIALIZED CLAIMS STATUTES

1204 FUNCTION OF THE SPECIALIZED CLAIMS STATUTES. The general claims statutes discussed in part A of this chapter cover a broad range of losses and incidents. The specialized claims statutes discussed in part B are limited to certain types of losses suffered by specific classes of claimants occurring under certain specific circumstances. The specialized claims statutes interact with the general claims statutes in two ways. First, they may permit compensation for certain losses, claimants, or incidents not covered by one of the general claims statutes. Some of the specialized statutes were enacted in order to plug "gaps" in the general claims statutes. Second, the specialized claims statutes often act as exclusions from liability for general statutes. For example, a claim that otherwise would be payable under the Federal Tort Claims Act or the Military Claims Act cannot be paid under those statutes if it is also cognizable under the Military Personnel and Civilian Employees' Claims Act.

1205 MILITARY PERSONNEL AND CIVILIAN EMPLOYEES' CLAIMS ACT

A. Overview. The Military Personnel and Civilian Employees' Claims Act of 1964, 31 U.S.C. § 3721 (1982) [hereinafter Personnel Claims Act], is a gratuitous payment statute intended to maintain morale by compensating servicemembers, and other Federal employees, for personal property which is lost, damaged, or destroyed incident to service. In 1988, the Department of Defense settled over 179,000 personnel claims, for a total amount of money exceeding $93 million -- a portion of which was offset by monies recovered from carriers, warehouse firms, and other third parties. Of these claims, the Navy settled approximately 29,000 claims, at a cost exceeding $12 million, and the Marine Corps settled approximately 4,500 claims, at a cost exceeding $3 million. Not only must the loss be incident to service, but the possession of the damaged property must have been reasonable, useful, or proper at the time of the loss. There are two major categories of exclusions under the Personnel Claims Act. First, some losses are excluded because of the circumstances under which they occur. Second, some types of personnel claims are excluded because of the type or nature of the damaged property.

B. Statutory authority. Like the Military Claims Act, the Personnel Claims Act contemplates payment of claims "under such regulations as the head of an agency may prescribe." 31 U.S.C. § 241 (1982). Therefore, a familiarity with the Department of the Navy's regulations, published in chapter XXI of the JAG Manual, is fundamental. Personnel claims regulations in other services are similar to the Navy's, but are not identical.

C. Scope of liability

1. Limited to personal property damage. The Personnel Claims Act is limited to recovery for personal property damage -- including loss, destruction, capture, or abandonment of personal property. Damage to real property (e.g., land, buildings, and permanent fixtures) is not covered, but may be compensable under the Military Claims Act. JAGMAN, §§ 2101e, 2102.

2. Limited to military personnel and civilian employees. Only military personnel and civilian employees of the Department of Defense may recover compensation. Military personnel include commissioned officers, warrant officers, enlisted personnel, and other appointed or enrolled military members. Civilian employees include those paid by the Department of the Navy on a contract basis. JAGMAN, § 2101b-c.

3. Loss incident to service. To be payable under the Personnel Claims Act, the claimant's loss must have occurred incident to his or her military service or employment. Section 2103 of the JAG Manual provides eleven general categories of losses incident to service:

a. Property losses in quarters or other authorized places designated by superior authority for storage of the claimant's personal property (JAGMAN, § 2103a);

b. transportation losses, such as damage to household goods shipped pursuant to PCS orders (JAGMAN, § 2103b);

c. losses caused by marine or aircraft disasters (JAGMAN, § 2103c);

d. losses incident to combat or other enemy action (JAGMAN, § 2103d);

e. property damaged by being subjected to extraordinary risks (JAGMAN, § 2103e);

f. property used for the benefit of the U.S. government (JAGMAN, § 2103f);

g. losses caused by the negligence of a Federal employee acting within the scope of employment (JAGMAN, § 2103g);

h. money deposited with authorized personnel for safe-keeping, deposit, transmittal, or other authorized disposition (JAGMAN, § 2103h);

i. certain noncollision damage to motor vehicles (limited to $1,000, not including the contents of the vehicles) (JAGMAN, § 2103i);

j. damage to house trailers and contents while on Federal property or while shipped under Federal government contract (JAGMAN, § 2103j); and

k. certain thefts aboard military installations from the possession of the claimant (JAGMAN, § 2103k).

Within each of these eleven categories are numerous specific types of incidents and circumstances. The rules governing each of these eleven areas can be complex and detailed. Therefore, it is absolutely necessary to refer to JAGMAN, § 2103, to determine whether a particular personnel claim is contemplated by one of the eleven categories.

4. The "reasonable, useful, or proper" test. Not only must the property damage or loss occur incident to service, the claimant's possession and use of the damaged property must have been reasonable, useful, or proper under the circumstances. JAGMAN, § 2105a. While the Personnel Claims Act provides broad protection for the military member's personal property, the government has not undertaken to insure all property against any risk. A personnel claim will usually be denied if the claimant's possession or use of damaged property was unreasonable under the circumstances. Thus, while possession of an inexpensive radio in a locker in the barracks is reasonable under most circumstances, keeping a $1,500 stereo system in the locker usually is not. Whether the possession or use of the property was reasonable, useful, or proper is largely a matter of judgment by the adjudicating authority. Factors that are considered include, but are not limited to, the claimant's living conditions, reasons for possessing or using the property, efforts to safeguard the property, and the foreseeability of the loss or damage that occurred.

5. Territorial applicability. The Personnel Claims Act applies worldwide.

6. Other meritorious claims. The Secretary of the Navy and Judge Advocate General may approve meritorious claims within the scope of the Personnel Claims Act that are not specifically designated as payable. JAGMAN, § 2127.

D. Exclusions from liability. Exclusions from personnel claims liability (JAGMAN, § 2104) fall into three general categories:

1. Circumstances of loss. The two most common examples are:

a. Caused by claimant's negligence. If the property damage was caused, either in whole or in part, by the claimant's negligence or wrongful acts -- or by such conduct by the claimant's agent or employee acting in the scope of employment -- the personnel claim will be denied. Such contributory negligence is a complete bar to recovery. JAGMAN, § 2104m.

b. Collision damage to motor vehicles. Damage to motor vehicles is not payable as a personnel claim when it was caused by collision with another motor vehicle. JAGMAN, § 2104g. "Motor vehicle" includes automobiles, motorcycles, trucks, recreational vehicles, and any other self-propelled military, industrial, construction, or agricultural equipment. Collision claims may be paid under other claims statutes -- most frequently the Federal Tort Claims Act, or Military Claims Act -- depending on the circumstances.

2. Excluded types of property. The JAG Manual limits or prohibits recovery for certain types of property damage. Section 2104 of the JAG Manual provides a complete list of the limitations and prohibitions. The most common examples are:

a. Money or currency losses unless the loss occurred under certain limited circumstances as set forth in sections 2103a,c,h,k of the JAG Manual (In cases of theft from quarters, the claimant must have taken reasonable steps to protect the money or currency from theft. Such measures will usually include securing the money in a locked container in locked quarters. JAGMAN, § 2104a.);

b. unserviceable or worn-out property (JAGMAN, § 2104b);

c. articles acquired for persons other than the claimant and members of his or her immediate household (JAGMAN, § 2104c);

d. articles being worn except under circumstances contemplated by sections 2103c,d,e,k of the JAG Manual (JAGMAN, § 2104d);

e. intangible property representing ownership or interest in other property, such as bank books, checks, stock certificates, and insurance policies (JAGMAN, § 2104e);

f. government property (JAGMAN, § 2104f);

g. enemy property (JAGMAN, § 2104h);

h. business property (JAGMAN, § 2104n); and

i. contraband [i.e., property acquired, possessed or transported in violation of law or regulations (JAGMAN, § 2104r)].

E. Measure of damages

1. General rules. The rules for calculating the amount the claimant can recover on a personnel claim are not complicated. The provisions of JAGMAN, § 2106 for computing the amount of award may be summarized as follows:

a. If the property can be repaired, the claimant will receive reasonable repair costs established either by a paid bill or an estimate from a competent person. Estimate fees may also be recovered under certain circumstances. See JAGMAN, § 2104o. Deductions may be made for any pre-existing damage (i.e., damage or defects which existed prior to the incident which gave rise to the personnel claim) that also would be repaired. If the cost of repairing the property exceeds its depreciated replacement cost, however, the property will be considered not economically repairable. JAGMAN, § 2106a.

b. If the property cannot be economically repaired, the claimant will recover an amount based on the property's replacement cost. This amount will be reduced to reflect any depreciation. JAGMAN, § 2106a. Schedules of depreciation deductions are published by the Judge Advocate General. JAGMAN, § 2106b. The schedules do not normally require depreciation for items less than six months old. Older items are depreciated on a basis of a percentage of the replacement cost for each year the claimant owned the property. Depreciation deductions will not usually be taken for

certain expensive items that appreciate in value over time (e.g., antiques, heirlooms, valuable jewelry, etc.) or for relatively unique items such as original works of art. JAGMAN, § 2106c. Deductions may also be taken when the claimant retains property that cannot be economically repaired, but nonetheless retains a significant salvage value. JAGMAN, § 2106a.

2. Dollar limits on recovery. The maximum amount payable under the Personnel Claims Act is $25,000. JAGMAN, § 2102. Lower maximum amounts may be imposed for certain types of property. JAGMAN, § 2106f. For example, noncollision damage claims for motor vehicles are limited to $1,000, except when the vehicle is being shipped pursuant to PCS orders. JAGMAN, § 2103i. For losses incurred in foreign countries as a result of acts of mob violence, terrorist attacks, or other hostile acts directed against the U.S. government or its officials or employees or which occur as a result of an evacuation of personnel in accordance with a recommendation order of the Secretary of State or other competent authorities due to political or hostile acts after 31 December 1978, the maximum amount per incident is $40,000. JAGMAN, § 2102b.

F. Statute of limitations. The statute of limitations for personnel claims is two years, although it can be suspended during time of armed conflict. JAGMAN, § 2107. In household goods claims, however, the claimant must act relatively promptly. Failure to take exceptions when the goods are delivered by the carrier, or within a reasonable time thereafter, may result in reduced payment. Also, failure to file the claim in time for the Federal government to recover compensation from the carrier under the carrier's contract with the government may also result in reduced payment. JAGMAN, §§ 2108f, 2111.

G. Procedures. Personnel claims procedures follow the same general pattern of presentment, investigation, and adjudication discussed in section 1202G of this study guide with respect to FTCA claims. There are, however, some significant differences. Procedures in household-goods shipment claims, which constitute the largest portion of personnel claims, can be complicated. JAGMAN, §§ 2108-2125. The most notable differences and distinctions are as follows:

1. Claim forms. Personnel claims are presented on DD Form 1842 (Claim for Personal Property Against the United States), a copy of which is reproduced in appendix A-21-c of the JAG Manual. JAGMAN, § 2116.

2. Supporting documentation. Supporting documentation in personnel claims can be rather extensive. DD Form 1845 (Schedule of Property) usually is required. A sample DD-1845 is reproduced in appendix A-21-d of the JAG Manual. Also, other documentation (such as copies of orders, bills of lading, inventories, copies of demands on carriers, and written repair estimates) may be required. Section 2117 of the JAG Manual sets forth the extent and type of documentation and supporting evidence required. These documents should not be treated lightly. DD 1840/1840R (Notice of Loss/Damage) must be submitted to a personal property office within 70 days of the delivery. Failure to furnish it means the military member will not recover anything for lost or damaged articles (because the government must file with the carrier by 75 days).

3. Investigation. The commanding officer of the military organization responsible for processing the claim will refer the claim to a claims investigating officer. At large commands, the claims investigating officer is often a full-time civilian employee. JAGMAN, §§ 2119-2120. The claims investigating officer's duties include reviewing the claim and its supporting documentation for completeness and, if necessary, examining the property damage. JAGMAN, § 2120. The claims investigating officer will also prepare and present a concurrent claim on behalf of the Federal government against any carriers liable for the damage under their government contract. JAGMAN, § 2121. The claims investigating officer prepares a report, the contents of which are prescribed by section 2122 of the JAG Manual. By referring to the sample report in appendix A-21-g of the JAG Manual, it will be noted that this report is not written in the format of a JAG Manual investigation. In the case of claims under $500, the abbreviated format on page 2 of DD-1842 is used. See JAGMAN, § 2122e, app. A-21-c(3).

4. Adjudication

a. Adjudicating authorities. Personnel claims adjudicating authorities and their respective payment limits are listed in section 2124 and appendix A-21-i of the JAG Manual. For Marine Corps personnel, personnel claims are adjudicated at Headquarters, Marine Corps. JAGMAN, § 2124b.

b. Advance payments. When the claimant's loss is so great that the claimant immediately needs funds to provide fundamental necessities of life, the adjudicating authority may make an advance partial payment -- normally one-half of the estimated total payment. JAGMAN, § 2124d.

c. Replacement in kind. Under certain circumstances, lost or damaged property may be replaced in kind in lieu of cash payment. JAGMAN, § 2124e.

d. Reconsideration. The claimant may request reconsideration of the claim, even though he or she has accepted payment, if the claim was not paid in full. If the adjudicating authority does not resolve the claim to the claimant's satisfaction, the request for reconsideration is forwarded to an adjudicating authority with $25,000 payment limits or, if the claim was originally adjudicated by a $25,000 authority, to the Judge Advocate General. JAGMAN, § 2128. There is no right under the Personnel Claims Act to sue the government.

5. Effect of claimant's insurance

a. Duty to claim against insurance policy. If the claimant's property is insured in whole or in part, the claimant must file a claim with the insurer as a precondition to recovery under the Personnel Claims Act. The Personnel Claims Act is intended to supplement any insurance the claimant has; it is not intended to be an alternative to that insurance or to allow double recovery. JAGMAN, § 2108e.

b. Effect of compensation from insurer. If the claimant receives payment under his or her insurance policy for the claimed property damage, the amount of such payment will be deducted from any payment authorized on the Personnel Claims Act claim. JAGMAN, § 2104j. Likewise, if the claimant receives payment on his or her personnel claim, and then is paid for the same loss by an insurance company, the claimant must refund the amount of the insurance payment to the Federal government. JAGMAN, § 2113a.

c. Recovery by insurers. An insurer may not recover from the government under the Personnel Claims Act for compensation it has paid to its insured for personal property damage incident to service. JAGMAN, § 2104i.

6. Recovered property. When the Federal government has paid a personnel claim for lost property and the property subsequently is recovered or found, the claimant has the option of surrendering all or part of the property to the government, refunding all or part of the payment, or a combination of both. JAGMAN, § 2113b.

H. Examples

1. Example

a. Facts. Airman Singe was standing near the hanger when an aircraft crashed while landing. An officer told Singe to jump into a vehicle and go to the crash scene to help out in any way he could. Singe immediately complied. At the scene, Singe assisted an injured crewmember from the wreckage. In doing so, Singe badly ripped his uniform pants on a jagged piece of debris, and the intense heat melted the plastic case of his watch. Singe has presented a personnel claim for his pants and watch. Will he collect?

b. Solution. YES. Although damage to articles being worn is not usually payable under the Personnel Claims Act (JAGMAN, § 2104d), an exception exists when the article was subjected to extraordinary risks. In this case, Airman Singe was performing an official duty in response to an aircraft disaster and suffered property damage while trying to save lives. This situation meets the requirements of extraordinary risks under section 2103e of the JAG Manual. Therefore, the claim is payable. The amount Singe recovers will be determined by the measure-of-damages rules in section 2106 of the JAG Manual. If the items cannot be economically repaired, Singe will receive the depreciated replacement cost. Since the pants are a uniform item, they may be replaced in kind, in lieu of cash compensation. JAGMAN, § 2124e.

2. Example

a. Facts. While parked in an authorized parking space during working hours, Private Crusht's automobile was destroyed by a runaway government steamroller operated by Mr. Pancake, a civilian Navy employee acting in the scope of his employment. The car, presently valued at $3,800, is a total loss. Alas, Crusht's insurance policy does not cover steamroller accidents, so Crusht has filed a personnel claim for $3,800. Can she collect?

b. Solution. YES (but not under the Personnel Claims Act). Although this loss appears to be incident to service, collision damage to automobiles is specifically excluded from payment under the Personnel Claims Act. JAGMAN, § 2104g. Like many other vehicle collision claims, Crusht's claim is payable under the Military Claims Act, because her loss was caused by a Federal employee acting in the scope of employment. JAGMAN, § 2055a. This claim is not payable under the Federal Tort Claims Act, because the Feres doctrine effectively precludes such claims by military members. Thus, where one act may not cover Crusht's loss, another statute will. The fact that this claim is not payable under the Personnel Claims Act actually works to Crusht's benefit. Under the MCA, Crusht can recover the entire $3,800 she claimed. Under the Personnel Claims Act, the maximum amount payable for noncollision vehicle damage is usually only $1,000. JAGMAN, § 2103i.

1206 FOREIGN CLAIMS ACT

A. Overview. The Foreign Claims Act, 10 U.S.C. §§ 2734-2736 (1982) [hereinafter FCA] provides compensation to inhabitants of foreign countries for personal injury, death, or property damage caused by, or incident to noncombat activities of military personnel overseas. Although the U.S. Government's scope of liability under FCA is broad, certain classes of claimants and certain types of claims are excluded from the statute's coverage. Procedures for adjudicating an FCA claim are substantially different from the general procedural pattern for other types of claims against the government.

B. Statutory authority. The FCA provides in pertinent part:

> (a) To promote and maintain friendly relations through the prompt settlement of meritorious claims, the Secretary concerned or any officer designated by him may, under such regulations as the Secretary may prescribe, appoint one or more claims commissions, each composed of one or more commissioned officers of the armed forces, to settle and pay any claim for not more than $100,000, for
>
> (1) damage to, or loss of, real property of any foreign country or of any political subdivision or inhabitant of a foreign country, including damage or loss incident to use and occupancy;
>
> (2) damage to, or loss of, personal property of any foreign country or of any political subdivision or inhabitant of a foreign country, including property bailed to the United States; or
>
> (3) personal injury to, or death of, any inhabitant of a foreign country; if the damage, loss, personal injury, or death occurs outside the United States, or the Territories, Commonwealths, or possessions, and is caused by, or is otherwise incident to noncombat activities of, the armed forces under his jurisdiction, or is caused by a member thereof or by a civilian employee of the military department concerned or the Coast Guard ....

C. Scope of liability. The government's liability under the FCA is somewhat parallel to that under the MCA. Liability is based on two general theories: (1) Loss caused by military personnel; and (2) loss incident to noncombat military activities. The government's liability under the FCA is generally greater than under the MCA. On the other hand, the FCA is more limited than the MCA in terms of eligible claimants and territorial application.

1. Loss caused by military personnel. Under the FCA, the government is liable for personal injury, death, and property damage, including both real and personal property, caused by military members or civilian military employees. JAGMAN, § 2201. Unlike the FTCA and the MCA, the scope-of-employment doctrine does not apply except when the civilian employee is an indigenous foreign national (e.g., a Spanish citizen employed by the U.S. government in Spain who had to be acting within the scope of employment for a possible recovery under the FCA). JAGMAN, § 2204. Also, unlike FTCA claims, the acts that caused the loss need not be wrongful or negligent. The government assumes liability for virtually all acts ranging from mere errors in judgment to malicious criminal acts. JAGMAN, § 2205.

2. Loss incident to noncombat military activities. The second theory of FCA liability is virtually identical to the second basis for liability under the MCA discussed in section 1203C2 of this study guide. The government assumes liability for personal injury, death, or property damage, both real and personal property, caused by, or incident to, noncombat military activities. Such activities are peculiarly military, having little parallel in civilian life, and involve situations in which the Federal government historically has assumed liability. JAGMAN, § 2209. If such a loss incident to noncombat military activities is payable both under the FCA and also under the MCA, it will be paid under the FCA and the regulations in chapter XXII of the JAG Manual. JAGMAN, § 2055d(5).

3. Effect of claimant's negligence. A claimant whose negligent or wrongful conduct partially or entirely caused the loss might be precluded from recovery under the FCA. The effect, if any, that the claimant's contributory or comparative negligence will have, will be determined by applying the law of the country where the claim arose. Under such circumstances, the claimant will recover under the FCA only to the extent that his or her own courts would have permitted compensation. JAGMAN, § 2212.

4. Territorial application. The FCA applies to claims arising outside the United States, its territories, commonwealths, and possessions. The fact that the claim arises in a foreign country but in an area that is under the temporary or permanent jurisdiction of the United States (e.g., an overseas military base) does not prevent recovery under FCA. JAGMAN, § 2203.

5. Relationship to claims under treaty or executive agreement. Certain treaties and executive agreements, such as Article VIII of the NATO Status of Forces Agreement, contain claims provisions that may be inconsistent with the FCA principles and procedures. When such treaty or executive-agreement claims provisions conflict with FCA, the treaty or the executive agreement usually governs. In countries where such treaty or executive-agreement provisions are in effect, directives of the cognizant area coordinator should be consulted before processing any claims by foreign nationals. JAGMAN, § 2227a.

D. Exclusions from liability. There are two general categories of exclusions from FCA liability: (1) Excluded types of claims; and (2) excluded classes of claimants.

1. Excluded types of claims. The following types of claims are not payable under FCA:

a. Claims that are based solely on contract rights or breach of contract (JAGMAN, § 2211a);

b. private contractual and domestic obligations of individual military personnel or civilian employees (e.g., private debt owed to foreign merchant) (JAGMAN, § 2211b);

c. claims based solely on compassionate grounds (JAGMAN, § 2211c);

d. bastardy claims (i.e., claims for support of children allegedly fathered by military personnel or civilian employees) (JAGMAN, § 2211d);

e. claims for patent infringements (JAGMAN, § 2211e);

f. claims arising directly or indirectly from combat activities (JAGMAN, § 2213); and

g. admiralty claims unless otherwise authorized by the Judge Advocate General (JAGMAN, § 2217).

2. Excluded classes of claimants. The following types of classes of claimants are excluded from recovering under FCA:

a. Inhabitants of the United States, including military members and dependents stationed in a foreign country and U.S. citizens and resident aliens temporarily visiting the foreign country (JAGMAN, § 2210a);

b. enemy aliens, unless the claimant is determined to be friendly to the United States (JAGMAN, § 2210b); and

c. insurers and subrogees (JAGMAN, § 2214).

E. Measure of damages

1. General rule. Damages under the FCA are determined by applying the law and local standards of recovery of the country where the incident occurred. JAGMAN, § 2206.

2. Dollar limit on recovery. The maximum amount payable under the FCA is $100,000. In the case of a meritorious claim above that amount, the Secretary of the Navy may pay up to $100,000 and certify the balance to Congress for appropriation. 10 U.S.C. § 2734 (1982).

F. Statute of limitations. The claim must be presented within two years after the claim accrues. If the claim is presented to a foreign government within this period, pursuant to treaty or executive agreement provisions, the statute-of-limitations requirement will be satisfied. JAGMAN, § 2215.

G. Procedures. Under the FCA, the investigation and adjudication functions are merged in a foreign claims commission which usually can be appointed by a commanding officer. The foreign claims commission not only conducts an investigation similar to an informal JAG Manual investigation, but also is empowered to settle the claim within certain dollar limits. The procedural requirements and powers of a foreign claims commission are discussed in detail in sections 2218-2224 of the JAG Manual.

H. Example

1. Facts: The USS Extremis was making a goodwill visit to Bug, Yugoslavia. BM3 Wildman went on liberty. Wanting to see as much of the countryside as he could, he hot-wired a car parked near the pier. Later that night, while driving extremely fast, high on marijuana, and being careful not to spill any of his martini, Wildman smashed the car into a tree. The owner, Mr. Bagadonutz, a Yugoslavian citizen, wants to file a claim. Can he collect?

2. Solution: YES. Even though Wildman's acts were not in the scope of his employment, were highly negligent, and involved criminal acts, the claim is payable under the FCA. JAGMAN, §§ 2201, 2204, 2205.

1207 ADMIRALTY CLAIMS

A. Overview

1. Purpose. Admiralty is a vast, highly specialized area of law. The purpose of this section is merely to provide a brief introduction to admiralty claims, with specific focus on the command's responsibilities. For those desiring more detailed information, a bibliography appears at the end of this section.

2. Admiralty law defined. Admiralty law involves liability arising out of maritime incidents (such as collisions, groundings, and spills). Admiralty claims may be asserted either against, or in favor of, the Federal government. The Navy's admiralty claims usually are handled by admiralty attorneys in the Admiralty Division of the Office of the Judge Advocate General. Other judge advocates with specialized admiralty training are located in larger naval legal service offices and at certain overseas commands. When admiralty claims result in litigation, attorneys with the Department of Justice, in cooperation with the Admiralty Division, represent the Navy in court. Thus, while the command has little involvement in the adjudication or litigation of admiralty claims, it often has critical investigative responsibilities. Millions of dollars are frequently involved in the litigation.

B. Statutory authority and references

1. Suits in Admiralty Act, 46 U.S.C. §§ 741-752 (1982). The Suits in Admiralty Act provides that a suit in admiralty may be brought against the Federal government in all circumstances under which an admiralty suit could be brought against a private party or vessel.

2. Public Vessels Act, 46 U.S.C. §§ 781-790 (1982). The Public Vessels Act supplements the Suits in Admiralty Act and provides for admiralty remedies in cases involving naval vessels.

3. 10 U.S.C. § 7623 (1982). Section 7623 of title 10, United States Code, provides for settlement of claims by the government against private parties and vessels.

4. JAG Manual. Chapter XII of the JAG Manual prescribes the Navy's regulations governing investigation and adjudication of admiralty claims for and against the government.

C. Scope of liability. The Federal government has assumed extensive liability for personal injuries, death, and property damage caused by naval vessels or incident to naval maritime activities. Examples of the specific types of losses that give rise to admiralty claims include incidents such as:

1. Collisions;

2. wave wash and swell damage;

3. damage to commercial fishing equipment, beds, or vessels;

4. damage resulting from oil spills, paint spray, or blowing tubes;

5. damages or injuries to third parties resulting from a fire or explosion aboard a naval vessel;

6. damage to commercial cargo carried in a Navy bottom;

7. damage caused by improperly lighted, marked, or placed buoys or navigational aids for which the Navy is responsible; and

8. personal injury or death of civilians not employed by the Federal government (e.g., longshoremen, harbor workers, and passengers).

D. Exclusions from liability. Certain categories of persons are precluded from recovering under an admiralty claim for personal injury or death incurred incident to maritime activities. Such potential claimants are compensated under other statutes. Such excluded claimants include:

1. Military personnel cannot recover for personal injury, death, or property damage resulting from the negligent operation of naval vessels, except when they are injured or killed while aboard a privately owned vessel that collides with a naval vessel. JAGMAN, § 1203g.

2. Civil Service employees and seamen aboard Military Sealift Command vessels are limited to compensation under the Federal Employees' Compensation Act, 5 U.S.C. §§ 8101-8150 (1982), for personal injury or death.

E. Measure of damages

1. Surveys. A survey of damaged property is required in all collisions and any other maritime incidents involving potential liability for property damage. JAGMAN, § 1210a. Surveys have been customary in admiralty law and are intended to eliminate burdensome and difficult questions concerning proof of damages. Section 1210 of the JAG Manual has an extensive discussion of survey procedures.

2. Medical examinations. In personal injury cases, medical examinations are required for all injured persons. The function of the medical examination is similar to that of the property damage survey. See JAGMAN, § 1213.

3. Dollar limits on recovery. The Secretary of the Navy is authorized to settle admiralty claims up to $1,000,000. JAGMAN, §§ 1204a, 1205c. Amounts in excess of $1,000,000 must be certified to Congress for appropriation. Certain other officials in the Department of the Navy are authorized to settle admiralty claims for smaller amounts. See JAGMAN, § 1204a.

F. Statute of limitations. Suits in admiralty must be filed within two years after the incident on which the suit is based. Unlike the statute-of-limitations rule under the FTCA discussed in section 1202F of this study guide, filing an admiralty claim with the Department of the Navy does not toll the running of this two-year period. Nor can the government administratively waive the statute of limitations in admiralty cases. JAGMAN, § 1203m. If the admiralty claim cannot be administratively settled within two years after the incident, the claimant must file suit against the government in order to prevent the statute of limitations from running. JAGMAN, § 1204d.

G. Procedures. The procedures for investigating and adjudicating admiralty claims are explained in sections 1206-1213 of the JAG Manual. For purposes of this brief introduction to admiralty claims, the following procedural aspects are most significant:

1. Immediate preliminary report. The most critical command responsibility in admiralty cases is to immediately notify the Judge Advocate General and an appropriate local judge advocate of any maritime incident which might result in an admiralty claim for, or against, the government. Section 1206 of the JAG Manual gives details concerning the requirement for immediate reports. Because of the highly technical, factual, and legal issues that may be involved in an admiralty case, it is absolutely vital that the Admiralty Division of the Office of the Judge Advocate General be involved in the case from the earliest possible moment.

2. Subsequent investigative report. After initially notifying the Judge Advocate General, the command must promptly begin an investigation of the incident. A JAG Manual investigation will usually be required, although in some circumstances a letter report will be appropriate. Section 1207 of the JAG Manual provides guidance for determining whether a JAG Manual investigation is necessary, and, if one is necessary, the type of JAG Manual investigation that is most appropriate. Sections 0905-0907 of the JAG Manual provide specific investigatory requirements for certain maritime incidents. Also, sections 1208 and 1209 of the JAG Manual prescribe requirements and procedures concerning witnesses and documents in admiralty investigations.

3. Summary of command procedural responsibilities. Section 1217 of the JAG Manual summarizes command responsibilities in collision and personal injury cases involving potential admiralty claims.

H. Bibliography

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1208 NONSCOPE CLAIMS

A. Overview. Section 2737 of title 10, United States Code, and sections 2060 through 2066 of the JAG Manual provide for payment of certain types of claims not cognizable under any other provisions of law. Such claims are known as "nonscope claims" and arise out of either the use of a government vehicle anywhere or the use of government property aboard a Federal installation. The personal injury, death, or property damage must be caused by a Federal military employee, but there is no requirement that the acts be negligent or in the scope of Federal employment (hence the term "nonscope claim").

B. Statutory authority. The statutory authority for payment of nonscope claims is based on 10 U.S.C. § 2737 (1982), which reads in pertinent part:

> (a) Under such regulations as the Secretary concerned may prescribe, he or his designee may settle and pay, in an amount not more than $1,000, a claim against the United States, not cognizable under any other provision of law, for -
>
> (1) damage to, or loss of, property; or
>
> (2) personal injury or death;

caused by a civilian official or employee of a military department or the Coast Guard, or a member of the armed forces, incident to the use of a vehicle or the United States at any place, or any other property of the United States on a Government installation.

C. Scope of liability

1. Claims not cognizable under any other provision of law. As a precondition to payment under the nonscope claims provisions, the claim must not be cognizable under some other claims statute.

2. Caused by a Federal military employee. The resulting personal injury, death, or property damage must be caused by a Federal military employee (either military member or civilian employee of the armed forces or Coast Guard). Acts by employees of nonappropriated fund activities are not covered by the nonscope claims statute. JAGMAN, § 2061a.

a. Negligence not required. Neither the nonscope claims statute nor the Navy's regulations require that the Federal military employee's conduct causing the loss be negligent or otherwise wrongful. JAGMAN, §§ 2062a, 2065a.

b. Scope of employment immaterial. The scope-of-employment concept, which is required under the FTCA and for some MCA claims, does not apply to nonscope claims. JAGMAN, §§ 2062a, 2065.

3. Circumstances giving rise to nonscope claim. Nonscope claims are limited to injury, death, or property damage arising out of either of the following circumstances:

a. Incident to the use of a government vehicle anywhere [JAGMAN, § 2065a(1)]; or

b. incident to use of government property aboard a government installation [JAGMAN, § 2065a(2)] ("Government installation" means any Federal government facility having fixed boundaries and owned or controlled by the Federal government. JAGMAN, § 2061c. It includes both military bases and nonmilitary installations).

4. Worldwide application. There are no territorial limitations on nonscope claims. JAGMAN, § 2062c.

D. Exclusions from liability

1. Effect of claimant's negligence. If the loss was caused, in whole or in part, by the claimant's negligence or wrongful acts or by negligence or wrongful acts by the claimant's agent or employee, the claimant is barred from any recovery under the nonscope claims statute. JAGMAN, § 2065b(1).

2. Excluded claimants. Subrogees and insurers may not recover subrogated nonscope claims. JAGMAN, § 2065b(6).

E. Measure of damages

1. General rule. The measure-of-damage provisions under the Military Claims Act are used to determine the extent of recovery for nonscope claims. JAGMAN, §§ 2056, 2065c.

2. Limitations on recovery

a. Personal injury and death cases. For personal injury or death, the claimant may recover no more than actual medical, hospital, or burial expenses not paid or furnished by the Federal government. JAGMAN, § 2065b(2), c.

b. Indemnifiable claims. The claimant may not recover any amount that he or she can recover under an indemnifying law or indemnity contract. JAGMAN, § 2065b(5).

c. Dollar limit on recovery. The maximum payable as a nonscope claim is $1,000. JAGMAN, § 2065c.

F. Statute of limitations. A nonscope claim must be presented within two years after the claim accrues or it will be forever barred. JAGMAN, § 2066.

G. Procedures. Notable procedural aspects of nonscope claims include the following:

1. Automatic consideration of other claims. Claims submitted pursuant to the FTCA or MCA, but which are not payable under those Acts because of scope-of-employment requirements, automatically will be considered for payment as a nonscope claim. JAGMAN, § 2063b.

2. Adjudicating authority. All adjudicating authorities listed in appendix A-20-e(1) of the JAG Manual are authorized to adjudicate nonscope claims. JAGMAN, § 2064.

3. Claimant's rights after denial. If a claim submitted solely as a nonscope claim is denied, the claimant may appeal to the Secretary of the Navy (Judge Advocate General) within 30 days of the notice of denial. JAGMAN, § 2063c. There is no right to sue under the nonscope claims statute. JAGMAN, § 2062b.

H. Example

1. Facts. BM2 Knasty resolved to kill his archenemy ENS Knice, but he planned to make it look like an accident. He stole a government sedan, drove it off base, and rode around town looking for Knice. When he spotted Knice standing on a corner, Knasty aimed the car at Knice and bore down on him at a high speed. Knice tried to jump out of the way, but not quickly enough to avoid being struck a glancing blow. As a result, Knice suffered extensive injuries, which were treated at a military hospital. Also, the clothes he was wearing and the radio he was carrying were destroyed. ENS Knice has filed an FTCA claim for $15,000 ($600 for property damage and $14,400 for personal injury, pain and suffering, and lost wages from his part-time job). How much, if anything, will ENS Knice collect?

2. Solution. This claim is not payable under the FTCA for several reasons, not counting any possible Feres doctrine problem caused by the claimant being a military member. First, FTCA does not provide compensation for losses caused by intentional torts such as assault and battery. JAGMAN, § 2036c(7). Moreover, BM2 Knasty's act was not within the scope of his Federal employment. Under the FTCA, the government is liable only for acts within the scope of Federal employment. JAGMAN, § 2037a. The fact that Knasty's acts were outside the scope of his Federal employment also prevent paying this claim under the MCA. JAGMAN, § 2055a. However, under the automatic consideration provisions of JAGMAN, § 2063b, this claim may be considered as a nonscope claim. It is not cognizable under another claims statute and the injuries and damage were caused by a Federal employee. Neither negligence nor scope of employment is required. JAGMAN, § 2062a. The claim involves the use of a government vehicle. JAGMAN, § 2065a(1). Therefore, Knice can recover under the nonscope claims statute. He will not be compensated for medical expenses, which were provided by the U.S. government. Pain and suffering and lost wages are likewise not compensable under the nonscope claims statute. JAGMAN, § 2065b(2). Therefore, Knice will recover only the $600 property damage loss.

1209 ARTICLE 139, UCMJ, CLAIMS

A. Overview. Article 139 of the Uniform Code of Military Justice provides compensation for property damage caused by the riotous, willful, or wanton acts of military members. Although the individual member, not the Federal government, is liable for the damage, the member's command has significant procedural responsibilities.

B. Statutory authority. Article 139 of the Uniform Code of Military Justice provides:

> (a) Whenever complaint is made to any commanding officer that willful damage has been done to the property of any person or that his property has been wrongfully taken by members of the armed forces, he may, under such regulations as the Secretary concerned may prescribe, convene a board to investigate the complaint. The board shall consist of from one to three commissioned officers and, for the purpose of that investigation, it has power to summon witnesses and examine them upon oath, to receive depositions or other documentary evidence, and to assess the damages sustained against the responsible parties. The assessment of damages made by the board is subject to the approval of the commanding officer, and in the amount approved by him shall be charged against the pay of the offenders. The orders of the commanding officer directing charges herein authorized is conclusive on any disbursing officer for the payment by him to the injured parties of the damages so assessed and approved.
>
> (b) If the offenders cannot be ascertained, but the organization or detachment to which they belong is known, charges totaling the amount of damages assessed and approved may be made in such proportions as may be

considered just upon the individual members thereof who are shown to have been present at the scene at the time the damages complained of were inflicted, as determined by the approved findings of the board.

C. Scope of liability

1. Limited to property damage. Article 139 claims are limited to damage, loss, or destruction of real or personal property. JAGMAN, § 1002.

2. Willful damage. The property damage must be caused by acts of military members which involve riotous conduct, acts of depredation, or demonstrate a reckless and wanton disregard for the property rights of other persons. JAGMAN, § 1002. Conduct that involves only simple negligence (i.e., failure to act with the same care that a reasonable person would use under the circumstances) does not give rise to an article 139 claim. JAGMAN, § 1003b.

D. Exclusions from liability. The following types of claims are not payable under article 139:

1. Claims payable under other claims statutes or regulations (JAGMAN, § 1003a);

2. insured loss [i.e., any portion of a loss covered by insurance (JAGMAN, § 1003c)];

3. claims for personal injury or death (JAGMAN, § 1003d);

4. conduct occurring within the scope of employment (JAGMAN, § 1003e);

5. property damage not involving riotous or violent conduct, [i.e., where loss occurs under conditions of stealth, deception, or trickery (JAGMAN, § 1003f)]; and

6. government property (JAGMAN, § 1003g).

E. Measure of damages

1. General rule. The amount of recovery is determined by applying the applicable measure-of-damages rules in sections 2014, 2037, 2056, and 2065 of the JAG Manual. JAGMAN, § 1006e. Only direct physical damages may be compensated, not indirect or inconsequential damages. JAGMAN, § 1004e.

2. Dollar limit on recovery. The maximum amount payable under article 139 is $750 per offender per incident. Thus, if two members damage the claimant's property in a single incident, the maximum amount payable is $1500; if four persons are involved, the maximum would be $3,000.

F. Statute of limitations. There are two 30-day time limits governing article 139 claims.

1. 30-day limit for initial complaints. Any person whose property was damaged or destroyed by the willful or wanton conduct of military members must make a complaint to a military authority within 30 days after the incident. JAGMAN, § 1004a. Usually the complaint is made to the commanding officer of the persons involved. Erroneously addressed complaints will be forwarded. JAGMAN, § 1005a.

2. 30-day limit for filing claims. When an initial complaint is received, the commanding officer who orders the investigation of the incident will advise the claimant of his or her rights under Article 139, UCMJ. See JAGMAN, § 1005b. Upon receiving such advice, the claimant has 30 days in which to file a formal claim. JAGMAN, § 1005b(3).

G. Procedures. Article 139 claims involve certain unique procedures:

1. Investigation. Article 139 requires that property damage complaints cognizable under article 139 be investigated by an investigation requiring a hearing. A court of inquiry may be used if appropriate. JAGMAN, § 1006a,b. The alleged offender shall be designated as a party to the investigation and shall be afforded all the rights of a party. JAGMAN, § 1006d. The investigation makes findings of fact and opinions concerning the extent and cause of damage, as well as which persons are responsible. JAGMAN, § 1006f. The investigation also recommends the amount to be assessed against each offender. JAGMAN, § 1006g.

2. Subsequent action. Action on the findings of fact, opinions, and recommendations of the investigation is explained in JAGMAN, §§ 1007-1008. If all offenders are attached to the command convening the investigation, the commanding officer may approve, disapprove, or modify the findings, opinions, and recommendations subject to review by the officer exercising general court-martial jurisdiction for the command. JAGMAN, § 1007b. If the offenders are members of different commands, action on the investigation's report is taken by a common superior exercising general court-martial jurisdiction. JAGMAN, § 1008.

3. Relationship to court-martial proceedings. Article 139 claims procedures are entirely independent of any court-martial or nonjudicial punishment proceedings based on the same incident. Acquittal or conviction at a court-martial may be considered by an article 139 investigation, but it is not controlling on determining whether a member should be assessed for damages. The article 139 investigation is required to make its own independent findings. JAGMAN, § 1010.

H. Example

1. Facts. YN2 Snootfull got uproariously drunk, stole a U.S. government sedan, and drove down the main street of Woonsocket, R.I., at 85 mph. Finding this less than entirely challenging, he decided to drive in reverse with his eyes closed. In doing so, Snootfull smashed into the front window of Woonsocket Wholesale Widgets, causing $1,100 property damage. The proprietor of Woonsocket Wholesale Widgets, Mr. Widgetmaker, has filed an article 139 claim with Snootfull's commanding officer. Is this claim payable under Article 139, UCMJ?

2. Solution. NO. Snootfull's conduct certainly qualifies as "acts showing . . . reckless and wanton disregard of the property rights of others . . . ." JAGMAN, § 1002. However, this claim would also be compensable under the nonscope claim statute because it involves use of a Federal government vehicle while not within the scope of Federal employment, as discussed in section 1208 of this study guide. Therefore, it is not payable under Article 139, UCMJ. JAGMAN, § 1003a.

PART C

CLAIMS ON BEHALF OF THE GOVERNMENT

1210 FEDERAL CLAIMS COLLECTION ACT

A. Overview. Under the Federal Claims Collection Act, 31 U.S.C. § 3711 (1982) [hereinafter FCCA], the Federal government may recover compensation for claims on behalf of the United States, including those for property damage caused by private parties. The extent of the government's recovery is determined by the law of the place where the damage occurred.

B. Statutory authority. The FCCA provides in pertinent part:

(a) The head of an executive or legislative agency -

(1) shall try to collect a claim of the United States Government of money or property arising out of the activities of, or referred to, the agency;

(2) may compromise a claim of the Government of not more than $20,000 (excluding interest) that has not been referred to another executive or legislative agency for further collection action; and

(3) may suspend or end collection action on a claim referred to in clause (2) of this subsection when it appears that no person liable on the claim has the present or prospective ability to pay a significant amount of the claim or the cost of collecting the claim is likely to be more than the amount recovered.

The jointly promulgated standards referred to in the Act are the Joint Regulations of the General Accounting Office and the Department of Justice on Federal Claims Collections Standards, which are published in part C of chapter XXIV of the JAG Manual.

C. Government's rights

1. Determined by local law. The extent of any FCCA recovery by the Federal government is determined by the law where the damage occurred. As a general rule, if a private person would be entitled to compensation under the same circumstances, the Federal government may recover under the FCCA.

2. Liable parties. FCCA claims may be pursued against private persons, corporations, associations, and nonfederal governmental entities. An FCCA claim also can be asserted against any Federal employee responsible for the damage. See JAGMAN, §§ 2421-102.3. But see Federal Drivers' Act, 28 U.S.C. § 2679(b) (1982) (prescribing immunity for Federal drivers). If the responsible party is insured, the claim may be presented to the insurer.

D. Measure of damages. The amount of the government's recovery for an FCCA claim is determined by the measure-of-damages rules of the law where the damage occurred. There is no maximum limit to recovery.

E. Statute of limitations. The government has three years after the damage occurs in which to make a written demand on the responsible party. JAGMAN, § 2419. See also JAGMAN, § 2421-102.2.

F. Procedures. Specific procedures and collection policies are promulgated in the Joint Regulations in part C of chapter XXIV of the JAG Manual. Among the notable features of FCCA procedures are the following:

1. Authority to handle FCCA claims. Section 2415a of the JAG Manual lists the officers authorized to pursue, collect, compromise, and terminate action on FCCA claims. These include certain officers in the Office of the Judge Advocate General of the Navy, Naval District Commandants (or their successors) and their staff judge advocates, most commanding officers of naval legal service offices, and commanding officers of most overseas commands that have a judge advocate attached. Claims over $20,000 can be terminated or compromised only with permission of the Department of Justice. JAGMAN, § 2415b.

2. Repair or replacement. In some cases, the party responsible for the damage, or that party's insurer, may offer to repair or replace the damaged property. If such a settlement is in the government's best interest, the commanding officer of the property may accept repair or replacement under conditions described in section 2417 of the JAG Manual.

3. Collection problems. Collecting the full amount claimed under an FCCA claim can often be difficult for a number of reasons. Therefore, the Joint Regulations authorize specific procedures to resolve or overcome collection problems:

a. Collection by offset. The U.S. government may deduct the amount of the FCCA claim from any pay, compensation, or payment it owes the responsible party. Section 2421-102.3 of the JAG Manual sets forth the details and limitations on offset collections.

b. Suspension or revocation of Federal license or eligibility. JAGMAN, § 2421-102.6.

c. Collection in installments. In cases where the responsible party is unable to make a lump-sum payment, an installment payment schedule may be used. Section 2421-102.9 of the JAG Manual sets forth the terms, conditions, and limitations on installment payment plans. A substantia' portion of FCCA claims against individuals are liquidated through installment payments.

d. Compromise. When the responsible party is unable to pay the full amount of the claim within a reasonable time (usually three years), or when the responsible party refuses to pay and the government is unable to enforce collection within a reasonable time, the claim may be compromised. Section 2421-102.9 - 103 of the JAG Manual are formed in detailed policies and procedures for compromising FCCA claims

4. Referral to Department of Justice. Unsettled claims may be referred to the Department of Justice for litigation. See JAGMAN, § 2421-105. The referral is made by the Office of the Judge Advocate General, and not by the local authority directly. JAGMAN, § 2418.

1211 MEDICAL CARE RECOVERY ACT

A. Overview. The key to understanding the complexities of the Medical Care Recovery Act is to realize that the Federal government operates one of the largest health-care systems in the world. When the government treats, or pays for the treatment of, a military member, retiree, or dependent, it may recover its expenses from any third party legally liable for the injury or disease.

B. Statutory authority

1. Statutes authorizing medical care by the Federal Government

a. Active-duty personnel

(1) Military facilities: 10 U.S.C. § 1074 (1982).

(2) Emergency care: 10 U.S.C. § 5203 (1982).

b. Dependents: 10 U.S.C. §§ 1076-1078 (1982).

c. Retirees: 10 U.S.C. § 1074 (1982).

d. CHAMPUS payments: 10 U.S.C. § 1079ff (1982).

2. Medical Care Recovery Act. The Medical Care Recovery Act, 42 U.S.C. § 2651 (1982) [hereinafter MCRA], provides in part:

> (a) In any case in which the United States is authorized or required by law to furnish hospital, medical, surgical, or dental care and treatment (including prostheses and medical appliances) to a person who is injured or suffers a disease, after the effective date of this Act, under circumstances creating a tort liability upon some third person (other than or in addition to the United States and except employers of seamen treated under the provisions of section 249 of this title) to pay damages therefor, the United States shall have a right to recover from said third person the reasonable value of the care and treatment so furnished or to be furnished and shall, as to this right be subrogated to any right or claim that the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors has against such third person to the extent of the reasonable value of the care and treatment so furnished or to be furnished. The head of the department or agency of the United States furnishing such care or treatment may also require the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors, as appropriate, to assign his claim or cause of action against the third person to the extent of that right or claim.

C. Government's rights

1. Independent cause of action. The MCRA created an independent cause of action for the United States. Its right of recovery is not dependent upon a third party. The requirement that the U.S. furnish care to an injured party is merely a condition precedent to the government's independent right of recovery. If the tortfeasor has a procedural attack or defense against the injured party, it will not serve as a bar to a possible recovery by the government. Heusle v. Nat'l Mut. Ins. Co., 628 F.2d 733 (3d Cir. 1980).

2. Determined by local law. The extent of any MCRA recovery by the Federal government is determined by the law where the injury occurred. The Federal government enjoys no greater legal rights or remedies than the injured person would under the same circumstances. Thus, if the injured person would be legally entitled to compensation for his or her injuries from the responsible party under the law where the injury occurred, the Federal government may recover its expenses in treating the injured person. JAGMAN, § 2405a.

3. Liable parties. MCRA claims may be asserted against private individuals, corporations, associations, and nonfederal governmental agencies. They also may be asserted against a Federal employee responsible for the injuries, except that no such claim may be asserted against a servicemember injured as a result of his/her own willful or negligent acts for two reasons. First, the wording of the Medical Care Recovery Act, 42 U.S.C. §§ 2651-2653 (1982), is explicit in providing a right of action against third parties. The injured member does not qualify as a third party. Second, to allow such a claim would violate the provisions and spirit of 10 U.S.C. § 1074 (1982), which provides the entitlement of active-duty servicemembers to medical care free of charge (save for certain subsistence costs chargeable to officers). However, the United States can subrogate against any insurance coverage which the member may have that might cover medical care and treatment as a result of the self-injury.

4. Claims against insurers. If the party responsible for the injuries is insured, an MCRA claim may be asserted against the insurer. Since a large portion of injuries resulting in MCRA claims involve automobile accidents, assertions against insurance companies are commonplace.

D. Measure of damages. The Federal government may recover the reasonable value of medical services it provided, either directly at a U.S. government hospital or indirectly through the CHAMPUS program.

1. Treatment at Federal government facility. The value of treatment at Federal government facilities is computed on a flat-rate per diem basis for inpatient care and a per-visit charge for outpatient treatment, rather than the itemized charges used by most civilian hospitals. These rates are promulgated by the Bureau of the Budget and are published in appendix A-24-c of the JAG Manual.

2. CHAMPUS payments. The Federal government may recover the amount actually paid to, or on behalf of, a military dependent under the CHAMPUS program. JAGMAN, § 2403i.

3. Other payments. The Federal government may recover amounts it paid to civilian facilities for emergency medical treatment provided active-duty personnel. JAGMAN, § 2403h.

E. Statute of limitations. MCRA claims must be asserted within three years after the injury occurs. JAGMAN, § 2412. Sections 2405a and 2407 of the JAG Manual set forth the assertion procedures that must be followed.

F. Procedures. MCRA procedures are governed by parts A and C of chapter XXIV of the JAG Manual. Notable aspects of MCRA procedures include the following:

1. "JAG designees". Primary responsibility for assertion and collection of MCRA claims rests with "JAG designees" (i.e., officers delegated MCRA responsibilities by the Judge Advocate General). JAGMAN, § 2402a. JAG designees include certain officers in the Office of the Judge Advocate General and commanding officers of most naval legal service offices. JAGMAN, § 2401b. Designees outside of the Office of the Judge Advocate General have been assigned geographic responsibility as set forth in appendix A-20-f of the JAG Manual. JAG designees may assert and receive full payment of MCRA claims in any amount, but they may compromise, settle, or waive claims up to $40,000. Claims in excess of $40,000 may be compromised, settled, or waived only with the approval of the Department of Justice. JAGMAN, § 2402b.

2. Initial action. JAG designees learn of potential MCRA claims from several sources:

a. Investigations

(1) When required. When a military member, retiree, or dependent receives, either directly or indirectly, Federal medical care for injuries or disease for which another party may be legally responsible, usually a JAG Manual investigation will be required. One exception to this requirement is when the inpatient care does not exceed three days or outpatient care does not exceed ten visits. JAGMAN, § 2404a.

(2) Responsibility for conducting investigation. The responsibility for conducting the investigation of a possible MCRA claim normally lies with the commanding officer of the local naval activity most directly concerned, usually the commanding officer of the personnel involved in the incident or of the activity where the incident took place. JAGMAN, § 2004a. This responsibility may be assigned to another commanding officer under circumstances described in sections 2402a and 2004b of the JAG Manual.

(3) Scope and contents of investigation. An investigation into a possible MCRA claim will be conducted in accordance with JAGMAN, §§ 2002-2009. JAGMAN, § 2404a. An investigation of the same incident that was convened for some other purpose usually may be used to determine possible MCRA liability, provided it is complete. See JAGMAN, § 2404b. See also JAGMAN, §§ 0910, 2007.

(4) Copy to JAG designee. If any investigation, regardless of its origin or initial purpose, involves a potential MCRA claim, a copy should be forwarded to the cognizant JAG designee. JAGMAN, § 2404c.

b. Reports of care and treatment. The second major way in which the JAG designee learns of a possible MCRA claim is by a report from the facility providing medical care.

(1) Military facilities. Military health-care facilities are required to report medical treatment they provide when it appears that a third party is legally responsible for the injuries or disease. In the Navy, this reporting requirement is satisfied by submission of NAVJAG Form 5890/12 (Hospital and Medical Care - Third Party Liability Case) to the cognizant JAG designee. JAGMAN, § 2403a. A sample of NAVJAG 5890/12 is reproduced in appendix A-24-d of the JAG Manual. NAVJAG 5890/12 is submitted when it appears that the patient will require more than three days inpatient care or more than ten outpatient visits. Preliminary, interim, and final reports are prepared as the patient progresses through the treatment. JAGMAN, § 2403c. This report is, in essence, a hospital bill, because it will reflect the value of the medical care provided to date, computed in accordance with the Bureau of the Budget rates. JAGMAN, § 2403b. Military health-care facilities in other services use forms similar to NAVJAG 5890/12.

(2) CHAMPUS cases. Statements of CHAMPUS payments on behalf of the injured person are available from the local CHAMPUS carrier (usually a civilian health-care insurance company that administers the CHAMPUS program under a government contract). Statements are to be forwarded automatically to JAG designees in cases involving potential third-party liability. JAGMAN, § 2403i.

(3) Civilian medical care reports. District medical officers are required to submit reports to cognizant JAG designees whenever they pay emergency medical expenses incurred by active-duty personnel at a civilian facility and the circumstances indicate possible MCRA liability. JAGMAN, § 2403h.

3. Injured person's responsibilities. The JAG designee will advise the injured person of his or her legal obligations under MCRA. These responsibilities are to:

a. Furnish the JAG designee with any pertinent information concerning the incident;

b. notify the JAG designee of any settlement offer from the liable party or that party's insurers [JAGMAN, § 2405c(2)];

c. cooperate in the prosecution of the government's claim against the liable party [JAGMAN, § 2405c(2)];

d. furnish the JAG designee with the name and address of any civilian attorney representing the injured party, since the civilian attorney may represent the government as well as the injured person if the claim is litigated in court [JAGMAN, § 2405c(3), e];

e. refuse to execute a release or settle any claim concerning the injury without the prior approval of the JAG designee [JAGMAN, § 2405c(4)]; and

f. refuse to provide any information to the liable party, that party's insurer, or attorney without prior approval of the JAG designee [JAGMAN, § 2405c(4)].

At first, these restrictions and obligations may appear unfair. But, it must be remembered that the government's rights under the MCRA are largely derivative from the injured person's legal rights. If the injured person makes an independent settlement with the liable party, the government's rights could be prejudiced. Also, if the injured person settles the claim independently and receives compensation for medical expenses, the government is entitled to recover its MCRA claim from the injured person directly -- out of the proceeds of the settlement.

4. JAG designee action. The JAG designee formally asserts the government's MCRA claim by mailing a Standard Form 96 (Notice of Claim) to the liable party or insurer. JAGMAN, §§ 2405a, 2407. The JAG designee may accept full payment of the claim or may establish an installment payment plan with the liable party. Under appropriate circumstances, the JAG designee may waive or compromise the claim. See JAGMAN, § 2405g. Waivers or compromises of claims in excess of $40,000 require prior Department of Justice approval. JAGMAN, § 2402C. If the claim cannot be collected locally, referral to the Department of Justice for litigation is possible, but must be done by the Judge Advocate General. JAGMAN, § 2402g.

G. Medical payments insurance coverage. As noted in section 1211C3 above, government claims for medical care normally are directed against the tortfeasor and recovery is obtained either directly from him or his insurance carrier. There are, however, other potential sources for recovery of medical care expenditures, depending upon the circumstances involved. One such potential source is "medical payments" insurance coverage. Under the provisions of certain automobile insurance policies, an insurer may be obligated to pay the cost of medical care for injuries incurred by the policyholder, his passengers who are riding in the insured vehicle, or a pedestrian who is struck by the insured vehicle. Assuming such coverage exists (and it is the claims officer's responsibility to determine if it does), medical payments clauses apply regardless of who was at fault and the United States may be entitled to recover as the provider of medical care. It is extremely important to note that recovery has been allowed, based on one of two theories: that the United States is insured under the medical pay provisions of the insurance policy, or that the United States is a third-party beneficiary of the insurance contract. Recovery is not based upon the MCRA, but under the terms of the individual insurance policy. The language of the contract is critical in determining whether the United States is a proper third-party beneficiary. It must also be determined whether or not the state has approved the exclusion of the United States as a third-party beneficiary. See, e.g., United States v. Cal. State Auto. Ass'n, 385 F. Supp. 669 (C.D. Cal. 1974), aff'd, 530 F.2d 850 (9th Cir. 1976); United States v. United States Auto. Ass'n, 431 F.2d 735 (5th Cir. 1970).

H. Uninsured motorist coverage. Another potential source of recovery of medical care costs is the "uninsured motorist" coverage provisions of the typical automobile insurance policy. If an injured servicemember has obtained such coverage, and the tortfeasor is uninsured, the typical uninsured motorist coverage clause provides for payment to the policyholder of these sums which

he would have been able to recover from the tortfeasor, but for the fact that the tortfeasor was uninsured. Like medical payments insurance coverage, the right of the United States to recover is based upon the terms of the insurance contract and not upon the MCRA. If the term "insured" includes "any person," then the courts have generally held that the United States is entitled to recover. United States v Geico, 440 F.2d 1338 (5th Cir. 1971).

I. No-fault statutes. The recovery of the United States under the MCRA in states that have enacted no-fault statutes will be determined by the language of the statute. It is necessary to determine if the United States is within the terms of the statute so as to be entitled to recover for medical care provided. If the state statute eliminates a cause of action against the tortfeasor, then the only probable source of recovery is under the injured party's no-fault insurance. If the United States is excluded and has no cause of action, then there may be no recovery in the particular case. Hohman v. United States, 628 F.2d 832 (3d Cir. 1980); Gov't Employment Ins. Co. v. Rozmyslowicz, 605 F.2d 669 (2d Cir. 1979).

J. Bibliography. The following references are helpful in working with MCRA claims:

1. Bernzweig, Pub. L. No. 87-693: An Analysis and Interpretation of the Federal Medical Care Recovery Act, 64 Colum. L. Rev. 1257 (1964).

2. Turner, Hospital Recovery Claims (42 U.S.C. § 2651): The United States as a Subrogee, 12 A.F. JAG L. Rev. 44, 51 (1970).

3. Long, Administration of the Federal Medical Care Recovery Act, 46 Notre Dame Law 253 (1971).

4. Long, The Federal Medical Care Recovery Act: A Case Study, 18 Vill. L. Rev. 353 (1973).

5. SECNAVINST 6320.8 series, Subj: Uniformed Services Health Benefits Program.

6. BUMEDINST 6320.32 series, Subj: Non-Naval Medical and Dental Care.

1212 AFFIRMATIVE CLAIMS AGAINST SERVICEMEMBER TORTFEASORS.

The United States may not assert an affirmative claim against a servicemember/employee who, while in the scope of employment, damages government property or causes damage or injury for which the United States must pay. See United States v. Gilman, 347 U.S. 507 (1953). Consideration, in the case of gross negligence or willful and wanton acts, should be given to whether such actions took the servicemember/employee outside the scope of employment.

CLAIMS WORK SHEET*	MILITARY PERSONNEL AND CIVILIAN EMPLOYEES' CLAIMS ACT	FEDERAL TORT CLAIMS ACT	FOREIGN CLAIMS ACT	MILITARY CLAIMS ACT	NONSCOPE CLAIMS
GEOGRAPHIC LIMITS	No, see 2101, 2102, 2103	See 2036c(10) (USA & Poss.)	Yes, see 2201,2203, 2206	No, see 2051, 2052c	No, see 2062c
COVER LOSS TO PERSONAL PROPERTY?	Yes, see 2103, 2105	Yes, but see 2036d(2)	Yes, see 2201	Yes, see 2052	Yes, see 2062 but look carefully
COVER PERSONAL INJURY LOSSES?	No, see 2105	Yes, but see 2036d(1)-(3)	Yes, see 2204	Yes, see 2052. But see 2055d(14)	Yes, see 2062 but look carefully
COVER MILITARY PERSONNEL? Property Bar	Yes, see 2101, 2102 2210	See 2036d(1)-(2) (Feres Doctrine) Personal Injury/	No, see 2201, 2202 2065a	See 2052, 2055	Yes, see 2062, 2063
COVER MILITARY DEPENDENTS?	No, see generally 2101, 2102	Yes, but see 2036d(1) (Feres Doctrine)	No, see 2201, 2202, 2210	Yes, see 2052	Yes, see 2062, 2063, 2065a
COVER CIVILIAN EMPLOYEES?	Yes, see 2101, 2102	See 2036d(2)-(4) 2210	No, see 2201, 2202,	See 2055d(4)	Yes, see 2062, 2065a
GIVE RISE TO 3RD PARTY RIGHTS?	No, see 2104i	Yes, see 2034a(4)	No, see 2214	Yes, see 2053a	No, see 2065b(6)
COVER UNCONNECTED CIVILIANS?	No, see 2102	Yes, see 2032e(1), 2034	Yes, see 2201	Yes, see 2052, 2053 2055a-b	Yes, see 2062
IS THERE A "SCOPE OF DUTY" REQUIREMENT?	No, see generally 2103	Yes, see 2031b 2032a	See 2204	See 2052, 2055	No, see 2062
"SERVICE CONNECTION" REQUIRED?	Yes, see 2102, 2103	Yes, see 2032	See 2204	Yes, see 2052	Perhaps, see 2062, 2065a

* All references are to sections in the JAG Manual.

CLAIMS WORK SHEET*	MILITARY PERSONNEL AND CIVILIAN EMPLOYEES' CLAIMS ACT	FEDERAL TORT CLAIMS ACT	FOREIGN CLAIMS ACT	MILITARY CLAIMS ACT	NONSCOPE CLAIMS
ARE THERE DOLLAR LIMITS ON RECOVERY?	Yes, see 2102, 2103i	See 2037	Yes, see 2218b, 2225	Yes, see 2052b	Yes, see 2062, 2065a, c
IS NEGLIGENCE REQUIRED?	No, see generally 2102, 2103	Yes, see 2032a	No, see 2205	See 2052, 2055	No, see 2065
IS CONTRIBUTORY NEGLIGENCE A BAR?	Yes, see 2104m	See state law 2032, 2036b	Yes, see 2212	See state law limits 2055d	Yes, see 2065b(1)
ARE INTENTIONAL TORTS COVERED?	Yes, see generally 2102, 2103	See 2036b(7)	Yes, see 2205	See 2036b(7) 2055	Yes, see 2065a
WHAT IS THE STATUTE OF LIMITATIONS?	See 2107	See 2038 (2 yrs/6 mos after refusal)	See 2215	See 2057	See 2066
IF SO, WHAT ARE PROCEDURAL STEPS FOR FILING?	Yes, see 2108-13, 2115-18	See 2032, 2034	Yes, see 2216	See 2053	Yes, see 2063a-c
IS THERE A RIGHT TO SUE IF CLAIM REJECTED?	No	Yes, see 2038	No, see 2224	No, see 2052d	No, see 2062b
IS THERE A JURY RIGHT?	N/A	No, see 2032d	N/A	N/A	N/A
ARE THERE SPECIAL PERSONS OR OCCURRENCES EXCLUDED?	Yes, see 2104	See 2036c, d	Yes, see 2210, 2211, 2213, 2214, 2217	Yes, see 2055d	Yes, see 2065b

* All references are to sections in the JAG Manual.

CHAPTER XIII

STANDARDS OF CONDUCT AND GOVERNMENT ETHICS

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CHAPTER XIII

STANDARDS OF CONDUCT AND GOVERNMENT ETHICS

1301 INTRODUCTION

A. The purpose of the standards of conduct rules is to provide ethical standards for all DON personnel. The primary reference for these rules is SECNAVINST 5370.2 series, which applies to the military (Regular and reservist, active or ACDUTRA) as well as to civilians (including nonappropriated fund activities personnel and special government employees). The primary standards of conduct reference for the Coast Guard is COMDTINST 5370.8.

B. The standards of conduct rules in this chapter that are shown in bold type are regulatory general orders and, therefore, military violators of those rules are subject to the UCMJ, while civilian violators are subject to disciplinary action.

-- The government does not have to allege or to prove that a military accused had knowledge of a particular regulation to obtain a conviction for the violation of a lawful general regulation under Article 92 of the UCMJ. The government would have to allege and prove the facts which allegedly violated the regulation and, depending on the lawful general regulation alleged, the government would have to prove any general or specific intent required by the regulation. United States v. Bruce, 14 M.J. 254, 258 (C.M.A. 1982).

1302 COMMAND RESPONSIBILITIES

A. There are several important command responsibilities with regard to the standards of conduct. Individual commands must:

1. Be responsible for ensuring compliance with the conduct rules within the command;

2. provide regular training, at least annually, to all DON personnel in the command;

3. periodically publish the bedrock standards [Appendix D in SECNAVINST 5370.2 - see at pp. 33-34, infra] within the command and provide a copy of these rules on request to DON personnel within the command;

4. ensure that any required Private Interests Disclosure Reports, discussed below, are timely filed;

5. make conflict of interest determinations per the rules and take appropriate remedial action;

6. ensure that ACDUTRA reservists are assigned duties that avoid conflicts of interest and minimize the possibility of gaining information which could give them unfair advantage over their civilian competitors;

7. receive and promptly handle reported violations; and

8. ensure that individuals leaving Federal Service, including retirees, are briefed concerning post-government employment service restrictions and reporting requirements.

1303 ETHICS COUNSELORS

A. Are designated as the delegated authority for initially reviewing Financial Disclosure Statements (SF-278) and for finally reviewing Confidential Statements of Affiliations and Financial Interests (DD Form 1555) submitted by DON personnel within their organization, activity, or geographic area.

B. Are responsible for providing advice and assistance on standards of conduct, ethics, conflicts of interest, and post-government service employment restriction issues. This advice should be in writing whenever it is practical to do so.

C. Are permitted to issue written opinions relating to private employment contracts between former DOD procurement officials and defense contractors. A former DOD procurement official who receives a favorable written opinion from a designated ethics counselor, prior to his acceptance of compensation from a defense contractor during the two-year period after that official has separated from DOD, operates as a conclusive presumption in that official's favor that the acceptance of compensation in his case is not prohibited by the two-year statutory ban on the receipt of such compensation. 10 U.S.C. § 2397b (1987).

D. Appendix E to SECNAVINST 5370.2 lists the ethics counselor billets in the naval service. These billets include the commanding officers of Naval Legal Service offices, the staff and force judge advocates on the staffs of all commands having general court-martial convening authority, and the staff judge advocates for Naval Regional Medical Commands.

1304 GENERAL POLICIES FOR ALL DON PERSONNEL

A. The appearance of impropriety must be avoided by all Department of Navy personnel. The broad standard used by SECNAVINST states:

> Whether an appearance of impropriety exists must be determined from the prospective of a reasonable member of the American public and not solely from the vantage point of the Government officials involved. This policy implicitly assumes that questioned actions will be evaluated with the knowledge common to the community whose perception is being evaluated. If, under this standard, an action appears improper, it shall not be taken.

SECNAVINST 5370.2 series.

B. All Department of Navy personnel must:

1. Know their scope of authority and do not exceed it.

2. Be familiar with statutory prohibitions on conduct.

3. Consult designated ethics counselors as needed

4. Avoid any action that results in or reasonably can be expected to create the appearance of:

a. Using public office for private gain;

b. giving preferential treatment to any person or entity;

c. impeding government efficiency or economy;

d. losing independence or impartiality;

e. making a government decision outside official channels; or

f. adversely affecting the confidence of the public in the integrity of the government.

1305 AFFILIATIONS AND FINANCIAL INTERESTS

DON personnel shall not engage in personal, business, or professional activity nor hold a direct or indirect financial interest that conflicts with the duties and responsibilities of the DON positions. Unless expressly authorized below, all DON personnel who have or acquire an affiliation or a financial interest that conflicts or creates the appearance of a conflict with their official duties shall report the matter to their appropriate superior in the chain of command.

A. For purposes of this rule, the private financial interests of an individual's spouse, minor child, immediate household member, or partner are considered the private financial interests of the individual.

B. Situations where conflicts of interest are likely to arise include those in which DON personnel have government duties or responsibilities related to persons or business entities with which they, their spouses, minor children, or immediate household members:

1. Are associated as employees, officers, owners, directors, members, trustees, partners, advisers, or consultants;

2. have established contact, are negotiating, or have arrangements for future employment; or

3. have interests such as ownership of stock, stock options, bonds, real estate, or other securities or financial arrangements, such as trusts, or through participation in certain types of pension or retirement plans.

C. Examples of conflict situations include:

1. A commanding officer who holds a position in an insurance company, or an employee welfare or benefit organization, that sells insurance to its members -- since the official duties of a commanding officer require the exercise of control over the solicitation of insurance within the command.

2. A supply officer who buys government supplies from a local firm while his son is trying to obtain employment with the same firm.

3. A contracting officer who owns stock in one of the companies bidding on a government contract which that officer is about to award.

4. A government employee who enters into an agreement with a construction company to pay him a percentage of the profits realized on all contracts which the construction company would have with the government. K & K Engineering Co. v. United States, 616 F.2d 469 (Ct. Cl. 1980).

D. The commander of the activity concerned must resolve a conflict, and the action taken may involve the individual's disqualification from duties related to the conflict, his or her transfer, the removal of the individual from the position, or a change in duties.

E. However, disqualification is not required for certain financial interests.

1. These financial interests are:

a. Shares of a widely held and diversified mutual, money market, trust, or similar funds offered for sale by a financial institution or by a regulated investment company;

b. deposits in and loans from banks or other financial institutions, provided they are at customary and generally available terms and conditions; and

c. federal, state, municipal, or local government bonds.

2. See 18 U.S.C. § 208 (1982), the statute upon which much of this standards of conduct rule is based. That statute provides two means by which a financial interest may be determined to be insufficient to affect the integrity of a government employee's services:

a. A written determination from the government official who appointed the government employee to his position, after full disclosure by that employee, that a financial interest is not sufficiently substantial; or

b. by general rule or regulation published in the Federal Register stating that the financial interest has been exempted as either too remote or too inconsequential.

3. In United States v. Gorman, 807 F.2d 1299 (6th Cir. 1986), the court reviewed a case in which an assistant U.S. Attorney was convicted under 18 U.S.C. § 208 for having a financial conflict of interest relating to a bankruptcy case which his office was investigating. While that attorney argued that the government, at his trial, had failed to establish that he had a cognizable financial interest in the matter, the court affirmed the conviction stating:

> A financial interest exists on the part of a party to a Section 208 action where there is a real possibility of gain or loss as a result of developments in or resolution of a matter. Gain or loss need not be probable for the prohibition against official action to apply. All that is required is that there be a real, as opposed to a speculative, possibility of benefit or detriment.

Id. at 1303.

F. DON personnel who are members or officers of nongovernmental associations or organizations must avoid activities on behalf of such groups that are incompatible with their official government positions.

1. Individuals are not disqualified from rendering advice or making recommendations within their chain of command on particular matters affecting private, nonprofit associations or organizations that foster and promote the general interests of the naval service and which depend upon the voluntary leadership efforts of DON personnel if:

a. Such individuals disclose their interest or affiliation to their superior prior to rendering advice or making recommendations;

b. the final decision is made by higher authority; and

c. the individual's commander does not otherwise find disqualification to be necessary.

2. For additional policy guidance in this Private Associations area, see SECNAVINST 5760.4 series, Policies Governing Participation of Department of the Navy Components and DON Personnel in Activities of Private Associations.

1306 OUTSIDE EMPLOYMENT

DON personnel shall not engage in any outside employment activity, with or without compensation, that:

A. Interferes with or is not compatible with the performance of their government duties;

B. may reasonably be expected to bring discredit upon the government or the Department of the Navy; or

C. is otherwise inconsistent with the requirements of the instruction.

1. Commanders and individuals must assess each outside activity individually and prohibit those which can reasonably be expected to create the appearance of impropriety.

2. Commanders may require all individuals in their commands desiring to engage in outside employment to obtain advance permission.

3. There are many limitations on outside activities in Federal statutes and regulations, including:

a. Officers on active duty (except while on terminal leave) may not accept employment if it requires separation from their organization, branch, or unit, or interferes with the performance of military duties. 10 U.S.C. § 973 (1982).

b. Enlisted naval personnel on active duty cannot leave their post to engage in a civilian pursuit, business, or professional activity if it interferes with the customary or regular employment of local civilians in their art, trade, or profession. 10 U.S.C. § 974 (1982). The purpose of this prohibition is to prevent enlisted personnel from competing with local civilians for work.

-- In Jenkins v. Rumsfeld, 412 F. Supp. 1177 (E.D. Va. 1976), a Federal District Court decided a case in which Army bandsmen sought an injunction to restrain the local Musicians Protective Union from seeking to enforce both this statute and 10 U.S.C. § 3634, which prohibits Army band members from competing with local civilian musicians [10 U.S.C. § 6223 is the equivalent statute for Navy and Marine Corps musicians]. The court denied the relief requested by the bandsmen. In its opinion, the court addressed an equal protection argument that officers and enlisted are treated on different terms in this area of outside employment, since the only restriction for officers is that the off-duty jobs not interfere with their military duties. The court found that this difference in the treatment of officers and enlisted personnel did not reach constitutional proportions, and it stated:

> The equal protection clause forbids only invidious discrimination. It tolerates rational classifications, and it permits legislative action that is addressed only to 'the phase of the problem which seems most acute to the legislative mind.' [citation omitted] Congress could properly take into consideration the differences between officers and enlisted men with respect to the number of each assigned to military posts, their military duties, and the amount of pay each receives. These factors could lead Congress to believe the enlisted men, not the officers, presented the most pressing danger of competition for civilian jobs during off-duty hours.

Id. at 1180.

c. DON personnel cannot receive pay or allowances from any source other than the United States for the performance of any official service or duty unless specifically authorized by law. See 18 U.S.C. § 209 (1982).

(1) In United States v. Muntain, 610 F.2d 964 (DC Cir. 1979), the court reviewed a case in which the Assistant to the Secretary for Labor Relations at HUD was convicted under 18 U.S.C. § 209 for receiving $800.00 from a private consulting company. That money was paid to reimburse that government official for expenses incurred in connection with a trip to Ireland, which that official and his wife took as part of a charter tour organized by the International Laborers' Union. The appellate court overturned that conviction because it did not find evidence that the payment of the cost of the Ireland trip had no relation to the performance of government services.

(2) In United States v. Boeing, 845 F.2d 476 (4th Cir. 1988), the fourth circuit held that the government may recover "severance payments" which were made to employees prior to the time when they started federal employment, based on 18 U.S.C. § 209 (1982). The court found that the payments were made with compensatory intent and were calculated by Boeing to offset for those Boeing employees the financial impact of moving from Boeing to government service, including salary and benefit differentials and higher living costs over the expected tenure of their government service. The court reasoned that, since the conflict of interest laws are preventative in nature, it was not necessary for the government to prove an actual conflict--the appearance of a conflict was sufficient. The court held that the government was entitled to recover the amount of the payments from either Boeing or the individuals.

d. Other than in the discharge of his official duties, an officer or employee of the government is prohibited from acting as agent or attorney for prosecuting any claim against the United States or receiving any gratuity or share of or interest in any claim for providing assistance in prosecuting such a claim. That employee is also prohibited from acting as agent or attorney for anyone before any department, agency, court-martial, or commission in connection with any matter in which the United States is a party or has a direct and substantial interest. 18 U.S.C. § 205 (1982).

4. Examples of outside employment rule violations include:

a. An 0-5 who violates the rule by accepting a consulting position that requires him to travel extensively during the workweek;

b. an 0-3 who violates the rule by working part-time for a company under contract with DON to provide electronic data programming services to that officer's department, if she has any official responsibility to oversee, manage, or deal with the company's representatives or products; and

c. an E-6 who violates the rule by taking a job providing, on behalf of a contractor, aircraft maintenance services to the same airplanes for which he is responsible as a part of his military duties.

1307 COMMERCIAL DEALINGS INVOLVING DON PERSONNEL

DON personnel shall not knowingly solicit or make solicited sales to DOD personnel who are junior in rank, grade, or position or their family members, at any time, on or off duty. In the absence of actual coercion, intimidation, or pressure, this prohibition does not include:

A. The sale or lease by an individual of his or her privately owned real or personal property not held for commercial or business purposes; and

B. sales in commercial establishments incident to employment by individuals working part-time on their off-duty hours.

1. The reasoning behind this rule is the elimination of the appearance of coercion, intimidation, or pressure from rank, grade, or position.

2. This rule applies to both the act of soliciting and to the act of selling as a result of soliciting; although, in both cases, a solicitation is necessary for a violation to occur.

3. This prohibition includes, for example, the solicited sale of insurance, stocks, mutual funds, real estate, household supplies, and other goods and services.

4. While this standards of conduct rule prohibits a senior from making a solicited sale to a junior or to the junior's family, sales made because a junior approaches the senior and requests the sale be made are not prohibited. However, officers are prohibited by Article 1131.1, U.S. Navy Regulations, 1973, from having any pecuniary dealings with enlisted personnel except as required in the performance of official duties.

-- In United States v. Moultak, 24 M.J. 316 (C.M.A. 1987), the court examined a case in which a Marine captain provided financial assistance to a female lance corporal for the purchase of an automobile and was subsequently convicted of violating Article 1131.1 of the U.S. Navy Regulations. On appeal, that officer argued that the regulation was overbroad and a violation of due process, since there was no requirement for a finding of either duress or personal gain in order for the regulation to be violated. The court upheld this regulation and refused to read either requirement into it. The court noted that this Navy regulation is more restrictive than the standards of conduct rule pertaining to commercial dealings with personnel who are junior in pay grade or position, and that the regulation "imposes extreme limits on the conduct of officers." However, the court held that:

> ...it is within the discretion of the Secretary of the Navy to prohibit his officers from engaging in financial transactions with enlisted members, without regard to motive. In light of these considerations, we conclude that, when he entered into this financial arrangement with an enlisted person, appellant did, in fact, commit an act prohibited by Article 1131.1, and his trial and punishment by court-martial for such conduct was appropriate.

Id. at 318.

5. Examples of commercial dealing situations:

a. A GS-13 violates this rule if he circulates to his subordinates his business card, showing that he is a certified life insurance underwriter, with a note that he will be happy to advise them on his company's products, since such an act is a subtle form of solicitation.

b. An 0-7 does not violate the rule by selling his personal residence to an 0-1 when the 0-7 receives PCS orders.

c. An 0-5 does not violate the rule by teaching an 0-1 to fly for a fee if the 0-1 approached the 0-5 and requested that he provide that instruction.

1308 COMMERCIAL USE OF GOVERNMENT GRADE, RANK, TITLE, POSITION OR UNIFORM

Naval personnel shall not use nor permit the use of their grade, rank, title, position, or uniform to promote any commercial enterprise or to endorse any commercial product, except that:

A. Retired military personnel and members of Reserve components not on active duty may use their military titles in connection with commercial enterprises if they indicate clearly their inactive or retired status, the use of which does not discredit DON or DOD, and the use does not give the appearance of DOD or DON sponsorship; and

B. all personnel may identify themselves as authors or speakers who publish or lecture in accordance with prescribed procedures.

1. DON personnel cannot indicate support for any private enterprise, whether commercial or not, where such support is or appears to be equivalent to preferential treatment or official endorsement.

-- Additionally, DOD Instruction 1334.1 provides that members of the armed forces, including retired members and members of Reserve components, are prohibited from wearing their uniform under prescribed circumstances, including "during or in conjunction with political activities, private employment or commercial interest, that imply official sponsorship of the activity or interest." See also Article 1401, U.S. Navy Uniform Regulations, 1987.

2. The limited exception for inactive Reserve or retired personnel is also subject to the control of DON commanders in foreign countries who may limit or eliminate the exception in areas under their jurisdiction to avoid confusing foreign governments or nationals.

-- Examples of commercial use violations:

(1) An 0-8 violates the rule by permitting his rank and title to be placed on the letterhead of a company in which he serves as a member of the board of directors.

(2) A Reserve officer not on active duty violates the rule by using his rank and military affiliation on his professional letterhead and implies that DON supports his activities in the substance of his letters.

1309 CONTRIBUTIONS AND GIFTS TO SUPERIORS

DON personnel shall not solicit from a subordinate or give any contribution or gift to a superior or to the superior's immediate family, nor accept any gift or contribution from a subordinate or the subordinate's immediate family, unless the gift or total of gifts is:

A. Voluntary;

B. of reasonable value under the circumstances;

C. if procured with contributions, the contributions are voluntarily donated and of nominal amounts; and

D. presented to mark significant personal occasions such as marriage, transfer out of chain of command, death of a family member, illness or retirement.

1. All four of these conditions must be met. What is "reasonable" or "nominal" depends on the circumstances prevailing at the time and place that the gift is presented. As used in this rule, these terms are limited to $300.00 and $10.00, respectively. Superiors are forbidden from soliciting gifts. Examples of contributions and gifts rule violations include:

a. An 0-4 violates this rule by suggesting that a senior would be "gravely disappointed" if all hands did not contribute to a farewell present, since any contributions from subordinate personnel under these circumstances are not voluntary.

b. A GS-7 violates the rule by giving a Christmas present to his boss, even if it is of reasonable value, since the present does not mark a personal occasion -- and his boss violates the rule by accepting the present.

c. A bouquet of flowers presented to a superior's sick spouse by members of his office is reasonable and may be accepted.

2. A contribution of $1.00 is of nominal value, but a gift purchased with 1,000 such contributions is not reasonable and cannot be presented or accepted.

3. By statute, a government civilian employee is subject to removal from the Civil Service for either soliciting a contribution from another employee as a gift to an official superior, making a donation as a gift to an official superior, or accepting a gift from an employee receiving less pay than himself. 5 U.S.C. § 7342 (1966). Similar to the rules for the uniformed services, this Civil Service statute is interpreted to permit voluntary gifts of nominal value or donations made on special occasions.

1310 GIFTS OR GRATUITIES FROM OUTSIDE SOURCES

DON personnel and their spouses, minor children, and members of their immediate family shall not solicit, accept, or agree to accept any gratuity for themselves, members of their families, or others, either directly or indirectly, from or on behalf of a defense contractor or other entity that:

A. Is engaged in or seeks business or financial relations of any sort with any DOD component;

B. conducts operations or activities that are either regulated by a DOD component or significantly affected by DOD functions;

C. has interests that may be substantially affected by the performance or nonperformance of the official duties of DOD personnel; or

D. is a foreign government, or any representative or subdivision thereof, that is engaged in selling to any DOD component, and the gift or gratuity is tendered in the context of the foreign government's commercial activity.

1. Unless a specific exception to this general prohibition permits a gratuity to be accepted, DON personnel must refuse it. And, even if accepting a gift is permissible under a liberal reading of one of the exceptions, it should be refused if the appearance of impropriety is created by accepting it. If in doubt, a designated ethics counselor should be consulted prior to accepting the gift or as soon thereafter as practical. For DOT regulations governing this area for Coast Guard personnel, see 49 C.F.R. Part 99, Employee Responsibilities and Conduct.

2. In addition to the reporting requirements detailed in SECNAVINST 5370.2 series, DON personnel who receive gratuities under circumstances not covered by the instruction, or have gratuities received for them, must report the matter in writing to their commander via the cognizant ethics counselor for appropriate action and disposition of the gratuity.

3. This rule is based in part on a federal bribery and gratuities statute which prohibits both the offering or giving, and the soliciting or accepting, of a gratuity for or because of any official act performed, or to be performed by a public official. 18 U.S.C. § 201 (1982). Unlike the portion of that criminal statute dealing with bribery, there is no proof required that a gratuity was given in order to influence a particular matter pending before the public official receiving it. In short, there is no quid pro quo element for gratuity convictions and simple mens rea is sufficient. See United States v. Johnson, 621 F.2d 1073, 1076 (10th Cir. 1980). Thus, if the motivation for the gratuity is to keep a public official "happy" or to create a better "working atmosphere," the gratuity may form the basis for a criminal charge.

4. The acceptance of gifts of personal or real property intended for the Department of the Navy, including gifts of consumable or perishable products such as fruit, flowers, or candy, intended for DON personnel, and an offer of tickets to an entertainment or sporting event, is governed by SECNAVINST 4001.2 series, Acceptance of Gifts. That instruction identifies both the acceptance criteria and also the acceptance authorities.

5. Exceptions to gift or gratuity from outside sources rule:

a. Accepting unsolicited advertising or promotional items that have less than $10.00 retail value in the United States;

b. accepting trophies, entertainment, prizes, or awards for public service or achievement in an individual capacity (not in an official capacity), or in games or contests that do not relate to official duties and are clearly open to a broad segment of the public generally, or that are approved officially for participation by DON personnel;

c. benefits available to the public;

d. discounts or concessions realistically available to all DON personnel, provided that such discounts or concessions are not used to obtain any item for the purpose of resale at a profit;

e. participation by DON personnel in civic and community activities when the involvement of DOD contractors is remote from the business purposes of any contractor sponsoring, supporting, or participating in the activity;

f. activities engaged in by senior officials of a DON component or officers in command, or their representatives, with local civic leaders as part of a DON community relations program authorized by SECNAVINST 5720.44 series, Department of the Navy Public Affairs Policy and Regulations;

g. the participation of DON personnel in widely attended gatherings of mutual interest to government and industry, sponsored or hosted by higher institutions of higher learning -- or by industrial, technical, or professional associations (not by individual contractors), provided that, in the case of associations, their programs have been approved under DOD Instruction 5410.20, Public Affairs Relations with Business and Nongovernmental Organizations Representing Business;

-- This exception permits lunch, dinner, or refreshments that are part of the gathering to be accepted, but does not extend to the acceptance of transportation or accommodations unless otherwise authorized in the Travel and Transportation section of SECNAVINST 5370.2 series.

h. participation by naval personnel in public ceremonial activities of mutual interest to industry or local communities and DON -- such as ship launchings or aircraft rollouts -- if the activities serve the interests of the government and accepting the invitation is approved, after consultation with the appropriate ethics official or counselor, by the commanding officer or head of the activity to which the invitee is attached;

i. attending vendor training sessions when the vendor's products or systems are provided under DOD contract, the training facilitates use of those products or systems by DON personnel, and the appropriate supervisor determines that the training is in the best interests of the government, as long as the contractor waives any claim against the government for such training;

j. attending tuition-free training or refresher courses, or other educational meetings, offered by defense contractors (although not required to do so by DOD contract) and the appropriate supervisor determines that the training is in the best interests of the government, and the contractor waives any claim against the government for such training;

k. continued participation in employee welfare or benefit plans of a former employer when permitted by law and approved by the appropriate supervisor with advice of the cognizant ethics official or counselor;

l. customary exchanges of gratuities between DON personnel and their friends and relatives and the friends and relatives of their spouses, minor children, and members of their immediate household when the circumstances clearly indicate that it is the relationship, rather than the business of the person concerned, that is the motivating factor for the gratuity, and it is clear that the gratuity is not paid for by the government or any DOD contractor;

m. accepting benefits resulting from the business activities of a spouse, where it is clear that such benefits are accorded the spouse in the normal course of the spouse's employment or business, and have not been proffered or made more attractive because of the DON individual's status;

n. on an infrequent basis only, accepting coffee, doughnuts, and similar refreshments of nominal value offered as a normal courtesy incidental to the performance of duty; or

o. situations in which, in the sound judgment of the individual concerned or of his or her supervisor, the government's best interests are served by the individual participating in activities otherwise prohibited.

In any such case, a written report of the circumstances must be submitted in advance or, when an advance report is not possible, within 48 hours, by the individual to his or her commander via the appropriate ethics counselor. This last exception is not intended to be a "catch-all," and the burden of decision and accountability is placed on the individual who exercises it. Each time the exception is used, reasons why accepting an otherwise prohibited gratuity is or was in the best interests of the government must be made in writing to the chain of command.

6. Examples of gift or gratuity from outside sources rule violations include the following:

a. A contracting officer violates the rule if he accepts an unsolicited gift worth $9.00 on his birthday from a DOD contractor, since the pertinent exception applies only to promotional or advertising items;

b. a DON employee violates the rule if he requests a promotional coffee mug worth $5.95 from a DOD contractor, since the exception permits only unsolicited items to be accepted;

c. a newly qualified pilot violates the rule by accepting a model of the aircraft in which he qualified (worth more than $10.00) from the plane's manufacturer; or

d. an 0-7 sponsor at a ship christening ceremony violates the rule by accepting a post-ceremony dinner invitation from the shipbuilder, since the dinner is not a part of the sanctioned ceremony.

7. In addition to the prohibition in this standards of conduct rule, gifts or gratuities to Federal officials from foreign governments, without the consent of Congress, are prohibited by Article 1, section 9, clause 1 of the U.S. Constitution. By Federal statute, Congress has prohibited either requesting or encouraging the tendering of a gift or decoration, including an award, from a foreign government. See 5 U.S.C. § 7342 (1978). That statute also prohibits accepting a gift or decoration except for:

a. The acceptance of gifts of minimal value, which is currently set by the General Service Administration at $180.00 (retail value in the U.S. at the time of acceptance) (See 41 C.F.R. § 101-49.001-5); and

b. the acceptance of gifts of more than minimal value if that gift is in the nature of medical treatment or an educational scholarship; and

c. the acceptance of gifts of more than minimal value if a refusal of the gift would likely cause offense or embarrassment or otherwise affect U.S. foreign relations.

(1) If a tangible gift is accepted for this reason, it would be deemed to have been accepted on behalf of the U.S. and would become U.S. property, and

(2) if such an accepted gift is in the form of travel (or travel expenses) taking place outside the U.S., then it must be consistent with U.S. interests and be approved by the agency, department, or office by which the government employee is employed.

All decorations, awards, and gifts from foreign governments to U.S. naval military and civilian personnel, and their spouses and dependents, must be processed under the procedures outlined in SECNAVINST 1650.1 series, United States Navy and Marine Corps Awards Manual. That instruction permits the receipt and retention of table favors, mementos, remembrances, or other tokens bestowed at official functions and other gifts of minimal value received as souvenirs or marks of courtesy from a foreign government. The definition of minimal value and the requirements for the processing of gifts of more than minimal value are in accord with the requirements listed above from 5 U.S.C. § 7342 (1982).

1311 SPEAKING, LECTURING, WRITING AND APPEARANCES

DON personnel shall not, either with or without compensation, engage in speaking, lecturing, or writing activities that are dependent on information obtained as a result of their government employment, except when the information does not focus specifically on the agency's responsibilities, policies and programs, and:

A. The information has been published or is generally available to the public;

B. the information is available to the public under the Freedom of Information Act; or

C. the concerned service secretary authorizes in writing nonpublic information to be used on the basis that the use is in the public interest.

This rule contains the general prohibition against using inside information for the benefit of oneself or for others; but, it does not preclude DON personnel from writing or speaking on matters in which they have developed expertise because of their DON experience.

-- **Naval personnel may not accept a payment or fee for any appearance or writing unless undertaken in a purely private capacity.**

(1) Government officers and employees are prohibited under 18 U.S.C. § 209 (1982) from accepting any contribution or supplementation of salary for the performance of official duties from any source other than the United States. Therefore, DON personnel are prohibited from receiving compensation for lectures or articles which focus specifically on DON's responsibilities, policies, and programs, or when it may be perceived by the public that the article or speech conveys DON policies, or when the activity interferes with the individual's official duties.

(2) With regard to a request for copyright protection and a possible entitlement to royalties, under Federal copyright law, a work of the United States Government cannot be afforded copyright protection. 17 U.S.C. § 105 (1976). A work of the United States Government is defined as "a work prepared by an officer or employee of the United States Government as part of that person's official duties." 17 U.S.C. § 101 (1980).

-- In Public Affairs Associates, Inc. v. Rickover, 268 F. Supp. 449 (1967), a case on remand from the U.S. Supreme Court, Admiral Rickover asserted that various speeches made by him did not fall within his official duties and were entitled to copyright protection. The Federal Court looked beyond his formal job description and examined the circumstances of the preparation and delivery of the speeches. The court found that he had prepared the speeches at home, in his leisure time, without the use of assistants, and presented them without compensation to private audiences while he was not on official duty. The court held that Admiral Rickover was acting in a private capacity rather than a public capacity and that the speeches could be protected property.

(3) If preparing or delivering a speech, writing, or other work which was properly assigned by a superior, or was properly self-assigned within the context of one's position or billet description, the speaker or writer cannot accept compensation for doing so, even if the work was prepared and delivered outside of normal working hours.

(4) An example of payment for duty rule violation would be:

-- An 0-6 in a sea systems engineering office who violates the rule by accepting a fee for delivering, after normal working hours, a speech on recent developments in naval ship design that he wrote while on annual leave using his own paper and ink, if that officer had been tasked by his superior with giving the speech.

1312 HONORARIA

DON personnel shall not accept honoraria or suggest charitable contributions in place thereof:

A. That are provided in the performance of official duties;

B. that exceed $2,000 (excluding expenses for travel, subsistence and agent fees or commissions);

C. that are provided by entities or groups doing or seeking to do business with DOD or DON, unless the cognizant commander determines after consulting an ethics counselor that accepting will not cause an actual or apparent conflict of interest; or

D. that are provided to a civilian presidential appointee whose appointment must be made by and with the advice and consent of the Senate for any consultation, lecture, discussion, appearance, or writing -- the subject matter of which is devoted substantially to naval responsibilities, programs, or operations, or that draws substantially from official material that has not become part of the body of public information.

1. An honoraria is any payment of money or other thing of value to DON personnel as consideration for an appearance, speech, writing, or presentation. DON personnel may not accept any honoraria without first consulting an ethics counselor.

An example of an honoraria rule violation would be:

-- An O-7 violates the rule by accepting an honorarium for participating in a debate on nuclear arms policy held after normal working hours if his commander has designated him to represent the Navy in the proceedings.

2. Prepublication review

Prior to publishing or delivering any work or speech pertaining to military matters, national security issues, or subjects of significant concern to DOD, DON authors or speakers must ensure that cognizant DON authorities have reviewed it and cleared it for dissemination. In general, each such work must be subjected to both security and policy reviews. See DOD Directive 5230.9 series, Clearance of DOD Information for Public Release (NOTAL); U.S. Navy Regulations, 1973, Article 1116; SECNAVINST 5510.25 series, Responsibility for Security Review of Department of the Navy Information (NOTAL); SECNAVINST 5720.44 series, Department of the Navy Public Affairs Policy and Regulations; and National Security Decision Directive-84, "Safeguarding National Security Information" (NOTAL).

Except as authorized [in SECNAVINST 5370.2 series], naval personnel and their spouses, minor children, and members of their immediate household shall not solicit, accept, or agree to accept in-kind transportation or accommodations or reimbursement for transportation or travel-related expenses from -- or on behalf of -- a DOD contractor or other entity that:

A. Is engaged in or seeks business or financial relations of any sort with any DOD component;

B. conducts operations or activities that are either regulated by a DOD component or significantly affected by DOD functions;

C. has interests that may be substantially affected by the performance or nonperformance of the official duties of DOD personnel; or

D. is a foreign government, or any representative or subdivision thereof, engaged in selling to or buying from any DOD component (including foreign military sales), and the payment or service is tendered in the context of the foreign government's commercial activities.

Exceptions to DOD contractor travel expense payment rule include:

1. Accepting such services, payments, or reimbursements from a potential employer in connection with a job interview if reporting requirements are met;

2. situations in which the recipient is on official government business and reports the circumstances in writing to his/her superior or supervisor and to the ethics counselor before accepting, if possible, or as soon as possible thereafter and accepts:

a. Space-available, previously scheduled, ground transportation to, from, or around a contractor's place of business provided by the contractor to its own employees; or

b. contractor-provided transportation, meals, or overnight accommodations when arrangements for government or commercial transportation, meals, or accommodations are clearly impracticable and refusing the contractor's offer would interfere significantly with the performance of official duties.

The exceptions listed in SECNAVINST 5370.2 series are the only occasions in which DON personnel may accept transportation or travel-related expense payments or reimbursement from a DOD contractor.

3. Examples of DOD contractor travel expense payment rule violations:

a. An 0-6 violates the rule by accepting hotel accommodations in a foreign country at a foreign government's expense if the 0-6 is present to negotiate a U.S. weapons purchase from that country; or

b. a GS-13 violates the rule by sharing a taxi ride with a DOD contractor representative without paying for his share even if both are going to the same destination.

1314 NON-DOD CONTRACTOR TRAVEL EXPENSE PAYMENTS

DON personnel shall not accept from any non-DOD source transportation, accommodations, or subsistence in connection with official travel unless:

A. The recipient is a speaker, panelist, project officer, or other bona fide participant in a seminar, symposium, or similar event;

B. the recipient obtains the prior written approval of his or her commanding officer or designee;

C. the transportation, accommodations, or subsistence are provided in-kind;

D. the provider is a nonprofit, tax-exempt organization, association, or institution listed in 26 U.S.C. § 501 (c)(3) (1982) or authorized by 5 U.S.C. § 4111 (1982); and

E. the transportation, accommodations, or subsistence are not extravagant or excessive.

1. An example of non-DOD contractor travel expense payment rule violation would be:

-- A GS-11 who violates the rule using his personal charge card to pay travel expenses in connection with attending a seminar hosted by the American Cancer Society to give a lecture as a representative of the Navy and subsequently accepting the Cancer Society's check in reimbursement, since the rule's exception is limited to the acceptance of in-kind services only.

2. Promotional benefits in connection with official travel

a. DON personnel may accept, but must surrender to their commanding officer or designee, promotional items or benefits such as "frequent flyer" airline tickets, coupons, dividends, and the like -- regardless of transferability limitations -- and tangible gifts of more than nominal value ($10.00 or less).

b. "Credits," miles," "points," etc. accumulated in commercial airline frequent-flyer clubs or programs pursuant to official travel may not be used to upgrade accommodations from "coach" to "first-" or "business-"class, except when such accommodations would otherwise be approved (e.g., to accommodate medical necessities, handicapped travelers, the requirements of security, and the like).

c. Any payment received by DON personnel on official travel orders from carriers which fail to provide confirmed reserved seating are penalties properly due the government and must be surrendered to the cognizant authority.

d. For detailed guidance on the disposition of promotional benefits from airlines, car rental agencies, or other commercial sources, see Joint Federal Travel Regulations, Uniform Service Members, Paragraph U2010B; Joint Travel Regulations, paragraph C1200; and NAVMILPERSCOMINST 4650.2 series, Navy Passenger Transportation Manual (NOTAL).

1315 GAMBLING

While on government owned, leased, or controlled property, or while on duty for the government, DON personnel shall not participate in any gambling activity, including a lottery or pool, a game of chance for money or property, or the sale or purchase of a number slip or ticket, unless:

A. Necessitated by an individual's law enforcement duties; or

B. the activity is specifically authorized by the Secretary of the Navy; or

C. otherwise authorized by law (such as the sale on DOD premises of state lottery tickets by blind vendors licensed pursuant to the laws of that state).

1. For the purpose of this rule, military personnel are "on duty" except when on leave or liberty.

2. This rule prohibits all forms of gambling (including lotteries, football pools, numbers, raffles, wagering, bingo, and other games of chance). While games of skill are not prohibited, betting on them is prohibited.

3. A raffle to support Navy Relief, authorized by SECNAV, conducted in accordance with local law, and subject to adequate administrative controls is permitted. Additionally, CNO or CMC may authorize the playing of bingo on board Navy or Marine activities or vessels.

4. Although specifically not desired [see SECNAVINST 5370.2 series], requests for exceptions to this rule may be authorized by SECNAV. Such requests must be forwarded via the chain of command, including CNO or CMC as appropriate, and must include a complete statement of local gambling laws, proposed administrative controls, and a copy of the proposed implementing order.

5. Examples of violations of this gambling prohibition include:

a. An E-5 who violates the rule by running a weekly football pool on his ship, even if all winners are paid their winnings ashore and away from military property and even though the winners agree that their success is attributable to skill; or

b. DON personnel who attend a dance aboard a naval installation if the price of their admission includes the cost of a door prize to be awarded to one of the attendees whose name will be drawn at random.

1316 USE OF TITLE, RANK, OR POSITION TO RAISE FUNDS FOR CHARITIES

DON personnel shall not use or allow the use of their titles, rank, or positions in connection with charitable or nonprofit organizations -- except that:

A. DON personnel may assist charitable programs administered by the Office of Personnel Management (OPM) under delegation from the President (Combined Federal Campaign, United Way) and other specifically authorized programs (e.g., Navy Relief); and

B. this prohibition does not preclude speeches before such organizations by DON personnel if the speech is designed to express an official position in a public forum.

This prohibition does not preclude volunteer efforts on behalf of charitable or nonprofit organizations by individuals who do not use their official titles, ranks, or positions.

1317 SOLICITATION OF GIFTS AND CONTRIBUTIONS

Unless authorized by the Secretary of the Navy, requests for gifts or contributions for institutions or organizations of the Department shall not be initiated by DON personnel.

This prohibition applies for both appropriated and nonappropriated institutions and organizations of the Department of the Navy.

1318 AUGMENTATION OF APPROPRIATED FUNDS

A. Naval personnel are not permitted, without proper authority, to augment appropriated funds through outside resources. This naval policy is based on three Federal statutes:

1. 31 U.S.C. § 3302, which requires that any person having custody or possession of public money, including a disbursing official having public money but not for current expenditure, deposit the money without delay in the Treasury without deduction for any charge or claim.

-- This has particular relevance in the claims area when monies are received to compensate or to reimburse the government for damage or loss. Unless there is specific statutory authority to the contrary, amounts received by a government agency for liability resulting from damage to government property must be deposited in the Treasury as miscellaneous receipts. This would include monies recovered from private parties or insurers resulting from damage to government vehicles which occurred in motor vehicle accidents, even though a particular agency which had its vehicle repaired may wish to retain the monies for credit to its own appropriation. 64 Comp. Gen. 431 (1985). And it would also include recoveries from tort-feasors pursuant to

the Medical Care Recovery Act, and may include, depending on agency practice, recoveries from third-parties for damages to or loss of personal property for which payment was made under the Military Personnel and Civilian Employees' Claims Act. See 61 Comp. Gen. 537 (1982).

2. 31 U.S.C. § 1301 (1982), which restricts the use of appropriated funds to the purposes for which they were intended by Congress, except as provided by law. A significant exception is the Minor Military Construction Act, 10 U.S.C. § 2805 (1982), which permits the use of Operations and Management funds to be used for the funding of construction projects which cost less than $200,000.

3. 18 U.S.C. § 209 (1982), which prohibits the payment of, contribution to, or supplementation of the salary of a government officer or employee for the performance of his official duties by anyone other than the United States.

B. This nonaugmentation policy complements Article 1145, U.S. Navy Regulations, 1973, which provides:

> No person in the Department of the Navy shall make or authorize an expenditure from or create or authorize an obligation under any appropriations or fund in excess of the amount available therein; nor shall any such person involve the Government in any contract or other obligation for the payment of money for any purpose in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law.

C. Other related Federal statutes include:

1. 31 U.S.C. § 1517 (1982), which prohibits government officials from making or authorizing an expenditure or obligation exceeding an "apportionment." An apportionment is defined as including appropriated amounts, funds, and authority to make obligations by contract before appropriations (31 U.S.C. § 1511 (1982));

2. 31 U.S.C. § 1341 (1982), the Anti-Deficiency Act, which prohibits creating or involving the government in a contract or obligation to pay money before an appropriation is made, and prohibits the making or authorizing of an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure of an obligation; and

3. 31 U.S.C. § 1342 (1982), which prohibits officers and employees of the U.S. Government from accepting voluntary service for the United States or employing personal services in excess of that authorized by law, except for emergencies involving the safety of human life or protection of property.

1319 VOLUNTARINESS

DON Personnel shall not take or permit actions or practices that involve actual or apparent compulsion, coercion, or reprisal in connection with fund-raising events or campaigns.

A. Among the coercive practices proscribed by this rule are:

1. Supervisory solicitation of supervised employees;

2. setting 100 percent participation goals;

3. providing or using contributor lists for purposes other than the routine collection and forwarding of contributions and pledges;

4. establishing mandatory personal dollar goals or quotas;

5. developing or using noncontributor lists; and

6. "counseling" or grading individual service personnel or civilian employees about their failure to contribute or about the size of their donation.

B. An example of a violation of this voluntariness rule would be:

-- A CO who violates the rule by designating his leading chief as a "key person" and directing him to personally solicit all the command personnel, which includes individuals whom the chief directly supervises.

1320 PROTECTING GOVERNMENT ASSETS

Naval personnel shall not directly or indirectly use, take, dispose of, or allow the use, taking, or disposing of government manpower, property, facilities, or information of any kind, including property leased to the government, for other than official government business or purposes.

A. This rule covers all government property, including telecommunication services, stationery, typing and word-processing assistance, duplication equipment, transportation services, computers, and information.

B. As a matter of DON policy, uniformed naval personnel may not participate officially in civil law enforcement functions. See SECNAVINST 5820.7 series, Posse Comitatus Act.

C. U.S. Navy Regulations, 1973, Article 1138 requires all DON personnel to "ensure that equipage and supplies in their charge are properly cared for, preserved, and economically used."

D. Property of the Department of the Navy, as well as its manpower, facilities, or information may be used to support community relations programs authorized by SECNAVINST 5720.44 series, Department of the Navy Public Affairs Policy and Regulations. That instruction provides that the program, its sponsor, site, and the type of support provided must all be considered appropriate. It also provides that the loan of equipment and permission to use Navy and Marine Corps facilities are dependent upon the following:

1. Program support must be within the command's public affairs responsibility.

2. The loan of the equipment must not interfere with the military mission of the command.

3. Equipment must be readily available within the command or obtainable from another Navy or Marine Corps command in the local area.

4. The event in which the material will be used must meet the criteria set forth (in tables shown in this SECNAVINST).

5. The material must not be obtainable from commercial sources.

6. There must be no potential danger to persons or private property that could result in a claim against the government and safety requirements must be observed.

7. The use of equipment or facilities by law enforcement authorities is governed by DOD Directive 5525.5 series, DOD Cooperation with Civilian Law Enforcement Officials, and by SECNAVINST 5820.7 series, Cooperation with Civilian Law Enforcement Officials; Posse Comitatus Act.

E. Persons who submit fraudulent claims or make fraudulent statements in programs and operations are seen as contributing to fraud, waste, and abuse and can now be assessed civil fines and penalties under the Program Fraud Civil Remedies Act. See SECNAVINST 5330.102 series and DOD Directive 5340.102 series. See also the Civil False Claims Act, 31 U.S.C. § 3729 (1987), which provides an additional means for the government to recover assets lost through fraud due to the submission of a false claim, (e.g., a fraudulent voucher submitted by a defense contractor).

F. Reporting instances of suspected fraud, waste, or abuse is the responsibility of all naval personnel. Toll-free numbers are available to report suspected violations. Those numbers are 1-800-

1. 424-9098 (DOD);

2. 424-5454 (GAO);

3. 533-3451 (DON) (also use: A/V 288-6743 for DON; A/V 224-2172 for USMC IG];

4. 356-3464 (NAVSEA IG);

5. 424-9071 (DOT IG);

6. 538-8429 (USAF); and

7. 446-9000 (USA).

Enforcement is the responsibility of appropriate command authority. Sanctions may be administrative and/or punitive in nature. Violators may receive warnings, letters of caution, loss of job, or criminal action.

1321 USE OF INSIDE INFORMATION

Current and former naval personnel shall not use, directly or indirectly, inside information to further a private gain for themselves or others.

A. "Inside information" is information about the business of the Navy or the Marine Corps which is:

1. Not generally available to the public and not releasable to the public under a Freedom of Information Act request; and

2. was obtained by virtue of an individual's DOD position.

B. This rule does not address the unauthorized use of classified or trade secret material, since use of such information is controlled by other directives.

C. An example of a violation of the inside information rule would be:

-- A personnel officer who provides her realtor husband with the names and addresses of personnel ordered to report to her unit in the future so that he can contact them about the purchase of new homes.

1322 ACQUISITION INFORMATION

Current and former naval personnel shall not release any information concerning proposed acquisitions or purchases by any DOD contracting activity, except per authorized procedures. Naval personnel, other than contracting officers, shall not make any commitment or promise relating to the award of a contract nor make any representation that could reasonably be construed as such a commitment.

This rule bars the unauthorized release of acquisition data even if no gain or benefit to the discloser, or to another person, is contemplated and even after the individual has left the naval service.

1323 USING OFFICIAL POSITION

Naval personnel shall not use their official positions to improperly induce, coerce, or influence any person, particularly subordinates, defense contractors, and potential defense contractors, to provide any benefit, financial or otherwise, to themselves or to others.

Examples of improper use of government position include:

1. A commanding officer who permits dinner in the captain's mess to be "auctioned" by a local charity to raise funds for the charity; or

2. a member of the shore patrol who uses his position to obtain favors at the bars along his patrol route.

1324 POLITICAL ACTIVITIES FOR MILITARY PERSONNEL

A. The Hatch Act, 5 U.S.C. § 7324 (1982) limits partisan political activity by Federal civilian employees. It is applied as a matter of policy for military employees in the naval service. See DOD Directive 1344.10, Political Activities by Members of the Armed Forces. Additional guidance concerning

political activities of naval personnel on active duty is provided in MILPERSMAN, Art. 6210240. That article provides numerous examples of types of political activity prohibited for DON personnel pursuant to the DOD directive.

B. Competitive Federal service employees are also subject to restrictions on partisan political activities, such as prohibitions on participating in fund-raising activities for the candidate of a political party and on collecting, soliciting, or receiving contributions for a partisan political candidate. See 5 C.F.R. § 733.122 (1970).

C. Military personnel are permitted to:

1. Register, vote, and express personal opinions on political candidates and issues, but not as members of the armed forces;

2. make monetary contributions to a political organization; or

3. attend both partisan and nonpartisan political rallies, as a spectator, while not in uniform.

D. Military personnel are prohibited from political activities such as:

1. Using official authority or influence for interfering with an election, affecting its course or outcome, soliciting votes for a particular candidate or issue, or requiring or soliciting political contributions from others;

2. being a candidate or holding office except under specified conditions [in SECNAVINST 5370.2 series] (See 10 U.S.C. § 973 (1968), which provides that a Regular officer of an armed force, including the Coast Guard, may not hold elective office except as otherwise authorized by law. See also MILPERSMAN, Art. 6210240, which provides that a Regular Navy officer is required to acknowledge by letter to NMPC his awareness of the provisions of the Manual pertaining to statutory separation of officers by election or appointment to civil office);

3. participating in partisan political management, campaigns, or conventions; or

4. making campaign contributions to a partisan political candidate, another member of the armed forces, or an employee of the Federal government.

E. An active-duty member may serve as a regular or reserve civilian law enforcement officer, or member of a civilian fire or rescue squad. Such service must be in a personal capacity, may not involve the exercise of military authority, and may not interfere with the performance of military duties.

1325 PRIVATE INTEREST DISCLOSURE SYSTEM

A. There are three separate and distinct private interest disclosure systems in the Department of the Navy, the first two of which are of particular significance:

1. Confidential Statement of Affiliations and Financial Interests (DD Form 1555);

2. Financial Disclosure Report (SF 278); and

3. Report of DOD and Defense Related Employment (DD Form 1787) (See sec. 1326, infra).

B. For the first of the two main disclosure systems, the Confidential Statement of Affiliations and Financial Interests (DD Form 1555), the interests of a spouse, minor child, or member of the immediate household must be reported as if they were interests of the filing individual. That report must be filed initially and then annually by:

1. Regular Navy and Marine Corps officers frocked to 0-7, and Reserve Navy and Marine Corps officers frocked to 0-7 serving on voluntary extended duty in excess of 130 days.

2. Commanding officers (or heads of) and executive officers (or deputy heads of):

a. Navy shore installations with 500 or more military and civilian personnel (including foreign national and indirect-hire personnel regularly attached, but excluding personnel attached for duty under instruction); and

b. all Marine Corps bases and air stations.

3. DON civilian personnel classified at GS/GM-15 or below under 5 U.S.C. § 5332 (1982), or a comparable pay level under other authority.

4. DON military personnel below the rank of 0-7, when their official responsibilities require them to exercise judgment in making government decisions or in taking government actions regarding contracting or procurement, regulation or audit of private or nonfederal enterprises, or other activities in which final decision or action may economically affect the interests of any nonfederal activity.

5. Special government employees (except those excluded in SECNAVINST 5370.2 series).

6. Those DON personnel serving in positions in which the concerned commanding officer determines this disclosure report should be filed.

C. Individuals who must initially, and then annually, file the second of the two main disclosure reports, the Financial Disclosure Report (SF-278), include:

1. Regular Navy and Marine Corps officers who have been promoted (not frocked) to 0-7, or above;

2. Reserve Navy and Marine Corps officers serving on voluntary extended active duty in excess of 130 days who have been promoted (not frocked) to 0-7 or above;

3. special government employees; and

4. members of the Senior Executive Service.

D. All Navy officer filers must submit their SF-278 to JAG via their appropriate supervisor and ethics counselor, and all Marine Corps officer filers must submit their SF-278 to Director, Judge Advocate General Division, Headquarters, U.S. Marine Corps, unless their position requires a different submission chain (outlined in SECNAVINST 5370.2 series). Navy and Marine Corps officers serving in joint, unified, or specified commands must file their SF-278 under procedures adopted by the unified, specified, or joint commander.

E. Both the DD Form 1555 and the SF-278 report are initially reviewed by both the individual's appropriate supervisor and the ethics counselor. If there is a disagreement between those individuals concerning whether there is or may be a conflict, based on the information provided on DD Form 1555, the filing individual's commanding officer or activity head will resolve the matter or forward the report to the cognizant deputy ethics official for resolution.

F. All DD Form 1555's and SF-278's must be retained for six years at the command or activity to which the reporting individual was assigned when the report(s) was (were) filed.

1326 SEARCHING FOR POST-GOVERNMENT SERVICE EMPLOYMENT

A. DON personnel shall not participate personally and substantially on behalf of the government in any particular matter in which an organization with which they are pursuing or have an agreement concerning post-government service employment has a financial interest.

Federal law prohibits DON personnel from participating "personally and substantially" in any particular government matter in which any private entity with which they are negotiating or with which they have an arrangement for future employment has a financial interest. That statute provides for a fine of not more than $10,000, or imprisonment for not more than 2 years, or both. See 18 U.S.C. § 208 (1982).

1. To participate "personally" means to do so directly and includes the participation of a subordinate when actually directed by a superior in the matter.

2. To participate "substantially" means that the individual's involvement was of significance in the matter.

3. "Pursuing employment" includes sending letters or resumes, in pursuit of employment, to a finite number of firms or individuals, as well as discussions concerning employment.

4. This personal and substantial participation standard is also important with regard to post-employment compensation. 10 U.S.C. § 2397b (1987) provides that a former or retired member of the armed forces (defined to not include the Coast Guard), while performing duties in paygrade 0-4 or

above, or a former officer or employee of DOD in a pay rate of at least GS-13, may not accept compensation from a contractor for a period of two years after separation from DOD service if that person:

a. Spent a majority of his working days during a two-year period (ending on the date of that person's separation from service) in DOD or performed a procurement function relating to a DOD contract (principally at a site owned and operated by the contractor); or

b. performed a procurement function during a majority of his working days during that two-year period, involving his substantial and personal participation in decisionmaking responsibilities, with respect to a contract with that contractor.

A person who violates this prohibition is subject to a civil fine up to $250,000. If it was an intentional or knowing violation, a civil fine of up to $500,000 is authorized by that statute.

B. If, at any time during their DOD service, either a military member 0-4 or above or a civilian employee serving in a position for which the rate of pay is equal to or greater than the minimum rate of pay for GS-11 -- who performed a "procurement function" in connection with a DOD-awarded contract that involved a contractor who does at least $25,000 a year in DOD business -- should contact or be contacted by the DOD contractor to whom that contract was awarded regarding future employment, said personnel must report the contact in writing to their ethics counselor and to their reporting senior.

1. This reporting requirement does not apply to the first contact if it is initiated by the contractor and the DON personnel involved immediately terminates the contact. However, if the contact is renewed by either the contractor or the DON individual within 90 days of the first contact, all contacts must be reported. See 10 U.S.C. § 2397a (1987).

2. Additionally, such DON personnel must disqualify themselves from participating in any "procurement function" relating to contracts of that contractor for any period for which future employment opportunities have not been rejected.

3. The term "procurement function" is defined in 10 U.S.C. § 2397b, with respect to a contract, as any function relating to:

a. the negotiation, award, administration, or approval of the contract;

b. the selection of a contractor;

c. the approval of changes in the contract;

d. quality assurance, operational and developmental testing, the approval of payment, or auditing under the contract; or

e. the management of the procurement program.

4. Examples of violations of this reporting contacts rule are:

a. An 0-7 who violates the rule by not reporting a telephone call from a defense contractor who said, "call me after you retire to talk about a job," if 6 years ago he performed a "procurement function" in connection with a contract award greater than $25,000 to the same company -- even if he has not worked in procurement since that time.

b. An 0-5 who violates the rule by failing to report the second employment inquiry made to her by a DOD contractor within a 90-day period, even though she firmly and unequivocally rejected both offers.

5. A violation of this reporting contacts rule also constitutes a violation of 18 U.S.C. § 208 (1982) and may be punished by sanctions (including a fine of up to $10,000 and imprisonment for 2 years). Administrative penalties may also be imposed (including a prohibition of employment with that defense contractor for up to 10 years from the date of separation from service with DOD and an administrative penalty of up to $10,000 under 10 U.S.C. § 2397a (1987)).

C. Active duty Regular officers of the Navy and Marine Corps, including those on terminal leave, cannot be employed by any person or entity furnishing naval supplies or war materials to the United States. If so employed, that officer would not be entitled to payment from the United States during the duration of that employment. 37 U.S.C. § 801(a) (1982).

D. After military retirement, Article 1, section 9, clause 8 of the U.S. Constitution is interpreted as prohibiting former members of the armed forces from accepting any compensation, office, or title from a foreign government without the consent of Congress, unless those members have received the approval of both the Secretary of State and the Secretary of their service. See Section 509, Pub. L. No. 95-109 (1977) and 62 Comp. Gen. 432 (1983). This need for pre-employment approval would also apply to domestic corporations which are "ultimately controlled by a foreign government and the domestic corporation acts as an agent or instrumentality of the foreign government." 62 Comp. Gen. 432, 434 (1983). See 53 Comp. Gen. 753 (1974). This approval will not extend to post-retirement employment in a foreign military service. 58 Comp. Gen. 566 (1979).

Additional post-employment restrictions, and penalties for noncompliance with federal law in this area, are summarized on the chart shown below (at pp. 33-31, infra).

1327 POST-GOVERNMENT SERVICE REPORTING REQUIREMENTS

A. Report of Defense Contractor Employment

-- Former DON personnel, as specified below, who are employed by a DOD contractor within 2 years of leaving DON service are required to file a report of Defense Contractor Employment (DD Form 1787), within 90 days after beginning such employment, if that contractor was awarded $10,000,000 in DOD contracts during the year preceding the employment of that former DON employee. Personnel must file this report if they left DON service on or after 8 November 1985, and if they are either:

a. A former or retired military officer who served on active duty for at least 10 years and held the paygrade of 0-4; or

b. a former civilian officer or employee who attained pay rate GS-13 at any time during the 3 years preceding the end of their DOD service.

B. Statement of employment

All retired Regular officers of the Navy and Marine Corps whose names have been on the retired list for 3 years or less must file a statement of employment (DD Form 1357) to advise the DON of that former officer's post-retirement employment activities. The initial statement of employment must be submitted within 30 days of retirement, and again within 30 days if that employment changes. After 3 years the use of that form is encouraged, but not mandatory, unless that former officer is employed by the federal government.

POST EMPLOYMENT RESTRICTIONS
STATUTE SUMMARY

STATUTE	TYPE/DURATION/PENALTY	ACTIVITY PROHIBITED
I. PRIOR TO TERMINATING FEDERAL EMPLOYMENT		
18 U.S.C. § 208	Criminal, applies throughout employment; $10,000 and 2 years' imprisonment	Participating in an official matter involving a firm with which the employee is negotiating future employment
10 U.S.C. § 2397a	Civil and administrative; applies throughout employment; 10-year ban on employment with that contractor; $10,000 penalty, additional $10,000 if employment taken	Affirmative requirement to report contact to ethics official and disqualify self from acting on pending matters with the prospective employer
II. POST-FEDERAL EMPLOYMENT		
A. SELLING		
37 U.S.C. § 801(b)	Civil; 3 years from date put on retired list; no pay from the United States	Engaging in selling naval supplies or war materials to DoD, CG, PHS, or NOAA
18 U.S.C. § 281	Criminal; 2 years from date put on retired list; fine $10,000 and 2 years' imprisonment	Representing anyone in the sale of anything to the Government through the Department in which retired status is held
B. REPRESENTING		
18 U.S.C. § 207(a)	Criminal; applies for life; $10,000 and 2 years' imprisonment	Acting as attorney/agent for another person by appearance before, or communication with, the Government in connection with a matter in which the employee participated personally and substantially while in Government service
18 U.S.C. § 207(b)	Criminal; applies for 2 years; $10,000 and 2 years' imprisonment	Acting as attorney/agent for another person by appearance before, or communication with, the Government in connection with a matter which was actually pending under the employee's official responsibility within one year before leaving Government service

STATUTE	TYPE/DURATION/PENALTY	ACTIVITY PROHIBITED
18 U.S.C. § 281	Criminal; applies for 2 years after retirement; $10,000 and 2 years' imprisonment	Acting as attorney/agent for prosecuting or assisting in the prosecution of any claim against the Government involving the Department in which retired status is held
18 U.S.C. § 281	Criminal; applies for life; $10,000 and 2 years' imprisonment	Acting as attorney/agent for prosecuting or assisting in the prosecution of any claim against the Government involving any subject matter with which he was directly connected while in an active duty status

C. ACCEPTING EMPLOYMENT

§ 931, 1987 DoD Auth. Act 10 U.S.C. § 2397b	Criminal; applies for 2 years after negotiation/settlement; $5,000 and 1 year imprisonment	Accepting employment with a DoD contractor with which he has acted in negotiating or settling a Government contract

D. POST-EMPLOYMENT REPORTING REQUIREMENT

10 U.S.C. § 2397b	Civil; applies for 2 years after leaving Government service; $10,000 administrative penalty	Affirmative requirement for majors and above w/10+ years of service to file DD Form 1787 when employed at a salary of $25,000+ by a DoD contractor which was awarded contracts exceeding $10 million during the prior year
37 U.S.C. § 801(b)	Civil; applies for 3 years after retirement; withholding of retired pay	Affirmative requirement for retired Regular officers to file Statement of Employment, DD Form 1357, which indicates whether the officer is employed with a DoD contractor

APPENDIX D

Bedrock Standards of Conduct for Department of the Navy Personnel

To maintain the public's confidence in our institutional and individual integrity, all Department of the Navy (DON) personnel shall --

1. Avoid any action, whether or not specifically prohibited by the rules of conduct, which might result in or reasonably be expected to create an appearance of:

   a. Using public office for private gain,

   b. giving preferential treatment to any person or entity,

   c. impeding Government efficiency or economy,

   d. losing complete independence or impartiality,

   e. making a Government decision outside official channels, or

   f. adversely affecting the confidence of the public in the integrity of the Government;

2. not engage in any activity or acquire or retain any financial or associational interest that conflicts or appears to conflict with the public interests of the United States related to their duties;

3. not accept gratuities from Department of Defense contractors unless specifically authorized by law or regulation;

4. not use their official positions to improperly influence any person to provide any private benefit;

5. not use inside information to further a private gain;

6. not wrongfully use rank, title, or position for commercial purposes;

7. avoid outside employment or activities incompatible with their duties or which may discredit the Navy;

8. never take or use Government property or services for other than officially approved purposes;

9. not give gifts to your superiors or accept them from your subordinates when it is not appropriate to do so;

10. not conduct official business with persons whose participation in the transaction would violate law or regulation;

11. seek ways to promote efficiency and economy in Government operations;

12. preserve the public's confidence in the Navy and its personnel by exercising public office as a public trust;

13. put loyalty to the highest moral principles and to country above loyalty to persons, party, or Government department;

14. uphold the Constitution, laws, and regulations of the United States and never be a party to their evasion;

15. give a full day's labor for a full day's pay, providing earnest effort to the performance of duties;

16. never discriminate unfairly by the dispensing of special favors or privileges to anyone, whether for remuneration or not, and never accept for himself or herself or for family members, favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of Governmental duties;

17. make no private promises of any kind binding upon the duties of office;

18. not engage in business with the Government, either directly or indirectly, inconsistent with the conscientious performance of Government duties; and

19. expose corruption wherever discovered.

CHAPTER XIV

THE FREEDOM OF INFORMATION & PRIVACY ACTS

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CHAPTER XIV

THE FREEDOM OF INFORMATION & PRIVACY ACTS

1401 GENERAL. The purpose of this chapter is to discuss the basic provisions and policy considerations of the Freedom of Information Act and the Privacy Act. These discussions are of a general nature. Reference to the basic source material is essential if the reader is to acquire a thorough understanding of these Acts.

PART A - FREEDOM OF INFORMATION ACT

1402 REFERENCES. The following source material will prove valuable in applying the Freedom of Information Act.

A. Statute. Freedom of Information Act, 5 U.S.C. § 552 (1982).

B. Regulations

1. DoD Directive 5400.7 series, Subj: Department of Defense Freedom of Information Act Program.

2. SECNAVINST 5720.42 series, Subj: Department of the Navy Freedom of Information Act Program.

3. SECNAVINST 5720.45 series, Subj: Indexing, Public Inspection and Federal Register Publication of Department of the Navy directives and other documents affecting the public.

4. JAGMAN, §§ 0134, 1330, 1331, 2023.

5. Federal Personnel Manual, chs. 293, 294, 297, 335, 339, 713.

6. U.S. Navy, Manual of the Medical Department, ch. 23, III.

7. OPNAVINST 5510.161 series, Subj: WITHHOLDING OF UNCLASSIFIED TECHNICAL DATA FROM PUBLIC DISCLOSURE.

8. SECNAVINST 5720.44 series, Subj: Public Affairs Office Instruction.

9. OPNAVINST 5510.48 series, Subj: Disclosure of Classified Information to Foreign Governments and International Organizations.

10. OPNAVINST 5510.156 series, Subj: Control of Technology Transfers.

11. USMC - MCO 5720.56

12. USCG - COMDINST M5260.2

13. FOIA Information - AV 224-2004/2817

14. ALNAV 029/88 dtd 252117Z FEB 88 - Release of name and address lists.

1403 BACKGROUND. The Freedom of Information Act was enacted in 1966 as a revision to the Administrative Procedure Act. This Act established the public's right to gain access to records possessed by the Federal government. In 1974, the Act was amended to answer complaints by public interest groups during the Moorhead hearings and to respond to public concern over government secrecy during the Watergate period. These amendments established procedures for providing requested information and authorized personnel to administer the Act. Additional amendments to the Act were passed in 1976, 1978, and 1986. The Freedom of Information Act is designed principally to ensure that agencies of the Federal government, including the military departments, provide the public with requested information to the maximum extent possible. The objectives of the Act are: (1) Disclosure (the general rule, not the exception); (2) equality of access (all individuals have equal rights of access to government information); (3) justified withholding (the burden is on the government to justify the withholding of information and documents from the general public and individuals); and (4) relief for improper withholding (individuals improperly denied access to documents have the right to seek relief in the judicial system).

1404 PUBLIC NOTICE PROVISIONS OF THE FREEDOM OF INFORMATION ACT

A. General provisions/purpose. Paragraph 5 of SECNAVINST 5720.42 series states, in part: "In accordance with the spirit and intent of ... [The Freedom of Information Act] ... the Department of the Navy will make available to any person the maximum information concerning its operations, activities, and administration."

B. Public notice

1. To aid in meeting the objectives of the Freedom of Information Act (i.e., make information maintained by the government known to the public), the Act requires that each agency, including the uniformed services, make available the following types of information through the medium of the Federal Register:

a. Description of central and field organizations, and employees from whom, and methods by which, information can be obtained;

b. statements of the general course and method by which its functions are channeled and determined;

c. procedures and forms available for obtaining information;

d. substantive rules and general policy guidelines; and

e. each amendment, revision, or repeal of the foregoing.

In United States v. Academia, 14 M.J. 582 (N.M.C.M.R. 1982), the Navy-Marine Corps Court of Review held that FOIA's publication requirements are not applicable to punitive general orders promulgated by a base commander in the Philippines for merchandise-control purposes and, further, that the accused could be convicted of violation of a lawful local regulation, not published in the Federal Register, without proof of his actual knowledge of the contents of the regulation.

2. The Act also requires each Federal agency, in accordance with its rules, to make available for final inspection and copying:

a. Final opinions, dissents, and orders made in the adjudication of cases;

b. statements of policy and interpretation adopted by the agency, but not published in the Federal Register; and

c. administrative staff manuals and instructions to staff that affect a member of the public --

unless the materials are promptly published and offered to members of the public for sale.

1405 REQUESTS FOR RECORDS

A. General. When a command receives a request for information, it must initially determine if the request falls within the Freedom of Information Act (FOIA). A FOIA request is one made by any person or organization for records concerning the operations or activities of a Federal governmental agency. There is no distinction made between U.S. citizens and foreign nationals. The records requested must be in existence at the time of the request and they must be within the possession and control of the agency to whom the request is made (e.g., the Department of the Navy).

B. Agency record. It then becomes important to determine what constitutes an agency record and if it is in existence at the time of the request. (Hereinafter we will be concerned solely with the application of FOIA to the Department of the Navy.) The provisions of the Freedom of Information Act apply to "records." Records are information or products of data compilation, regardless of physical form or characteristics, made or received by a naval activity in the transaction of public business or under Federal law. Some examples of agency records that are naval records include memos, deck logs, contracts, letters, ADP storage, reports, and computer printouts. The term "agency records" does not include:

1. Library and museum material made, acquired and preserved solely for reference or exhibition;

2. objects or articles (such as structures, furniture, paintings, sculpture, three-dimensional models, vehicles, equipment, and parts of wrecked aircraft), whatever their historical value or value as evidence;

3. commercially exploitable resources (including, but not limited to, musical arrangements and compositions, formula, designs, drawings, maps and charts, map compilation manuscripts and map research materials, research data, computer programs, and technical data packages that were not created and are not utilized as primary sources of information about organizations, policies, functions, decisions or procedures of the Department of the Navy);

4. unaltered publications and processed documents (such as regulations, manuals, maps, charts, and related geographical materials) that are available to the public through an established distribution system with or without charges;

5. anything that is an intangible or documentary record (such as an individual's memory or oral communication); and

6. supervisor's personal notes on his/her employees, which are not required to be prepared or maintained by any naval instruction or regulation, concerning their performance, etc., and used solely as a memory aid in preparing evaluation reports. (These notes are not made available to other persons in the agency, are not filed with agency records, and are destroyed after the evaluation period by the individual who prepared them.)

C. In existence. A record must exist and be in the possession and control of the Department of the Navy at the time of the request in order to be subject to the provisions of SECNAVINST 5720.42 series. There is no obligation to create, compile, or obtain a record not already in existence.

D. Form of request. In order to qualify as a request for permission to examine or obtain copies of Department of the Navy records, the request itself must:

1. Be in writing and indicate expressly, or by clear implication, that it is a request under the Freedom of Information Act, DoD Directive 5400.7, or SECNAVINST 5720.42 series;

2. contain a reasonable description of the particular record or records requested; and

3. contain:

a. a check or money order for the anticipated search and duplication fees determined in accordance with enclosure (2) of SECNAVINST 5720.42 series;

b. a clear statement that the requester will be willing and able to pay all fees required; or

c. satisfactory evidence that the requester is entitled to a waiver.

E. Excluded requests. The following categories of requests for information are specifically excluded from the scope of SECNAVINST 5720.42 series:

1. Requests from Congress or members of Congress that are governed by SECNAVINST 5730.5 series;

2. requests from individuals for records pertaining to themselves which are governed by the Privacy Act;

3. requests from the General Accounting Office for records in connection with audits that are governed by SECNAVINST 5741.2 series; and

4. court orders or subpoenas demanding production of records, discovery, or testimony of witnesses that are governed by chapter XIII of the JAG Manual.

1406 PROCESSING PROCEDURES

A. Possible actions on the request

1. Receipt of request. When an official receives a request for a record, that official is responsible for timely action on the request. If a request meets the requirements for processing as a FOIA request, the command should take the following steps:

a. Date-stamp the request upon receipt;

b. establish a suspense control record to track the request;

c. conspicuously stamp or label the request "Freedom of Information"; and

d. flag it as requiring priority handling throughout its processing because of the limited time available to respond to the request.

The command must coordinate procedures for the screening and routing of the correspondence to appropriate personnel within the command so that prompt and expeditious action may be taken on the request.

2. Forwarding controls. When a request is forwarded to another activity for review or other action, the request, letter of transmittal, and the envelope or cover should be conspicuously stamped or labeled "FREEDOM OF INFORMATION ACT." Additionally, a record should be kept of the request--which includes the date and the activity to which it was forwarded.

3. Incomplete requests. If a request is received that does not meet the minimum requirements set forth above, it should nevertheless be answered promptly (within 10 working days of receipt) in writing and in a manner designed to assist the requester in obtaining the desired records. It is within a command's discretion to waive technical defects in the form of an FOIA request if the requested information is otherwise releasable.

4. Classified records. If the existence or nonexistence of the requested record is classified, the activity shall refuse to confirm or deny its existence or nonexistence. If a request is received for documents classified by another agency, it shall be referred to the appropriate agency and the requester notified of such referral, unless the existence or nonexistence of the document is in itself classified. If a request is received for classified records originated by another naval activity for which the head of the activity is not the classifying authority, the request shall be forwarded to the official having classification authority and the requester notified of such referral, unless the existence or nonexistence of the record is in itself classified.

5. NIS reports. Requests for reports by the Naval Investigative Service shall be readdressed and forwarded to the Director, Naval Security and Investigative Command, Washington, D.C., and the requester notified of such referral.

6. JAG Manual investigations. Requests for JAG Manual investigations shall be readdressed and forwarded to OJAG (Code 21), and the requester notified of such referral.

7. Mishap investigation reports. Requests for mishap investigation reports shall be readdressed and forwarded to the Commander, Naval Safety Center, and the requester notified of such referral.

8. Naval Audit Service reports. Requests for reports by the Naval Audit Service shall be readdressed and forwarded to the Naval Audit Service Headquarters (Code OPS), and the requester notified of such referral.

9. Misdirected requests. Requests that have been misdirected shall be readdressed and forwarded to the cognizant naval activity, and the requester notified of such readdressal.

10. Technical documents controlled by distribution statements, records originated by other government agencies, and records of non-U.S. government sources. See SECNAVINST 5720.42 series.

11. Release of records. Subject to the foregoing, a requested record, or a reasonably segregable portion thereof, will be deemed "releasable" and should be released to the requester, unless it is affirmatively determined that the record contains matters which are exempt from disclosure under the conditions outlined in section 1407B of this study guide. Commanding officers and heads of all Navy and Marine Corps activities (departmental and field) are authorized, upon proper request, to furnish copies of records in their custody, or to make such records available for examination. Where there is a question concerning the releasability of a record, the local command should coordinate with the official having cognizance of the subject matter, and, if denial of a request is deemed appropriate, such denial may be accomplished only by the proper initial denial authority (all officers authorized to convene general courts-martial and the heads of various Navy Department activities listed in paragraph 6b of SECNAVINST 5720.42 series).

12. Denial of release. If a local commanding officer receives a request for a copy of, or permission to examine, a record in existence and believes that the requested record, or a nonsegregable portion thereof, is not

releasable under the FOIA, or if he feels denial of a fee waiver is appropriate, he must expeditiously refer the request -- with all pertinent information and a recommendation -- directly to the initial denial authority. If the initial denial authority agrees that the requested record contains information not releasable under FOIA, and any releasable information in the record is not reasonably segregable from the nonreleasable information, he shall notify the requester of such determination, the reasons therefor, and the name and title of the person responsible for the denial. This notification will also include specific citation of the exemption(s) upon which the denial is based, a brief discussion that there is a jeopardy to a governmental interest if the requested information is disclosed, and advisement of the requester's right to appeal to the designee of the Secretary of the Navy within 45 days. If the initial denial authority determines that the requested record contains releasable information that is reasonably segregable from nonreleasable information, he shall disclose the releasable portion and deny the request as to the nonreleasable portion. The initial denial authority should maintain at the activity a complete file of those FOIA requests which they have denied in full or in part.

B. Time limits. The official having responsibility for making the initial determination regarding a request shall transmit his determination in writing to the requester within 10 working days after receipt by the appropriate activity. Denial authorities are, however, authorized by statute to extend the above time limit for responding to requests. Extensions may be granted only in unusual circumstances and, in no event, may the period of extension exceed 10 additional working days. The 10-day time limit does not begin to run until the appropriate authority has received the request. If a request is incorrectly addressed, it should be promptly readdressed and forwarded to the appropriate activity. As an alternative to the taking of formal extensions of time, the official having responsibility for acting on the request may negotiate an informal extension of time with the requester.

C. Fees. The Freedom of Information Reform Act of 1986 (Pub. L. No. 99-570) set the stage for extensive changes in the charging of fees for production upon request under the FOIA. In the past, only direct costs associated with document search and duplication could be charged to the requester. The legislation, as implemented within DoD, permits requesters seeking information for "commercial purposes" to be charged in addition for the cost of reviewing documents to determine releasability and to excise exempt portions thereof.

1. In addition, the former requirement to waive fees that total $30.00 or less has been altered as follows:

a. If the total charge is less than $15.00, it will be waived for all requesters.

b. Various noncommercial requesters receive, in addition, varying amounts of credit for search time and copies that are factored in before the waiver amount is applied.

2. For the purposes of fees, there are four classes of requesters. These are:

a. Commercial requesters -- charged for search, duplication, and review;

b. educational and noncommercial scientific institutional requesters -- charged only for duplication costs, with credit for 100 free pages of copies per request;

c. news media -- treated the same as educational and non-commercial scientific institutional requesters; and

d. other requesters (includes every requester not covered by a, b, or c above) -- charged only for search and duplication, subject to credit for 2 free hours of search time and 100 free pages of copies.

3. In addition to the mandatory credit and fee waiver, there is also discretionary authority to waive fees where disclosure of the information is in the public interest and not in the commercial interest of the requester.

4. The following is the fee schedule in para. 11, enclosure (2) of SECNAVINST 5720.42 series:

Duplication costs

Printed material	$ .02 per page
Office copies	$ .15 per page
Microfiche	$ .25 per page

Manual search and (if chargeable) document review

Clerical (E-9/GS-8 or below)	$12 per hour
Professional (O-1-O-6/GS-9-GS-15)	$25 per hour
Executive (O-7, GS/GM-16, ES-1 or above)	$45 per hour

NOTE: Time is billed to the nearest 15 minutes.

Computer search: Bill for all direct costs of operating equipment in actual configuration used to satisfy the request, including time of programmers/operators actually involved in determining how to conduct search and those subsequently involved in executing the search.

D. Appeals. Any denial of requested information or fee waiver may be appealed. The requester must be advised of the these appeal rights in the letter of denial by the appropriate denial authority. The Judge Advocate General and the General Counsel have been designated by the Secretary of the Navy as appellate authorities. The General Counsel handles contracts, commercial law, and civilian personnel matters, while the Judge Advocate General handles military law, torts, and all other matters not under the cognizance of the General Counsel. Appeals of denials on requests for classified materials present a special problem. Before the Judge Advocate General can make a final determination on any appeal involving classified material, the appellate record must affirmatively establish that the information in question was properly classified, both procedurally and substantively, under the appropriate Executive Order. An appeal from an initial denial, in whole or in part, must be in writing and received by the appellate authority not more than 45 days following the date of transmittal of the initial denial. The appeal must state

that it is an appeal under FOIA and include a copy of the denial letter. The appellate authority will normally have 20 working days after receipt of the appeal to make a final determination. There is a provision permitting a 10-working-day extension in unusual circumstances. The appellate authority shall provide the appellant with a written notification of the final determination either causing the requested records, or the releasable portions thereof, to be released or, if denied, providing the name(s) and title(s) of the individual(s) responsible for such denial, the basis for the denial, and an advisement of the requester's right to seek judicial review.

E. Judicial review. Once a requester's administrative remedies have been exhausted, he may seek judicial review of a final denial in Federal district court, in which case the requested document normally will be produced for examination and determination by the court. Exhaustion of administrative remedies consists of either final denial of an appeal or failure of an agency to transmit a determination within the applicable time limit.

F. Reporting requirements. The Freedom of Information Act requires each agency to submit annual FOIA reports to Congress regarding the costs and time expended to administer the Act. Naval activities that are initial denial authorities will submit an annual FOIA report by 20 January of each year to the Chief of Naval Operations (OP-09B1P), while Marine Corps initial denial authorities will forward their report by 10 January of each year to the Commandant of the Marine Corps (Code PAP), who is then responsible for submitting a consolidated report to the Chief of Naval Operations. Units afloat and operational aviation squadrons are exempt from these annual reporting requirements if they have not received any FOIA requests during the reporting period. SECNAVINST 5720.42 series sets forth detailed instructions and the appropriate format for submitting these reports. Note: In 1985, the requirement for a tri-annual FOIA report was rescinded. In addition, some denial authorities have individually eliminated the requirement for negative reporting for some nonoperational or shore-based units.

1407 EXEMPTIONS

A. General. Perhaps more important than the aspects of the Act that require the government to make information available to the public are the categories of information exempted from those requirements. Matters contained in records may be withheld from public disclosure only if they come within one or more of the exemptions listed below. However, even exempted matters in a record are releasable and will be made available to a member of the public, unless:

1. Release of the matters would be inconsistent with a statutory requirement; or

2. release of the information would jeopardize a governmental interest.

In addition to this two-step determination necessary to decide if a record is releasable, there is also a requirement that, if nonreleasable matters in a record are "reasonably segregable" from releasable portions, the releasable portions should be made available.

B. Specific exemptions. The following types of information may be withheld from public disclosure if one of the two requirements stated above is met:

1. Classified documents. In order for this exemption to apply, the record must be currently and properly classified under the criteria established by Executive Order No. 12,356, 47 Fed. Reg. 14,874 (1982) and implemented by OPNAVINST 5510.1 series.

2. Internal personnel rules and practices. In addition to determining that the document relates to internal personnel rules or practices of the Department of the Navy, it must be determined that releasing the information would substantially hinder the effective performance of a significant command or naval function and that they do not impose requirements directly on the general public (e.g., advancement exams, audit or inspection schedules, and negotiating or bargaining techniques or limitations).

3. Exempt by statute. There are some statutes which, by their language, permit no discretion on the issue of disclosure. Examples of this exemption include 42 U.S.C. § 2162 (1982) on restricted data; 18 U.S.C. § 798 (1982) on communication intelligence; 50 U.S.C. §§ 402(d)(8) - (9) (1982) on intelligence sources and methods; 21 U.S.C. § 1175 (1982) on drug abuse prevention/rehabilitation; and 42 U.S.C. § 4582 (1982) on alcohol abuse prevention/rehabilitation.

4. Trade secrets and commercial or financial information. This exemption refers to trade secrets or commercial or financial information obtained from a person or organization outside the government with the understanding that the information will be retained on a privileged or confidential basis. For this exemption to apply, the disclosure of the information must be likely to cause substantial harm to the competitive position of the source, impair the government's ability to obtain necessary information in the future, or impair some other legitimate government interest (e.g., trade secrets, inventions, sealed bids, and scientific and manufacturing processes or developments).

5. Inter/intra-agency memorandums or letters. This refers to internal advice, recommendations, and subjective evaluations -- as contrasted with factual matters. If the record would be available through the discovery process in litigation with the Department of the Navy, then the record should not be withheld under this exemption. A directive or order from a superior to a subordinate, though contained in an internal communication, generally cannot be withheld if it constitutes policy guidance or decision -- as distinguished from a discussion of preliminary matters or advice. The purpose and intent of this examination is to allow frank and uninhibited discussion during the decisionmaking process. Examples of this exemption include, among other things, nonfactual portions of staff papers, after-action reports, records prepared for anticipated administrative proceedings or litigation, attorney-client privilege documents, attorney work-produce privilege documents, and Inspector General reports.

6. Personnel and medical files and similar files. This exemption protects personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. The determination of whether disclosure would constitute a clearly unwarranted invasion is a subjective judgment requiring a weighing of the privacy interest to be protected against the importance of the requester's purpose for seeking the information. This exemption shall not be used to protect the privacy of a deceased person, since deceased persons do not have a right to privacy; however, information may be withheld to protect the privacy of the next of kin of the deceased person. Information that is normally released concerning military personnel includes name, grade, date of rank, gross salary, duty status, present and past duty stations, office phone, source of commission, military and civilian educational level, promotional sequence number, combat service and duties, decorations and medals, and date of birth. However, pursuant to ALNAV 150/85, SECNAVINST 5720.42 now provides: "Department of the Navy information security policy prohibits disclosure of names and duty addresses or duty telephone numbers of servicemembers when disclosure would reveal classified information.... unclassified information about service members also may be withheld when disclosure 'would constitute a clearly unwarranted invasion of personal privacy.' Disclosure of names and duty addresses or duty telephone numbers of members assigned to units that are stationed in foreign territories, routinely deployable, or sensitive can constitute a clearly unwarranted invasion of personal privacy." Before denying such requests, though, since this area of the law is fraught with legal problems, consultation with a judge advocate or, where possible, JAG (Code 14) is recommended. ALNAV 029/88 dtd 252117Z FEB 88, requires all requests for unit personnel lists be forwarded to the initial denial authority. The IDA may only release such a list if CNO (OP-09830) approves.

7. Investigatory records and information compiled for law enforcement purposes. This exemption applies only to the extent that the production of such records would:

a. Interfere with enforcement proceedings;

b. deprive a person of a right to a fair trial or an impartial adjudication;

c. constitute an unwarranted invasion of personal privacy;

d. disclose the identity of a confidential source;

e. disclose investigative techniques and procedures; or

f. endanger the life or physical safety of law enforcement personnel

8. Financial institutions. This exemption applies to matters that are contained in, or related to, examination, operation, or condition reports prepared by, on behalf of, or for the use of, an agency responsible for the regulation or supervision of financial institutions.

9. Wells. This exemption refers to geological and geographical information and data, including maps, concerning wells.

C. For official use only (FOUO). This applies only to information, records, and other material which has not been given a security classification, but which contains information which may be withheld from the public under the exemptions discussed in paragraphs B2 through B9, immediately above. Records requiring the FOUO designation should be marked at the time of their creation, as this not only provides notice of FOUO content but also facilitates review once the record is requested under FOIA.

PART B - PRIVACY ACT

1408 REFERENCES

A. Statute. Privacy Act of 1974, 5 U.S.C. § 552a (1982).

B. Regulations

1. DoD Directive 5400.11 series, Subj: Department of Defense Privacy Program.

2. SECNAVINST 5211.5 series, Subj: Personal privacy and rights of individuals regarding records pertaining to themselves. This instruction explains the provisions of the Privacy Act of 1974 and assigns responsibility for consideration of Privacy Act requests for records and petitions for amending records. It also contains sample letters for responding to Privacy Act requests and lists exempted records that cannot be inspected by individuals.

3. OPNAVNOTE 5211 series, Current Privacy Act issuances as published in the Federal Register. It provides an up-to-date listing, as published in the Federal Register, concerning:

a. Specific single systems, "umbrella-type systems," and subsystems of personnel records which have been authorized to be maintained under the Privacy Act;

b. the Office of Personnel Management's government-wide system of records; and

c. a directory of naval activities maintaining these systems.

4. MCO P5211.2 series, Subj: The Privacy Act of 1974. The Marine Corps' manual for implementing the Privacy Act.

5. MCBUL 5211 series, Subj: Current Privacy Act System Notices Published in the Federal Register. The information describes specific single systems, "umbrella-type systems," and subsystems that contain information authorized to be maintained under the Privacy Act.

6. COMDINST M5260.2

1409 BACKGROUND. The wave of openness regarding the government's recordkeeping systems gradually matured during the 1960's and culminated in the 1974 amendments to the Freedom of Information Act. This wave of openness, however, was found to be lacking in one important particular--namely, protection of the individual's personal right to privacy in matters concerning the individual. Partly in response to the desire to counter the open flow of information to the detriment of individual rights to privacy, the Privacy Act of 1974 was signed into law by President Ford on 31 December 1974, and was codified as section 552a of title 5, United States Code, immediately following the Freedom of Information Act. The Act was subsequently amended in 1982.

1410 SYNOPSIS OF ACT

A. Purposes. The Act set up safeguards concerning the right to privacy by regulating the collection, maintenance, use, and dissemination of personal information by Federal agencies. The Act accomplishes this end by requiring Federal agencies, with certain exceptions as noted later in this chapter, to:

1. Permit an individual to determine what records pertaining to him are collected, maintained, used, or disseminated;

2. permit an individual to prevent records pertaining to him, that were obtained by such agencies for a particular purpose, from being used or made available for another purpose without his consent;

3. permit an individual to gain access to information pertaining to him in a Federal agency's records, to have a copy made of all or any portion thereof, and to correct or amend such records;

4. collect, maintain, use, or disseminate any record of identifiable personal information in a manner that ensures that such action is for a necessary and lawful purpose, that the information is current and accurate for its intended use, and that adequate safeguards are provided to prevent misuse of such information;

5. permit exemptions from the requirements with respect to records provided in the Act only in those cases where there is an important public policy need for such exemption as has been determined by specific statutory authority; and

6. be subject to civil suit for any damages which occur as a result of acts or omissions that violate any individual's rights under the Act.

B. Definitions

1. Record. Any item, collection, or grouping of information about an individual that is maintained by the Federal government and contains personal information and either the individual's name, symbol, or another identifying particular assigned to the individual (e.g., social security number).

2. System of records. A group of records from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to that individual.

3. Personal information. Any information about an individual that is intimate or private to the individual, as distinguished from information related solely to the individual's official functions. This ordinarily includes information pertaining to an individual's financial, family, social, and recreational affairs; medical, educational, employment, or criminal history; or information that identifies, describes, or affords a basis for inferring personal characteristics. It ordinarily does not include such information as time, place, and manner of, or authority for, an individual's execution of, or omission of, acts directly related to the duties of his/her Federal employment or military assignment.

4. Individual. A living citizen of the United States, an alien lawfully admitted for permanent residence, or a member of the naval service (including a minor). Additionally, the legal guardian of an individual or a parent of a minor has the same rights as the individual and may act on behalf of the individual concerned. Emancipation of a minor occurs upon enlistment in an armed force, marriage, court order, reaching the age of majority in the state in which located, reaching age 18 (if residing overseas), or reaching age 15 (if residing overseas) for medical records compiled under a program of confidentiality which the individual specifically requested.

5. Routine use. A normal, authorized use made of records within a system of records, but only if that use is published as a part of the public notification appearing in the Federal Register for the particular system of records.

1411 COLLECTION OF INFORMATION

A. Policy. It is the policy of the naval service to collect personal information, to the greatest extent practicable, directly from the individual--particularly when the information may adversely affect an individual's rights, benefits, and privileges. The following examples illustrate when exceptions to the general policy are applicable:

1. When there is a n verify information through a third party (e.g., verifying information for a security clearance);

2. when it would present an exceptional practical difficulty or result in unreasonable cost to obtain the information directly from the individual; or

3. when the information can be obtained only from a third party (e.g., a supervisor's evaluation of an individual).

These examples are not exclusive or all-encompassing.

B. Privacy Act statement. When the Navy or Marine Corps requests information that is personal and is for inclusion in a system of records, the individual from whom the information is solicited must be informed of the following:

1. The authority for solicitation of that information (i.e., the statute or executive order);

2. all major purposes for which the relevant agency uses the information (e.g., pay entitlement, retirement eligibility, or security clearances);

3. the routine uses to be made of the information as published in the Federal Register;

4. whether disclosure is mandatory or voluntary; and

5. the possible consequences for failing to provide the requested information.

The above information will be provided to the individual from whom personal information (as defined in section 1410B3 above) is solicited for a system of records via the "Privacy Act Statement." There is no formal requirement contained in the basic legislation or SECNAVINST 5211.5 series which requires that the subject be given a written Privacy Act statement or that he sign the statement. It is strongly recommended, however, in order to ensure that an individual fully understands the Privacy Act statement, that he be given a copy of the statement and requested to sign an original of the statement, and that the signed original be attached to the particular record involved. If an individual refuses to sign an original Privacy Act statement, a note of that fact should be made on the original statement indicating his refusal to sign and the fact that he was provided a copy, and the document should then be attached to the collected record of information. If oral advice concerning the provisions mentioned above is required to be administered for any reason, a note of the fact that information concerning the Privacy Act requirements was furnished to the individual should be made and attached to the collected information and, if at all possible, a copy of the advice orally furnished should be forwarded to the individual involved.

C. Exceptions. There is no requirement for use of the Privacy Act statement in:

1. Processes relating to the enforcement of criminal laws (including criminal investigations by NIS, base police, and master at arms); or

2. courts-martial and the personnel thereof (i.e., military judge, trial counsel, defense counsel, article 32 investigating officer, and government counsel for the article 32 investigation).

D. Requesting an individual's social security number (SSN). Department of the Navy activities may not deny an individual any right, benefit, or privilege provided by law because the individual refuses to disclose his SSN, unless such disclosure is required by Federal statute or, in the case of systems of records in existence and operating before 1 January 1975, such disclosure was required under statute or regulation adopted prior to 1 January 1975 to verify the identity of an individual.

1. When an individual is requested to disclose his/her social security number, he/she must be informed:

a. Whether such disclosure is mandatory or voluntary;

b. by what statutory or other authority the number is solicited; and

c. what uses will be made of it.

2. An activity may request an individual's SSN, even though it is not required by Federal statute or is not for a system of records in existence and operating prior to 1 January 1975. The separate Privacy Act statement for the SSN alone, or a merged Privacy Act statement covering both the SSN and other items of personal information, however, must make clear that disclosure of the number is voluntary. If the individual refuses to disclose his SSN, the activity must be prepared to identify the individual by alternate means.

3. Once a military member or civilian employee of the Department of the Navy has disclosed his/her SSN for purposes of establishing personnel, financial, or medical records upon entry into naval service or employment, the SSN becomes his service or employment identification number. Such an individual need not be provided a Privacy Act statement when he/she is subsequently asked to provide or verify this identification number in connection with those records.

1412 PUBLIC NOTICE AND SYSTEMS MANAGEMENT

A. General provisions/purposes. The purposes of the Privacy Act regarding the management of record systems and public notification concerning such record systems are as follows:

1. To allow the public to be informed as to the existence of a system of records, its purposes, and routine uses;

2. to delineate procedures for allowing individuals to gain access to their own personal information; and

3. to prevent misuse of, or improper access to, personal information contained within systems of records.

B. Contents of public notice. In the above regard, no Federal agency may maintain a system of records without public disclosure of the existence of that system. To ensure such public knowledge, the Privacy Act requires that a catalog of all such systems of records be published in the Federal Register, and that such publication be updated at least annually. Such public notice must include, in an understandable form:

1. The name and mailing address of the system;

2. the categories of individuals covered by the system;

3. the types of records in the system;

4. the authority for maintenance of the system;

5. the routine uses of the information in the system;

6. the media in which records are maintained (e.g., file folders, magnetic tape, computer cards, etc.);

7. the manner in which retrieval is accomplished (e.g., name, social security number, fingerprint classification, etc.);

8. general safeguards to prevent unauthorized access;

9. retention and disposal policies;

10. the title and duty address of the official responsible for the system of records (system manager);

11. the agency procedures for individual notification;

12. the agency procedures for granting individual access to, and for requesting amendment to, or contesting the content of, those records;

13. the sources of information in the system; and

14. exemptions claimed.

C. Administrative procedures. Appropriate administrative, technical, and physical safeguards must be established to ensure the security and confidentiality of records in order to protect any individual on whom information is maintained against substantial harm, embarrassment, inconvenience, or unfairness. Such information should be afforded at least the protection required for information designated as "For Official Use Only."

D. Exemptions. Exemptions from disclosure are provided by the Privacy Act. Exemptions are not automatic and must be invoked by the Secretary of the Navy. Furthermore, public notice, even of exempted systems, is required, and the exemption from complete disclosure and the reasons therefore must be specified in the Federal Register. Exemptions are either general or specific.

1. General exemptions. To be eligible for a general exemption, the system of records must be maintained by an activity whose principle function involves the enforcement of criminal laws and must consist of:

a. Data compiled to identify individual criminals and alleged criminals which consists only of identifying data and arrest records and type and disposition of charges, sentencing/confinement/release records, and parole and probation status;

b. data that supports criminal investigations (including efforts to prevent, reduce, or control crime) and reports of informants and investigators that identify an individual; or

c. reports on a person, compiled at any stage of the process of law enforcement, from arrest or indictment through release from supervision.

2. Specific exemptions. The Privacy Act also lists seven specific exemptions:

a. Classified information that is exempt from release under the Freedom of Information Act;

b. investigatory material compiled for law enforcement purposes, but beyond the scope of the general exemption mentioned above;

c. records maintained in connection with providing protective service to the President and others under section 3056 of title 18, United States Code;

d. records required by statute to be maintained and used solely as statistical records;

e. investigatory material compiled solely to determine suitability, eligibility, or qualification for Federal employment or military service, but only to the extent that disclosure would reveal the identity of a confidential source,

f. testing and examination material used solely to determine individual qualification for appointment or promotion in the Federal service, the disclosure of which would compromise the objectivity or fairness of the testing or examination process; and

g. evaluation material used to determine potential for promotion in the armed forces, but only to the extent that the disclosure of such material would reveal the identity of a confidential source.

1413 DISCLOSURE OF PERSONAL INFORMATION TO THIRD PERSONS

A. General provisions/purposes. The Privacy Act carefully limits those situations in which the information gathered by a Federal agency may be disclosed to third persons. The latter provision obviously was included to ensure that maximum privacy regarding personal information be maintained and controlled. The general rule of the Privacy Act and its implementing directives is that no personal information from a record or record system shall be disclosed to third parties without the prior written request or consent of the individual about whom the information pertains.

B. Exceptions. The prior written consent or request of the individual concerned is not required if the disclosure of information is authorized under one of the eleven exceptions discussed below.

1. Personnel within the Department of the Navy or the Department of Defense. Disclosure is authorized without the consent of the individual concerned, provided that the requesting member has an official need to know the information in the performance of duty and the contemplated use of the information is compatible with the purposes for which the record is maintained. No disclosure accounting is required when information is released

pursuant to this exception. Under this exception, the name, rate, offense(s), and disposition of an offender at captain's mast/office hours may be published in the plan of the day or on the command bulletin board within a month of the imposition of nonjudicial punishment, or at daily formations or morning quarters. JAGMAN, § 0107.

2. FOIA. If the information is of the type that is required to be released pursuant to the Freedom of Information Act as implemented by SECNAVINST 5720.42 series, it may be released. Recall, from part A of this chapter, that personal information from personnel or medical files and similar files, the release of which would cause an unwarranted invasion of personal privacy, may be exempt from release under the Freedom of Information Act. Therefore, the responsible officer must weigh the public's right to know the information against the right to privacy of the individual. Sound, intelligent discretion is obviously necessary in such situations. When in doubt, the safer course is to avoid public disclosure.

a. Paragraph 7b(2) of SECNAVINST 5211.5 series lists several examples of nonderogatory information of an official character about a naval member or employee that can routinely be disclosed to a member of the public, so long as the requestor's stated or ascertained purpose in seeking the information (as discussed in section 1407B6 above) is not for purposes of commercial solicitation. This list includes such information as name, rank or rate, date of rank, salary, duty status, present and past duty stations, duty station address, finalized future duty station, office phone number, source of commission, military and civilian educational level, and promotion sequence number. See ALNAV 029/88, which requires all requests for personnel lists to be sent to the IDA. The IDA can only release of CNO (OP-09830) approves.

b. Disclosure of home addresses and home telephone numbers without permission shall normally be considered a clearly unwarranted invasion of personal privacy. Requests for home addresses (including barracks and government-provided quarters) may be referred to the last-known address of the individual for reply at the person's discretion. In such cases, requesters will be notified accordingly.

c. Disclosure of home address to individuals for the urpose of initiating court proceedings for the collection of alimony or child support, and to state and local tax authorities for the purpose of enforcing tax laws, are examples of circumstances where disclosure could be appropriate. However, care must be taken prior to release to ensure that a written record is prepared to document the reasons for the release determination.

d. Lists or compilations of names and home addresses or single-home addresses will not be disclosed to the public -- including, but not limited to, individual Members of Congress, creditors, and commercial and financial institutions -- without the consent of the individual involved. Requests for home addresses may be referred to the last-known address of the individual for reply at the individual's discretion and the requester will be notified accordingly. This prohibition may be waived when circumstances of a case indicate compelling and overriding interests of the individual involved.

e. An individual shall be given the opportunity to elect not to have his/her home address and telephone number listed in a Navy activity telephone directory. The individual shall also be excused from paying additional cost that may be involved in maintaining an unlisted number for government-owned telephone service if the individual complies with regulations providing for such unlisted numbers; however, the exclusion of a home address and telephone number from a Navy activity telephone directory does not apply to the mandatory listing of such information on a command's recall roster.

3. Routine use. Disclosure may be made for a routine use (as defined in section 1410B5) and declared and published in the system notice in the Federal Register and complementary Privacy Act statement. For example, a routine use for the home address information maintained in the Navy Personnel Records System is the disclosure of such information to the duly-appointed command family ombudsman in the performance of their duties.

4. Bureau of the Census

5. Statistics. Disclosure may be made for purposes of statistical research or reporting if the individual's identity will be held private by the recipient and that identity will be lost in the published statistics.

6. National Archives

7. Civil and criminal law-enforcement agencies of governmental units in the United States. The head of the agency making the request must do so in writing to the activity maintaining the record indicating the particular record desired and the law-enforcement purpose for which the record is sought. Blanket requests will not be honored. A record may also be disclosed to a law-enforcement activity, provided that such disclosure has been established as a "routine use" in the published record-systems notice. Disclosure to a state child-support agency or a state bar association is authorized under this section. Disclosure to foreign law-enforcement agencies is not authorized under this section.

8. Emergency conditions. Disclosure may be made if the health or safety of a person is imperiled. The individual whose record was disclosed must be notified of such disclosure.

9. Congress. Disclosure is permitted if information is requested by either House of Congress or any committee or subcommittee thereof to the extent of matters within its jurisdiction. Disclosure may be made to an individual Member of Congress when the request for information was prompted by an oral or written request for assistance by the individual to whom the record pertains, or when the congressional office, after requesting information, subsequently states that it has received a request for assistance from the individual or has obtained his written consent for the disclosure of the information.

10. Comptroller General

11. Courts of competent jurisdiction. When complying with an order from a court of competent jurisdiction signed by a state or Federal court judge to furnish information, if the issuance of the order is made public by the court which issued it, reasonable efforts will be made to notify the individual to whom the record pertains of the disclosure and the nature of the information provided. If the court order itself is not a matter of public record, the concerned activity shall seek to learn when it will be made public. In this situation, an accounting for the disclosure shall be made at the time the activity complies with the order, but neither the identity of the party to whom the disclosure was made nor the purpose of the disclosure shall be made available to the concerned individual unless the court order has become a matter of public record.

12. Disclosure of records to contractors. Records required by contractors for the operation, use, or maintenance of a system of records in the performance of a government contract shall not require the consent of the individual to whom the record pertains.

13. Consumer reporting agency. Records concerning debts owed to the Federal government by an individual may be disclosed to consumer reporting agencies (e.g., credit bureaus) after the individual has been notified of the validated debt and afforded an opportunity to resolve the matter.

C. Disclosure accounting. In order to allow individuals to discover what disclosures of information concerning them have been made, and to provide a system whereby prior recipients of information may be notified of disputed or corrected information, the Privacy Act and implementing instruction require that each command must maintain an accounting record of all disclosures, including those requested or consented to by the individual. The accounting record must include the date, nature and purpose of the disclosure, and the name and address of the recipient. There are several exceptions to the general rule where disclosure accounting is not required:

1. Disclosure made within the Department of Defense;

2. disclosure made within the Department of the Navy;

3. disclosure made pursuant to the Freedom of Information Act;

4. disclosure made for statistical compilation, when the disclosure involves gross statistics covering a population of a system of records and identification of the individuals is not possible, or similar statistical data are already available to the public; and

5. disclosure of records to contractors for the operation, use, or maintenance of a system of records in the performance of a government contract.

D. Administrative procedures. SECNAVINST 5211.5 series does not provide any specific mandates concerning the method of disclosure accounting, leaving each command free to determine and utilize the most efficient method for that command consistent with implementing the purposes of the accounting requirement. For most paper records, it may be suitable to maintain the accounting on a record by-record basis, physically affixed to the records. A

sample form is set forth in appendix A-3-b of the JAG Manual. Whatever method of recording disclosures is used, it must be retained for at least five years after the last disclosure, or the life of the record -- whichever is longer. Upon the request of an individual, he must be told of all accountable disclosures except those made in the furtherance of law-enforcement activity. As mentioned above, even without his request, the individual must be informed of disclosures made under emergency conditions and those made pursuant to court order where the information is made public. Finally, if the individual officially disputes or obtains correction of his record, all prior recipients of information who are subject to disclosure accounting must be so advised.

1414 PERSONAL NOTIFICATION

A. General provisions/purposes. Because one of the underlying purposes of the Privacy Act is to allow the individual, upon his request, to discover whether records pertaining to him are maintained by Federal agencies, the system manager must notify a requesting individual whether or not the system of records under his management contains a record pertaining to that individual. The request itself must adequately identify the system of records and provide information and individual identifiers needed to locate records in the particular system (e.g., full name and social security number). All properly submitted requests for personal notification will be honored, except in cases where exemption is authorized by law, claimed by the Secretary of the Navy [SECNAVINST 5211.5 series, enclosure (7)], and exercised by the denial authority.

B. Administrative procedures

1. Individual's action. An individual requesting notification concerning records about himself must:

a. Request notification of personal records within the system from the system manager,

b. accurately identify himself;

c. identify the system of records from which he requests information; and

d. provide the information or personal identifiers needed to locate records in that particular system.

2. Command action. Requests for personal notification may be granted by officials who have custody of the records, even if they are not the system manager or denial authority. Denials of initial requests for notification may only be made by denial authorities. If the request is deficient, the command should inform the individual of the correct means, or additional information needed, for obtaining consideration of his/her request for notification.

3. Time limits. A request for notification shall be acknowledged in writing within 10 working days. Determination and required action on initial requests for notification shall be completed, if reasonably possible, within 30 working days of receipt by the cognizant office.

C. Denial authority. The denial authorities, which include all officers authorized to convene general courts-martial and the heads of designated Navy Department activities, are authorized to deny requests for notification when an exemption is applicable and denial of the notification would serve a significant and legitimate governmental purpose (e.g., avoid interfering with an on-going law-enforcement investigation). The denial letter shall inform the individual of his right to request further administrative review of the matter with the Judge Advocate General (Code 14) within 120 days from the date of the denial letter.

D. Reviewing authority. Upon receipt of a request for review of a determination denying an individual's initial request for notification, the Judge Advocate General shall obtain a copy of the case file from the denial authority, review the matter, and make a final determination. Any final denial letter should cite the exemptions exercised and the legitimate governmental purposes served and inform the individual of the right to seek judicial review.

1415 PERSONAL ACCESS TO RECORDS

A. General provisions/purposes. Hand-in-hand with the provisions concerning personal notification of records is the Privacy Act's mandate that an individual will be allowed to inspect and have copies of records pertaining to him that are maintained by Federal agencies. Upon receiving a request from an individual, the systems manager shall permit that individual to review records pertaining to him from the system of records in a form that is comprehensible to the individual. The individual to whom the record pertains may authorize a third party to accompany him when he seeks access. Note: 5 U.S.C. § 552a(d)(5) provides that: "Nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding."

B. Administrative procedures

1. Individual's action. The requesting individual must:

a. Request access from the system manager;

b. verify his identity;

c. accurately identify the system of records and the particular records he desires access to; and

d. provide information of personal identifiers needed to locate records within the system (e.g., full name and social security number).

2. Command action. Upon receipt of an individual's initial request for access, the system manager or other appropriate custodial official shall acknowledge the request within the time limits discussed in section 1414B3 above. If the request is deficient, the command should inform the individual

of the corrective action or additional information needed to obtain access. If it is determined that the individual should be granted access to the entire record requested, the official should inform the individual, in writing, that access is granted and furnish a copy of the record, or advise when and where it is available. Fee schedules for duplication costs are contained in SECNAV-INST 5211.5 series.

C. Denial authorities. In order to deny the individual access to all or part of the requested record, the denial authority shall send an expurgated copy of the record available, where appropriate, or, when none of the record is releasable, shall inform the individual of the denial of access and the reasons therefor (including citation of any applicable exemptions, a brief discussion of the significant and legitimate governmental purposes served by denial of the access, and an advisement of the right to seek further administrative review within 60 calendar days.

D. Reviewing authority. Upon receipt of a request for review or determination denying an individual's request for access, the appellate authority (the General Counsel or the Judge Advocate General, depending on the subject matter) shall review the matter and make a final determination.

1416 PERSONAL AMENDMENTS TO RECORDS

A. General provisions/purposes. Once an individual has gained access to his records, it is conceivable that he may desire that amendments to his records be made. The Privacy Act permits the individual to ensure that the records maintained about him are as accurate as possible by allowing him to amend information that is inaccurate, to appeal a refusal to amend, and to file a statement of dispute in the record should an appeal be denied. Exceptions to this rule permitting amendment of personal records may only be exercised in accordance with published notice where authorized by law, claimed by the Federal agency head, and exercised by the denial authority.

B. Administrative procedures

1. Individual's action. The requesting individual must:

a. Request amendment in writing from the system manager;

b. verify his identity;

c. provide information or individual identifiers needed to locate the record within system; and

d. state reasons for requesting amendment and provide information to support his request.

2. Command action. The command's handling of requests for records amendments under the Privacy Act parallels those discussed in sections 1414B2 and 1415B2 concerning notification and access to records. If the request is deficient, the command should inform the individual of the correct means or additional information needed for obtaining consideration of his/her

request for amendment. A request may not be rejected, nor may the individual be required to resubmit the request, unless that is essential for processing the request. If an available exemption is not exercised, an individual's request for amendment of a record pertaining to him/herself shall be granted if it is determined, on the basis of the information presented by the requester and all other reasonably available related records, that the requested amendment is warranted in order to make the record sufficiently accurate, relevant timely, and complete as to ensure fairness in any determination which may be made about the individual on the basis of record. Other agencies holding copies of the record must be notified of the amendment. These provisions are not designed to permit collateral attack upon that which has already been the subject of a judicial or quasi-judicial action. For example, an individual would not be permitted to challenge a courts-martial conviction under this instruction, but the individual would be able to challenge the accuracy with which a conviction has been recorded in a record. If amendment is made, all prior recipients of the record must be notified of the amended information.

C. Denial authorities. If the request to amend is denied in whole or in part, the denial authority must notify the individual of the basis for denial and advise him that he may request review of the denial within 120 days and the means of exercising that right.

D. Reviewing authorities. If the official who reviews the denial also refuses to amend the record as requested, that official must notify the individual of his refusal to amend and the basis therefor, the individual's right to file a statement of dispute annotated to the disputed record, the purpose and effect of a statement of dispute, and the individual's right to request judicial review of the refusal to amend the record.

E. Privacy Act/Board for Correction of Naval Records (BCNR) interface. While factual amendments may be sought under both the Privacy Act and the procedures of BCNR, attempts to correct other than factual matters (such as judgmental decisions in efficiency reports or promotion board reports) fall outside the purview of the Privacy Act and under the purview of BCNR. If a factual matter is corrected under the Privacy Act procedures, any subsequent judgmental decisions that may have been affected by the factual correction, if contested, should be submitted by petition to BCNR for corrective action.

1417 CIVIL AND CRIMINAL SANCTIONS FOR VIOLATIONS OF THE PRIVACY ACT

A. Civil sanctions. Civil sanctions apply to the agency (e.g., the Navy) involved in violations -- as opposed to individuals. Civil actions may be brought by individuals in cases where the Federal agency:

1. Refuses to amend the individual's record or refused to review the initial denial of a requested amendment;

2. refuses to allow the individual to review or copy his record;

3. fails to maintain any record accurately, relevantly, completely, and currently and an adverse determination is made based on that record; or

4. fails to comply with any other provision of the Privacy Act or any rule promulgated thereunder in such a way to adversely affect the individual (e.g., unauthorized posting of names on a bulletin board).

With regard to these civil sanctions, if the plaintiff's suit is upheld, the agency can expect to be directed to take the necessary corrective actions and pay court costs and attorney fees. In addition, where the plaintiff can show that he suffered damage under paragraph A3 or A4 immediately above because the agency acted in a manner which was intentional or willful, the agency will be assessed actual damages sustained by the individual -- but not less than $1,000. The courts are divided as to whether actual damages may include mental injuries. Compare Johnson v. Commissioner, 700 F.2d 971 (5th Cir. 1983) (finding physical injury and mental anxiety, neither of which resulted in increased out-of-pocket medical expenses, compensable as actual damages) and Fitzpatrick v. Commissioner, 665 F.2d 327 (11th Cir. 1982) (finding only proven pecuniary losses, not general mental injury, loss of reputation, embarrassment, or other nonquantifiable injuries, compensable as actual damages). The statute of limitations for filing suit is two years from the occurrence of the violation of the Act.

B. Criminal sanctions. Criminal sanctions apply to any officer or employee within the Federal agency who misuses a system or records in the following ways:

1. Knowingly and willfully discloses information protected by the Privacy Act to a person or agency not entitled to receive it;

2. willfully maintains a system of records without meeting the public notice requirements of the Privacy Act; or

3. knowingly and willfully requests, obtains, or discloses any record concerning personal information about another individual from an agency under false pretenses.

The above violations are misdemeanors and the individual is subject to a fine of up to $5,000 for each file or name disclosed illegally. With regard to the criminal sanctions, all pertain to intentional misdeeds. Therefore, if an individual makes a good faith and honest effort to comply with the provisions of the Privacy Act, he should be protected from criminal liability. Criminal violations of the Privacy Act are not punishable by incarceration.

1418 REPORTING. SECNAVINST 5211.5 series requires the Chief of Naval Operations to annually submit a consolidated Department of the Navy report to the Secretary of Defense. The report involves information on records systems maintained, systems exempted, and other information concerning administration of the Privacy Act. Denial authorities are required to submit similar reports to the Chief of Naval Operations through the appropriate chain of command. All activities subordinate to denial authorities are required to submit feeder reports to the denial authority in their chain of command by 1 February of each year. Units afloat and operational aviation squadrons are exempt from the reporting requirements described above, unless they have received Privacy Act requests -- in which case they are subject to the less formal reporting procedures set forth in paragraph 14a(4) of SECNAVINST 5211.5 series.

1419 FREEDOM OF INFORMATION ACT (FOIA)/PRIVACY ACT OVERLAP. There is a very narrow area of overlap between FOIA and Privacy Act that may arise when an individual requests documents or records pertaining to himself. As a general rule, his request will be processed under whichever Act he cites in the request; however, special cases arise where the requester cites both Acts or where he cites neither Act.

A. Both Acts cited. Since one's own request for access to agency records concerning oneself is subject to both Acts, the requester who has cited both Acts is entitled to the most beneficial features of each Act. Thus:

1. Exemptions: Apply Privacy Act exemptions, as they are narrower and generally provide greater access.

2. Fees: Privacy Act fees cover only the cost of duplication and the requester is not charged for search time; accordingly, Privacy Act fees are generally less and should be charged.

3. Time limits: In this area, FOIA provides the shortest response time (10 days vice 30 days).

4. Appellate rights: FOIA appellate procedures.

5. Reporting requirements: Report under FOIA.

B. Neither Act cited. When an individual's request for access to records concerning himself cites neither FOIA nor Privacy Act. materials properly releasable under the Privacy Act (greatest access) should be provided and standard Privacy Act fees (usually cheaper) charged for duplication. All other requirements (time limits, denial authority, appellate rights, judicial review, annual reporting, etc.) may be ignored and the response need not cite either Act.

C. All other requests

1. FOIA and Privacy Act do not overlap in any area other than -- as stated -- the individual's request for access to records and documents concerning himself. All other requests for documents or records are subject only to FOIA and the FOIA requirements. Citation of the Privacy Act for such other requests is irrelevant, confers no additional rights upon the requester, and may therefore be ignored.

2. If such a request does not cite or refer to FOIA (regardless of whether it mentions the Privacy Act), the request is not a true FOIA request and may be handled as a public affairs matter. In this case, the response should provide all records that are releasable under FOIA and the requester should be charged for costs incurred; however, all other requirements of FOIA (time limits, denial authority, appellate rights, judicial review. annual reporting, etc.) may be ignored.

APPENDIXES

APPENDIXES

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FORMAT FOR APPOINTING ORDER FOR
ONE-OFFICER INVESTIGATION
NOT REQUIRING A HEARING
(See JAGMAN, § 0503, and Text, § 0304)

(LETTERHEAD)

5830
(File Information)
(Date)

From: Commanding Officer, _____ _____
To: Lieutenant _____, U.S. Navy, 000-00-0000/1100

Subj: INVESTIGATION TO INQUIRE INTO THE CIRCUMSTANCES CONNECTED WITH _____, WHICH OCCURRED AT (LOCATION) ON (TIME AND DATE), RESULTING IN INJURIES TO (RATE, NAME, BRANCH OF SERVICE, SERVICE NUMBER, COMMAND ASSIGNED TO), AND DAMAGE TO GOVERNMENT VEHICLE (I.D. NUMBER)

Ref: (a) JAG Manual

1. Following reference (a), you are appointed to conduct a one-officer investigation not requiring a hearing, in accordance with chapter V, Part C, as soon hereafter as practicable, for the purpose of inquiring into all the circumstances connected with _____ which occurred at _____ on (DAY, MONTH).

2. You will conduct a thorough investigation into all the circumstances connected with _____ and report your findings of fact, opinions and recommendations as to the cause of _____ [the resulting damage,] [the injuries to members of the naval service and their line of duty and misconduct status,] [the circumstances attending the death of members of the naval service,] [potential claims for or against the government,] [scope of employment,] and responsibility for _____, including any recommended administrative or disciplinary action.

3. Your attention is directed to sections 0306, 0308, 0505 and 0817 of reference (a) which pertain to warnings required before requesting statements regarding disease or injury; compliance with the Privacy Act; and warnings required before requesting statements from a person suspected of improper performance of duty. Any personnel suspected of an offense must be advised of their rights under Article 31, UCMJ. Additionally, your attention is directed to sections _____ and _____ of reference (a) as they relate to _____. Additionally, your attention is directed to sections _____ and _____ of reference (a) as they relate to _____ [*See A-1(3)].

4. (Additional paragraphs as required for additional guidance to the investigating officer, special instructions, etc. For instance, if potential claims are involved, add: "This investigation is being convened because of anticipated litigation for the purpose of assisting attorneys representing the interests of the United States.")

Subj: INVESTIGATION TO INQUIRE INTO THE CIRCUMSTANCES CONNECTED WITH _____, WHICH OCCURRED AT (LOCATION) ON (TIME AND DATE), RESULTING IN INJURIES TO (RATE, NAME, BRANCH OF SERVICE, SERVICE NUMBER, COMMAND ASSIGNED TO), AND DAMAGE TO GOVERNMENT VEHICLE (I.D. NUMBER)

5. You are directed to forward your completed report within _____ days from the date of this letter. If, for any reason, the report cannot be forwarded within that period, report in writing the basis for your delay, the estimated date of completion, and specifically request permission for an extension of time.

6. By copy of this appointing order, _____ is directed to furnish the necessary reporters and clerical assistance for recording and transcribing the testimony of witnesses and assisting you in preparing the report of the results of your investigation. Social security numbers should not normally be included in the investigation or enclosures for persons other than the subject of the investigation.

/s/ A. B. Sea
A. B. SEA

Copy to:
(Personnel assigned to
assist in para. 6)

* In this paragraph, list all sections of the JAG Manual which may apply to the particular incident under investigation. The following list is not exhaustive, but it does indicate the extent of research necessary to determine what factual data and what procedural requirements may have to be incorporated into a JAG Manual investigation.

JAG Manual Sections	Subject
	Warnings
0306	Warning required before requesting statements regarding disease or injury
0308	Advice required by the Privacy Act
Article 31, UCMJ	Persons suspected of violations of UCMJ
	Line of duty/misconduct determinations
0807	Mental responsibility and suicide attempts/gestures
0808	Intoxication and drug abuse
0810	Deaths
0811	LOD/Misconduct investigations which involve claims
0812, 0911	Reservists
0817	Checklists for factfinding bodies
	Specific types of incidents
0902	Aircraft accidents
0903	Vehicle accidents
0904	Explosions
0905	Loss or stranding of a ship
0906	Collisions
0907	Flooding of a ship
0908	Pretrial investigation
0909	Loss of government funds or property
0910f	Sonic booms
0912	Firearm accidents
0913a	Security violations
0913b	Postal violations
0913d	Fires
0910, 2001-2007	General investigation requirements for claims
2122	Personnel claims
2220-2221	Foreign claims
2301	Nonappropriated fund claims
2404	Medical care recovery claims

FORMAT FOR INVESTIGATIVE REPORT FOR INVESTIGATION
NOT REQUIRING A HEARING

From: Lieutenant _____, U.S. Navy, 000-00-0000/1100
To: Commanding Officer, _____

Subj: (SAME AS SUBJECT OF APPOINTING ORDER)

Ref: (a) JAG Manual

Encl: (1) CO, _____, appointing order dated _____ (and any modifications thereto)
(2) Summary of (or verbatim) sworn/unsworn testimony/statement of LCDR M. D. Slasher, MC, USN, 456-78-9012/2100, Naval Hospital, Newport, R.I.
(3) Summary of (or verbatim) sworn/unsworn testimony/statement of Mr. Harry Rhubarb, Sales Manager, AAA Computer Co., 174 Green St., Newport, RI 02840 (also home address)
(4) Statement of SN Dan P. Jones, USN, 234-56-7890, USS NEVER-SAIL, with signed Art. 31b, UCMJ warning, Privacy Act warning, and JAGMAN, § 1306 warning attached
(5) Description of _____ (knife found at scene of the accident)
(6) Photograph of _____ depicting _____

NOTE: The testimony of each witness should be a separate enclosure to the investigative report. Enclosures containing testimony or statements of witnesses should precede enclosures in the form of other documents, descriptions of real evidence, photographs, etc.

Preliminary Statement

Section 0512b of the JAG Manual lists the purposes:

-- Procurement of evidence;

-- whether the appointing order and all directives of the convening authority have been met;

-- name and organization of any judge advocate consulted for assistance;

-- nature of investigation (i.e. "An informal one-officer JAG Manual investigation was convened to inquire into the circumstances surrounding...");

-- difficulties;

-- delay;

-- limited participation by a member; and

-- any other information necessary to a complete understanding of the investigation.

Legitimate uses:

Calling attention to conflicting facts in the enclosure (i.e., difficulty);

-- the extent of compliance with rights warnings for injury/disease, Privacy Act, article 31 and "party" status; and

-- in claims investigations, a statement to the effect that "This investigation has been conducted and this report is being prepared in contemplation of litigation and for the express purpose of assisting attorneys representing the interests of the United States in this matter."; and

-- an explanation as to why delays were encountered

Common errors:

- Including a synopsis of the facts (the preliminary statement is the wrong place for this - that is what the findings of fact are for);

-- including opinions and recommendations; and

-- including investigating officer's itinerary.

Sample Preliminary Statements

1. Pursuant to enclosure (1) and in accordance with reference (a), a one-officer JAGMAN investigation was conducted to inquiry into the circumstances surrounding a collision between Government vehicle 94-18021 and a privately owned vehicle which occurred at the intersection of U.S. highways 1 and 138, Newport, R.I., on or about 0900, 1 November 19CY. All reasonably available relevant evidence was collected. The directives and special requirements articulated in enclosure (1) were met (except as noted below:).

2. While certain minor conflicts appear in the evidence, none was of sufficient degree or materiality to warrant comment. (While the testimony of witnesses A and B dramatically differed regarding which vehicle had the right of way, the testimony of witness A is considered to be the more creditable for the following reasons and was therefore relied upon to the exclusion of the testimony of witness B.)

3. All unnecessary social security numbers have been deleted from the enclosures.

4. All enclosures attached hereto are either original documents or are certified to be true and accurate copies of the original documents they represent.

5. (Any other items necessary or pertinent to provide reviewing authorities a complete understanding of the investigation.)

Findings of Fact

Facts are just that. They are not opinions, recommendations, or speculation. However, note the language of the JAG Manual in this area: "Findings of Fact constitute an investigating officer's description of details of events based on evidence." JAGMAN, App. A-5-e(1). The use of the word "description" implies a fact-sifting process that falls short of opinionmaking because direct evidence exists to support the sifted facts. The following problem should make this clear.

-- Problem. Enclosures in our investigation reveal the following information. Mr. A (encl. (4)) states he had seen a vehicle speeding by him at 90 mph. Mr. A was almost hit by the car. Mr. A does not own a car, is 80 years of age, and has not driven since 1945. Mr. B, an off-duty police officer, also made a statement (encl. (5)). He states the car passed him, and he glanced at his speedometer. He was traveling at 35 mph. He estimates the speed of the car at 45 mph. Skid marks from the police report (encl. (6)) reveal that only 7 feet of skid marks on dry, smooth, asphalt pavement were necessary for the car to stop. How should the investigating officer record this information?

-- Solution. Note the conflicting accounts in the preliminary statement as follows: "Two conflicting accounts of the speed of the vehicle in question appear in witnesses statements (encl. (4) and (5)), but only enclosure (5), the statement of Mr. B, is accepted as fact below because of his experience, ability to observe, and emotional detachment from the situation." Findings of fact should reflect only the investigating officer's evaluation of the facts: "That the vehicle left skid marks of seven feet in length in an attempt to avoid the collision. (encl. (6))." "That the skid marks were made on a dry, smooth, asphalt surface. (encl. (6))." "That the speed of the vehicle was 45 mph. at the time brakes were applied. (encl.(5))."

-- Note that in some situations it may not even be necessary to reflect a discrepancy in the preliminary statement. In other situations, it may be impossible to ascertain a particular fact. If, in the opinion of the IO, the evidence does not support any particular fact, this difficulty could be properly noted in the preliminary statement: "The evidence gathered in the forms on enclosures (4) and (7) does not support a finding of fact as to the ..., and, hence, none is expressed."

-- Only rarely will the conflict in evidence or the absence of it prevent the IO from making a finding of fact in a particular area. Thus, this should not be used as a "copout" for the IO who is either unwilling to evaluate the facts or too lazy to gather the necessary evidence.

Each fact must be supported by evidence and should be numbered separately rather than grouped into a cumbersome, narrative form as the JAG Manual permits.

-- Thus, an enclosure number should follow each finding of fact: "That the vehicle was traveling at 25 mph. [encl. (14), (15), (16)]." (Here all three enclosures support the finding of fact.)

-- If an enclosure is lengthy, number the pages of each so the reviewer will not have to thumb through 20 pages of enclosures to find what he wants: "That the vehicle was traveling at 25 mph. [encl. (14), p. 3; encl. (15), p. 7; encl. (16), p. 20]."

Opinions

Opinions may be required by the appointing order or the JAG Manual (chapters VIII and IX) or other regulation. They are not factual evaluations, but rather logical inferences or conclusions drawn from the facts. Reference to the underlying findings of fact as a basis for each opinion is required. Facts should be developed so as to render opinions self-evident.

Recommendations

Recommendations will be made only when specifically directed in the appointing order. They should flow from the findings of fact and opinions. If a court-martial is recommended, a sworn charge sheet should normally be submitted as an enclosure. The factfinding body should not notify the accused of charges. Such notification is done by the commanding officer and will help avoid speedy trial problems. See R.C.M. 308 and 707, MCM, 1984. If a punitive letter of reprimand or admonition is recommended, a draft should be prepared and forwarded as an enclosure. If a nonpunitive letter is recommended, a draft should be prepared and separately forwarded to the appropriate commander for issuance but should not be included as an enclosure to the JAG Manual investigation.

IO's signature block

SAMPLE ENDORSEMENT OF THE CONVENING AUTHORITY ON JAG MANUAL INVESTIGATION CONDUCTED PURSUANT TO JAGMAN, §§ 0810a OR 0814a

COMMAND LETTERHEAD

5830
Ser /
Date

FIRST ENDORSEMENT on LT ___ ___'s ltr of ___

From: Commanding Officer, USS ___
To: Judge Advocate General
Via: Commander, ___

Subj: (SAME)

Ref: (b) ___ (lettering begins after last one of 10's)

Encl: (numbering begins after last one of 10's)

1. Returned for compliance with sections ___ and ___ of reference (a).

or

1. Readdressed and forwarded.

* ___ has been advised of this incident by separate correspondence as required by reference (b) (if required by chain of command directives)

* By copy of this endorsement an advance copy of the basic correspondence is forwarded to ___ pursuant to section 0211 of reference (a). By copy of this endorsement a copy of the basic correspondence is being provided ___ for possible claims action in regard to recommendations ___ and ___. ___ additional copies are forwarded herewith for the Judge Advocate General pursuant to section 0211c of reference (a).

* Social security numbers herein were obtained from official sources and not from individuals where there was no Privacy Act statement given OR all unnecessary social security numbers have been deleted.

* A Privacy Act record of disclosure sheet has been affixed before the first page of the report of investigation.

* The following findings of fact are hereby modified as follows:

* The following additional findings of fact are added: (numbers start after the last findings of fact in the basic investigation).

* Opinion _____ in the basic correspondence is not substantiated by the findings of fact because _____ and is therefore disapproved (modified to read as follows: _____).

* The following additional opinions are added: (numbers start after the last opinions in the basic investigation).

* Recommendation _____ is not appropriate for action at this command; however, a copy of this investigation is being furnished to _____ for such action as may be deemed appropriate.

* Additional recommendations: (numbers start after the last recommendations in the basic investigation).

* The action recommended in Recommendation _____ has been accomplished by _____ (has been forwarded to _____ for action; etc.).

* The unauthorized absence of _____ at the time of his injury substantially interfered with the performance of his duties.

2. Subject to the foregoing remarks, the proceedings, findings of fact, opinions and recommendations of the investigating officer are approved; specifically including the opinion that the injuries suffered by _____ were incurred in the line of duty and not due to his own misconduct.

SIGNATURE OF CONVENING AUTHORITY

Copy to:
(NOTE: Other commands member is assigned to,
COMNAVSAFCEN, NAVLEGSVCOFF, etc.)

(* = AS APPROPRIATE)

PRIVACY ACT STATEMENTS FOR INJURED SERVICEMEMBERS
IN JAG MANUAL INVESTIGATIONS
FOR LOD/MISCONDUCT AND CLAIMS PURPOSES

NAME: _____ RANK/RATE: _____

ACTIVITY: _____ UNIT: _____ TEL. NO: _____

Today, _____, 19___, I acknowledge that I have received the following advisement statements from _____.

PRIVACY ACT STATEMENT

This statement is provided in compliance with the provisions of the Privacy Act of 1974 (Public Law 93-579) which requires that Federal agencies must inform individuals who are requested to furnish personal information about themselves as to certain facts regarding the information requested below.

1. Authority. 5 U.S.C. § 301; 10 U.S.C. §§ 972(5), 1201-1221, 2733, 2734, 2734a, 2737, 5131-5153, 5947, 6148, 7205, 7622-7623; 28 U.S.C. §§ 1346, 2671-2680; 31 U.S.C. §§ 71-75, 240 243, 951-953; 37 U.S.C. § 802; 38 U.S.C. § 105; 42 U.S.C. §§ 2651-2653; 44 U.S.C. § 3101; 49 U.S.C. § 1901.

2. Principal Purposes. The information which will be solicited is intended principally for the following purposes:

a. Determinations on the status of personnel regarding entitlements to disability pay, disability benefits, severance pay, retirement pay, increases of pay for longevity, survivor's benefits, involuntary extensions of enlistments, dates of expiration of active obligated service, and accrual of annual leave;

b. determinations on disciplinary or punitive action;

c. determinations on liability of personnel for losses of, or damage to, public funds or property;

d. adjudication, pursuit, or defense of claims for or against the Government or among private parties;

e. other determinations, as required, in the course of naval administration;

f. public information releases; and

g. evaluations of procedures, operations, material, and designs by the Navy and contractors, with a view to improving the efficiency and safety of the Department of the Navy.

3. Routine Uses. In addition to being used within the Departments of the Navy and Defense for the purposes indicated above, records of investigations are routinely furnished, as appropriate, to the Department of Veterans' Affairs for use in determinations concerning entitlement to veterans and survivors benefits; to Servicemen's Group Life Insurance administrators for determinations concerning payment of life insurance proceeds; to the U.S. General

Accounting Office for purposes of determinations concerning payment of relief of accountable personnel from liability for losses of public funds and related fiscal matters; and to the Department of Justice for use in litigation involving the Government. Additionally, such investigations are sometimes furnished to agencies of the Department of Justice and to State or local law enforcement and court authorities for use in connection with civilian criminal and civil court proceedings. The records of investigations are provided to agents and authorized representatives of persons involved in the incident, for use in legal or administrative matters. The records are provided to contractors for use in connection with settlement, adjudication, or defense of claims by or against the Government, and for use in design and evaluation of products, services, and systems. The records are also furnished to agencies of the Federal, State, or local law enforcement authorities, court authorities, administrative authorities, and regulatory authorities, for use in connection with civilian and military criminal, civil, administrative, and regulatory proceedings and actions.

4. Mandatory/Voluntary Disclosure/Consequences of Refusing to Disclose. Disclosure is voluntary. You are advised that you are initially presumed to be entitled to have the (personal determinations) (disciplinary determinations) (pecuniary liability to the Government) (medical claims liability assignment) listed above resolved in your favor, but the final determination will be based on all the evidence in the investigative record. If you do not provide the requested information, you will be entitled to a favorable determination if the record does not contain sufficient evidence to overcome the presumption in your favor. If the completed record does contain sufficient evidence to overcome the presumption in your favor, however, your election not to provide the requested information possibly could prevent the investigation from obtaining evidence which may be needed to support a favorable determination.

_____/_____
Signature Date

JAGMAN, § 0306 Warning

NOTE: If the injured party is the subject of the investigation which involves a disease or injury he incurred, the following should be acknowledged.

I have been advised that under section 0306 of the JAG Manual, if the matter under investigation involves disease or injury that I have incurred, I cannot be required to sign any statement relating to the origin, incurrence or aggravation of a disease or injury that I may have acquired.

NOTE: Attach article 31 warning if servicemember is suspected of committing an offense under the UCMJ.

_____/_____
Signature Date

PRIVACY ACT STATEMENTS FOR WITNESS
IN JAG MANUAL INVESTIGATION
FOR LOD/MISCONDUCT AND CLAIMS PURPOSES

NAME: _____ RANK/RATE: _____

ACTIVITY: _____ UNIT: _____ TEL. NO: _____

Today, _____, 19___, I acknowledge that I have received the following advisement statements from _____.

PRIVACY ACT STATEMENT

This statement is provided in compliance with the provisions of the Privacy Act of 1974 (Public Law 93-579) which requires that Federal agencies must inform individuals who are requested to furnish personal information about themselves as to certain facts regarding the information requested below.

1. Authority. 5 U.S.C. § 301; 10 U.S.C. §§ 972(5), 1201-1222, 2733, 2734-2734b, 2737, 5947, 6148, 7205, 7622-7623; 28 U.S.C. §§ 1346, 2671-2680; 31 U.S.C. §§ 71-75, 82a, 89-92, 95a, 240-243, 951-953; 37 U.S.C. § 802; 38 U.S.C. § 105; 42 U.S.C. §§ 2651-2653; 44 U.S.C. § 3101; 49 U.S.C. § 1901.

2. Principal Purposes. The information which will be solicited is intended principally for the following purposes:

a. Determinations on the status of personnel regarding entitlements to pay during disability, disability benefits, severance pay, retirement pay, increases of pay for longevity, survivor's benefits, involuntary extensions of enlistments, dates of expiration of active obligated service, and accrual of annual leave;

b. determinations on disciplinary or punitive action;

c. determinations on liability of personnel for losses of, or damage to, public funds or property;

d. evaluations of petitions, grievances, and complaints;

e. adjudication, pursuit, or defense of claims for or against the Government or among private parties;

f. other determinations, as required, in the course of naval administration;

g. public information releases; and

h. evaluations of procedures, operations, material, and designs by the Navy and contractors, with a view to improving the efficiency and safety of the Department of the Navy.

3. Routine Uses. In addition to being used within the Departments of the Navy and Defense for the purposes indicated above, records of investigations are routinely furnished, as appropriate, to the Department of Veterans' Affairs for use in determinations concerning entitlement to veterans and survivors benefits; to Servicemen's Group Life Insurance administrators for determinations concerning payment of life insurance proceeds; to the U.S. General Accounting Office for purposes of determinations concerning payment of relief of accountable personnel from liability for losses of public funds and related fiscal matters; and to the Department of Justice for use in litigation involving the Government. Additionally, such investigations are sometimes furnished to agencies of the Department of Justice and to State or local law enforcement and court authorities for use in connection with civilian criminal and civil court proceedings. The records of investigations are provided to agents and authorized representatives of persons involved in the incident, for use in legal or administrative matters. The records are provided to contractors for use in connection with settlement, adjudication, or defense of claims by or against the Government, and for use in design and evaluation of products, services, and systems. The records are also furnished to agencies of the Federal, State, or local law enforcement authorities, court authorities, administrative authorities, and regulatory authorities, for use in connection with civilian and military criminal, civil, administrative, and regulatory proceedings and actions.

4. Mandatory/Voluntary Disclosure, Consequences of Disclosure. Disclosure is voluntary. If you do not provide the requested information, any determinations or evaluations made as a result of this investigation will be made on the basis of the evidence that is contained in the investigative record.

_____/_____

Signature Date

ARTICLE 31 WARNING

If, in the course of a JAG Manual investigation, any person is suspected of committing an offense under the UCMJ, the person should be advised of his rights under Article 31, UCMJ -- utilizing this form -- before interviewing or questioning that person.

I have been advised that I may be suspected of the offense of _____ and that:

a. I have the right to remain silent. ( ) Init.

b. Any statements I do make may be used as evidence against me in trial by court-martial. ( ) Init.

c. I have the right to consult with lawyer counsel prior to any questioning. This lawyer counsel may be a civilian lawyer retained by me at my own expense, a military lawyer appointed to act as my counsel without cost to me, or both. ( ) Init.

d. I have the right to have such retained civilian lawyer and/or appointed military lawyer present during this interview. ( ) Init.

e. I have the right to terminate this interview at any time. ( ) Init.

WAIVER OF RIGHTS

I further certify and acknowledge that I have read the above statement of my rights and fully understand them, and that: ( ) Init.

a. I expressly desire to waive my right to remain silent. ( ) Init.

b. I expressly desire to make a statement. ( ) Init.

c. I expressly do not desire to consult with either a civilian lawyer retained by me or a military lawyer appointed as my counsel without cost to me prior to any questioning. ( ) Init.

d. I expressly do not desire to have such a lawyer present with me during this interview. ( ) Init.

e. This acknowledgement and waiver of rights is made freely and voluntarily by me, and without any promises or threats having been made to me or pressure or coercion of any kind having been used against me. ( ) Init.

_____/_____ _____/_____
(Witness' Signature) (Date) (Signature) (Date)

Understanding the above, I wish to make the following statement (attach continuation page, if necessary):

REPORT OF PROCEEDINGS UNDER SECTION 0815a(3)
OF THE JAG MANUAL

I, _____, have been afforded a hearing which included the following advice and by initialing opposite each item I confirm that it was explained to me and that I fully understand the contents of each one:

___ 1. I was advised of and signed a copy of the Privacy Act statement.

___ 2. That questions have arisen concerning whether or not my injury/disease, sustained or discovered on _____19___, was incurred in the line of duty and/or as the result of my own misconduct.

___ 3. That, in the event such injury/disease is determined to have been incurred not in the line of duty and/or as a result of my own misconduct, I will be required to serve for an additional period beyond my present enlistment or to make up for the duty time lost.

___ 4. That lost duty time will not count as creditable service for pay entitlement purposes.

___ 5. That I may be required to forfeit some pay (where absence from duty in excess of one day immediately follows intemperate use of liquor or habit-forming drugs).

___ 6. That, if I am permanently disabled, I may be barred from receiving disability pay or allowances, as well as veterans' benefits.

___ 7. That I have been given the opportunity to inspect the complete investigative report including all the enclosures and endorsements thereto; and to discuss said report with a disinterested person of my choosing (chaplain, lawyer, supervisor, or anyone else not acting for the Government in the investigation).

___ 8. That I may not be required to give information or a statement relating to the origin, incurrence, or aggravation of any disease/injury that I have suffered.

___ 9. That I have been given a full opportunity and a reasonable time to present any evidence, statements, letters, or other matters in explanation, refutation, rebuttal, or otherwise on my behalf respecting my injury/disease.

(Items 1 through 5 below need only be completed if the individual is suspected of an offense which is punishable under the Uniform Code of Military Justice. The fact that the individual is suspected of having incurred his injury/disease as the result of his own misconduct and/or not in the line of duty does not necessarily mean that he is suspected of having committed an offense).

I further certify and acknowledge by my initials opposite each item that I have been advised as follows:

___ 1. That I am suspected of the following offense(s) which is (are) punishable under the UCMJ: _____

_____

_____

_____

___ 2. That I have the right to remain silent.

___ 3. That any statement I do make may be used as evidence against me in a trial by court-martial.

___ 4. That I have the right to consult with a lawyer prior to any questioning. This lawyer may be a civilian lawyer retained by me at my own expense or, if I wish, Navy or Marine Corps authority will appoint a military lawyer to act as my counsel without cost to me, or both.

___ 5. That I have the right to have such retained civilian lawyer and/or appointed military lawyer present during the interview.

___ 6. That I have the right to terminate my interview.

I do/do not choose to submit evidence in refutation, explanation, rebuttal, or otherwise respecting the incurrence of my injury/disease. (If matters are submitted, they should be attached as enclosures to the investigative report).

_____
Signature

_____
Witness

_____
Date

CHECKLISTS FOR JAG MANUAL INVESTIGATIONS NOT REQUIRING A HEARING

General. This outline is designed to be a concise summary for the more common JAG Manual investigations that are required to be conducted. The first part is a general checklist designed to ensure that the JAG Manual investigation not requiring a hearing is administratively complete. The next part is a brief documents checklist, while the third part is a checklist of information for shipboard investigations (although it is intended specifically for shipboard investigations, it is a good indicator of the extent to which a thorough investigation may be taken). The final part consists of checklists for specific types of incidents.

GENERAL CHECKLIST FOR JAG MANUAL INVESTIGATIONS NOT REQUIRING A HEARING

In writing or reviewing a JAG Manual investigation, the following should be checked or examined:

1. Appointing order (if written)
   - a. Convened by commanding officer, or officer in charge, or delegate
   - b. Name(s) of member(s)
   - c. Seniority rule for member(s)
   - d. Scope of inquiry defined, including sections in JAG Manual outlining special investigative requirements
   - e. Whether opinions/recommendations required
   - f. Deadlines addressed and the need to request extensions of time
   - g. Warnings under article 31, injury/disease, Privacy Act
   - h. Assistance available
2. Investigative report
   - a. Heading and copies
     - (1) "From" command
     - (2) "To" JAG
     - (3) "Via" and "Copy to" addressees identified (JAGMAN, §§ 0209-0211)
     - (4) Advance copies (JAGMAN, § 0211c)
     - (5) Sufficient copies, complete with enclosures, for convening and reviewing authorities and JAG (JAGMAN, §§ 0209, 0211)
     - (6) Xerox copies legible
     - (7) All necessary documents/exhibits/enclosures attached
     - (8) Investigation properly classified or unclassified (JAGMAN, § 0209c)
     - (9) All persons involved in incident (e.g., witnesses) properly identified (JAGMAN, § 0901a)
   - b. Preliminary statement
     - (1) Identify nature of investigation and reference appointing order

(2) Limited participation of any member(s)

(3) Difficulties encountered in the investigation

(4) Conflicts in evidence and reasons for reliance on particular information, if any

(5) Reasons for any delays

(6) Failure to advise persons of article 31, Privacy Act, injury/disease, or "party" rights

(7) Assistance received in conducting the investigation

c. Findings of fact

(1) Narrative or separate facts

(2) Evaluation of evidence or lack of evidence (negative finding of fact)

(3) Special factfinding requirements of chapters XIII, IX and XX of the JAG Manual addressed

(4) Specific as to times, places, and events

(5) Reference enclosure(s) to support each finding of fact

(6) Person(s) connected with the incident identified by grade or rate, service number, organization, occupation or business, and residence

(7) All factual evidence, including investigating officer's personal observations, considered and included in the report as enclosure(s) and finding(s) of fact

d. Opinions

(1) Logical inferences from facts

(2) Reference findings of fact to support each enclosure

(3) Properly labeled

(4) Those required by appointing order or JAG Manual addressed and any others considered appropriate

e. Recommendations

(1) Logical and consistent with opinions and findings of fact

(2) Those required by appointing order or the JAG Manual addressed and any others considered appropriate

(3) Corrective, disciplinary or administrative action

(4) Signed, sworn change sheet enclosed if court-martial recommended

(5) Draft of punitive letter of reprimand if recommended

f. Enclosures

(1) Checklist at appendix D-3 of this text

(2) All evidence

(3) Signed, sworn witness statement or summary of witness' oral statement

(4) Authenticated copies of documents

(5) Each statement, document or exhibit a separate enclosure

(6) Separately numbered

g. Endorsements

(1) Convening authority and subsequent addressees set forth action taken

(2) State relevant disciplinary, administrative or operational information known at time investigation reviewed that is not contained in record or prior endorsements

(3) Approve/disapprove/modify proceedings, facts, opinions, and recommendations in record and prior endorsements

DOCUMENTS CHECKLIST FOR JAG MANUAL INVESTIGATIONS NOT REQUIRING A HEARING

1. Appointing order, if necessary
2. Statement of doctor and/or copies of medical records as to extent of injuries (copies of private medical bills if reimbursement may be claimed)
3. Report of autopsy and, where available, autopsy protocol in death cases
4. Report of coroner's inquest or medical examiner's report in death cases
5. Laboratory reports, if any
6. Copy of reservist's orders, if applicable
7. Statements or affidavits of witnesses or others
8. Statement of investigating officer, if applicable
9. Photographs and/or diagrams properly labeled
10. Copy of local regulations, if applicable
11. Exhibit material to support IO's findings and opinions
12. Signed original Privacy Act statement for each witness

CHECKLIST FOR SHIPBOARD INVESTIGATIONS

1. Personnel
   a. Allowance
   b. Manning level
   c. Stability
   d. General personnel appearance
   e. Safety hazards
   f. Any history of accidents for person(s) involved
2. Equipment
   a. History of failures
   b. Proper design or jury rigged
   c. COSAL, open purchase, substitute
   d. Complete operating instructions
   e. Safety precautions
   f. Properly labeled: Compartments, piping, ducts
   g. Piping systems
   h. PMS/MDCS coverage, documentation
   i. Clocks synchronized, time-check log maintained and, if appropriate, any time check in affected spaces
   j. Communication circuits adequate: IMC and other intercom systems, sound-powered phones
   k. Age of ship in years
   l. Firefighting and damage control equipment and techniques used to control or reduce damage, operative or inoperative, effective or ineffective
3. Location of accident (where most damage occurred)
   a. Compartment number
   b. Compartment noun name
   c. In what compartment did primary accident cause occur?

4. Logs, records and reports - Review and check for corrective action taken/contemplated

   a. Deck log

   b. Sonar logs

   c. Watch, quarter and station bill

   d. Navigation center log

   e. Engineering smooth log

   f. Engine bell book

   g. Engineering operating logs

   h. Damage control closure log

   i. Tag-out log

   j. Standing orders: Unit commander, commanding officer, engineering officer, navigator

   k. Night orders: Unit commander, commanding officer, engineering officer, navigator

   l. Training records: Shipboard, plan of the day, team, watch qualification, equipment qualification, ship qualification, individual personnel

   m. Quartermaster's notebook

   n. Radio log

   o. Personnel records

   p. Ship's operating schedule

   q. INSURV, command inspections, combined trials

   r. Monthly hull reports, 2000 reports, zone inspections

   s. Significant outstanding CASREPTS

   t. Machinery out-of-commission logs

   u. Ships procedures adequate, followed

5. Morale

   a. Liberty/leave

   b. Number of duty sections/watch sections

c. Working hours, as indicated in plan of the day and deck logs

d. Habitability (air conditioning, ventilation, laundry facilities, lighting system, general housekeeping, heads, living quarters, working spaces, recreational spaces)

6. Condition of ship's boats

7. Availability of shore services

   a. Electricity

   b. Shore steam

   c. Potable and firefighting water

   d. High pressure air

8. Illumination

   a. Exterior

   b. Interior

   c. At scene

9. Full description of damage sustained to ship and equipment, including:

   a. Material costs to Navy

   b. Navy manhours required to repair damage

   c. Off-ship labor costs

   d. Outside assistance costs (drydock, etc.)

10. Primary and contributing causes

SPECIAL JAG MANUAL INVESTIGATION CHECKLISTS

General. In addition to those items listed previously, the following checklists should be consulted in appropriate JAG Manual investigations, as applicable.

APPENDIX

D-5(2)	LOD/Misconduct
D-5(6)	Claims for/against Government
D-5(7)	Fires
D-5(11)	Flooding
D-5(13)	Collision
D-5(15)	Grounding
D-5(18)	Article 138, UCMJ, complaints

1. Injured person's/deceased's/witness' identifying data

   a. Name

   b. Sex and age

   c. Military

      (1) Grade or rate

      (2) Service number, if applicable

      (3) Reguiar or Reserve

      (4) Organization

      (5) Armed force

      (6) Experience or expertise, i.e., training, licenses, etc.

   d. Civilian

      (1) Title

      (2) Business or occupation

      (3) Address

      (4) Experience or expertise, i.e., training, licenses, etc.

2. Injury/death

   a. Date/time/place of occurrence

   b. Nature/extent of injury including description of body parts injured

   c. Place, extent, and cause of hospitalization of injured/deceased

   d. Status of injured/deceased vis-a-vis leave, liberty, unauthorized absence (UA), active duty, active duty for training, or inactive duty for training at time of injury/death

   e. Whether any UA status at time of injury materially interfered with his military duty

   f. Servicemember unable to perform duties for over 24 hours

   g. Servicemember's injury possibly permanent

h. Training

(1) Formal/on the job

(2) Adequacy

(3) Engaged in tasks different from those in which trained

(4) Engaged in tasks too difficult for skill level

(5) Emergency responses/reaction time

i. Supervision

(1) Adequate/lax

(2) Absent

j. Physical factors

(1) Tired

(2) Working excessive hours

(3) Hungry

(4) Medication prescribed or unauthorized

(5) Ill or experiencing dizziness, headaches or nausea

(6) Suffering from exposure to severe environmental extremes

(7) Periods of alcohol or habit-forming drug impairment

(a) Individual's general appearance, behavior, rationality of speech, and muscular coordination

(b) Quantity and nature of intoxicating agent used

(c) Period of time in which consumed

(d) Results of blood, breath, urine or tissue tests for intoxicating agents

(e) Lawfulness of intoxicating agent

k. Mental factors

(1) Emotionally upset (angry, depressed, moody, tense)

(2) Inattention due to preoccupation with unrelated matters

(3) Motivation

(4) Knowledge of standard procedures and adherence to them

(5) Mental competence

(a) Presumption of sanity

(b) Attempted suicide (reasonable, adequate motive or not)

(c) Mental disease or defect

l. Design factors

(1) Equipment's condition, e.g., vehicle's mechanical condition

(2) Operating unfamiliar equipment/controls

(3) Operating equipment with controls that function differently than expected due to lack of standardization

(4) Unable to reach all controls from his work station and see and hear all displays, signals and communications

(5) Provided insufficient support manuals

(6) Using support equipment which was not clearly identified and likely to be confused with similar but noncompatible equipment

m. Environmental factors

(1) Harmful dusts, fumes, gases without proper ventilation

(2) Working in a hazardous environment without personal protective equipment or a line-tender

(3) Unable to hear and see all communications and signals

(4) Exposed to temperature extremes that could degrade efficiency or cause faintness, heart stroke or numbness

(5) Suffering from eye fatigue due to inadequate illumination or glare

(6) Visually restricted by dense fog, rain, smoke or snow

(7) Darkened ship lighting conditions

(8) Exposed to excessive noise/vibration levels

n. Personnel protective equipment

(1) Using required equipment for the job, e.g., seatbelts, safety glasses

(2) Not using proper equipment due to lack of availability (identify)

(3) Not using proper equipment due to lack of comfort or "sissy" connotations (identify)

(4) Using protective equipment that failed and caused additional injuries (identify)

o. Hazardous conditions

(1) Inadequate/missing guards, handrail, ladder treads, protective mats, safety devices/switches, skid proofing

(2) Jury-rigged equipment

(3) Utilization of improper noninsulated tools

(4) Incorrectly installed equipment

(5) Defective/improperly maintained equipment

(6) Slippery decks or ladders, obstructions

(7) Improper clothing (leather heels, conventional shoes vice steel-toed shoes, loose-fitting clothes, no shirt, conventional eyeglasses vice safety glasses)

3. Adverse LOD/Misconduct determination requires hearing under JAGMAN, § 0815a(3)

4. No LOD/Misconduct determination in death cases

1. Names/addresses of witnesses/passengers, if any

2. Names, grades, organizations, addresses and ages of all civilian/military personnel injured or killed

3. Claim prospects and name and address of claimant or potential claimant

4. Owner of damaged property, if any

5. Basis of claimant's alleged right to file a claim, e.g., owner, renter, etc.

6. Scope-of-employment status of Government employee(s)

7. Description of government property involved and nature and amount of damage, if any

8. Nature and extent of injuries, degree of permanent disability, prognosis, period of hospitalization, quality of medical care provided

9. Name and address of attending physician and hospital

10. Amount of medical, hospital and burial expenses actually incurred

11. Occupation and wage or salary of civilians injured or killed

12. Names, addresses, ages, relationships and extent of dependency of survivors of any person fatally injured

13. Violation of state or Federal statutes, local ordinances or installation regulations by a party

14. Police investigation results

15. Arrests made, or charges preferred, and result of any trial or hearing in civil or military courts

16. Comments and recommendations of investigating officer as to:

    a. Amount of damages, loss, or destruction; and

    b. extent of liability.

17. Statements in convening order and investigative report that the investigation has been prepared for the purpose of assisting attorneys representing the interests of the United States in this matter

FIRE

1. Items in addition to the Forces Afloat Accident/Near Accident Report (OPNAV Form 3040/1) and general checklist

   a. Location of fire

      (1) Compartment noun name

      (2) Compartment number

   b. Class of fire (A-B-C-D)

   c. Time fire detected

   d. Means of detection

   e. Time fire started (estimated)

   f. Time fire alarm sounded

   g. Time fire located

   h. Time started fighting fire

   i. Time general quarters sounded

   j. Time assistance was requested

   k. Time assistance arrived

   l. Time boundaries set

   m. Time fire extinguished

   n. Fire did/did not reflash

   o. Extinguishing agents used (indicate effectiveness)

      (1) Fire main water (submarines: trim/drain system water)

      (2) Light water

      (3) Foam (portable/installed)

      (4) CO2 (portable/installed)

      (5) PKP

      (6) Steam smothering

      (7) Flooding

      (8) Other

p. Extinguishing equipment (indicate availability and operability)

(1) Pumps (portable/installed) size and number (quantity)

(2) Nozzles/applicators (LC and HC)

(3) Foam maker

(4) Vehicles

(5) Eductors

(6) Type and size of hoses

(7) Other

q. Firefighting organization used

(1) Nucleus fire party

(2) Repair party (condition I or II watches)

(3) Inport fire party

(4) Outside assistance (explain)

(5) Fire party/repair locker personnel assigned in accordance with appropriate publications, ships organization and regulations manual, battle bill, etc.

(6) Personnel duties and responsibilities assigned in writing

(7) Fire/repair locker organization charts properly maintained

(8) Damage control system diagrams up to date and available for use

(9) Communications effectively established between control stations

r. Protective equipment used (Indicate availability, operability, and effectiveness)

(1) OBAs

(2) EAB masks

(3) Fire suits

(4) Boots

(5) Gloves

(6) Helmets

(7) Other

s. Alarm system

(1) CO2 flooding

(2) High temperature

(3) Other

t. Fire contained/spread

u. How it spread

(1) Through hot deck/bulkhead

(2) Through hole in deck/bulkhead

(3) By explosion (type)

(4) Through vent ducts

(5) By liquid flow

(6) By wind

(7) Other (explain)

v. Electric power in area

w. Jettison bill

(1) Current

(2) Used

x. If ship underway, course changes (snorkeling, surfaced)

y. Automatic vent closures

z. Magazines flooded

aa. Operational problems

(1) OBAs/canisters effective

(2) EABs effective

(3) Sufficient water and pressure

(4) Flooding problems

(5) Drainage problems (installed/portable)

(6) Desmoking problems (installed/portable)

(7) Lighting (explain)

(8) Adequate equipment readily available

(9) Adequate intra-ship communications

(10) Other (explain)

bb. Material discrepancies of any equipment used (list and explain)

cc. Determine all heat/ignition sources possible then eliminate those that are improbable

dd. Operating personnel qualified in accordance with PQS requirements for the systems operation and maintenance

FLOODING

1. Items in addition to the Forces Afloat Accident/Near Accident Report (OPNAV Form 3040/1) and the general checklist

   a. Location of flooding

      (1) Compartment noun name

      (2) Compartment number

   b. Type of flooding (fresh or salt water, oil, JP-5, etc.)

   c. Source of flooding (internal or external)

      (1) Pipe rupture or valve failure

      (2) Tank rupture/hull rupture/shaft seal failure

      (3) Open to sea through designed hull penetration

      (4) Other

   d. Time flooding was detected

   e. Flooding detection method

   f. Time duty emergency party called away

   g. Time general quarters sounded

   h. Time assistance requested (from whom)

   i. Time assistance arrived

   j. Appropriate equipment used to dewater

   k. Dewatering equipment used (effective, available, operative)

   l. Time required to dewater

   m. Time flooding was stopped or under control

   n. Time space was last inspected prior to flooding

   o. Cause of flooding

   p. Flooding contained within set boundaries

   q. Amount of flooding (effect on list, trim or depth control)

r. Damage (list all items)

(1) Material costs

(2) Labor costs

(3) Outside assistance costs

s. Injuries (list and submit NAVJAG Form 5800/15)

t. Ship's procedures and safety precautions

1. Items in addition to the Forces Afloat Accident/Near Accident Report (OPNAV Form 3040/1) and the general checklist

   a. Tactical situation existing at time of collision

   b. Personnel manning and qualification

      (1) CDO

      (2) OOD/diving officer

      (3) Helmsman, planesman

      (4) Lookouts

      (5) CIC team (including sonar team, fire control tracking party and navigation team)

      (6) Phone talkers

      (7) Location of conning officer

      (8) Line handlers

      (9) Personnel qualified in accordance with PQS requirements for the system operation and maintenance

   c. Material factors

      (1) Radar

      (2) Sonar

      (3) Navigational lights

      (4) Periscopes

      (5) Compasses

      (6) Ship control systems

      (7) Ballast, blow and vent systems

      (8) UNREP special equipment

   d. Communication factors

      (1) Radio

      (2) Telephone

(3) Oral (audibility/understanding)

(4) Signal systems

(5) Interferences (e.g., background noise level)

e. Rules-of-the-road factors

f. Operating area factors

(1) Adherence to op area boundaries

(2) Existence of safety lanes

(3) Depth constraints

(a) Depth separation

(b) Depth changes

(c) Out-of-layer operations

g. Environment and visibility

h. Unique local practices

i. Assistance factors

(1) Pilot - experience/language barrier

(2) Tugs

(3) Line handlers

j. For collisions in restricted waters or with fixed geographic features (including buoys) refer also to the checklist for groundings

1. Items in addition to the Forces Afloat Accident/Near Accident Report (OPNAV Form 3040/1) and the general checklist

   a. Tactical situation

   b. Navigational factors

      (1) Charts (available/correct/in use)

      (2) Sailing directions/coast pilot

      (3) Fleet guide

      (4) Tide/current condition (computed/displayed/recorded)

      (5) Track laid out/DR plot indicated/fixes plotted/track projected

      (6) Notices to mariners

      (7) Compass errors/application

      (8) Navigation fix errors

      (9) Navigation reset errors

      (10) Depth of water

      (11) Type of bottom

      (12) Navigation reference points coordinated (radar/visual, points logged/plotting teams coordinated)

   c. Material factors

      (1) Radar

      (2) Fathometer

      (3) Compasses

      (4) Ship's depth indicators

      (5) Ship's speed log

      (6) Alidades, bearing circles, peroruses, periscopes, bearing repeaters

      (7) Sounding lead

      (8) Ship's draft/submerged keel depth

(9) Ship's anchor

(10) Ship's control system

d. Personnel factors (posted/qualified)

(1) CDO

(2) OOD

(3) Diving officer

(4) Navigator

(5) Piloting officer

(6) Fathometer operator

(7) Lookouts

(8) Helmsman

(9) Planesman

(10) Bearing takers

(11) CIC team

(12) Leadsman

(13) Line handlers

(14) Local pilot

(15) Location of conning officer

(16) Personnel qualified in accordance with PQS requirements for the systems operation and maintenance

e. Communications factors

(1) Radio

(2) Telephone

(3) IC systems

(4) Oral (audibility/understanding)

f. Environment

(1) Light conditions

(2) Visibility

(3) Wind, current, tide condition (actual vs. predicted)

g. Assistance factors (tugs)

h. Organizational factors

(1) Ship organization directives

(2) Watch organization directives

i. Action taken after grounding

(1) Ship secured to prevent further damage

(a) Anchors kedged out

(b) Ballast shifted

(c) Cargo shifted

(2) Draft readings/soundings taken

(3) Damage surveyed

(4) Excess machinery secured

ARTICLE 138, UCMJ COMPLAINTS
(Checklist for OEGCMJ)

1. Original complaint or certified copy received

2. Complaint is complete

   a. Includes all documents submitted by complainant and intermediate endorsers

   b. Signed and sworn by complainant

   c. Cites Article 138, UCMJ

   d. Addressed through respondent and appropriate chain of command

   e. Clearly identifies respondent (and only one respondent) by name and title

   f. Reflects complainant has made a prior request for redress from respondent which was denied (request and respondent's response should be enclosures to complaint)

   g. Respondent has Article 15, UCMJ, power over complainant

   h. Facts and circumstances giving rise to alleged wrong(s) are detailed and available supporting information included

   i. Personal detriment or harm suffered from alleged wrong(s) detailed

   j. Specific relief requested

   k. Requested relief may be granted in command channels

3. Complaint lies within scope of Article 138, UCMJ

4. Complaint is timely, or delay justified

5. If complaint is not cognizable under Article 138, UCMJ, OEGCMJ shall return it to complainant advising him of alternative avenues of redress, e.g., article 1106, U.S. Navy Regulations, 1973, complaint or petition to the Board for Correction of Naval Records. (Where a complaint is not cognizable under Art. 138, UCMJ, but may be considered under art. 1106, U.S. Navy Regulations, 1973, and redesignation will not adversely affect complainant's interests, the OEGCMJ may redesignate the complaint and treat it on its merits rather than returning it to the complainant for redesignation and resubmission.)

6. If the complaint is cognizable under article 138, but otherwise defective, OEGCMJ will:

   a. Return complaint and advise complainant of nature of defect

   b. Give complainant 30 days to cure defect

   c. Advise complainant that complaint will be acted on despite defect, only if complainant resubmits his complaint within thirty days and so requests

7. If redress is denied for failure to cure improper joinder or lack of timeliness, OEGCMJ must report to SECNAV

8. Complaint and associated materials

   a. Document facts and circumstances of complaint

   b. Permit OEGCMJ to make an informed decision whether to grant relief

   c. Permit adequate review by SECNAV

9. Ensure complainant receives copies of all endorsements, enclosures, and adverse matters added to his complaint (including results of any inquiries ordered by OEGCMJ) and that record reflects that complainant received such materials

10. If relief is granted, include documentation of relief granted or that action to effect relief has been directed

11. Advise complainant of OEGCMJ's action on complaint including specific findings as to which complaints were determined to have merit and which were found to be without merit

12. OEGCMJ personally signed report to SECNAV setting forth action on complaint

13. Include in the report to SECNAV the entire file, including original/ certified copy of complaint, all information considered by OEGCMJ, and the action of OEGCMJ (Marine Corps activities forward the report via CMC)

LOSS OF PUBLIC MONIES

1. The use of Navy Regional Finance Center (NRFC) professional judicators is highly recommended for reviewing disbursing records when investigating disbursing losses. The use of these teams and the results of their findings should be included in the JAG Manual investigation write-up.

2. The ship's Cash Verification Board should make a written report of the results of their recount that verified the shortage.

3. All information required by section 041382, NAVCOMPT Manual, except 3(11), should be covered in the JAG Manual investigation even though it may be redundant to any official letter for relief of liability.

4. Specific mention should be made that the provisions of section 0909c(1), JAGMAN have been covered. This is not meant to exclude the other requirements of section 0909, JAGMAN.

5. Reports of deficits or excess of public funds must be made in accordance with U.S. Navy Regulations and section 041380, NAVCOMPT Manual.

NOTE: Appendix D (Program for Disbursing Reviews Afloat) to COMNAVSURFPACINST 4400.1 may be modified to provide an audit checklist when professional auditors (1, above) are not available.

PART I - STANDARDS OF FAIRNESS

1. No finance charge contracted for, made, or received under any contract shall be in excess of the charge which could be made for such contract under the law of the place in which the contract is signed in the United States by the servicemember. In the event a contract is signed with a United States company in a foreign country, the lowest interest rate of the State or States in which the company is chartered or does business shall apply. However, determination of interest rates applicable to loans made by overseas military banking facilities to DOD personnel and others authorized to use military banking facilities will be deferred to the Treasury Department.

2. No contract or loan agreement shall provide for an attorney's fee in the event of default unless suit is filed in which event the fee provided in the contract shall not exceed 20% of the obligation found due. No attorney fees shall be authorized if member is a salaried employee of the holder.

3. In loan transactions, defenses which the debtor may have against the original lender or its agents shall be good against any subsequent holder of the obligation. In credit transactions, defenses against the seller or its agent shall be good against any subsequent holder of the obligation provided that the holder had actual knowledge of the defense or under conditions where reasonable inquiry would have apprised him of this fact.

4. The debtor shall have the right to remove any security for the obligation beyond state or national boundaries if member or members of the family moves beyond such boundaries under military orders and notifies the creditor in advance of the removal, of the new address where the security will be located. Removal of the security shall not accelerate payment of the obligation.

5. No late charge shall be made in excess of 5% of the late payment, or $5., whichever is the lesser amount. Only one late charge may be made for any tardy installment. Late charges will not be levied where an allotment has been timely filed but payment of the allotment has been delayed.

6. The obligation may be paid in full at any time or through accelerated payments of any amount. There shall be no penalty for prepayment and in the event of prepayment that portion of the finance charges which have inured to the benefit of the seller or creditor shall be prorated on the basis of the charges which would have been ratably payable had finance charges been calculated and payable as equal periodic payments over the terms of the contract and only the prorated amount to the date of prepayment shall be due. As an alternative the "Rule of 78" may be applied, in which case its operation shall be explained in the contract.

7. No charge shall be made for an insurance premium or for finance charges for such premium unless satisfactory evidence of a policy, or insurance certificate where state insurance laws or regulations permit such certificates to be issued in lieu of a policy, reflecting such coverage has been delivered to the debtor within 30 days after the specified date of delivery of the item purchased or the signing of a cash loan agreement.

8. If the loan or contract agreement provides for payments in installments, each payment other than the down payment, shall be in equal or substantially equal amounts, and installments shall be successive and of equal or substantially equal duration.

9. If the security for the debt is repossessed and sold in order to satisfy or reduce the debt, the repossession and resale will meet the following conditions: (a) the defaulting purchaser will be given advance written notice of the intention to repossess; (b) following repossession, the defaulting purchaser will be served a complete statement of members obligations and adequate advance notice of the sale; (c) member will be permitted to redeem the item by payment of the amount due before the sale, or in lieu thereof submit a bid at the sale; (d) there will be a solicitation for a minimum of three sealed bids unless sold at auction; (e) the party holding the security, and all agents thereof, are ineligible to bid; (f) the defaulting purchaser will be charged only those charges which are reasonably necessary for storage, reconditioning and resale and (g) member shall be provided a written detailed statement of members obligations, if any, following the resale and promptly refunded any credit balance due member, if any.

10. A contract for personal goods and services may be terminated at any time before delivery of the goods or services without charge to the purchaser. However, if goods made to the special order of the purchaser result in pre-production costs, or require preparation for delivery, such additional costs will be listed in the order form or contract. No Termination charge will be made in excess of this amount. Contracts for delivery at future intervals may be terminated as to the undelivered portion, and the purchaser shall be chargeable only for that proportion of the total cost which the goods or services delivered bear to the total goods and services called for by the contract.

GOVERNMENT PRINTING OFFICE

PART II - FULL DISCLOSURE

A copy of this form or its equivalent should be provided to the servicemember in advance of executing the contract, and must be submitted with requests for debt processing assistance.

A. IDENTIFICATION

Date:

1. Purpose of loan or purchase	2. Security for loan
3. Borrower's name and address _____ _____	4. Creditor's name and address _____ _____
5. Name and address of creditor (if known) to whom the obligation is or will be payable, if other than above. _____ _____	6. Has creditor any financial ties with, or right of recourse against seller in event of default? Yes ☐ No ☐

B. CONTRACT TERMS

1. Quoted cash price of goods or services, or total amount of cash advanced.	$_____
2. Ancillary charges from which seller or lender receives no benefit, and which would be paid if this were a cash purchase: taxes; auto license fees; filing or recording fees paid or payable to a public official, etc. a. _____ b. _____ c. _____ Total ancillary charges	 _____ _____ _____ $_____
3. Total cash delivered price, or total amount of credit extended (1 + 2)	$_____
4. Less down payment or trade-in allowance.	($_____)
5. Unpaid cash balance to be financed (3 - 4)	_____
6. Finance charges which benefit the seller or creditor, or entities in which either has an interest. These are charges which would not be made if this were a cash purchase: a. Official fees for filing or recording credit instrument _____ b. Charges for investigating credit worthiness of borrower _____ c. Insurance premiums (life, disability, accident, health, other)_____ d. All other charges for extending credit _____ Total finance charges	 _____ _____ _____ _____ $_____
7. Total amount to be repaid, in accordance with terms of agreement (5 + 6)	$_____
8. To be repaid in ___ monthly installments, of $_____ each, with the first payment to be made on _____ (date).	
9. The finance charges expressed in approximate annual percentage rate (see reverse side and Attachment B.) All lenders and all sellers who regularly engage in credit sales must complete this item.	_____ %

* Explain on reverse side if amount is to be repaid in other than level monthly payments.

PART II - FULL DISCLOSURE (cont'd.)

C. CALCULATION OF APPROXIMATE ANNUAL PERCENTAGE RATE *

1. Total finance charges (B. 6) . . . . . $_____

2. Total amount to be financed (B. 5) . . . . . $_____

3. Finance charges per $100 financed . . . . . $_____
   (Divide 1 above by 2 above and multiply the result by $100)

4. Number of monthly payments (B. 8) . . . . . _____

5. Determine annual percentage rate by using either:

   a. DoD Annual Rate Table (Attachment B). This table will give an approximate annual percentage rate based on the actuarial method. These approximate rates will differ from precise calculations by no more than 1/4% at the left end of the table and not more than 1-1/2% at the right end of the table. Read down the left column of the table to the number of monthly payments (4 above). Read across to find between which pair of columns the finance charge per hundred (3 above) falls. Read up and find the approximate annual percentage rate at the head of the pair of columns, .. _____ %

   - or -

   b. A More Precise Actuarial Calculation based on standard annuity tables. . . . . _____ %

* For purposes of this calculation, it is necessary to determine the number of equal monthly payments which would be required during the period of the contract, regardless of the actual repayment terms specified.

REPAYMENT TERMS IF OTHER THAN LEVEL MONTHLY PAYMENTS

_____

_____

_____