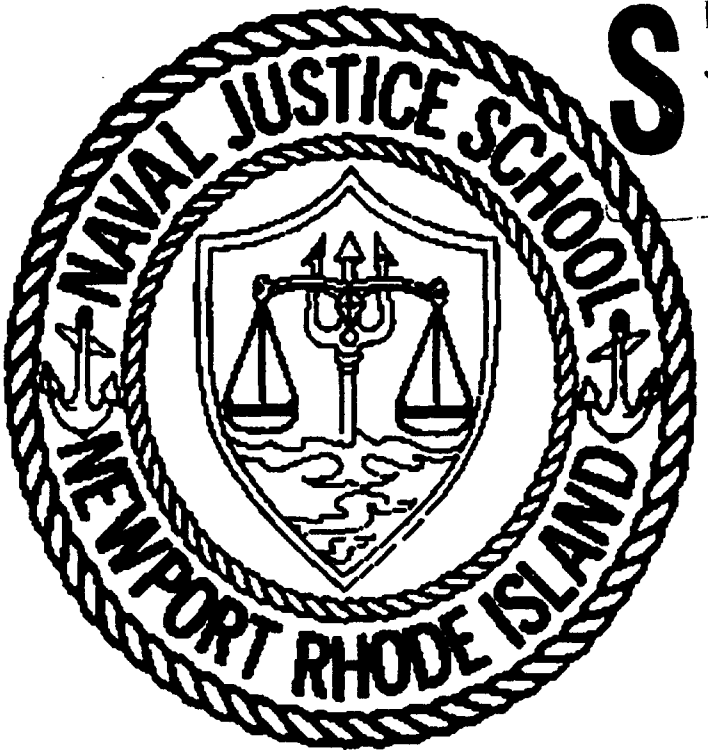
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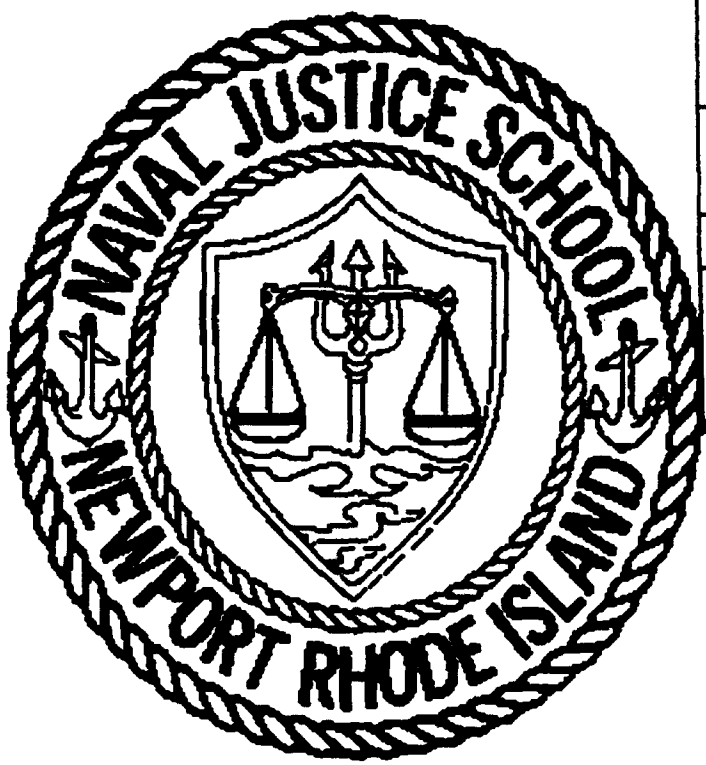
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PART I - INTERNATIONAL LAW

CHAPTER ONE

SOURCES OF INTERNATIONAL LAW

0101 INTERNATIONAL LAW

International law may be defined as that body of rules that nations consider binding in their relations with one another. International law derives from the practice of nations in the international arena and from international agreements. Though ever-changing, international law provides stability in international relations and an expectation that certain acts or omissions will effect predictable consequences. Consequently, failure to comply with international law ordinarily involves greater political and economic costs than does observance. Nations comply with international law because it is in their interest to do so.

0102 CUSTOMARY INTERNATIONAL LAW

The general and consistent practice among nations with respect to a particular subject, which over time is accepted by them generally as a legal obligation, is known as customary international law. Customary international law is the principal source of international law and is binding upon all nations. Occasional violations do not substantially affect the validity of a rule of law, provided routine compliance, observance, and enforcement continue to be the norm.

0103 INTERNATIONAL AGREEMENTS

An international agreement is a commitment entered into by two or more nations which reflects their intention to be bound by its terms in their relations with one another. International agreements, whether bilateral treaties, executive agreements, or multilateral conventions, bind only those nations that are party to them or that may otherwise consent to be bound by them. Moreover, rules established through the treaty process are binding only to the extent required by the terms of the treaty itself as limited by the reservations, if any, that have accompanied its ratification or adherence by individual nations. Conversely, to the extent that

such rules over time come to represent a general consensus among nations of their obligatory nature, they are binding upon party and nonparty nations alike.

A. International agreement references

1. DOD Directive 5530.3, Subj: INTERNATIONAL AGREEMENTS

2. JAGMAN, § 1003

3. JCS MOP 179

4. SECNAVINST 5710.25, Subj: INTERNATIONAL AGREEMENTS

5. OPNAVINST 5710.24, Subj: INTERNATIONAL AGREEMENTS NAVY PROCEDURES

6. OPNAVINST 5710.25, Subj: INTERNATIONAL AGREEMENTS OPNAV PROCEDURES

B. International agreement defined. An international agreement is any oral or written agreement with a foreign government, its agencies, instrumentalities, or political subdivisions, or with an international organization, that: is agreed to by Department of Defense (DOD) personnel; signifies the intention of its parties to be bound; and is denominated as an international agreement or any other name connoting a similar legal consequence. Accordingly, international agreements do ***not*** include: contracts made under the Federal Acquisition Regulations (FAR); North Atlantic Treaty Organization (NATO) Standardization Agreements; certain real estate leases; agreements solely to establish administrative procedures; and other agreements specified in JAGMAN, § 1003.

C. Negotiation of agreements. The United States concludes international agreements in various ways. Navy and Marine Corps members may conclude these agreements only when specifically authorized. For matters under the Department of the Navy (DON) cognizance, members seek authorization to negotiate and conclude an international agreement from the Chief of Naval Operations (CNO), the Chief of Naval Research, or the Commandant of the Marine Corps (CMC), as appropriate. For matters that concern operational command of joint forces, such authorization should be sought from the Chairman, Joint Chiefs of Staff (JCS). Negotiations toward the formation of any international agreement are not permitted prior to receipt of such authorization. Once authorized to negotiate, the cognizant U.S. representative must not deviate from the letter of the authorization. The procedures for requesting negotiating authority, concluding agreements, and ultimate forwarding are discussed in JAGMAN, § 1003.

D. Practice points. Make no unilateral commitments to any foreign government or international organization on any subject. Report every unsolicited proposal made by a foreign government or international organization on any subject to proper authority through appropriate channels. Bring the need for international agreements on any subject matter to the attention of the Judge Advocate General (JAG) and CNO or CMC.

E. International agreements in the law of armed conflict. Principal among the international agreements reflecting the development and codification of the law of armed conflict are the Hague Regulations of 1907, the Gas Protocol of 1925, the Geneva Conventions of 1949 for the Protection of War Victims, the 1954 Hague Cultural Property Convention, the Biological Weapons Convention of 1972, and the Conventional Weapons Convention of 1980. Whereas the 1949 Geneva Conventions and the 1977 Protocols Additional thereto address, for the most part, the protection of victims of war, the Hague Regulations, the Geneva Gas Protocol, Hague Cultural Property Convention, Biological Weapons Convention and the Conventional Weapons Convention are concerned primarily with controlling the means and methods of warfare. The most significant of these agreements are discussed throughout the chapter on in the law of armed conflict. Staff judge advocates interested in the primary references should consult the Annotated Supplement to NWP 9 (Rev. A) / FMFM 1-10, DA Pamphlet 27-24, and AFP 110-20.

0104 ADHERENCE BY THE UNITED STATES

Under the U.S. Constitution, our treaties with other nations constitute a part of the "supreme law of the land" with a force equal to that of law enacted by Congress. Moreover, the Supreme Court has consistently ruled that, where no treaty, law, or other judicial precedent controls, customary international law and the common law are fundamental elements of U.S. national law. Article 0705, *U.S. Navy Regulations, 1990*, provides that: "At all times, commanders shall observe, and require their commands to observe, the principles of international law. Where necessary to fulfill this responsibility, a departure from other provisions of Navy Regulations is authorized." That requirement has been further implemented by CNO and CMC in OPNAVINST 3300.52 and MCO 3300.3. Specific guidance regarding the law of armed conflict is provided in SECNAVINST 3300.1A.

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CHAPTER TWO

LAW OF THE SEA

LEGAL DIVISIONS OF THE OCEANS AND AIRSPACE

0201 MARITIME BASELINES

The territorial sea and all other maritime zones are measured from baselines. To calculate the seaward reach of claimed maritime zones, one must understand how baselines are drawn.

A. Low-water line. Unless other special rules apply, the baseline from which maritime claims of a nation are measured is the low-water line along the coast as marked on the nation's official large-scale charts.

B. Straight baselines. Where a coastal or island nation's irregular coastline would be impracticable to use the low-water line, the nation may instead employ straight baselines. Generally, straight baselines must not depart from the general direction of the coast, and the sea areas they enclose must be closely linked to the land domain. A list of nations which use straight baselines appears in table ST1-3 of NWP-9 (Rev. A).

C. Bays and gulfs. Many bodies of water called "bays" in the geographic sense are not bays for purposes of international law. For baseline purposes, a "bay" is a well-marked indentation in the coastline of such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. The water area of a bay must be greater than that of a semicircle whose diameter is the length of the line drawn across the mouth. Where the indentation has more than one mouth due to the presence of islands, the diameter of the test semicircle is the sum of the lines across the various mouths. The baseline across the mouth of a bay may not exceed 24 nautical miles (NM) in length. Where the mouth is wider than 24 NM, a baseline of 24 NM may be drawn within the bay so as to enclose the maximum water area. Where the semicircle test has been met, and a closure line of 24 NM or less may be drawn, the body of water is a "bay" in the legal sense.

D. Historic bays. "Historic bays" are not determined by the semicircle and 24 NM closure line rules. To meet the international standard for establishing a claim to a historic bay, a nation must demonstrate its open, effective, long-term, and continuous exercise of authority over the bay, coupled with acquiescence by foreign nations in the exercise of that authority. The United States has taken the position that an actual showing of acquiescence by foreign nations in such a claim is required, not the mere absence of opposition.

E. Other features. Where a river flows directly into the sea, the baseline is a straight line across the mouth of the river between points on the low-water line of its banks. The low-water line of a reef may be used as the baseline for islands situated on atolls or having fringing reefs. Harbor works are structures such as jetties and breakwaters erected along the coast at inlets or rivers for protective purposes or for enclosing sea areas adjacent to the coast to provide anchorage and shelter. The outermost permanent harbor works which form an integral part of the harbor system are regarded as forming part of the coast for baseline purposes.

0202 NATIONAL WATERS

National waters include internal waters, territorial seas, and archipelagic waters. These national waters are subject to the territorial sovereignty of coastal and island nations, with certain navigational rights reserved to the international community.

A. Internal waters. Internal waters are landward of the baseline from which the territorial sea is measured. Lakes, rivers, some bays, harbors, some canals, and lagoons are examples of internal waters. From the standpoint of international law, internal waters have the same legal character as the land itself. Unless in distress, ships and aircraft may not enter or overfly internal waters without the permission of the coastal or island nation.

B. Territorial seas. The territorial sea is a belt of ocean which is measured seaward from the baseline of the coastal or island nation and subject to its sovereignty. The United States claims a 12 NM territorial sea and recognizes territorial sea claims of other nations up to a maximum breadth of 12 NM.

1. Islands, rocks, and low-tide elevations. Each island has its own territorial sea and, like the mainland, has a baseline from which it is calculated. An island is defined as a naturally formed area of land surrounded by water which is above water at high tide. Rocks are islands which cannot sustain human habitation or economic life. Provided they remain above water at high tide, they too possess a territorial sea. Land which is above water at low tide, but submerged at high tide,

if situated wholly or partly within the territorial sea, may be used for territorial sea purposes as though it were an island.

2. Artificial islands, off-shore installations, and roadsteads. Artificial islands and off-shore installations have no territorial sea of their own. Roadsteads normally used for the loading, unloading, and anchoring of ships, and which would otherwise be situated wholly or partly beyond the outer limits of the territorial sea, are included within the territorial sea. Roadsteads included within the territorial sea must be clearly marked on charts by the coastal or island nation.

C. Archipelagic waters. An archipelagic nation is one wholly comprised of one or more groups of islands. Such nations may draw straight archipelagic baselines joining the outermost points of their islands, provided that the ratio of water to land within the baselines is between 1-to-1 and 9-to-1. The waters enclosed within the archipelagic baselines are called archipelagic waters. The archipelagic baselines are also the baselines from which the archipelagic nation's territorial sea, contiguous zone, and exclusive economic zone (EEZ) are also measured seaward from these baselines.

1. U.S. recognition. The United States recognizes the right of an archipelagic nation to establish archipelagic baselines enclosing archipelagic waters, provided baselines are drawn in conformity with the 1982 Law of the Sea (LOS) Convention and the United States is accorded navigation and overflight rights and freedoms under international law in the enclosed archipelagic and adjacent waters.

2. Archipelagic sea lanes. Archipelagic nations may designate archipelagic sea lanes through their archipelagic waters suitable for continuous and expeditious passage of ships and aircraft. All normal routes used for international navigation and overflight are to be included. If the archipelagic nation does not designate such sea lanes, the right of archipelagic sea lanes passage may nonetheless be exercised by all nations through routes normally used for international navigation and overflight.

0203 INTERNATIONAL WATERS

International waters include all ocean areas not subject to the territorial sovereignty of any nation. All waters seaward of the territorial sea are international waters in which the high seas freedoms of navigation and overflight are preserved to the international community. International waters include contiguous zones, EEZs, and high seas.

A. Contiguous zones. A contiguous zone is an area extending seaward from the territorial sea in which the coastal or island nation may exercise the control

necessary to prevent or punish infringement of its customs, fiscal, immigration, and sanitary laws and regulations that occur within its territory or territorial sea (but not for so-called security purposes). The United States claims a contiguous zone extending 12 NM from the baselines used to measure the territorial sea. The United States will respect contiguous zones extending up to 24 NM, provided the coastal or island nation recognizes U.S. rights in the zone consistent with the provisions of the 1982 LOS Convention.

B. EEZs. EEZs are resource-related zones adjacent to the coast and extending beyond the territorial sea. As the name suggests, the central purpose is economic. The United States established a 200 NM EEZ by Presidential Proclamation on March 10, 1983. The United States recognizes the sovereign rights of a coastal or island nation to prescribe and enforce its laws in the EEZ (extending up to 200 NM from the baselines used to measure the territorial sea) for the purposes of exploration, exploitation, management, and conservation of the natural resources of the waters, seabed, and subsoil of the zone, as well as for the production of energy from the water, currents, and winds. The coastal or island nation may exercise jurisdiction in the zone over the establishment and use of artificial islands, installations, and structures having economic purposes; over marine scientific research (with reasonable limitations); and over some aspects of marine environmental protection (primarily implementation of international vessel-source pollution control standards). All nations, however, enjoy the right in any EEZ to exercise the traditional high seas freedoms of navigation and overflight, of the laying of submarine cables and pipelines, and of all other traditional high seas uses by ships and aircraft which are not resource related.

C. High seas. The high seas include all parts of the ocean seaward of the EEZ. When a coastal or island nation has not proclaimed an EEZ, the high seas begin at the seaward edge of the territorial sea.

D. Security zones. Some coastal nations have claimed the right to establish military security zones of varying breadth beyond the territorial sea, in which they purport to regulate the activities of warships and military aircraft of other nations by such restrictions as prior notification or authorization for entry, limits on the number of foreign ships or aircraft present at any given time, prohibitions on various operational activities, or complete exclusion. These restrictions are not recognized under international law. Accordingly, the United States does not recognize the peacetime validity of any claimed security or military zone seaward of the territorial sea which purports to restrict or regulate the high seas freedoms of navigation and overflight.

0204 CONTINENTAL SHELF

For international law purposes, the continental shelf of a coastal or island nation consists of the seabed and subsoil of the submarine areas that extend beyond its territorial sea to the outer edge of the continental margin or to a distance of 200 NM from the baseline used to measure the territorial sea where the continental margin does not extend to that distance. The continental shelf may not extend beyond 350 NM from the baseline of the territorial sea or 100 NM from the 2,500 meter isobath, whichever is greater. Although the coastal or island nation exercises sovereign rights over the continental shelf for purposes of exploring and exploiting its natural resources, the legal status of the superjacent water is not affected. Moreover, all nations have the right to lay submarine cables and pipelines on the continental shelf.

0205 SAFETY ZONES

Coastal and island nations may establish safety zones to protect artificial islands, installations, and structures located in their internal waters, archipelagic waters, territorial seas and EEZs, and on their continental shelves. In the case of artificial islands, installations, and structures located in the EEZ or on the continental shelf beyond the territorial sea, safety zones may not extend beyond 500 meters from the outer edges of the facility, except as authorized by generally accepted international standards.

0206 AIRSPACE

Under international law, airspace is classified as either national airspace (that over the land, internal waters, archipelagic waters, and territorial seas of a nation) or international airspace (that over contiguous zones, EEZs, the high seas, and territory not subject to the sovereignty of any nation). Subject to a right of overflight of international straits and archipelagic sea lanes, each nation has complete and exclusive sovereignty over its national airspace. Except as otherwise consented through treaties or other international agreements, aircraft of all nations are free to operate in international airspace without interference by other nations.

INTERNATIONAL STATUS AND NAVIGATION OF WARSHIPS

0207 STATUS OF WARSHIPS

A. Warship defined. International law defines a warship as a ship belonging to the armed forces of a nation bearing the external markings distinguishing the character and nationality of such ships, under the command of an officer duly commissioned by the government of that nation and whose name appears in the appropriate service list of officers, and manned by a crew which is under regular armed forces discipline. In the U.S. Navy, those ships designated "USS" are "warships" as defined by international law. U.S. Coast Guard vessels designated "USCGC" are also "warships" under international law.

B. International status. A warship enjoys sovereign immunity from interference by the authorities of nations other than the flag nation. Police and port authorities may board a warship only with the permission of the commanding officer (CO). A warship cannot be required to consent to an onboard search or inspection, nor may it be required to fly the flag of the host nation. Although warships are required to comply with coastal nation traffic control, sewage, health, and quarantine restrictions instituted in conformance with the 1982 LOS Convention, a failure of compliance is subject only to diplomatic complaint or to coastal nation orders to leave its territorial waters immediately. Moreover, warships are immune from arrest and seizure, both in national and international waters; exempt from foreign taxes and regulation; and exercise exclusive control over all passengers and crew with regard to acts performed on board. Nuclear-powered warships and conventionally powered warships enjoy identical international legal status.

C. Auxiliaries. Auxiliaries are vessels, other than warships, that are owned by or under the exclusive control of the armed forces. Auxiliaries enjoy sovereign immunity because they are state-owned or operated and used only on government noncommercial service. This means that, like warships, they are immune from arrest and search whether in national or international waters. They are also exempt from foreign taxes and regulation and exercise exclusive control over all passengers and crew with respect to acts performed onboard. United States auxiliaries include all vessels which comprise the Military Sealift Command (MSC) Force. The MSC Force includes: (1) United States Naval Ships (USNS) (i.e., U.S.-owned vessels or those under bareboat charter and assigned to MSC), (2) the National Defense Reserve Fleet and the Ready Reserve Force (RRF) (when activated and assigned to MSC), (3) privately owned vessels under time charter assigned to the Afloat Prepositioned Force (APF), and those vessels chartered by MSC for a period of time or for a specific voyage or voyages. The United States claims full rights of sovereign immunity for all USNS, APF, NDRF and RRF vessels. As a matter of policy, however, the United

States claims only freedom from arrest and taxation for those MSC Force time and voyage charters not included in the APF.

0208 NAVIGATION IN NATIONAL WATERS

A. Internal waters. Nations exercise the same jurisdiction and control over their internal waters and superjacent airspace as they do over their land territory. Entering a port ordinarily involves navigation in internal waters. ***Because entering internal waters is legally equivalent to entering the land territory of another nation, that nation's permission is required.*** While many nations grant foreign merchant vessels standing permission to enter internal waters to facilitate commerce, warships, auxiliaries, and all aircraft require specific and advance-entry permission unless otherwise permitted under bilateral or multilateral arrangements.

B. The territorial sea. Navigation by foreign vessels in the territorial sea is regulated by the regimes of innocent passage, assistance entry, transit passage, and archipelagic sea lanes passage.

C. Innocent passage. International law provides that ships, but ***not*** aircraft, of all nations enjoy the right of innocent passage for the purpose of continuous and expeditious traversing of the territorial sea or for proceeding to or from internal waters. Innocent passage includes stopping and anchoring, but only insofar as incidental to ordinary navigation or as rendered necessary by force majeure or by distress. Foreign ships, including warships, exercising the right of innocent passage are required to comply with the laws and regulations enacted by the coastal or island nation in conformity with established principles of international law and, in particular, with such laws and regulations relating to the safety of navigation. Passage is innocent so long as it is not prejudicial to the peace, good order, or security of the coastal or island nation. The coastal or island nation may take affirmative actions in its territorial sea to prevent passage that is not innocent including, where necessary, the use of force.

1. Inconsistent activities. Military activities considered to be prejudicial to the peace, good order, and security, and therefore inconsistent with innocent passage, include:

a. Any threat or use of force against the sovereignty, territorial integrity, or political independence of the coastal nation;

b. any exercise or practice with any weapons;

c. the launching, landing, or taking on board of any aircraft or of any military device;

d. intelligence collection activities detrimental to the security of that coastal nation; and

e. any research or survey activities.

2. Permitted restrictions. For purposes such as resource conservation, environmental protection, and navigational safety, a coastal or island nation may establish certain restrictions upon the right of innocent passage of foreign vessels. For example, where navigational safety dictates, nations may require foreign ships exercising the right of innocent passage to use designated sea lanes and traffic separation schemes. Such restrictions upon the right of innocent passage through the territorial sea are not prohibited by international law, provided that they:

a. Are reasonable and necessary;

b. do not have the practical effect of denying or impairing the right of innocent passage; and

c. do not discriminate in form or in fact against the ships of any nation or those carrying cargoes to, from, or on behalf of any nation.

3. Temporary suspension. A nation may suspend innocent passage temporarily in specified areas of its territorial sea when essential to its security. Such a suspension must be preceded by a published notice to the international community and may not discriminate in form or in fact between foreign ships.

4. Warships. All warships, including submarines, enjoy the right of innocent passage on an unimpeded and unannounced basis. Submarines, however, are required to navigate on the surface and to show their flag when passing through foreign territorial seas. If a warship does not comply with national regulations that conform to established principles of international law and disregards a request for compliance, the nation may require the warship immediately to leave the territorial sea.

D. Assistance entry. All ship and aircraft commanders have an obligation to assist those in danger of being lost at sea. This long-recognized duty of mariners permits assistance entry into the territorial sea by ships or, under certain circumstances, aircraft without the nation's permission to engage in bona fide efforts to render emergency assistance to those in danger or distress at sea. This right applies only when the location of the danger or distress is reasonably well known; it does not extend to entering the territorial sea or airspace to conduct a search.

E. Transit passage. Under international law, the ships and aircraft of all nations, including warships and military aircraft, enjoy the right of unimpeded

transit passage through international straits overlapped by territorial seas. Submarines are free to transit international straits submerged since that is their normal mode of operation; surface warships may transit in a manner consistent with sound navigational practices and the security of the force, including formation steaming and the launching and recovery of aircraft. All transiting ships and aircraft must proceed without delay; refrain from the threat or use of force against the sovereignty, territorial integrity, or political independence of nations bordering the strait; and otherwise refrain from any activities other than those incident to their normal modes of continuous and expeditious transit.

1. International straits overlapped by territorial seas. Straits used for international navigation through the territorial sea between one part of the high seas or an EEZ and another part of the high seas or an EEZ are subject to the legal regime of transit passage.

a. Suspension. Transit passage through international straits cannot be suspended by the coastal or island nation for any purpose during peacetime. This principle of international law also applies to transiting ships (including warships) of nations at peace with the bordering coastal or island nation, but involved in armed conflict with another nation.

b. Traffic schemes. Coastal or island nations bordering international straits overlapped by territorial seas may designate sea lanes and prescribe traffic separation schemes to promote navigational safety. Sea lanes and separation schemes must be approved by the competent international organization per generally accepted international standards. Ships in transit must respect properly designated sea lanes and traffic separation schemes.

2. Straights between the EEZ and the territorial sea. The regime of innocent passage, rather than transit passage, applies in straits used for international navigation that connect a part of the high seas or an EEZ with the territorial sea of a coastal or island nation. Nations may not suspend innocent passage through such straits.

3. International straits not completely overlapped by territorial seas. Ships and aircraft transiting through or above straits used for international navigation, which are not completely overlapped by territorial seas and through which there is a high seas or EEZ corridor suitable for such navigation, enjoy the high seas freedoms of navigation and overflight while operating in and over such a corridor. So long as they remain beyond the territorial sea, all ships and aircraft of all nations have the unencumbered right to navigate through and over such waters subject only to due regard for the right of others to do so. If that corridor unduly restricts navigation, the doctrine of transit passage applies.

F. Archipelagic sea lanes passage. Archipelagic sea lanes passage is defined under international law as the exercise of the freedom of navigation and overflight for the sole purpose of continuous and expeditious transit through archipelagic waters, in the normal modes of operation, by the ships and aircraft involved. All ships and aircraft, including warships and military aircraft, enjoy the right of archipelagic sea lane passage while transiting through, under, or over the waters of archipelagos and adjacent territorial seas via designated archipelagic sea lanes. Archipelagic sea lanes include all routes normally used for international navigation and overflight, regardless of whether designated by the archipelagic nation. Each sea lane is defined by a continuous line from the point of entry into the archipelago to the point of exit. Ships and aircraft in archipelagic sea lanes passage are required to remain within 25 NM to either side of the axis line and must approach no closer to the coastline than 10 percent of the distance between the nearest islands. Submarines may transit while submerged; surface warships may carry out those activities normally undertaken during passage through such waters, including activities necessary to their security (such as formation steaming and the launching and recovery of aircraft). The right of archipelagic sea lanes passage cannot be impeded or suspended by the archipelagic nation for any reason. Outside of archipelagic sea lanes, all surface ships (including warships) enjoy the more limited right of innocent passage throughout archipelagic waters just as they do in the territorial sea as discussed above.

0209 NAVIGATION IN AND OVERFLIGHT OF INTERNATIONAL WATERS

A. The contiguous zone. The contiguous zone is comprised of international waters in and over which the ships and aircraft (including warships and military aircraft) of all nations enjoy the high seas freedoms of navigation and overflight discussed in subparagraph C below. Although the coastal nation may exercise the control necessary in those waters to prevent and punish infringement of its customs, fiscal, immigration, and sanitary laws that may occur within its territory (including its territorial sea), the coastal nation cannot otherwise interfere with international navigation and overflight in and above the contiguous zone.

B. The EEZ. The coastal nation's jurisdiction and control over the EEZ are limited to matters concerning the exploration, exploitation, management, and conservation of the resources of those international waters. The coastal or island nation may also exercise in-the-zone jurisdiction over the establishment and use of artificial islands, installations, and structures having economic purposes; marine scientific research (with reasonable limitations); and some aspects of marine environmental protection. Accordingly, the coastal or island nation cannot unduly restrict or impede the exercise of the freedoms of navigation in and overflight of the EEZ. Since all ships and aircraft (including warships and military aircraft) enjoy the

high seas freedoms of navigation and overflight and other internationally lawful uses of the sea related to those freedoms in and over those waters, the existence of an EEZ in an area of naval operations need not, of itself, be of operational concern to the naval commander.

C. The high seas. All ships and aircraft (including warships and military aircraft) enjoy complete freedom of movement and operation on and over the high seas. For warships, this includes task force maneuvering, flight operations, military exercises, surveillance, intelligence-gathering activities, and ordnance testing and firing. All nations also enjoy the right to lay submarine cables and pipelines on the bed of the high seas as well as on the continental shelf beyond the territorial sea, with coastal or island nation approval for the course of pipelines on the continental shelf. All of these activities must be conducted with due regard for the rights of other nations and the safe conduct and operation of other ships and aircraft.

1. Closure or warning areas. Any nation may declare a temporary closure or warning area on the high seas to advise other nations of the conduct of activities that, although lawful, are hazardous to navigation and / or overflight. The United States and other nations routinely declare such areas for missile testing, gunnery exercises, space vehicle recovery operations, and other purposes entailing some danger to other lawful uses of the high seas by others. Notice of the establishment of such areas must be promulgated in advance, usually in the form of a Notice to Mariners (NOTMAR) and / or a Notice to Airmen (NOTAM). Ships and aircraft of other nations are not required to remain outside a declared closure or warning area, but are obliged to refrain from interfering with activities therein. Consequently, subject to the requirement of due regard for the rights of the declaring nation to use the high seas for such lawful purposes, U.S.-ships and aircraft may operate in a closure area declared by a foreign nation, collect intelligence and observe the activities involved, as may the ships and aircraft of other nations in a U.S. declared closure area.

2. Declared security and defense zones. International law does not recognize the right of any nation to restrict the navigation and overflight of foreign warships and military aircraft beyond its territorial sea. Although several coastal nations, including North Korea and Vietnam, have asserted claims that purport to prohibit warships and military aircraft from operating in so-called security zones extending beyond the territorial sea, such claims have no basis in international law in time of peace and are not recognized by the United States.

3. Wartime defensive measures. The U.N. Charter and general principles of international law recognize that a nation may exercise measures of individual and collective self-defense against an imminent threat of armed attack or an actual attack directed at that nation or at the regional defense organization of which it is a member. Those measures may include the establishment of "defensive

sea areas" or "maritime control areas" in which the threatened nation seeks to enforce some degree of control over foreign entry into its territory. Historically, the establishment of such areas extending beyond the territorial sea has been restricted to periods of war or to declared national emergency involving the outbreak of hostilities. Beyond laying down the general requirement of reasonableness in relation to the needs of national security and defense, international law does not determine the geographic limits of such areas or the degree of control that a coastal nation may exercise over them.

D. Polar regions

1. Arctic region. The United States considers that the waters, ice pack, and airspace of the Arctic region beyond the lawfully claimed territorial seas of littoral nations have international status and are open to navigation by the ships and aircraft of all nations. Although several nations, including Canada and the countries of the former U.S.S.R., have at times attempted to claim sovereignty over the Arctic on the basis of discovery, historic use, contiguity (proximity), or the so-called "sector" theory, those claims are not recognized in international law.

2. Antarctic region. A number of nations have asserted conflicting and often overlapping claims to portions of Antarctica. These claims are premised variously on discovery, contiguity, occupation and, in some cases, the "sector" theory. The United States, as a party to the Antarctic Treaty of 1959, does not recognize the validity of the claims of other nations to any portion of the Antarctic area. Designed to encourage the scientific exploration of the continent and to foster research and experiments in Antarctica without regard to conflicting assertions of territorial sovereignty, the 1959 Accord provides that no activity in the area, undertaken while the treaty is in force, will constitute a basis for asserting, supporting, or denying such claims. The treaty also provides that Antarctica "shall be used for peaceful purposes only," and that "any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons" shall be prohibited. The treaty does not, however, affect in any way the high seas freedoms of navigation and overflight in the Antarctic region. Antarctica has no territorial sea or territorial airspace.

E. Nuclear free-zones. The 1968 Nuclear Weapons Non-Proliferation Treaty, to which the United States is a party, acknowledges the right of groups of nations to conclude regional treaties establishing nuclear-free zones. Such treaties or their provisions are binding only on parties to them or to protocols incorporating those provisions. To the extent that the rights and freedoms of other nations, including the high seas freedoms of navigation and overflight, are not infringed upon, such treaties are not inconsistent with international law. The 1967 Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco) is an example of a nuclear-free zone arrangement that is fully consistent with international law,

as evidenced by U.S. ratification of its two Protocols. This does not affect the exercise by the United States of navigational rights and freedoms within waters covered by the Treaty of Tlatelolco.

0210 EXERCISE AND ASSERTION OF NAVIGATION AND OVERFLIGHT RIGHTS AND FREEDOMS

A. Policy statement. The United States has not ratified the 1982 U.N Convention on the Law of the Sea (UNCLOS III), in part because of provisions concerning seabed mining (Part XI). Still, the United States has stated that it is committed to abiding by the Convention to the extent it reflects customary international law. As announced in the President's U.S. Oceans Policy statement of March 10, 1983:

> The United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the [1982 LOS] convention. The United States will not, however, acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses.

B. Purpose. When maritime nations appear to acquiesce in excessive maritime claims and fail to exercise their rights actively in the face of constraints on international navigation and overflight, those claims and constraints may, in time, be considered to have been accepted by the international community as reflecting the practice of nations and as binding upon all users of the seas and superjacent airspace. Consequently, it is incumbent upon maritime nations to protest diplomatically all excessive claims of coastal or island nations and to exercise their navigation and overflight rights in the face of such claims. The President's Oceans Policy Statement makes clear that the United States has accepted this responsibility as a fundamental element of its national policy.

C. Freedom of navigation (FON) program. The purpose of the FON program is to preserve the global mobility of U.S. forces by avoiding acquiescence in excessive maritime claims of other nations. The FON program combines diplomatic action and operational assertions of our navigation and overflight rights to encourage modification of, and to demonstrate nonacquiescence in, maritime claims that are inconsistent with the customary rules of international law pertaining to maritime navigation and overflight freedoms. Those waters (and the airspace above them) which are the subjects of excessive maritime claims of other nations [hereinafter "those waters"] are cataloged in DODINST 2005.1M of 12 Jul 90, *Maritime Claims Reference Manual*. Uses of those waters which will be recorded as operational

assertions are mostly uses which are planned well enough in advance to be placed on a list which is preapproved under a classified and rather complicated procedure. *See also* DODINST C-2005.1 of 21 Jun 83, U.S. Program for the Exercise of Navigation and Overflight Rights at Sea (U).

0211 RULES FOR NAVIGATIONAL SAFETY

A. International rules. Most rules for navigational safety governing surface and subsurface vessels (including warships) are contained in the *International Regulations for Preventing Collisions at Sea, 1972*, known informally as the "International Rules of the Road" or "72 COLREGS." These rules apply to all international waters (i.e., the high seas, EEZs, and contiguous zones) and, except where a coastal or island nation has established different rules, in that nation's territorial sea, archipelagic waters, and inland waters. Article 1139, *U.S. Navy Regulations, 1990*, directs that all persons in the naval service responsible for the operation of naval ships and craft "shall diligently observe" the 1972 COLREGS.

B. National rules. Many nations have adopted special rules for waters subject to their territorial sovereignty (i.e., internal waters, archipelagic waters, and territorial seas). Violation of these rules by U.S. Navy vessels may subject the United States to a lawsuit for collision or other damage, provide the basis for diplomatic protest, result in limitation on U.S. access to foreign ports, or provide the basis for other foreign action.

C. U.S. inland rules. The United States has adopted special inland rules applicable to navigation in U.S. waters landward of the demarcation line established by U.S. law for that purpose. (*See* U.S. Coast Guard publication CG 169; 33 C.F.R. Part 80; 33 U.S.C. §§ 2001-2073.) The 1972 COLREGS apply seaward of the demarcation line in U.S. national waters, in the U.S. contiguous zone and EEZ, and on the high seas.

0212 U.S.-U.S.S.R. (RUSSIAN) AGREEMENT ON THE PREVENTION OF INCIDENTS ON AND OVER THE HIGH SEAS.

In 1972, to promote the safety of navigation and flight of their respective warships and military aircraft during encounters at sea, the United States and the Soviet Union in 1972 entered into the U.S.-U.S.S.R. Agreement on the Prevention of Incidents On and Over the High Seas. (Note: Russia has agreed to accept all treaty and international agreement obligations of the former U.S.S.R.) This Navy-to-Navy agreement, popularly referred to as the "Incidents at Sea" or "INCSEA" agreement, has been highly successful in minimizing the potential for harassing actions and navigational one-upmanship between U.S. and of the former Soviet

Union units operating in close proximity at sea. Although the agreement applies to warships and military aircraft operating on and over the "high seas," it is understood to embrace such units operating in all international waters and international airspace, including that of the EEZ and the contiguous zone.

A. INCSEA provisions. Principal provisions of the INCSEA agreement include:

1. Ships will observe strictly both the letter and the spirit of the International Rules of the Road;

2. ships will remain well clear of one another to avoid risk of collision and, when engaged in surveillance activities, will exercise good seamanship so as not to embarrass or endanger ships under surveillance;

3. ships will use special signals for signalling their operation and intentions;

4. ships of one country will not simulate attacks by aiming guns, missile launchers, torpedo tubes, or other weapons at the ships of the other country, and will not launch any object in the direction of passing ships nor illuminate their navigation bridges;

5. ships conducting exercises with submerged submarines will show the appropriate signals to warn of submarines in the area; and

6. ships, when approaching ships of the other party, particularly those engaged in replenishment or flight operations, will take appropriate measures not to hinder maneuvers of such ships and will remain well clear.

B. Amendment. The INCSEA agreement was amended in a 1973 protocol to extend certain provisions of the agreement to include nonmilitary ships. Specifically, U.S. and Russian military ships and aircraft shall not make simulated attacks by aiming guns, missile launchers, torpedo tubes, and other weapons at nonmilitary ships of the other party nor launch or drop any objects near nonmilitary ships of the other party in such a manner as to be hazardous to these ships or to constitute a hazard to navigation. The agreement also provides for an annual review meeting between Navy representatives of the two parties to review its implementation.

MILITARY AIRCRAFT

0213 MILITARY AIRCRAFT GENERALLY

A. Defined. International law defines military aircraft to include all aircraft operated by commissioned units of the armed forces of a nation bearing the military markings of that nation, commanded by a member of the armed forces, and manned by a crew subject to regular armed forces discipline. Civilian-owned and -operated aircraft qualify as "state aircraft" if they are so designated by the United States and their full capacity has been contracted by the military for use in the military service of the United States. In those circumstances, they too enjoy sovereign immunity from foreign search and inspection. As a matter of policy, however, the United States normally does not designate chartered aircraft as "state aircraft."

B. International status. Military aircraft are "state aircraft" within the meaning of the Convention on International Civil Aviation of 1944 (the "Chicago Convention") and, like warships, enjoy sovereign immunity from foreign search and inspection. Subject to the right of transit passage and archipelagic sea lanes passage, state aircraft may not fly over or land on the territory (including the territorial sea) of another nation without authorization by special agreement or otherwise. Host nation officials may not board the aircraft without the consent of the aircraft commander. Should the aircraft commander fail to certify compliance with host nation customs, immigration, or quarantine requirements, the aircraft may be directed to leave the territory and national airspace of that nation immediately.

0214 AIR NAVIGATION

A. National airspace. Under international law, every nation has complete and exclusive sovereignty over its national airspace (i.e., the airspace above its territory, its internal waters, its territorial sea, and, in the case of an archipelagic nation, its archipelagic waters). Unlike warships, aircraft have no customary right of innocent passage through the airspace over the territorial sea or archipelagic waters. Accordingly, unless party to an international agreement to the contrary, all nations have complete discretion in regulating or prohibiting flights within their national airspace (as opposed to a Flight Information Region, discussed below), with the sole exception of overflight of international straits and archipelagic sea lanes. Aircraft wishing to enter national airspace must identify themselves, seek or confirm permission to land or to transit, and obey all reasonable orders to land, turn back, or fly a prescribed course and / or altitude. For military aircraft, permission is obtained by the local U.S. embassy ahead of time. Permission to enter foreign national airspace is called diplomatic clearance. Aircraft in distress are entitled to special

consideration and should be allowed entry and emergency landing rights. Aircraft enjoy a right of assistance entry analogous to warships.

B. International straits which connect EEZ / high seas to EEZ / high seas and are overlapped by territorial seas. All aircraft enjoy the right of unimpeded transit passage through the airspace above international straits overlapped by territorial waters. Transits must be continuous and expeditious; the aircraft must refrain from the threat or the use of force against the sovereignty, territorial integrity, or political independence of the bordering nation. These overflight rights cannot be suspended in peacetime for any reason. When the international strait is not completely overlapped by territorial seas, aircraft transiting above a high seas or EEZ navigation corridor enjoy the high seas freedom of overflight so long as they remain beyond the territorial sea.

C. Archipelagic sea lanes. Military aircraft enjoy the right of unimpeded passage through the airspace above archipelagic sea lanes. The right of overflight of such sea lanes is essentially identical to that of transit passage through the airspace above international straits overlapped by territorial seas.

D. International airspace. International airspace is the airspace over the contiguous zone, the high seas, the EEZ, and territories not subject to national sovereignty (e.g., Antarctica). All international airspace is open to the aircraft of all nations. Accordingly, military aircraft are free to operate in international airspace without interference from national authorities. Military aircraft may engage in flight operations, including ordnance testing and firing, surveillance and intelligence gathering, and support of other naval activities. All such activities must be conducted with due regard for the rights of other nations and the safety of other aircraft and of vessels. (Note, however, that the Antarctic Treaty prohibits military maneuvers and weapons testing in Antarctic airspace.) These same principles apply with respect to the overflight of high seas or EEZ corridors through that part of international straits not overlapped by territorial seas.

0215 CONVENTION ON INTERNATIONAL CIVIL AVIATION

As are most nations, the United States is a party to the 1944 Convention on International Civil Aviation. That multilateral treaty, commonly referred to as the "Chicago Convention," applies to civil aircraft. It does not apply to military aircraft or chartered aircraft designated as "state aircraft," other than to require that they operate with "due regard for the safety of navigation of civil aircraft." The Chicago Convention established the International Civil Aviation Organization (ICAO) to develop international air navigation principles and techniques and to promote safety of flight in international air navigation. Various operational situations do not lend themselves to ICAO flight procedures (e.g., military contingencies, classified missions,

politically sensitive missions, or routine aircraft carrier operations). Operations not conducted under ICAO flight procedures are conducted under the "due regard" or "operational" prerogative of military aircraft. For additional information, see DOD Directive 4540.1 and OPNAVINST 3770.4A.

0216 FLIGHT INFORMATION REGIONS (FIRs)

A FIR is a defined area of airspace within which flight information and alerting services are provided. The ICAO establishes FIR's in national and international air space to promote the safety of civil aviation. Within a FIR, flight information and alerting services are provided by air traffic controllers designated by ICAO. Local coastal nation air traffic controllers are "double-hatted" with this ICAO responsibility. As a matter of policy, U.S. military aircraft on routine point-to-point flights through international airspace ordinarily follow ICAO flight procedures and use FIR services. Exceptions to this policy include military contingency operations, classified or politically sensitive missions, and routine aircraft carrier operations or other training activities. When U.S. military aircraft do not follow ICAO flight procedures, they must navigate with "due regard" for civil aviation safety. Some coastal nations seek to bill military aircraft for "services" provided during flights through a FIR. With regard to military aircraft, U.S. policy is to decline payment.

0217 AIR DEFENSE IDENTIFICATION ZONES (ADIZs) IN INTERNATIONAL AIRSPACE

Pursuant to their right to establish reasonable conditions of entry into their territory, nations may establish ADIZs in the international airspace adjacent to their territorial airspace. Accordingly, an aircraft approaching national airspace can be required to identify itself while in international airspace as a condition of entry approval. ADIZ regulations promulgated by the United States apply to aircraft bound for U.S. territorial airspace and require the filing of flight plans and periodic position reports. Some nations, notably India, Libya, Greece, Seychelles, and Mauritius, purport to require all aircraft penetrating an ADIZ to comply with ADIZ procedures regardless of whether they intend to enter national airspace. The United States does not recognize this extension. Unless the United States has specifically agreed to do so, military aircraft not intending to enter national airspace need not identify themselves or otherwise comply with ADIZ procedures established by other nations.

0218 NAVIGATIONAL RULES FOR AIRCRAFT

Rules for air navigation in international airspace applicable to civil aircraft may be found in Annex 2 (Rules of the Air) to the Chicago Convention, DOD Flight Information Publication (FLIP) General Planning, and OPNAVINST 3710.7N, NATOPS General Flight and Operating Instructions. The same standardized technical principles and policies of ICAO that apply in international and most foreign airspace are also in effect in the continental United States. Consequently, U.S. pilots can fly all major international routes following the same general rules of the air, using the same navigation equipment and communication practices and procedures, and being governed by the same air traffic control services with which they are familiar in the United States.

0219 U.S.-U.S.S.R. (RUSSIA) AGREEMENT ON THE PREVENTION OF INCIDENTS ON AND OVER THE HIGH SEAS

To promote the safety of navigation and flight of their respective warships and military aircraft during encounters at sea, the United States and the Soviet Union in 1972 entered into the U.S.-U.S.S.R. Agreement on the Prevention of Incidents On and Over the High Seas. (*Note*: Russia has agreed to accept all treaty and international agreement obligations of the former U.S.S.R.) This Navy-to-Navy agreement, popularly referred to as the "Incidents at Sea" or "INCSEA" agreement is discussed in more detail in section 0212. With regard to aircraft, INCSEA provisions include:

A. Ships, when approaching ships of the other party, particularly those engaged in replenishment or flight operations, will take appropriate measures not to hinder maneuvers of such ships and will remain well clear.

B. Aircraft will use the greatest caution and prudence in approaching aircraft and ships of the other party, in particular ships engaged in launching and landing aircraft, and will not simulate attacks by the simulated use of weapons or perform aerobatics over ships of the other party nor drop objects near them.

0220 INTERCEPTION OF CIVILIAN AIRCRAFT

Annex 2, attachment A, to the Chicago Convention contains recommended procedures for military intercepts of civil aircraft which should be undertaken only as a last resort. If initiated, interception should be limited to determining the aircraft's identity and providing navigational guidance for safe conduct. Intercepting aircraft should refrain from use of weapons in all cases of interception of civil aircraft. The United States has notified ICAO that it follows

these intercept procedures. After the downing of KAL-007, the United States joined 106 other nations in the ICAO Assembly in adopting an amendment to Article 3 of the Chicago Convention specifically prohibiting "the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered."

A. Amendment provisions. In this connection, the Chicago Convention has been amended to provide:

1. That all nations must refrain from the use of weapons against civil aircraft, and, in the case of the interception of intruding civil aircraft, that the lives of persons on board and the safety of the aircraft must not be endangered. (This provision does not, however, detract from the right of self-defense recognized under Article 51 of the U.N. Charter.)

2. That all nations have the right to require intruding aircraft to land at some designated airfield and to resort to appropriate means consistent with international law to require intruding aircraft to desist from activities in violation of the Convention.

3. That all intruding civil aircraft must comply with the orders given to them and that all nations must enact national laws making such compliance by their civil aircraft mandatory.

4. That all nations shall prohibit the deliberate use of their civil aircraft for purposes (such as intelligence collection) inconsistent with the Convention.

B. Effect. The amendment was approved unanimously on May 10, 1984, and will come into force upon ratification by 102 of ICAO's members. The Convention, by its terms, does not apply to intruding military aircraft. The United States takes the position that customary international law establishes similar standards of reasonableness and proportionality with respect to military aircraft that stray into national airspace through navigational error or that are in distress. Recognizing that the use of force against an aircraft is likely to kill people on board and may kill or injure persons on the ground, the U.S. Coast Guard position is that there is no authority to use deadly force against a civilian aircraft during drug law enforcement operations.

PROTECTION OF PERSONS AND PROPERTY AT SEA

0221 RESCUE

Mishaps frequently occur at sea. The obligation of mariners to provide material aid in cases of distress encountered at sea has long been recognized in custom, tradition, and both the 1958 Geneva Convention on the High Seas and the 1982 LOS Convention. Article 0925, *U.S. Navy Regulations, 1990*, requires that, insofar as he / she can do so without serious danger to his / her ship or crew, the CO or senior officer present, as appropriate, shall proceed with all possible speed to the rescue of persons in distress if informed of their need for assistance (insofar as this can reasonably be expected of him / her); render assistance to any person found at sea in danger of being lost; and, after a collision, render assistance to the other ship, her crew and passengers, and, where possible, inform the other ship of his / her identity. The United States is also a party to the 1974 London Convention on Safety of Life at Sea which imposes the additional requirement to broadcast warning messages with respect to dangerous conditions or hazards encountered at sea.

0222 SAFE HARBOR

Under international law, no port may be closed to a foreign ship seeking shelter from storm or bad weather or otherwise compelled to enter it in distress, unless another equally safe port is open to the distressed vessel to which it may proceed without additional jeopardy. The distress must be real and based on a well-founded apprehension of loss of the vessel, cargo, or crew. In general, the distressed vessel may enter a port without being subject to local regulations concerning any penalty, incapacity, prohibition, duties, or taxes in force at that port.

0223 INNOCENT PASSAGE

Innocent passage through territorial seas and archipelagic waters includes stopping and anchoring when necessitated by force majeure or by distress. Stopping and anchoring in such waters for the purpose of rendering assistance to others in similar danger or distress is also permitted by international law.

0224 QUARANTINE

Article 0859, *U.S. Navy Regulations, 1990*, requires that the CO of a ship or aircraft commander comply with quarantine regulations and restrictions. CO's will not permit foreign inspection of his / her vessel or aircraft, but shall afford every

other assistance to health officials, U.S. or foreign, and shall give all information required, insofar as permitted by the requirements of military necessity and security.

0225 REPRESSION OF PIRACY

International law has long recognized a general duty of all nations to cooperate in the repression of piracy. This obligation is included in the 1958 Geneva Convention on the High Seas and the 1982 LOS Convention. Exercising its constitutional powers under Article I, Section 8, Congress prescribes life imprisonment for conviction of piracy. 18 U.S.C. § 1651.

A. Piracy defined. Piracy is an international crime consisting of illegal acts of violence, detention, or depredation committed for ***private ends*** by the crew or passengers of a ***private*** ship or aircraft in or over ***international waters*** against another ship or aircraft or persons and property on board. Depredation is the act of plundering, robbing, or pillaging. The same acts committed in the territorial sea, archipelagic waters, or national airspace are crimes within the jurisdiction and sovereignty of the littoral nation, not piracy. Mutiny is not piracy unless the mutinous crew uses the vessel to commit piracy.

B. Seizure of pirate vessels and aircraft. When a pirate vessel or aircraft is encountered in or over U.S. or international waters it may be seized and detained by any U.S. Navy warship or aircraft. Every effort should be made to obtain the consent of the littoral nation before pursuing pirate vessels into its waters. The pirate vessel or aircraft, and all persons on board, should be taken to the nearest U.S. port or airfield and delivered to U.S. law enforcement authorities for disposition under U.S. law. Alternatively, higher authority may arrange disposition of the matter with another nation; every nation has jurisdiction.

0226 PROHIBITION OF SLAVE TRANSPORTATION

International law strictly prohibits use of the seas for the purpose of transporting slaves. The 1982 LOS Convention requires every nation to prevent and punish the transport of slaves in ships authorized to fly its flag. Commanders should request guidance from higher authority if confronted with this situation.

0227 SUPPRESSION OF UNAUTHORIZED BROADCASTING

The 1982 LOS Convention provides that all nations shall cooperate in the suppression of unauthorized broadcasting from international waters. Unauthorized broadcasting involves the transmission of radio or television signals

from a ship or off-shore facility intended for receipt by the general public, contrary to international regulation. Commanders should request guidance from higher authority if confronted with this situation.

0228 WARSHIP'S RIGHT OF APPROACH AND VISIT

As a general principle, vessels in international waters are immune from the jurisdiction of any nation other than the flag nation. Under international law, however, a warship may approach any vessel in international waters to verify its nationality. Unless the vessel encountered is itself a warship or government vessel of another nation, it may be stopped, boarded, and the ship's documents examined, provided there is reasonable ground for suspecting that it is engaged in piracy, the slave trade, or unauthorized broadcasting. Vessels may also be stopped if they are without nationality or, in reality, of the same nationality as the warship, but falsely flying another flag – or – none at all.

0229 HOT PURSUIT

The hot pursuit of a foreign ship may be undertaken ***as a law enforcement action*** when the coastal or island nation has reason to believe that the ship has violated its laws or regulations. To be valid, the pursuit must begin when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea, or the contiguous zone of the pursuing nation. The pursuit may only be continued outside the territorial sea or contiguous zone if the pursuit has been continuous.

A. Procedure. Pursuit may begin only after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship. The location of the pursuing ship when the order to stop is given is irrelevant. If the foreign ship is within a contiguous zone, the nation may pursue only if the ship violated rights the zone was established to protect. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own or another nation. The right of hot pursuit may be exercised only by warships, military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect. The right of hot pursuit applies also to violations in the EEZ or on the continental shelf, including safety zones around continental shelf installations, of the laws and regulations of the coastal or island nation applicable to the EEZ or the continental shelf, including such safety zones.

B. Hot pursuit by aircraft. In addition to the rules above, where hot pursuit is effected by aircraft, the aircraft must do more than merely sight the offender or suspected offender to justify an arrest outside the territorial sea. The

aircraft must first order the suspected offender to stop; if the offender fails to comply, the aircraft may pursue—alone or in conjunction with other aircraft or ships. Pursuit must continue without interruption until a ship of the coastal or island nation arrives to take over and arrest the ship.

0230 PROTECTION OF U.S. FLAG VESSELS AND AIRCRAFT, U.S. CITIZENS AND PROPERTY

The international law doctrines of self-defense and protection of nationals permit the use of proportionate force by U.S. warships and military aircraft as necessary to protect U.S. flag vessels and aircraft, U.S. citizens (whether embarked in U.S. or foreign flag vessels), and their property against unlawful violence in and over international waters. JCS Peacetime Rules of Engagement (ROE), as incorporated into applicable operational orders, operational plans, and contingency plans, provide guidance to the naval commander for the exercise of this inherent authority.

A. In foreign internal waters, archipelagic waters, and territorial seas. The coastal or island nation is responsible for the protection of all vessels, aircraft, and persons lawfully within its sovereign territory. When that nation is unable or unwilling to take timely and effective action, however, international law recognizes the right of another nation to direct its warships and military aircraft to use proportionate force in or over those waters to protect its flag vessels and its citizens. Because the coastal or island nation may lawfully exercise jurisdiction and control over foreign flag vessels, aircraft and citizens within its internal waters, archipelagic waters, territorial seas and national airspace, special care must be taken by the warships and military aircraft of other nations not to interfere with the lawful exercise of jurisdiction by that nation in those waters.

B. Foreign contiguous zones and EEZs. The responsibility of coastal or island nations to protect foreign shipping and aircraft ends at the seaward edge of the territorial sea. Beyond that point, each nation bears the primary responsibility for the protection of its own flag vessels and aircraft and its own citizens and their property. The coastal or island nation may properly exercise jurisdiction over foreign vessels, aircraft, and persons in and over its contiguous zone to enforce its customs, fiscal, immigration, and sanitary laws, and in its EEZ to enforce its resource-related regulations. When the coastal or island nation is acting in that capacity, or is in lawful hot pursuit, the flag nation should not interfere. Naval commanders should consult applicable peacetime ROE for specific guidance.

C. Government property lost at sea. Sovereign property lost at sea remains vested in that sovereign until title is formally relinquished or abandoned. Sovereign property includes aircraft wreckage, sunken vessels, practice torpedoes, test missiles,

and target drones. The general rule applies regardless of whether the cause of the sinking was through accident or enemy action (unless the warship or aircraft was captured before it sank). As a matter of policy, the U.S. Government does not grant permission to salvage sunken U.S. warships or military aircraft that contain the remains of deceased service personnel or explosive material. Requests from foreign countries to have their sunken warships or military aircraft located in U.S. waters similarly respected by salvors are honored. Should U.S. property be recovered at sea by foreign entities, the U.S. will demand its immediate return. Specific guidance for the on-scene commander in such circumstances is contained in the applicable operation order.

0231 PROTECTION OF FOREIGN FLAG VESSELS, AIRCRAFT, AND PERSONS

The international law concept of collective self-defense permits the use of proportionate force as necessary to protect foreign flag vessels and aircraft and foreign persons from unlawful violence at sea. Consent of the flag nation should first be obtained unless prior arrangements are already in place or the need to act immediately to save human life precludes such efforts.

0232 ASYLUM AND TEMPORARY REFUGE

A. References

1. Article 0939, *U.S. Navy Regulations, 1990*

2. SECNAVINST 5710.22

3. NWP 9 (Rev. A) / FMFM 1-10, paragraph 3.3

B. Definitions

1. Asylum. The United States defines "asylum" as:

> Protection and sanctuary granted by the U.S. Government within its territorial jurisdiction or in international waters to a foreign national who applies for such protection because of persecution or fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

2. Temporary refuge. SECNAVINST 5710.22 defines "temporary refuge" as:

> Protection afforded for humanitarian reasons to a foreign national in a Department of Defense shore installation, facility, or military vessel within the territorial jurisdiction of a foreign nation or in international waters, under conditions of urgency in order to secure the life or safety of that person against imminent danger, such as pursuit by a mob.

C. Procedures. The rules governing asylum and temporary refuge depend in part on where the request is made.

1. On the high seas or in territories under exclusive U.S. jurisdiction (including 50 states, Puerto Rico, territories or possessions, and U.S. territorial seas), foreign nationals seeking asylum will be received aboard the naval installation, aircraft, or vessel. Military authorities may grant temporary refuge; only the Secretary of State may grant asylum.

2. If a request for asylum or refuge is made in foreign territory or territorial seas under foreign jurisdiction, the applicant will be advised to apply in person at the nearest American Consulate or Embassy. An applicant may be received aboard and given temporary refuge ***only*** under extreme or exceptional circumstances where his / her life or safety is in imminent danger (e.g., where he / she is being pursued by a mob). If already on board, however, the foreign national will not be surrendered to foreign jurisdiction or control without the personal direction of the Secretary of the Navy (SECNAV) or higher authority.

D. Notification. Regardless of the location of the unit involved, any action taken upon a request for asylum or refuge must be reported to the Chief of Naval Operations (CNO) or the Commandant of the Marine Corps (CMC), as appropriate, by the fastest available means. Telephone or other voice communication is preferred but, in any case, an immediate precedence message (info: Secretary of State) 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.

E. Release. Once received aboard an installation, aircraft, or vessel, an applicant will not be turned over to foreign officials without personal permission from SECNAV or higher authority, regardless of where the accepting unit is located.

F. Solicitation prohibited. DON personnel 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 (ASECDEF) for Public Affairs.

G. Public announcement. No public statement concerning political asylum or temporary refuge cases should be released without authorization by the ASECDEF for Public Affairs. DOD Directive 2000.11 and SECNAVINST 5710.22. In foreign territory, any such announcements should also be coordinated with the U.S. Embassy.

H. Reporting requirements. Upon receipt of a request for political asylum or temporary refuge on board a U.S. installation or vessel, the information below should be reported via OPREP-3 PINNACLE procedures. OPNAVINST 3100.6F. Initial reports should not be delayed pending further developments.

1. Name and nationality of the person requesting asylum (or temporary refuge).

2. Date, place of birth, and occupation.

3. Description of any documentation in his possession.

4. List of foreign authorities who are aware of or will be notified of the request.

5. Circumstances surrounding the request.

6. Exact location. If aboard a vessel or aircraft, give the estimated time of arrival at next port or airport.

7. Reason for requesting asylum or temporary refuge.

8. Description of any criminal charges known or alleged to be pending against the person requesting asylum. Specifically indicate if any piracy at sea, air piracy, or hijacking is involved.

9. Any Communist Party or other political party affiliation. Also list any government office now held or previously occupied.

10. If applicable, whether a field office of the Immigration and Naturalization Service (INS) has been notified and if arrangements have been made to transfer the case to INS.

11. Any other pertinent information.

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CHAPTER THREE

LAW OF ARMED CONFLICT (LOAC)

0301 INTRODUCTION

Article 2 of the United Nations (U.N.) Charter requires all nations to settle their international disputes by peaceful means and to refrain from the threat or use of force against the territorial integrity or political independence of other nations. The use of force is prohibited except as an enforcement action taken by or on behalf of the U.N. or as a measure of individual or collective self-defense. Regardless of whether a nation's use of force in a particular circumstance is prohibited by the U.N. Charter, the manner in which states and combatants conduct those hostilities is regulated by LOAC. The principal sources of LOAC (as with international law generally) are custom, as reflected in the practice of nations, and international agreements. The lack of precision in defining and interpreting the rules of customary law has been a principal motivation behind efforts to codify LOAC through treaties and conventions.

0302 PURPOSE

The purpose of LOAC is not to impede the waging of hostilities, but to ensure that the violence of hostilities is directed toward the enemy's forces and is not used to cause unnecessary suffering and destruction. In this regard, LOAC complements and supports the principles of warfare embodied in the military concepts of objective, mass, economy of force, surprise, and security. Together, these concepts underscore the importance of concentrating forces against critical military targets while avoiding the expenditure of personnel and resources against persons, places, and things that are militarily unimportant.

0303 GENERAL PRINCIPLES

LOAC seeks to prevent unnecessary suffering and destruction by limiting the harmful effects of hostilities through minimum standards of protection to be accorded to "combatants" and to "noncombatants." LOAC embraces three central concepts:

A. Necessity. Only that degree and kind of force, not otherwise prohibited by LOAC, required for the partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources may be applied.

B. Proportionality. The employment of any kind, or degree of force not required for the purpose of the partial, or complete submission of the enemy with a minimum expenditure of time, life, and physical resources is prohibited. Collateral damage must not be disproportionate or excessive with regard to the military advantage gained from the use of that force.

C. Humanity. Civilians and noncombatants will be protected. To limit casualties, LOAC forbids those measures of violence which are not necessary and proportionate to the achievement of a definite military advantage. The law seeks to avoid unnecessary suffering, superfluous injury, and indiscriminate effects. Dishonorable (treacherous) means, expedients, and conduct during armed conflict are forbidden.

THE LAW OF NAVAL TARGETING

0304 GENERAL PRINCIPLES OF TARGETING

A. Principles. The law of naval targeting is premised upon the three fundamental principles of LOAC:

1. The right of belligerents to adopt means of injuring the enemy is limited;

2. belligerents are prohibited from launch attacks against the civilian population as such; and

3. distinctions must be made between combatants and noncombatants, to the effect that noncombatants be spared as much as possible.

B. Discussion. These legal principles governing targeting generally parallel the military principles of the "objective," "mass," and "economy of force." The law requires that only objectives of military importance be attacked, but permits the use of sufficient mass to destroy those objectives. At the same time, unnecessary (and wasteful) collateral destruction and human suffering must be avoided to the extent possible and, consistent with mission accomplishment and the security of the force, unnecessary human suffering prevented. The law of naval targeting, therefore, requires that all reasonable precautions must be taken to ensure that only military

objectives are targeted so that civilians and civilian objects are spared to the extent possible.

0305 MILITARY OBJECTIVE

Only combatants and other military objectives may be attacked. Military objectives are those objects which, by their nature, location, purpose, or use, effectively contribute to the enemy's war-fighting or war-sustaining capability and whose total or partial destruction, capture, or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of the attack. Military advantage may involve a variety of considerations including the security of the attacking force.

A. Proper targets. Proper targets for naval attack include: enemy warships and military aircraft, naval and military auxiliaries, military bases ashore, warship construction and repair facilities, military depots and warehouses, storage areas, docks, port facilities, harbors, bridges, airfields, military vehicles, armor, artillery, ammunition stores, troop concentrations and embarkation points, lines of communication, and other objects used to conduct or support military operations. Proper naval targets also include geographic targets (such as a mountain pass), buildings, and facilities that provide administrative and personnel support for military and naval operations (such as barracks, communications and command and control facilities, headquarters buildings, mess halls, and training areas).

B. Economic targets. Proper economic targets for naval attack include enemy lines of communication used for military purposes, rail yards, bridges, rolling stock, barges, lighters, industrial installations producing war-fighting products, and power generation plants. Economic targets that indirectly, but effectively support and sustain the enemy's war-fighting capability may also be attacked.

C. Civilian objects. Civilian objects may ***not*** be made the object of attack. Civilian objects consist of all civilian property and activities other than those used to support or sustain the enemy's war-fighting capability. Attacks on installations (such as dikes and dams) are prohibited if their breach or destruction would result in the loss of civilian lives disproportionate to the military advantage to be gained. Similarly, the intentional destruction of food, crops, livestock, drinking water, and other objects indispensable to the survival of the civilian population, for the specific purpose of denying the civilian population of their use, is prohibited.

0306 INCIDENTAL INJURY AND COLLATERAL DAMAGE

Causing incidental injury or death to civilians, or collateral damage to civilian objects, during an attack upon a legitimate military objective is not unlawful; it must not, however, be excessive in light of the military advantage to be gained by the attack. Commanders must take all practicable precautions, taking into account military and humanitarian considerations, to keep civilian casualties and damage to the absolute minimum consistent with mission accomplishment and the security of the force. In each instance, the commander, on the basis of an honest and reasonable estimate of the facts, must determine whether incidental injuries and collateral damage would be excessive or whether to adopt an alternative method of attack, if reasonably available, to reduce civilian casualties and damage.

0307 SURFACE WARFARE

As a general rule, surface warships may employ their conventional weapons systems to attack, capture, or destroy enemy surface, subsurface, and air targets at sea wherever located beyond neutral territory. LOAC pertaining to surface warfare is concerned primarily with the protection of noncombatants through rules establishing lawful targets of attack. For that purpose, all enemy vessels and aircraft fall into one of three general classes (i.e., warships and military aircraft, merchant vessels and civilian aircraft, and exempt vessels and aircraft).

A. Enemy warships and military aircraft. Enemy warships and military aircraft, including naval and military auxiliaries, are subject to attack, destruction, or capture anywhere beyond neutral territory.

1. Warships. Once an enemy warship has clearly indicated a readiness to surrender by hauling down her flag, hoisting a white flag, surfacing (in the case of submarines), stopping engines and responding to the attacker's signals, or taking to lifeboats, the attack must be discontinued. Commanders may ***not*** refuse quarter to any enemy who has surrendered in good faith. Prize procedure is not used for captured enemy warships and naval auxiliaries because their ownership vests immediately in the captor's government by the fact of capture.

2. Aircraft. Disabled enemy aircraft in air combat are frequently pursued to destruction because of the impossibility of verifying their true status and inability to enforce surrender. Although disabled, the aircraft may or may not have lost its means of combat. Moreover, it still may represent a valuable military asset. Accordingly, surrender in air combat is not generally offered; however, if surrender is offered in good faith so that circumstances do not preclude enforcement, it must be respected.

B. Enemy merchant vessels and civilian aircraft

1. Capture. Enemy merchant vessels and civil aircraft may be captured at sea wherever located beyond neutral territory. Prior exercise of visit and search is not required, provided positive determination of enemy status can be made by other means.

a. When military circumstances preclude sending or taking in such vessel or aircraft for adjudication as an enemy prize, it may be destroyed after all possible measures are taken to provide for the safety of passengers and crew. Documents and papers relating to the prize should be safeguarded and, if practicable, the personal effects of passengers should be saved. Every case of destruction of a captured enemy prize should be reported promptly to higher command.

b. Officers and crews of captured enemy merchant ships and civilian aircraft may be made prisoners of war (POWs). Other enemy nationals on board are subject to the discipline of the captor. Nationals of a neutral nation on board are not made POWs unless they have participated in acts of hostility or resistance against the captor.

2. Destruction. Enemy merchant vessels may be attacked and destroyed by surface warships, either with or without prior warning, in any of the following circumstances:

a. Actively resisting visit and search or capture;

b. refusing to stop upon being duly summoned;

c. sailing under convoy of enemy warships or enemy military aircraft;

d. if armed;

e. if incorporated into, or assisting in any way, the intelligence system of the enemy's armed forces;

f. if acting in any capacity as a naval or military auxiliary to an enemy's forces; or

g. if integrated into the enemy's war-fighting / war-sustaining effort and compliance with the rules of the 1936 London Protocol would, under the circumstances of the specific encounter, subject the surface warship to imminent danger or otherwise preclude mission accomplishment.

3. Recovery. After each engagement with warships or merchant vessels, all possible measures should be taken without delay to search for and collect the shipwrecked, wounded, and sick and to recover the dead, as far as military exigencies permit.

C. Exempt vessels and aircraft. Certain classes of enemy vessels and aircraft are exempt from capture or destruction provided they are innocently employed in their exempt category. These specially protected vessels and aircraft must not take part in the hostilities nor hamper the movement of combatants, must submit to identification and inspection procedures, and may be ordered out of harm's way. If an enemy vessel or aircraft assists the enemy's military effort in any manner, it may be captured or destroyed. Refusal to provide immediate identification upon demand is ordinarily sufficient legal justification for capture or destruction. These specifically exempt vessels and aircraft include:

1. Vessels and aircraft designated for and engaged in the exchange of prisoners (cartel vessels);

2. properly designated and marked hospital ships, medical transports, and known medical aircraft;

3. vessels charged with religious, non-military scientific, or philanthropic missions (vessels engaged in the collection of scientific data of potential military application are not exempt.);

4. vessels and aircraft guaranteed safe conduct by prior arrangement between the belligerents;

5. small coastal (not deep-sea) fishing vessels and small boats engaged in local coastal trade (such vessels and boats are subject to the regulations of a belligerent naval commander operating in the area); and

6. civilian passenger vessels at sea and civil airliners in flight are subject to capture, but are exempt from destruction. Although enemy lines of communication are generally legitimate military targets in modern warfare, civilian passenger vessels at sea and civil airliners in flight are exempt from destruction unless, at the time of the encounter, they are being used by the enemy for a military purpose (e.g., transporting troops or military cargo) or refuse to respond to the directions of the intercepting warship or military aircraft. Such passenger vessels in port and airliners on the ground are not protected from destruction.

0308 SUBMARINE WARFARE

LOAC imposes essentially the same rules on submarines as apply to surface warships. Submarines may employ their conventional weapons systems to attack, capture, or destroy enemy surface, subsurface, or air targets wherever located beyond neutral territory. Enemy warships and naval auxiliaries may be attacked and destroyed without warning. Rules applicable to surface warships regarding enemy ships that have surrendered in good faith, or that have indicated clearly their intention to do so, apply as well to submarines. To the extent that military exigencies permit, submarines are also required to search for and collect the shipwrecked, wounded, and sick following an engagement. If not practicable, the location of possible survivors should be passed at the first opportunity to a surface ship, aircraft, or shore facility capable of rendering assistance.

A. Interdiction of enemy merchant shipping. The United States considers that the London Protocol of 1936, coupled with the customary practice of belligerents during and following World War II, imposes upon submarines the responsibility to provide for the safety of passengers, crew, and ship's papers before destruction of an enemy merchant vessel, unless:

1. The vessel refuses to stop when summoned to do so or otherwise resists capture;

2. the enemy merchant vessel is sailing under armed convoy or is itself armed;

3. the enemy merchant vessel is assisting in any way the enemy's military intelligence or is acting in any capacity as a naval auxiliary to the enemy's armed forces; or

4. the enemy has integrated its merchant shipping into its war-fighting / war-sustaining effort and compliance with this rule would, under the circumstances of the specific encounter, subject the submarine to imminent danger or would otherwise preclude mission accomplishment.

B. Exempt vessels. Rules of naval warfare regarding enemy vessels that are exempt from capture or destruction by surface warships apply as well to submarines.

0309 AIR WARFARE AT SEA

Military aircraft may employ conventional weapons to attack and destroy warships and military aircraft, including naval and military auxiliaries, anywhere at sea beyond neutral territory. To the extent that military exigencies permit, military aircraft are required to search for the shipwrecked, wounded, and sick following an engagement at sea. The location of possible survivors should be passed at the first opportunity to a surface vessel, aircraft, or shore facility capable of rendering assistance. Enemy merchant vessels and civil aircraft may be attacked and destroyed by military aircraft only under the following circumstances:

A. When refusing to comply with directions from the intercepting aircraft;

B. when assisting in any way the enemy's military intelligence system or acting in any capacity as auxiliaries to the enemy's armed forces;

C. when sailing under convoy of enemy warships, escorted by enemy military aircraft, or armed; or

D. when otherwise integrated into the enemy's war-fighting or war-sustaining effort.

0310 BOMBARDMENT

"Bombardment," for purposes of this chapter, refers to naval and air bombardment of enemy targets on land with conventional weapons, including naval guns, rockets and missiles, and air-delivered ordnance. Generally, the following rules reflect the underlying broad principles that belligerents are forbidden to make noncombatants the target of direct attack, that superfluous injury and unnecessary suffering are to be avoided, and that wanton destruction of property is prohibited.

A. Destruction of civilian habitation. The wanton or deliberate destruction of areas of concentrated civilian habitation (including cities, towns, and villages) is prohibited. *See* the "Noncombatants" section in this chapter for a more detailed discussion.

B. Undefended cities or agreed demilitarized zones. Belligerents are forbidden to bombard a city or town that is undefended and open to immediate entry by their own or allied forces. A city or town behind enemy lines is, by definition, neither undefended nor open; military targets therein may be destroyed by bombardment. An agreed demilitarized zone is also exempt from bombardment.

C. Medical facilities. Medical establishments and units, both mobile and fixed-medical vehicles, and medical equipment and stores may not be deliberately bombarded. Belligerents are required to ensure that such medical facilities are readily identifiable and, as far as possible, situated in such a manner to avoid that attacks against military targets in the vicinity do not imperil their safety. Any object ***recognized*** as a medical facility, however, may not be attacked, regardless of the absence of markings. If medical facilities are used for purposes inconsistent with their humanitarian mission, and appropriate warnings are ignored, they become subject to attack. When established by agreement between the belligerents, hospital zones and neutralized zones are immune from bombardment per the terms of the agreement.

D. Religious, cultural, and charitable buildings and monuments. Such buildings and monuments should not be bombarded, provided they are not used for military purposes. Local inhabitants have the responsibility to ensure that such buildings and monuments are clearly marked with the distinctive emblem of such sites: a rectangle divided diagonally, the upper portion black and the lower white.

E. Dams and dikes. Dams, dikes, levees, and other installations, which if breached or destroyed would release flood waters or other forces dangerous to the civilian population, should not be bombarded if the potential for harm to noncombatants would be excessive in relation to the military advantage to be gained by bombardment. Conversely, installations containing such dangerous forces that are used by belligerents to shield or support military activities are not so protected.

F. Warning before bombardment. Where the military situation permits, commanders should make every reasonable effort to warn the civilian population located in close proximity to a military objective targeted for bombardment. Warnings may be general rather than specific warnings lest the bombarding force or the success of its mission be jeopardized.

NONCOMBATANTS

0311 NONCOMBATANTS GENERALLY

LOAC is based largely on the distinction to be made between combatants and noncombatants. In accordance with this distinction, the population of a nation engaged in armed conflict is divided into two general classes: armed forces (combatants) and the civilian populace (noncombatants). Each class has specific rights and obligations in time of armed conflict. No individual can be a combatant and a noncombatant simultaneously. The term "noncombatant" is primarily applied to those individuals who do not form a part of the armed forces and who otherwise

refrain from the commission or direct support of hostile acts. In this context, noncombatants and, generally, the civilian population are synonymous. The term noncombatants also includes those members of the armed forces who enjoy special protected status (such as medical personnel and chaplains) or who have been rendered incapable of combat by wounds, sickness, shipwreck, or capture. This chapter reviews the categories of noncombatants and outlines the general rules of LOAC designed to protect them from direct attack.

0312 PROTECTED STATUS

LOAC prohibits the intentional attack of noncombatants and requires, to the extent possible, that they be safeguarded against injury. When circumstances permit, advance warning should be given of attacks that might endanger noncombatants in the vicinity. Such warnings are not required, however, if mission accomplishment (including the security of attacking forces) is premised on the element of surprise. On the other hand, a party to an armed conflict that has control over civilians and other noncombatants has an affirmative duty to remove them from the vicinity of targets of likely enemy attack and to otherwise separate military activities and facilities from areas of noncombatant concentration. Deliberate use of noncombatants to shield military objectives from enemy attack is prohibited. The presence of noncombatants within or adjacent to a legitimate target does not, however, preclude its attack.

0313 THE CIVILIAN POPULATION

The civilian population as such, as well as individual civilians, may not be the object of attack or of threats or acts intended to instill terror.

A. Scope of protection. The civilian population consists of all persons not serving in the armed forces, militia, or paramilitary forces and not otherwise taking a direct part in the hostilities. Women and children are entitled to special respect and protection.

B. Loss of protection. Civilians, unlike combatant military personnel who are always subject to attack, are immune from attack unless they are acting in direct support of the enemy's war-fighting or -sustaining effort. Civilians lose their immunity and may be attacked if they take a direct part in hostilities by taking up arms or otherwise trying to kill, injure, or capture enemy persons; destroying enemy property; or serving as lookouts, guards, or intelligence agents for military forces. Civilians providing command, administrative, or logistic support to military operations are subject to attack while so engaged. Similarly, civilian employees of naval shipyards, merchant seamen in ships carrying military cargoes, and laborers

engaged in the construction of military fortifications may be attacked while so employed.

0314 THE WOUNDED AND SICK

Members of the armed forces incapable of participating in combat due to injury or illness may not be intentionally attacked. Moreover, parties to any armed engagement must, without delay, take all possible measures to search for and collect the wounded and sick on the field of battle, protect them from harm, and ensure their care. When circumstances permit, an armistice or cease-fire should be arranged to enable the wounded and sick to be located and removed to safety and medical care. Wounded and sick personnel falling into enemy hands must be treated humanely and cared for without distinction. Priority of treatment for all military personnel may only be justified by urgent medical considerations. The physical or mental well-being of enemy wounded and sick personnel may not be unjustifiably endangered, nor may they be subjected to any medical procedure not called for by their condition or inconsistent with accepted medical standards.

0315 MEDICAL PERSONNEL

Medical personnel, including medical and dental officers, technicians and corpsmen, nurses, and medical service personnel have special protected status when engaged ***exclusively*** in medical duties and may not be attacked. Possession of small arms for self-protection, for the protection of the wounded and sick, and for protection from marauders and others violating LOAC does not disqualify medical personnel from protected status. Medical personnel may not use such arms against enemy forces acting in conformity with LOAC. Medical personnel should display the distinctive emblem of the Red Cross when engaged in their respective medical activities. Captured medical personnel and chaplains (below) do not become POWs; however, they may be detained by the enemy to provide for the medical or religious needs of POWs. Medical personnel and chaplains must be repatriated at the earliest opportunity.

0316 CHAPLAINS

Chaplains engaged in ministering to the armed forces enjoy protected status equivalent to that of medical personnel. Medical personnel and chaplains should display the appropriate distinctive emblem when engaged in their respective medical and religious activities. Unlike medical personnel, chaplains need not be exclusively or even partially assigned to the wounded and sick to be entitled to protection. Article 1063, *U.S. Navy Regulations, 1990*, however, requires that they

be engaged exclusively in religious duties. Further, to be accorded immunity, they must be attached to the armed forces—not mere volunteers. Chaplains lose their special status if they commit acts harmful to the enemy outside their humanitarian functions. Although not forbidden by international law, U.S. Navy chaplains are forbidden to carry arms by article 1204.1 of the *Chaplains Manual*. Enlisted religious program specialists have no such special status since they are not chaplains and the protected "staff" are limited to those administering medical units and establishments.

0317 THE SHIPWRECKED

Shipwrecked persons, whether military or civilian, may not be attacked. Shipwrecked persons include those in peril at sea or in other waters as a result of either sinking, grounding, or other damage to a vessel in which they are embarked, or of the downing or distress of an aircraft. The cause of the peril, whether the result of enemy action or nonmilitary causes, is immaterial. Following each naval engagement at sea, the belligerents are obligated to take all possible measures, consistent with the security of their forces, to search for and rescue the shipwrecked. Shipwrecked persons do not include combatant personnel engaged in amphibious, underwater, or airborne attacks who are proceeding ashore, unless they are clearly in distress and require assistance. In the latter case, they may qualify as shipwrecked persons only if they cease all active combat activity and the enemy has an opportunity to recognize their condition of distress. Shipwrecked combatants falling into enemy hands become POWs.

0318 PARACHUTISTS

Parachutists descending from disabled aircraft may not be attacked while in the air and, unless they land in territory controlled by their own forces or engage in combatant acts while descending, must be provided an opportunity to surrender upon reaching the ground. Airborne troops, special warfare infiltrators, and intelligence agents parachuting into combat areas or behind enemy lines are not so protected and may be attacked in the air, as well as on the ground. Such personnel may not be attacked, however, if they indicate their intention to surrender.

0319 POWs

Combatants cease to be subject to attack when they have individually laid down their weapons to surrender, when they are no longer capable of resistance, or when the unit in which they are serving or embarked has surrendered or been captured. Combatants that have surrendered or otherwise fallen into enemy hands are entitled to POW status and, as such, must be treated humanely and protected

against violence, intimidation, insult, and public curiosity. When POWs are given medical treatment, no distinction among them will be based on any grounds other than medical considerations. POWs may be interrogated upon capture, but are only required to disclose their name, rank, date of birth, and military serial number. POW issues are discussed in more detail below.

0320 INTERNED PERSONS

Enemy civilians falling under the control of a belligerent may be interned if security considerations make it absolutely necessary to do so. Civilians sentenced for offenses committed in occupied territory may also be ordered into internment in lieu of punishment. Enemy civilians may not be interned as hostages. Interned persons may not be removed from the occupied territory in which they reside unless their own security or imperative military reasons dictate. All interned persons must be treated humanely and may not be subjected to collective punishment nor reprisal action.

0321 PROTECTIVE SIGNS AND SYMBOLS

A. The Red Cross and Red Crescent. A red cross on a white field is the internationally accepted symbol of protected medical and religious persons and activities. Moslem countries use a red crescent on a white field for the same purpose. Israel uses the Red Star of David. All medical and religious persons or objects recognized as being so marked are to be treated with care and protection.

B. Other protective symbols. Other protective symbols specially recognized by international law include an oblique red band on a white background to designate hospital zones and safe havens for noncombatants. POW camps are marked by the letters "PW" or "PG"; civilian internment camps with the letters "IC." A royal-blue diamond and royal-blue triangle on a white shield is used to designate cultural buildings, museums, historic monuments, and other cultural objects that are exempt from attack. In the Western Hemisphere, a red circle with triple red spheres in the circle, on a white background (the "Roerich Pact" symbol) is used for that purpose.

1. Two protective symbols established by the 1977 Protocols Additional to the Geneva Convene of 1949, to which the United States is not a party, are described as follows for informational purposes only: works and installations containing forces potentially dangerous to the civilian population, such as dams, dikes, and nuclear power plants, may be marked with three bright orange circles of equal size on the same axis. Civil defense facilities and personnel may be identified by an equilateral blue triangle on an orange background.

2. The 1907 Hague Symbol. The 1907 Hague symbol, established by the 1907 Hague Convention Concerning Bombardment by Naval Forces in Time of War (Hague IX), is used to mark sacred edifices, hospitals, historic monuments, cultural buildings, and other structures protected from naval bombardment. The symbol consists of a rectangular panel divided diagonally into two triangles: the upper black, the lower white.

3. The white flag. Customary international law recognizes the white flag as symbolizing a request to cease-fire, negotiate, or surrender. Enemy forces displaying a white flag should be permitted an opportunity to surrender or to communicate a request for cease-fire or negotiation.

C. Permitted use. Protective signs and symbols may be used only to identify personnel, objects, and activities entitled to the protected status which they designate. Any other use is forbidden.

D. Failure to display. When objects or persons are readily recognizable as being entitled to protected status, the lack of protective signs and symbols does not render an otherwise protected object or person a legitimate target. Failure to use protective signs and symbols may, however, subject protected persons and objects to the risk of not being recognized by the enemy as having protected status.

0322 PROTECTIVE SIGNALS

Three optional methods of identifying medical units and transports have been created internationally. United States hospital ships and medical aircraft do not use these signals.

A. Radio signals. For the purpose of identifying medical transports by radio telephone, the words ***PAN PAN*** are repeated three times followed by the word "medical" pronounced as ***MAY-DEE-CAL***. Medical transports are identified in radio telegraph by three repetitions of the group ***XXX*** followed by the single group ***YYY***.

B. Visual signal. On aircraft, the flashing blue light may be used only on medical aircraft. Hospital ships, coastal rescue craft, and medical vehicles may also use the flashing blue light. Only by special agreement between the parties to the conflict may its use be reserved exclusively to those forms of surface medical transport.

C. Electronic identification. Medical ships and craft may be identified and located by means of appropriate standard maritime radar transponders as established by special agreement of the parties to the conflict. Medical aircraft may be identified and located by use of the secondary surveillance radar (SSR) specified in Annex 10

to the ICAO Convention. The SSR mode and code is to be reserved for the exclusive use of the medical aircraft.

0323 IDENTIFICATION OF NEUTRAL PLATFORMS

Ships and aircraft of nations not party to an armed conflict may use certain signals for self-identification, location, and establishment of communications. Use of these signals does not confer or imply recognition of any special rights or duties of neutrals or belligerents, except as may otherwise be agreed between them.

THE LAW OF NEUTRALITY

0324 THE LAW OF NEUTRALITY

The law of neutrality defines the legal relationship between nations engaged in an armed conflict (belligerents) and nations seeking to avoid direct involvement in such hostilities (neutrals). The law of neutrality serves to localize war, to limit the conduct of war on both land and sea, and to lessen the impact of war on international commerce. Despite the uncertainties and volatility of modern war, the law of neutrality continues to serve an important role in containing the spread of hostilities, in regulating the conduct of belligerents with respect to nations not participating in the conflict, and in reducing the harmful effects of such hostilities on international commerce.

A. Neutral status. In the absence of an international commitment to the contrary, all nations may refrain from participating in an armed conflict by declaring or assuming neutral status. LOAC reciprocally imposes duties and confers rights upon neutral nations and upon belligerents. The principal right of the neutral nation is that of inviolability; its principal duties are those of abstention and impartiality. The belligerent is obliged to respect the status and may demand the duties be observed. Once established, neutral status remains in effect until the neutral nation abandons its neutral stance and enters the conflict.

B. Neutrality under the U.N. Charter. In the event of a threat to or breach of the peace, the Security Council is empowered by the U.N. Charter to take enforcement action on behalf of all member nations. When called upon by the Security Council to do so, the member nations are obligated to provide assistance to the U.N. in any action it takes, thereby overriding the nation's option to remain neutral. Should the Security Council determine not to institute enforcement action, or is unable to do so due to the imposition of a veto by one or more of its permanent members, each U.N. member remains free to assert neutral status.

C. Neutrality under regional and collective self-defense arrangements. The inherent right of individual and collective self-defense may be implemented individually or through regional and collective security arrangements. The possibility of asserting and maintaining neutral status under such arrangements depends upon the extent to which the parties are obligated to provide assistance in a regional action or, in the case of collective self-defense, to come to the aid of a victim of an armed attack.

0325 NEUTRAL TERRITORY

As a general rule of international law, all acts of hostility in neutral territory, including neutral lands, neutral waters, and neutral airspace, are prohibited. A neutral nation has the duty to prevent the use of its territory as a place of sanctuary or a base of operations by belligerent forces of any side. If the neutral nation is unable or unwilling to enforce effectively its right of inviolability, an aggrieved belligerent may resort to acts of hostility in neutral territory against enemy forces making unlawful use of that territory. Belligerents are also authorized to act in self-defense when attacked or threatened with attack while in neutral territory or when attacked or threatened from neutral territory.

A. Neutral lands. Belligerents are forbidden to move troops or war materials and supplies across neutral land territory. Belligerent troops that enter neutral territory must be disarmed and interned until the end of the armed conflict. A neutral may authorize passage through its territory of wounded and sick belonging to the armed forces of either side on condition that the vehicles transporting them carry neither combatants nor materials of war. If permitted, the neutral nation assumes responsibility for providing for their safety and control. POWs that have escaped their captors and made their way to neutral territory may be either repatriated or left at liberty in the neutral nation, but must not be allowed to take part in belligerent activities while there.

B. Neutral ports and roadsteads. Although neutral nations may, on a nondiscriminatory basis, close their ports and roadsteads to belligerents, they are not obliged to do so. Vessels enjoy a 24-hour grace period in neutral ports at the outbreak of armed conflict; thereafter, belligerent vessels may visit only those neutral ports and roadsteads that the neutral nation may choose to open to them for that purpose. Belligerent vessels, including warships, retain a right of entry in distress whether caused by force majeure or damage resulting from enemy action.

1. Limitations on stay and departure. In the absence of special provisions to the contrary in the laws or regulations of the neutral nation, belligerent warships are forbidden to remain in a neutral port or roadstead in excess of 24 hours. This restriction does not apply to belligerent vessels devoted exclusively to

humanitarian, religious, or nonmilitary scientific purposes or warships unable to leave for reasons of weather or unseaworthiness. The neutral nation must intern a belligerent warship, together with its officers and crew, that will not or cannot depart a neutral port or roadstead where it is not entitled to remain.

2. Multiple belligerent vessels. Unless the neutral nation has adopted laws or regulations to the contrary, no more than three warships of any one belligerent nation may be present in the same neutral port or roadstead at any one time. When warships of opposing belligerent nations are present in a neutral port or roadstead at the same time, not less than 24 hours must elapse between the departure of the respective enemy vessels. The order of departure is determined by the order of arrival unless an extension of stay has been granted.

3. War materials, supplies, communications, and repairs. Warships may not make use of neutral ports or roadsteads to replenish or increase their supplies of war materials or their armaments or to erect any apparatus for communicating with belligerent forces. They may, however, take on food and fuel, subject to the principle of nondiscrimination and the prohibition against the use of neutral territory as a base of operations. Warships may carry out such repairs as are absolutely necessary to render them seaworthy. They may not add to or repair weapons systems or enhance any other aspect of their war-fighting capability.

C. Neutral waters

1. Internal Waters. Neutral internal waters encompass those waters of a neutral nation that are landward of the baseline from which the territorial sea is measured. The rules governing neutral ports and roadsteads apply as well to neutral internal waters.

2. Territorial seas. Neutral territorial seas, like neutral territory generally, must not be used by belligerent forces either as a sanctuary from their enemies or as a base of operations. Belligerents are obliged to refrain from all acts of hostility in neutral territorial waters except those necessitated by self-defense or undertaken as self-help enforcement actions against enemy forces that are in violation of the neutral status of those waters when the neutral nation cannot or will not enforce their inviolability.

3. Mere passage. A neutral nation may close its territorial waters to belligerent vessels on a nondiscriminatory basis, except in international straits. When properly notified of its closure, belligerents are obliged to refrain from entering a neutral territorial sea except to transit through international straits or as necessitated by distress. A neutral nation may, however, allow the "mere passage" of belligerent vessels (including warships and prizes) through its territorial waters. To qualify, such passage must be innocent in nature and, in the absence of special

laws or regulations of the neutral nation to the contrary, must not exceed 24 hours in duration and subject to the same restrictions as when in neutral ports. Neutral nations customarily authorize passage through their territorial sea of ships carrying the wounded, sick, and shipwrecked, whether or not those waters are otherwise closed to belligerent vessels.

4. Neutral straits. Belligerent and neutral surface ships, submarines, and aircraft have a right of transit passage through, over, and under all straits used for international navigation. Neutral nations cannot suspend or impede this right of transit passage through international straits. Belligerent forces transiting through international straits overlapped by neutral waters must proceed without delay, refrain from the threat or use of force against the neutral nation, and otherwise refrain from acts of hostility and other activities not incident to their transit. Belligerent forces in transit may, however, take defensive measures consistent with their security, including the launching and recovery of aircraft, screen formation steaming, and acoustic and electronic surveillance. Belligerents may not use neutral straits as a place of sanctuary or a base of operations, nor may they exercise visit and search rights in those waters.

5. Neutral archipelagic waters. Belligerent forces must refrain from acts of hostility in neutral archipelagic waters and from using them as a sanctuary or a base of operations. Belligerent ships or aircraft (including submarines, surface warships, and military aircraft) retain the right of unimpeded archipelagic sea lanes passage through, over, and under neutral archipelagic sea lanes. Belligerent forces exercising the right of archipelagic sea lanes passage may engage in those activities that are incident to their normal mode of continuous and expeditious passage and are consistent with their security. Visit and search is not authorized in neutral archipelagic waters.

D. Neutral airspace. Neutral territory extends to the airspace over a neutral nation's lands, internal waters, archipelagic waters (if any), and territorial sea. Belligerent military aircraft are forbidden to enter neutral airspace with the following exceptions:

1. The airspace above neutral international straits and archipelagic sea lanes remains open at all times to belligerent aircraft, including armed military aircraft, engaged in transit or archipelagic sea lanes passage. Such passage must be continuous and expeditious and must be undertaken in the normal mode of flight of the aircraft involved. Belligerent aircraft must refrain from acts of hostility while in transit, but may engage in activities that are consistent with their security and the security of accompanying surface and subsurface forces.

2. Unarmed military aircraft may enter neutral airspace under such conditions and circumstances as the neutral nation may wish to impose impartially

on the belligerents. Should such unarmed aircraft penetrate neutral airspace without permission, or otherwise fail to abide by the entry conditions imposed upon them by the neutral nations, they may be interned together with their crews.

3. Medical aircraft may overfly neutral territory, land there in case of necessity, and use neutral airfield facilities as ports of call, subject to such nondiscriminatory restrictions as the neutral nation may see fit to apply.

4. Belligerent aircraft in evident distress are permitted to enter neutral airspace and land in neutral territory under such safeguards as the neutral nation may wish to impose. The neutral nation may require such aircraft to land, intern both aircraft and crew, or impose nondiscriminatory conditions upon their stay or release.

0326 NEUTRAL COMMERCE

A principal purpose of the law of neutrality is the regulation of belligerent activities with respect to neutral commerce. Neutral commerce comprises all commerce between one neutral nation and another not involving materials of war or armaments destined for a belligerent nation, and all commerce between a neutral nation and a belligerent that does not involve the carriage of contraband or otherwise sustain the belligerent's war-fighting capability. Neutral merchant vessels and nonpublic civil aircraft engaged in legitimate neutral commerce are subject to visit and search, but may not be captured or destroyed by belligerent forces.

A. Commerce between neutrals and belligerents. The law of neutrality does not prohibit neutral nations from engaging in commerce with belligerent nations. A neutral nation cannot, however, supply materials of war or armaments to a belligerent without violating its neutral duties of abstention and impartiality and risking loss of its neutral status. Although a neutral may forbid its citizens from carrying on non-neutral commerce with belligerent nations, it is not obliged to do so.

B. Contraband. Contraband consists of goods which are destined for the enemy of a belligerent and which may be useful in armed conflict. Traditionally, contraband has been divided into two categories: "absolute" (i.e., those goods with obvious combat utility) and "conditional" (i.e., goods equally useful for combat or peaceful purposes). The practice of belligerents in World War II has cast doubt on the relevance, if not the validity, of the traditional distinction.

1. Enemy destination. The distinction between absolute and conditional contraband has continuing relevance with respect to the rules pertaining to the presumption of ultimate enemy destination. The enemy destination of conditional contraband must be ***factually established***. Goods consisting of absolute

contraband are liable to capture at any place beyond neutral territory if destined, directly or indirectly, for the enemy. When absolute contraband is involved, a destination of enemy-owned or -occupied territory may be ***presumed*** when:

a. The neutral vessel is to call at an enemy port before arriving at a neutral port for which the goods are documented;

b. the goods are documented to a neutral port serving as a port of transit to an enemy, even though they are consigned to a neutral; or

c. the goods are consigned "to order" or to an unnamed consignee, but are destined for a neutral nation in the vicinity of enemy territory.

2. Exemptions to contraband. Certain goods are exempt from capture as contraband even though destined for enemy territory:

a. Exempt or "free goods" (i.e., goods not susceptible for use in armed conflict);

b. articles intended exclusively for the treatment of wounded and sick members of the armed forces and for prevention of disease;

c. medical and hospital stores, religious objects, clothing, bedding, essential foodstuffs, and means of shelter for the civilian population in general, and women and children in particular, provided there is not serious reason to believe that such goods will be diverted to other purpose, or that a definite military advantage would accrue to the enemy by their substitution for enemy goods that would thereby become available for military purposes;

d. items destined for POWs, including individual parcels and collective relief shipments containing food, clothing, medical supplies, religious objects, and educational, cultural, and athletic articles; and

e. goods otherwise specifically exempted from capture by arrangement between belligerents.

0327 ACQUIRING ENEMY CHARACTER

All vessels operating under an enemy flag, and all aircraft bearing enemy markings, possess enemy character. The converse is not true: any vessel or aircraft owned or controlled by a belligerent possesses enemy character, regardless of whether it is operating under a neutral flag or bears neutral markings. Vessels

and aircraft acquiring enemy character may be treated by an opposing belligerent as if they are enemy vessels and aircraft.

A. Acquiring the character of an enemy warship or military aircraft. Neutral vessels and aircraft, other than warships and military aircraft, acquire enemy character and may be treated by a belligerent as enemy warships and military aircraft when they take a direct part in the hostilities on the side of the enemy or act in any capacity as a naval or military auxiliary to the enemy's armed forces.

B. Acquiring the character of an enemy merchant vessel or aircraft. Neutral vessels and aircraft, other than warships and military aircraft, acquire enemy character and may be treated by a belligerent as enemy merchant vessels or aircraft when they operate directly under enemy control, orders, charter, employment, or direction or resist an attempt to establish identity, including visit and search.

0328 VISIT AND SEARCH

Visit and search is the means by which a belligerent warship or military aircraft may determine: the enemy or neutral character of merchant ships encountered outside neutral territory, the contraband or exempt character of their cargo, the innocent or hostile manner of their employment, and other facts bearing on their relation to the armed conflict.

A. Prohibitions. Warships are not subject to visit and search. The prohibition against visit and search in neutral territory extends to international straits overlapped by neutral territorial seas and archipelagic sea lanes. Neutral vessels engaged in government noncommercial service may not be subjected to visit and search. Neutral merchant vessels under convoy of neutral warships of the same nationality are also exempt from visit and search, although the convoy commander may be required to provide in writing to the commanding officer (CO) of an intercepting belligerent warship ,information as to the character of the vessels and of their cargoes which could otherwise be obtained by visit and search.

B. Procedure for visit and search. In the absence of specific Rules of Engagement (ROE) or other special instructions, U.S. Navy warships should comply with the following procedure when exercising the belligerent right of visit and search:

1. Visit and search should be exercised with all possible tact and consideration.

2. Before summoning a vessel to lie to, the warship should hoist its national flag. The summons is made by firing a blank charge, international flag signal (SN or SQ), or other recognized means. The summoned vessel, if a neutral

merchant ship, is bound to stop, lie to, display her colors, and not resist. (If the summoned vessel is an enemy ship, it is not so bound and may legally resist, even by force, but thereby assumes all risk of resulting damage or destruction.)

3. If the summoned vessel takes flight, she may be pursued and brought to by forcible measures if necessary.

4. When a summoned vessel has been brought to, the warship should send a boat with an officer to conduct the visit and search. If practicable, a second officer should accompany the officer charged with the examination. The officer(s) and boat crew may be armed at the discretion of the CO.

5. If visit and search at sea is deemed hazardous or impracticable, the neutral vessel may be escorted by the summoning of another U.S. Navy warship or by a U.S. military aircraft to the nearest place (outside neutral territory) where the visit and search may be conveniently and safely conducted. The neutral vessel is not obliged to lower her flag (she has not been captured), but must proceed according to the orders of the escorting warship or aircraft.

6. The boarding officer should first examine the ship's papers to ascertain her character, ports of departure and destination, nature of cargo, manner of employment, and other facts deemed pertinent. Papers to be examined will ordinarily include a certificate of national registry, crew list, passenger list, logbook, bill of health clearances, charter party (if chartered), invoices or manifests of cargo, bills of lading and, on occasion, a consular declaration or other certificate of noncontraband carriage certifying the innocence of the cargo.

7. Regularity of papers and evidence of innocence of cargo, employment, or destination furnished by them are not necessarily conclusive and, should doubt exist, the ship's company may be questioned and the ship and cargo searched.

8. Unless military security prohibits, the boarding officer will record the facts concerning the visit and search in the logbook of the visited ship, including the date and position of the interception. The entry should be authenticated by the signature and rank of the boarding officer, but neither the name of the visiting warship nor the identity of her CO should be disclosed.

C. Visit and search by military aircraft. Although aircraft have a right of visit and search, no established international practice has developed. Ordinarily, visit and search of a vessel by an aircraft is accomplished by directing and escorting the vessel to the vicinity of a belligerent warship, which will carry out the visit and search, or to a belligerent port. Visit and search of an aircraft by an aircraft may be

accomplished by directing the aircraft to proceed under escort to the nearest convenient belligerent landing area.

0329 BLOCKADE

Blockade is a belligerent operation to prevent vessels and / or aircraft of all nations, enemy as well as neutral, from entering or exiting specified ports, airfields, or coastal areas under the control of an enemy nation. A belligerent's purpose in establishing a blockade is to deny the enemy the use of enemy and neutral vessels or aircraft to transport personnel and goods to or from enemy territory.

A. Other measures distinguished. Unlike the belligerent right of visit and search, which is designed to interdict the flow of contraband goods into enemy territory and which may be exercised anywhere outside of neutral territory, the belligerent right of blockade is intended to prevent vessels and aircraft from crossing an established and publicized cordon separating the enemy from international waters and / or airspace. Unlike a blockade, quarantine is not a belligerent act. A quarantine only becomes offensive if an attempt is made at running prohibited items through the quarantine. A quarantine only prohibits the entry of certain items. Ships and aircraft carrying prohibited items are simply turned back or diverted to unaffected ports; they are not seized as prizes. Ships and aircraft not carrying prohibited items are permitted to pass.

B. Requirements. To be valid under the traditional rules of international law, a blockade must conform to the following criteria:

1. Establishment. A blockade must be established by the government of the belligerent nation. This is usually accomplished by a declaration of the belligerent government or by the commander of the blockading force acting on behalf of his / her government. The declaration should include, as a minimum, the date the blockade is to begin, its geographic limits, and the grace period granted neutral vessels and aircraft to leave the area to be blockaded.

2. Notification. It is customary for the belligerent nation establishing the blockade to notify all affected nations of its imposition. Because knowledge of the existence of a blockade is an essential element of the offenses of breach and attempted breach of blockade, neutral vessels and aircraft are always entitled to notification. The commander of the blockading forces will usually also notify local authorities in the blockaded area. The form of the notification is not material so long as it is effective.

3. Effectiveness. To be valid, a blockade must be effective. To be effective, it must be maintained by a surface, air, or subsurface force or other

mechanism that is sufficient to render entry or exit of the blockaded area dangerous. The requirement of effectiveness does not preclude temporary absence of the blockading force, nor does effectiveness require that every possible avenue of approach to the blockaded area be covered.

4. Impartiality. A blockade must be applied impartially to the vessels and aircraft of all nations.

C. Limitations. A blockade must not bar access to or departure from neutral ports and coasts. Neutral nations retain the right to engage in neutral commerce that does not involve trade or communications originating in or destined for the blockaded area. Although neutral warships and military aircraft enjoy no positive right of access to blockaded areas, the belligerent imposing the blockade may authorize their entry and exit.

0330 BELLIGERENT CONTROL OF THE IMMEDIATE AREA OF NAVAL OPERATIONS

Within the immediate area or vicinity of naval operations, a belligerent may establish special restrictions on the activities of neutral vessels and aircraft and may prohibit altogether such vessels and aircraft from entering the area. The immediate area or vicinity of naval operations is that area within which hostilities are taking place or belligerent forces are actually operating. A belligerent may not purport to deny access to neutral nations, or to close an international strait to neutral shipping, pursuant to this authority unless another route of similar convenience remains open to neutral traffic. Similarly, the CO of a belligerent warship may exercise control over the communication of any neutral merchant vessel or civil aircraft whose presence in the immediate area of naval operations might otherwise endanger or jeopardize those operations.

0331 CAPTURE OF NEUTRAL VESSELS AND AIRCRAFT

Neutral merchant vessels and civil aircraft are liable to capture by belligerent warships and military aircraft if engaged in activities which constitute abandonment of their neutral character. Captured vessels and aircraft are sent to a port or airfield under belligerent jurisdiction as prize for adjudication by a prize court. Ordinarily, a belligerent warship will place a prize master and prize crew on board a captured vessel for this purpose. Prizes may not be brought into neutral ports. Article 630.23 of OPNAVINST 3120.32B, Standard Organization and Regulations of the U.S. Navy, sets forth the duties and responsibilities of COs and prize masters concerning captured vessels. Neutral vessels or aircraft attempting to resist proper capture lay themselves open to forcible measures by belligerent

warships and military aircraft and assume all risk of resulting damage. Every reasonable effort should be made to avoid destruction of captured neutral vessels and aircraft. If destruction of the prize is necessary, the capturing officer must provide for the safety of the passengers, crew, and all documents and papers relating to the prize. The officers and crews of captured neutral merchant vessels and civil aircraft who are nationals of a neutral nation must be repatriated as soon as circumstances reasonably permit, unless they took an active part in the hostilities justifying their internment as POWs. Enemy nationals do not become POWs unless engaged in the service of the enemy.

0332 BELLIGERENT PERSONNEL INTERNED BY A NEUTRAL NATION

International law recognizes that neutral territory, being outside the region of war, offers a place of asylum to members of belligerent forces and as a general rule, requires the neutral government concerned to prevent the return of such persons to their own forces. The neutral nation must accord equal treatment to the personnel of all the belligerent forces. With respect to aircrews of belligerent aircraft that land in neutral territory, whether intentionally or inadvertently, the neutral nation should usually intern them.

CONVENTIONAL WEAPONS AND WEAPONS SYSTEMS

0333 CONVENTIONAL WEAPONS GENERALLY

This section addresses the legal considerations pertaining to the use of conventional weapons and weapons systems. The right of nations engaged in armed conflict to choose methods or means of warfare is limited. This rule of law is expressed in the concept that the employment of weapons, material, and methods of warfare that are designed to cause superfluous injury or unnecessary suffering is prohibited. As a corollary, weapons which by their nature are incapable of being directed specifically against military objects, and therefore indiscriminately put noncombatants at equivalent risk, are forbidden. A few weapons, such as poisoned projectiles, are unlawful no matter how employed. Others may be rendered unlawful by alteration, such as by coating ammunition with a poison. Still others may be unlawfully employed, such as setting armed contact naval mines adrift so as to endanger innocent, as well as enemy shipping. And finally, any weapon may be set to an unlawful purpose when it is directed against noncombatants and other protected persons and property.

0334 UNNECESSARY SUFFERING

Antipersonnel weapons are designed to kill or disable enemy combatants and are lawful—notwithstanding the death, pain, and suffering they inflict. Weapons that are designed to cause unnecessary suffering or superfluous injury, however, are prohibited because the damage they produce is needlessly disproportionate to the military advantage to be gained by their use. Poisoned projectiles and dum-dum bullets, for example, are prohibited because there is little military advantage to be gained by ensuring the death of wounded personnel through poisoning or the expanding effect of unjacketed lead ammunition. Similarly, the law prohibits the use of projectile materials that are difficult or impossible to find, using field x-ray equipment, in the people they wound. These projectiles (e.g., glass or clear plastic) unnecessarily inhibit the treatment of wounds.

0335 INDISCRIMINATE EFFECT

Indiscriminate weapons (i.e., those weapons incapable of being controlled so as to be directed against a military target) are forbidden. A weapon is not indiscriminate simply because it may cause incidental or collateral civilian casualties, provided such casualties are not foreseeably excessive in light of the expected military advantage to be gained. An artillery round capable of being directed with a reasonable degree of accuracy at a military target is not an indiscriminate weapon simply because it may miss its mark or inflict collateral damage. Conversely, uncontrolled balloon-borne bombs, drifting armed contact mines, and long-range unguided missiles are examples of weapons which lack that capability of direction and are, therefore, unlawful.

0336 NAVAL MINES

Naval mines have been effectively employed for area denial, coastal and harbor defense, antisurface and antisubmarine warfare, and blockade. Naval mines may be "armed" or "controlled." Armed mines are either emplaced with all safety devices withdrawn, or are armed following emplacement, so as to detonate when preset parameters (if any) are satisfied. Controlled mines have no destructive capability until activated by some controlled arming order which makes them armed mines. Naval mines are lawful weapons, but their potential for indiscriminate effects has led to specific regulation of their deployment and employment by LOAC.

A. Peacetime mining

1. In territorial seas. Consistent with the safety of its own citizenry, a nation may emplace both armed and controlled mines in its own internal waters at

any time with or without notification. A nation may also mine its own archipelagic waters and territorial sea during peacetime when deemed necessary for national security purposes. If armed mines are emplaced in archipelagic waters or the territorial sea, appropriate international notification of the existence and location of such mines is required. Because the right of innocent passage can be suspended only temporarily, armed mines must be removed or rendered harmless as soon as the security threat that prompted their emplacement has passed. Emplacement of controlled mines in a nation's own archipelagic waters or territorial sea is not subject to such notification or removal requirements. Naval mines may not be emplaced in the internal, territorial, or archipelagic waters of another nation in peacetime without that nation's consent.

2. Controlled mines in international waters. Controlled mines may be emplaced in international waters beyond the territorial sea subject only to the requirement that they do not unreasonably interfere with other lawful uses of the oceans. The determination of what constitutes an "unreasonable interference" involves a balancing of a number of factors including the rationale for their emplacement (i.e., the self-defense requirements of the emplacing nation), the extent of the area to be mined, the hazard (if any) to other lawful ocean uses, and the duration of their emplacement. Because controlled mines do not constitute a hazard to navigation, international notice of their emplacement is not required.

3. Armed mines in international waters. Armed mines may not be emplaced in international waters prior to the outbreak of armed conflict, except under the most demanding requirements of individual or collective self-defense. Under such circumstances, prior notification of their location and the anticipated date of their complete removal must be stated. The nation emplacing armed mines in international waters during peacetime also assumes responsibility to maintain an on-scene presence in the area sufficient to warn ships approaching the danger area. All armed mines must be expeditiously removed or rendered harmless when the imminent danger that prompted their emplacement has passed.

B. Mining during armed conflict. Naval mines may be lawfully employed by parties to an armed conflict subject to the following restrictions:

1. International notification of the location of emplaced armed mines must be made as soon as military exigencies permit;

2. belligerents may not mine neutral waters;

3. anchored mines must become harmless as soon as they have broken their moorings;

4. unanchored mines not otherwise affixed or imbedded in the bottom must become harmless within an hour after loss of control over them;

5. the location of minefields must be carefully recorded to ensure accurate notification and to facilitate subsequent removal and / or deactivation;

6. naval mines may be employed to channelize neutral shipping, but not in a manner to impede the transit passage of international straits or archipelagic sea lanes passage of archipelagic waters by such shipping;

7. naval mines may not be emplaced off the coasts and ports of the enemy with the sole objective of intercepting commercial shipping, but may otherwise be employed in the strategic blockade of enemy ports, coasts, and waterways; and

8. mining of areas of indefinite extent in international waters is prohibited. Mines may establish reasonably limited barred areas, provided neutral shipping retains an alternate route around or through such an area with reasonable assurance of safety.

0337 TORPEDOES

Torpedoes which do not become harmless when they have missed their mark constitute a danger to innocent shipping and are therefore unlawful. All U.S. Navy torpedoes are designed to sink to the bottom and become harmless upon completion of their propulsion run.

0338 CLUSTER AND FRAGMENTATION WEAPONS

Cluster and fragmentation weapons are projectiles, bombs, missiles, and grenades that are designed to fragment prior to or upon detonation, thereby expanding the radius of their lethality and destructiveness. These weapons are lawful when used against combatants. When used in proximity to noncombatants or civilian objects, their employment should be carefully monitored to ensure that collateral civilian casualties or damage are not excessive in relation to the legitimate military advantage sought.

0339 DELAYED ACTION DEVICES

Booby traps and other delayed action devices are not unlawful, provided they are not designed or employed to cause unnecessary suffering. Devices that are designed to simulate items likely to attract and injure noncombatants (e.g., toys) are

prohibited. Similarly, booby traps cannot be attached to protected persons or objects (e.g., the wounded and sick, dead bodies, or medical facilities and supplies).

0340 INCENDIARY WEAPONS

Incendiary devices, such as tracer ammunition, thermite bombs, flame throwers, napalm, and other incendiary weapons and agents, are lawful weapons. Incendiary devices should be employed in a manner that minimizes uncontrolled or indiscriminate effects on the civilian population consistent with mission accomplishment and force security.

0341 OVER-THE-HORIZON WEAPONS SYSTEMS

Missiles and projectiles dependent upon over-the-horizon or beyond-visual-range guidance systems are lawful, provided they are equipped with sensors or are employed in conjunction with external sources of targeting data that are sufficient to ensure effective target discrimination.

0342 LEGAL REVIEW

Per the Department of Defense (DOD) policy, all weapons newly developed or purchased by the U.S. armed forces must be reviewed for consistency with international law. For the Navy, these reviews are conducted by the Judge Advocate General (JAG) before the engineering development stage of the acquisition process and before the initial contract for production is let. For further information, see SECNAVINST 5711.8.

NUCLEAR, CHEMICAL, AND BIOLOGICAL (NCB) WEAPONS

0343 NCB WEAPONS GENERALLY

NCB weapons present special LOAC problems due to their potential for indiscriminate effects and unnecessary suffering. This section addresses legal considerations pertaining to the development, possession, deployment, and employment of these weapons.

0344 NUCLEAR WEAPONS

No rules of customary or conventional international law prohibit nations from employing nuclear weapons in armed conflict. Employment of nuclear weapons is, however, subject to the following fundamental principles of LOAC: the right to adopt means of injuring the enemy is not unlimited, attacks against the civilian population as such may not be launched, and the distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible. The decision to authorize the use of U.S. nuclear weapons rests solely with the President. Nuclear weapons are regulated by a number of arms control agreements restricting their development, deployment, and use. Some of these agreements (e.g., the 1963 Nuclear Test Ban Treaty) may not apply during time of war.

A. Seabed Arms Control Treaty. This multilateral convention prohibits emplacement of nuclear weapons on the seabed and the ocean floor beyond a 12 nautical miles (NM) coastal zone measured from the baseline of the territorial sea. The prohibition extends to structures, launching installations, and other facilities specifically designed for storing, testing, or using nuclear weapons. This treaty prohibits emplacement of nuclear mines on the seabed and ocean floor or in the subsoil thereof. It does not, however, prohibit the use of nuclear weapons in the water column that are not so affixed to the seabed (e.g., nuclear-armed depth charges and torpedoes).

B. Outer Space Treaty. This multilateral convention prohibits the placement, installation, or stationing of nuclear weapons or other weapons of mass destruction in earth orbit, on the moon or other celestial bodies, or in outer space. Suborbital missile systems are not included in this prohibition.

C. Antarctic Treaty. The Antarctic Treaty is a multilateral convention designed to ensure that Antarctica, defined to include the area south of 60 degrees S latitude, is used for peaceful purposes only. The treaty prohibits in Antarctica "any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons." Nuclear explosions are specifically prohibited. Ships and aircraft at points of discharging personnel or cargoes in Antarctica are subject to international inspection. Ships and aircraft operating on and over the high seas within the treaty area are not subject to these prohibitions. For a detailed discussion of the Antarctic Treaty in general, see Hinkley, *Protecting American Interests in Antarctica*, 39 Naval L. Rev. 43 (1990).

D. Treaty of Tlatelolco. This treaty is an agreement among the Latin American countries not to introduce nuclear weapons into Latin America. The treaty does not, however, prohibit Latin American nations from authorizing nuclear-armed

ships and aircraft of nonmember nations to visit their ports and airfields or to transit through their territorial seas or airspace. The treaty is not applicable to the power system of any vessel. Under Protocol I to the treaty, the Netherlands, the United Kingdom, and the United States have agreed to abide by the denuclearization provisions of the treaty. Consequently, the United States cannot maintain nuclear weapons in Guantanamo Bay, Cuba; the Virgin Islands; and Puerto Rico. Protocol I nations retain the power to authorize transits and port visits by ships and aircraft of their own or other armed forces in their Protocol I territories, regardless of armament or cargo.

E. Nuclear Test Ban Treaty. This multilateral treaty prohibits the testing of nuclear weapons in the atmosphere, in outer space, and underwater. Over 100 nations are party to the treaty, including the countries of the former U.S.S.R., the United Kingdom, and the United States (France and China are not parties.) Underground testing of nuclear weapons is not included within the ban.

F. Non-Proliferation Treaty. This multilateral treaty obligates nations having nuclear weapons to refrain from transferring nuclear weapons or nuclear weapons technology to nations without them. Member nations without nuclear weapons agree to refrain from accepting such weapons from other nations or from manufacturing nuclear weapons themselves. The treaty does not apply in time of war.

G. Bilateral Nuclear Arms Control Agreements. The United States and the countries of the former U.S.S.R. have concluded a number of bilateral agreements designed to restrain the growth of nuclear warheads and launchers and to reduce the risk of miscalculation that could trigger a nuclear exchange. Among these agreements are the Hotline Agreements of 1963 and 1971, the Accidents Measures Agreement of 1971, the 1973 Agreement on Prevention of Nuclear War, the Anti-Ballistic Missile Treaty of 1972 and its Protocol of 1974, the Threshold Test Ban Treaty of 1974, the 1976 Treaty on Peaceful Nuclear Explosions, the SALT Agreements of 1972 and 1977 (SALT I—Interim Agreement has expired; SALT II was never ratified), and the INF Treaty of 1988.

0345 CHEMICAL WEAPONS

Both customary and conventional international law prohibit the "first use" of lethal chemical weapons in armed conflict. The United States is a party to the 1925 Geneva Gas Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare ("the 1925 Gas Protocol"). All North Atlantic Treaty Organization (NATO) nations and Warsaw Pact nations are parties. Most parties, including the United States, reserved the right to employ chemical weapons for retaliatory purposes. The 1925 Gas Protocol does not

prohibit the development, production, testing, or stockpiling of chemical weapons. Similarly, equipping and training military forces for chemical warfare is permissible. The United States categorizes chemical weapons under three headings of lethal and incapacitating agents, riot control agents, and herbicidal agents.

A. Lethal and incapacitating agents. The United States considers the prohibition against first use of lethal and incapacitating chemical weapons to be part of customary international law and, therefore, binding on all nations whether or not they are parties to the 1925 Gas Protocol. Lethal chemical agents are those which cause immediate death; incapacitating agents are those producing symptoms that persist for appreciable periods of time after exposure. National Command Authorities' (NCA) approval is required for retaliatory use of lethal or incapacitating chemical weapons by U.S. forces. Retaliatory use must stop as soon as the enemy use of such agents that prompted the retaliation has ceased and any tactical advantage gained by the enemy through unlawful first use has been redressed.

B. Riot control agents. Riot control agents are those gases, liquids, and analogous substances that are widely used by governments for civil law enforcement purposes (e.g., tear gas and Mace). Riot control agents, in all but the most unusual circumstances, cause effects that disappear within minutes after exposure.

1. During armed conflict. While opining that wartime use of riot control agents is not prohibited by the 1925 Gas Protocol, the United States has formally renounced first use of riot control agents in armed conflict except in defensive military modes to save lives. Use of riot control agents by U.S. forces in armed conflict requires NCA approval. Executive Order No. 11,850; 3A C.F.R. §§ 149-50. Examples of authorized use of riot control agents in time of armed conflict include:

a. Riot control situations in areas under effective U.S. military control, to include control of rioting POWs;

b. rescue missions involving downed aircrews or escaping POWs; and

c. protection of military supply depots, military convoys, and other military activities in rear echelon areas from civil disturbances, terrorist activities, or paramilitary operations.

2. During peacetime. Employment of riot control agents in peacetime may be authorized by the Secretary of Defense (SECDEF) or, in limited circumstances, by unified and specified commanders. Examples of authorized use of riot control agents in peacetime include:

a. Civil disturbances and other law enforcement activities in the United States, its territories, and possessions [SECNAVINST 5400.12];

b. on U.S. bases, posts, embassy grounds, and installations overseas for protection and security purposes, including riot control;

c. off-base overseas for law enforcement purposes specifically authorized by the host government; and

d. humanitarian evacuation operations involving U.S. or foreign nationals.

C. Herbicidal agents. Herbicidal agents are gases, liquids, and analogous substances that are designed to defoliate trees, bushes, or shrubs, or to kill long grasses and other vegetation that could shield the movement of enemy forces. While opining that use of herbicidal agents in wartime is not prohibited by the 1925 Gas Protocol, the United States has formally renounced the first use of herbicides in time of armed conflict except for control of vegetation within U.S. bases and installations or around their immediate defensive perimeters. Use of herbicidal agents during armed conflict requires NCA approval. In peacetime, the use of herbicidal agents may be authorized by SECDEF or, in limited circumstances, by unified and specified commanders.

0346 BIOLOGICAL WEAPONS

International law prohibits all biological weapons or methods of warfare whether directed against persons, animals, or plant life. Biological weapons include microbial or other biological agents or toxins, natural and artificial. The United States has formally renounced the use of biological weapons under any circumstances. The United States considers the prohibition against the use of biological weapons during armed conflict to be part of customary international law and thereby binding on all nations, regardless of whether they are parties to the 1925 Gas Protocol (prohibiting their use) or the 1972 Biological Weapons Convention (prohibiting their production, testing, and stockpiling). The United States, the countries of the former U.S.S.R., and most other NATO and former Warsaw Pact nations are parties to both the 1925 Gas Protocol and the 1972 Biological Weapons Convention. Pursuant to its treaty obligations, the United States has destroyed all its biological and toxin weapons and restricts its research activities to development of defensive capabilities.

DECEPTION DURING ARMED CONFLICT

0347 DECEPTION GENERALLY

LOAC permits deceiving the enemy through stratagems and ruses of war intended to mislead him, to deter him from taking action, or to induce him to act recklessly, provided the ruses do not violate rules of international law applicable to armed conflict.

0348 PERMITTED DECEPTIONS

Stratagems and ruses of war permitted in armed conflict include such deceptions as camouflage; deceptive lighting; dummy ships, aircraft, and other armament; decoys; simulated forces; feigned attacks, withdrawals, operations, or other activities; surprise attacks, traps, and ambushes; false intelligence information; moving landmarks and route markers; electronic deceptions; and use of enemy codes, passwords, and countersigns. These and similar lawful deceptions can be used offensively or defensively.

0349 PROHIBITED DECEPTIONS

The use of unlawful deceptions is called "perfidy." Acts of perfidy are deceptions designed to invite the confidence of the enemy to lead him to believe that he is entitled to, or is obliged to accord, protected status under LOAC with the intent to betray that confidence (e.g., feigning surrender to lure the enemy into a trap or the use by combatant aircraft of the electronic signal reserved exclusively for medical aircraft). Any deception which would invite the enemy to violate LOAC is unlawful. For example, it would be improper to spread false intelligence reports intended to induce the enemy to attack civilian objects in the mistaken belief that they are military objects. A false broadcast to the enemy that an armistice has been agreed upon has been widely recognized to be treacherous. It is not, however, perfidious to use spies; encourage defection or insurrection among the enemy; or to encourage enemy combatants to desert, surrender, or rebel.

0350 MISUSE OF PROTECTIVE SIGNS, SIGNALS, AND SYMBOLS

The use of protective signs, signals, and symbols to injure, kill, or capture the enemy is prohibited. Such acts are perfidious because they undermine the effectiveness of protective signs, signals, and symbols and thereby jeopardize the safety of noncombatants and the immunity of protected structures and activities. For example, using an ambulance or medical aircraft marked with the Red Cross or Red

Crescent to carry armed combatants, weapons, or ammunition with which to attack or elude enemy forces is prohibited. Similarly, use of the white flag to gain a military advantage over the enemy is unlawful. The white flag symbolizes a request to cease fire, negotiate, or surrender. Displaying a white flag before attack to cause the enemy to cease firing is prohibited. The enemy is not required to cease firing or place its troops in jeopardy when a white flag is raised. To indicate that the hoisting is authorized by its commander, the appearance of the flag should be accompanied or followed promptly by a complete cessation of fire from that side. Further, the commander hoisting the flag should immediately send a representative to negotiate.

0351 NEUTRAL FLAGS, INSIGNIA, AND UNIFORMS

The use of false or deceptive markings to disguise belligerent military aircraft as being of neutral nationality is prohibited. Similarly, belligerents engaged in armed conflict on land are not permitted to use the flags, insignia, or uniforms of a neutral nation to deceive the enemy. Under the customary international law of naval warfare, however, a belligerent warship ***may*** fly false colors and disguise its outward appearance in other ways to deceive the enemy into believing the vessel is of neutral nationality or is not a warship. A warship can not, however, go into action without first showing her true colors. Nevertheless, the use of these ruses by naval forces today may be politically sensitive since using neutral emblems might lead a party erroneously to conclude that a neutral has given up its neutrality and entered the fighting on the other side. This could lead to an attack or declaration of war on the neutral.

0352 THE U.N. FLAG AND EMBLEM

The flag of the United Nations and the letters "UN" may not be used in armed conflict for any purpose without U.N. authorization. The U.N. flag is white on light blue; the letters "UN" are its emblem. The prohibition is extended to operations at sea as a matter of U.S. policy.

0353 ENEMY FLAGS, INSIGNIA, AND UNIFORMS

A. At sea. Naval surface and subsurface forces may fly enemy colors and display enemy markings to deceive the enemy. Warships must, however, display their true colors prior to an actual armed engagement.

B. In the air. Given the inability to change markings once airborne, the use in combat of enemy markings by belligerent military aircraft is prohibited. Moreover,

the speed of engagement precludes effective attempts to display true markings at the instant of attack.

C. On land. Belligerent land forces ***may*** use enemy flags, insignia, or uniforms to deceive the enemy either before or after, but ***not*** during, an armed engagement. Combatants risk loss of entitlement to POW status, however, if they are captured while displaying enemy colors or insignia or wearing enemy uniforms in combat. Downed aircrews and escaping POWs, however, may use enemy uniforms to evade capture so long as they do not attack enemy forces, gather military intelligence, or engage in similar military operations while so attired. Using foreign military uniforms or equipment in training to promote realism and recognition is permissible. As a general rule, enemy markings should be removed from captured enemy equipment before it is used in combat; unmarked or camouflaged captured material may be used immediately.

0354 FEIGNING DISTRESS

It is unlawful to feign distress through the false use of internationally recognized distress signals such as ***SOS*** and ***MAYDAY***.

A. Wounded combatants. A wounded combatant does not commit perfidy by calling for and receiving medical aid even though he / she may be intending immediately to resume fighting; nor do medical personnel commit perfidy by rendering such aid.

B. Aerial combatants. In air warfare, however, it is permissible to feign disablement or other distress as a means to induce the enemy to break off an attack. Consequently, there is no obligation in air warfare to cease attacking a belligerent military aircraft that appears to be disabled. By analogy, the practice of submarines in releasing oil and debris to feign success of a depth charge or torpedo attack has never been considered to be unlawful. If one ***knows*** the enemy aircraft is disabled such as to permanently remove it from the conflict (e.g., major fire or structural damage), however, combatants are obligated to cease attacking to permit possible evacuation by crew or passengers.

0355 FALSE CLAIMS OF NONCOMBATANT STATUS

Combatants may not kill, injure, or capture the enemy by false indication of an intent to surrender or by feigning shipwreck, sickness, wounds, or civilian status. A surprise attack by a person feigning shipwreck, sickness, or wounds undermines the protected status of those rendered incapable of combat. Similarly, since civilians are not lawful objects of attack, combatants may not disguise

themselves in civilian clothing to engage in hostilities. Attacking enemy forces while posing as a civilian would put all civilians in jeopardy. Such acts of perfidy are punishable as war crimes.

0356 ILLEGAL COMBATANTS

Persons who take part in combat operations without distinguishing themselves clearly from the civilian population are illegal combatants and are subject to punishment upon capture. Illegal combatants may be denied POW status and be tried and punished for falsely claiming noncombatant status during combat by a competent tribunal of the captor nation. Under U.S. policy, however, illegal combatants will be accorded POW status if they were carrying arms openly at the time of capture.

0357 SPIES

A. Spy defined. A spy is someone who, while in territory under enemy control, seeks to obtain information while operating under a false claim of noncombatant or friendly forces status with the intention of passing that information to an opposing belligerent. Conversely, personnel conducting reconnaissance missions behind enemy lines while properly uniformed are not spies. Crewmembers of warships and military aircraft engaged in intelligence collection missions in enemy waters or airspace are not spies unless the ship or aircraft displays false civilian, neutral, or enemy markings.

B. Legal status. Spying during armed conflict is not a violation of international law. Captured spies are not, however, entitled to POW status. The captor nation may try and punish spies in accordance with its national law. Should a spy succeed in eluding capture and return to friendly territory, liability to punishment terminates. If subsequently captured during some other military operation, the former spy cannot be tried or punished for the earlier act of espionage. These rules apply only to members of the armed forces, including members of those resistance and guerrilla groups who qualify under the applicable international law as members of the armed forces who gather information under false pretenses. Espionage by civilians remains covered by The Hague Regulations, articles 29 and 30, as supplemented by the Fourth Convention and Additional Protocol 1, as well as by the national law of espionage.

POW ISSUES

0358 POW REFERENCES

A. Geneva Convention Relative to the Treatment of Prisoners of War of 1949 (GPW)

B. DOD Directive 1300.7, Subj: TRAINING AND EDUCATION MEASURES NECESSARY TO SUPPORT THE CODE OF CONDUCT

C. OPNAVINST 1000.24, Subj: CODE OF CONDUCT TRAINING

0359 PERSONS ENTITLED TO POW STATUS

Persons entitled to POW status upon capture include members of the regular armed forces, the militia and volunteer units fighting with the regular armed forces, and civilians accompanying the armed forces. Militia, volunteers, guerrillas, and other partisans not fighting in association with the regular armed forces, qualify for POW status upon capture, provided they are commanded by a person responsible for their conduct, are uniformed or bear a fixed distinctive sign recognizable at a distance, carry their arms openly, and conduct their operations in accordance with LOAC.

A. Status determinations. Should a question arise regarding a captive's entitlement to POW status, that individual should be accorded POW treatment until a competent tribunal convened by the captor determines the status to which that individual is properly entitled. Individuals captured as spies or as illegal combatants have the right to assert their entitlement to POW status before a judicial tribunal and to have the question adjudicated. Such persons have a right to be fairly tried for violations of LOAC and may not be summarily executed.

B. Evacuation to safety. Article 19 of GPW requires that POWs be evacuated to areas away from the combat zone. POWs shall be evacuated, as soon as possible after their capture, to camps situated in an area far enough from the combat zone for them to be out of danger and shall not be unnecessarily exposed to danger while awaiting evacuation from a fighting zone. Only those POWs who, owing to wounds or sickness, would run greater risks by being evacuated than by remaining where they are may be temporarily kept back in a danger zone.

C. Temporary detention aboard naval vessels. International treaty law expressly prohibits "internment" of POWs other than in premises on land, but does not address temporary stay on board vessels. United States policy, however, permits detention of POWs, civilian internees (CIs), and detained persons (DETs) on naval

vessels under certain circumstances. The detention must be temporary (i.e., limited to the minimum period necessary to evacuate such persons from the combat zone or to avoid significant harm such persons would face if detained on land). Use of immobilized vessels for temporary detention of POWs, CIs, or DETs must be authorized by NCA. Generally, persons may be temporarily detained as follows:

1. POW / CI / DET picked up at sea may be temporarily held on board as operational needs dictate, pending a reasonable opportunity to transfer them to a shore facility or to another vessel for evacuation to a shore facility.

2. POW / CI / DET may be temporarily held on board naval vessels while being transported between land facilities.

3. POW / CI / DET may be temporarily held on board naval vessels if such detention would appreciably improve their safety or health prospects.

0360 PUBLIC DISPLAY

Article 13, GPW, prohibits the public display of POWs. Likewise, POWs must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity. Although videotape or photographs showing POWs being captured do not, by themselves, violate the Geneva Convention, photographs shown on worldwide television are counterproductive and may invite the enemy to charge us with using POWs for propaganda purposes or take reprisal actions against American POWs. The media's proximity to the modern battlefield dictates that commanders and public affairs officers try to minimize contact between the media and POWs in our control. These efforts must be taken with the proper discretion. We can stay out of camera range when possible, but cannot wrest cameras from photographers or confiscate film. If we desire to show our humane treatment of POWs, we should not do it with photography. Similarly, commanders must make every effort to urge our allies to follow these guidelines.

0361 CHAIN OF COMMAND

For the Department of the Navy (DON) POWs, the senior officer present in a POW situation will be the senior officer, line or staff, regardless of branch of service, who is not a chaplain or medical officer unless all of the POWs are attached to the same command, in which case the officer detailed as the CO, or his / her successor, will be the senior officer present. Article 1140.3, *U.S. Navy Regulations, 1990*. Chaplains and medical officers (medical, dental, nurse, and medical service corps) do not assume command as the senior officer present in a POW situation

because it would be inconsistent with their protected status as retained (vice POW) personnel under Article 24 of the Geneva Convention.

0362 HUMANE TREATMENT

POWs must at all times be humanely treated. Any unlawful act or omission by the detaining power causing death or seriously endangering the health of a POW in its custody is prohibited and will be regarded as a serious breach of the present Convention. In particular, no POW may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental, or hospital treatment of the prisoner concerned and carried out in his / her interest.

A. Living arrangements. Article 22, GPW, requires that POWs be held with captive compatriots and be provided with healthy living arrangements located on land. POWs interned in unhealthy areas, or where the climate is injurious for them, shall be removed as soon as possible to a more favorable climate. The detaining power shall assemble POWs in camps according to their nationality, language, and customs, provided that such prisoners shall not be separated from POWs belonging to the armed forces with which they were serving at the time of their capture, except with their consent.

B. Labor. Enlisted POWs may be required to engage in labor having no military character or purpose, noncommissioned officers may only be required to perform supervisory work, and officers may not be required to work.

0363 INTERROGATION

Article 17, GPW, established strict guidelines on the interrogation of POWs, limiting the amount of information that a POW must give to his / her captors. Every POW, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number or, failing this, equivalent information. Violation of this requirement may subject the POW to restriction of the privileges accorded to his / her rank or status.

A. Identification (ID) card. Each party to a conflict is required to furnish the persons under its jurisdiction who are liable to become POWs, with an ID card showing the holder's surname, first names, rank, branch of service, personal or serial number or equivalent information, and date of birth. The ID card may, furthermore, bear the signature or the fingerprints, or both, of the owner, and may bear, as well, any other information the party to the conflict may wish to add concerning persons belonging to its armed forces. As far as possible, the card shall measure 6.5 x 10 cm.

and shall be issued in duplicate. The ID card shall be shown by the POW upon demand, but may in no case be taken away from him.

B. Interrogation techniques. No physical or mental torture, nor any other form of coercion, may be inflicted on POWs to secure from them information of any kind whatever. POWs who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind. POWs who, owing to their physical or mental condition, are unable to state their identity, shall be handed over to the medical service. The identity of such POWs shall be established by all possible means, subject to the provisions of the preceding paragraph.

0364 DISCIPLINE

Under Article 82, GPW, POWs are subject to the laws, regulations, and orders in force in the armed forces of the detaining power.

A. Penal and disciplinary offenses. Article 82, GPW, distinguishes penal from disciplinary offenses. If the law, regulation, or order is punishable only when committed by a POW (i.e., the same act would not be punishable if committed by a U.S. servicemember), only disciplinary punishment can be imposed for the offense. The detaining power is encouraged under the GPW to use disciplinary rather than judicial measures whenever possible.

B. Permissible disciplinary punishments. The following disciplinary punishments are applicable to POWs:

1. A fine which shall not exceed 50 percent of the advances of pay and working pay which the POW would otherwise receive under articles 60 and 62 of the GPW for a period not to exceed 30 days;

2. discontinuance of privileges granted over and above the treatment provided for by the GPW;

3. fatigue duties not exceeding two hours daily (shall not be applied to officers); or

4 confinement.

C. Other limitations on punishment. Disciplinary punishments cannot be inhuman, brutal, or dangerous to the health of POWs; nor can collective punishment for individual acts, corporal punishment, imprisonment in premises without daylights and, generally, any form of torture or cruelty be imposed. The duration of any single

punishment cannot exceed 30 days, even when the POW is answerable for several acts occurring at the same time, regardless of whether the acts are related. POWs may not be subjected to reprisal action.

D. Escape. Escaping POWs who are recaptured are subject only to disciplinary punishment, even for repeat escape offenses. POWs who commit offenses in the furtherance of an escape attempt which do not entail any violence against life or limb (such as offenses against public property, theft without intention of self-enrichment, using false papers, or wearing civilian clothes) are subject to disciplinary punishment only.

E. Procedure. Disciplinary punishment may be ordered only by an officer having disciplinary powers as a camp commander and, before any punishment is awarded, POWs are entitled to an opportunity to explain their conduct and defend themselves. Further, records of disciplinary punishments must be kept by the camp commander and be produced for inspection by representatives of the protecting power (e.g., International Committee of the Red Cross). POWs cannot be transferred to penal institutions to serve disciplinary punishments. Further, all premises in which disciplinary punishments are served must conform to the sanitary requirements of Article 25 of the GPW. While undergoing disciplinary confinement, POWs are accorded the benefits of the GPW except insofar as these are inapplicable because of their confinement. Nevertheless, POWs in disciplinary confinement are permitted to send and receive letters, read and write, receive medical attention, exercise, and to stay in the open air for two hours daily.

0365 CODE OF CONDUCT

The Code of Conduct, reproduced below, outlines basic responsibilities and obligations of servicemembers subjected to hostile detention. The Code of Conduct was first promulgated by President Eisenhower on August 17, 1955, as Executive Order No. 10, 631, "Code of Conduct for Members of the Armed Forces of the United States." The Code is consistent with the requirements of GPW. Under the GPW and the Code, when questioned, a POW is required to give name, rank, service number, and date of birth. Under GPW, the enemy may not use coercion to force a POW to provide any additional information.

A. Peacetime application. The Code of Conduct applies during peace and war. Personnel captured or detained by hostile governments or terrorists are often exploited for ransom, release of fellow captives, false confessions or information, and propaganda efforts to discredit either the captives themselves or their government.

B. Training. DOD Directive 1300.7 promulgates training policy and procedures. Training shall be conducted without delay upon entry of members into

C. Violations. The Code of Conduct itself is not punitive. Violations may, however, constitute violations of the *Uniform Code of Military Justice* (UCMJ) (e.g., Articles 90, 91, 99, 100, 104, and 105).

ENFORCEMENT

0366 ENFORCING LOAC

Under international law, various means are available to belligerents for inducing the observance of legitimate warfare. In the event of a clearly established violation of LOAC, the aggrieved nation may:

A. Publicize the facts with a view toward influencing world public opinion against the offending nation;

B. protest to the offending nation and demand that those responsible be punished and / or that compensation be paid;

C. seek the intervention of a neutral party, particularly with respect to the protection of POWs and other of its nationals that have fallen under the control of the offending nation;

D. execute a reprisal action; and

E. punish individual offenders either during the conflict or upon cessation of hostilities.

0367 THE PROTECTING POWER

Under the Geneva Conventions of 1949, the treatment of POWs, interned civilians, and the inhabitants of occupied territory is to be monitored by a neutral nation known as the protecting power. Due to the difficulty of finding a nation which the opposing belligerents will regard as truly neutral, international humanitarian organizations (such as the International Committee of the Red Cross) have been authorized by the parties to the conflict to perform at least some of the functions of a protecting power.

0368 THE INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC)

The ICRC is a nongovernmental, humanitarian organization based in Geneva, Switzerland. The ruling body of the ICRC is composed entirely of Swiss citizens and is staffed mainly by Swiss nationals. (The ICRC is distinct from and should not be confused with the various national Red Cross societies such as the American National Red Cross.) Its principal purpose is to provide protection and assistance to the victims of armed conflict. The Geneva Conventions recognize the special status of the ICRC and have assigned specific tasks for it to perform, including visiting and interviewing POWs, providing relief to the civilian population of occupied territories, searching for information concerning missing persons, and offering its "good offices" to facilitate the establishment of hospital and safety zones. Under its governing statute, the ICRC is dedicated to work for the faithful application of the Geneva Conventions, to endeavor to ensure the protection of military and civilian victims of armed conflict, and to serve as a neutral intermediary between belligerents.

0369 REPRISAL

A reprisal is an enforcement measure under LOAC consisting of an act which would otherwise be unlawful, but which is justified as a response to the unlawful acts of an enemy. The sole purpose of a reprisal is to induce the enemy to cease its illegal activity and to comply with LOAC. Reprisals may be taken against enemy armed forces; enemy civilians, other than those in occupied territory; and enemy property. Although reprisals are lawful when the requirements for their use are met, there is always the risk that it will trigger retaliatory escalation (counter-reprisals) by the enemy. Consequently, the United States has historically been reluctant to resort to reprisal actions.

A. Requirements. To be valid, a reprisal action must:

1. Be ordered by the highest authority of the belligerent's government (Only NCA can authorize reprisals by U.S. forces);

2. respond to illegal acts of warfare committed by an adversary government, its military commanders, or combatants for which the adversary is responsible (i.e., anticipatory reprisal is not authorized);

3. be preceded by a demand for redress by the enemy of his unlawful acts when circumstances permit;

4. be taken to cause the enemy to cease its unlawful activity (i.e., reprisal action should be brought to the attention of the enemy to achieve maximum effectiveness and must never be taken for revenge);

5. be used only as a last resort when other enforcement measures have failed or would be of no avail;

6. be proportional to the original violation; and

7. cease as soon as the enemy is induced to desist from its unlawful activities and to comply with LOAC.

B. Immunity. Reprisals may never be taken against:

1. POWs or ICs;

2. wounded, sick, and shipwrecked persons;

3. civilians in occupied territory; or

4. hospitals and medical facilities, personnel, and equipment (including hospital ships, medical aircraft, and medical vehicles).

0370 RECIPROCITY

Some obligations under LOAC are reciprocal in that they are binding on the parties only so long as both sides continue to comply with them. A major violation by one side will release the other side from all further duty to abide by that obligation. The concept of reciprocity is not applicable to humanitarian rules of law that protect the victims of armed conflict; that is, those persons protected by the 1949 Geneva Conventions. The decision to consider the United States released from a particular obligation following a major violation by the enemy will ordinarily be made by the NCA.

WAR CRIMES

0371 WAR CRIMES UNDER INTERNATIONAL LAW

War crimes may be defined as those acts which violate LOAC. Acts constituting war crimes may be committed by members of the armed forces or civilians. Belligerents have the obligation, under international law, to punish their own nationals who commit war crimes. Belligerents also have the right to punish

enemy armed forces personnel and enemy civilians who fall under their control for such offenses. War crimes are classified by their severity as "ordinary war crimes" (e.g., compelling a POW to perform prohibited labor) and "grave breaches" (e.g., torture).

0372 TRIALS

Although permitted under international law, nations rarely try enemy combatants during hostilities. Trials might provoke undesirable actions from an enemy and complicate humanitarian protections applicable to one's own nationals. Even after the close of hostilities, criminal trials against lawful enemy combatants have been the exception not the rule. No international trials were held against World War I combatants. Some trials were held by German authorities of German personnel as required by the allies. Due to the gross excesses of the axis powers during World War II, the United Nations determined it necessary to assign individual criminal responsibility to the principal political, military, and industrial leaders responsible for the initiation of the war and various inhumane policies. Since World War II, state practice has generally avoided such prosecutions after conflicts have terminated.

0373 JURISDICTION OVER OFFENSES

Except for war crimes trials conducted by the allies after World War II, the majority of prosecutions for violations of LOAC have been trials of one's own forces for breaches of military discipline. Although jurisdiction extends to enemy personnel, trials have almost exclusively been against unlawful combatants, such as persons who take part in combat operations without distinguishing themselves clearly from the civilian population during battle or those acting without state sanction for private ends. In the United States, jurisdiction is not limited to offenses against U.S. nationals, but extends to offenses against persons of other nationalities. Violations by enemy personnel may be tried as offenses against international law, which forms part of the law of the United States. In occupied territories, trials are usually held under occupation law. Trials of such personnel have been held in military courts, military commissions, provost courts, military government courts, and other military tribunals. War crimes are not subject to any statute of limitations.

0374 FAIR TRIAL STANDARDS

International law standards for the trial of war crimes are found in the 1949 Geneva Convention for the Protection of Prisoners of War (articles 82–108), in the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time

of War (articles 64–75 and 117–26), and in article 6 of the 1977 Additional Protocol II. Failure to provide a fair trial for the alleged commission of war crimes is itself a war crime, a grave breach under common articles 50 / 51 / 130 / 147 of the 1949 Geneva Conventions.

0375 DEFENSES

A. Ignorance of the act of a subordinate. Commanders are responsible for ensuring that they conduct all combat operations in accordance with LOAC. They are also responsible for the proper performance of their subordinates. While commanders may delegate some or all of their authority, they cannot delegate responsibility for the conduct of the forces they command. The fact that a commander did not order, authorize, or knowingly acquiesce in a violation of LOAC by a subordinate is not a defense if the commander failed to exercise command authority properly or otherwise failed to take reasonable measures to discover and correct violations that may already have occurred.

B. Superior orders. All members of the naval service have a duty to comply with LOAC and, to the utmost of their ability and authority, to prevent violations by others. Members of the naval service must obey all lawful orders issued by a superior. Under both international law and U.S. law, an order to commit an obviously criminal act, such as the wanton killing of a noncombatant or the torture of a prisoner, is an unlawful order. Compliance with a patently unlawful order of a military or civilian superior is not a defense. The standard is whether under the same or similar circumstances a person of ordinary sense and understanding would know the order to be unlawful. If the person knows the act is unlawful and only does it under duress, this circumstance may be taken into consideration either by way of defense or in mitigation of punishment.

C. Military necessity. When discussing military necessity as a defense to alleged war crimes, U.S. military tribunals have applied the same rule to both individuals and nations. While sanctioning measures necessary to compel the submission of the enemy or to protect the safety of forces in occupied territory, international law does not allow the individual combatant or his / her superiors to destroy life and property not required by the necessities of war. This law recognizes that a certain number of noncombatants may become inadvertent victims of armed conflict and provides that this unavoidable destruction is permissible when not disproportionate to the military advantage to be gained.

D. Acts legal or obligatory under national law. The fact that national law does not prohibit an act which constitutes a war crime under international law does not relieve the person who committed the act from responsibility under international law. These circumstances may be considered in mitigation of punishment.

0376 SANCTIONS

Under international law, any punishment, including the death penalty, may be imposed on any person found guilty of a war crime. United States policy requires that the punishment be deterrent in nature and proportionate to the gravity of the offense.

APPENDIX A

CODE OF CONDUCT

Article I

I am an American fighting in the forces which guard my country and our way of life. I am prepared to give my life in their defense.

Article II

I will never surrender of my own free will. If in command, I will never surrender the members of my command while they still have the means to resist.

Article III

If I am captured, I will continue to resist by all means available. I will make every effort to escape and aid others to escape. I will accept neither parole nor special favors from the enemy.

Article IV

If I become a prisoner of war, I will keep faith with my fellow prisoners. I will give no information or take part in any action which might by harmful to my comrades. If I am senior, I will take command. If not, I will obey the lawful orders of those appointed over me and will back them up in every way.

Article V

When questioned, should I become a prisoner of war, I am required to give name, rank, service number and date of birth. I will evade answering further questions to the utmost of my ability. I will make no oral or written statements disloyal to my country and its allies or harmful to their cause.

Article VI

I will never forget that I am an American, fighting for freedom, responsible for my actions, and dedicated to the principles which made my country free. I will trust in my God and in the United States of America.

CHAPTER FOUR

SECURITY ASSISTANCE

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CHAPTER FOUR

SECURITY ASSISTANCE

0401 INTRODUCTION

Security assistance enhances U.S. national security by providing defense articles, services, training, and other assistance by grant, credit, or cash sales to friendly foreign nations. Authority for these programs is found in the Foreign Assistance Act and the Arms Export Control Act. Basic guidance is found in the *Security Assistance Management Manual*, DOD 5105.38-M of October 1, 1988. The multi-service security assistance training instruction, SECNAVINST 4950.4, Joint Security Assistance Training (JSAT) Regulation, became effective March 27, 1990 (superseding MCO 4950.2) and updates much of the material on international student administration and exchange training. Security assistance has been part of our nation's history ever since the Revolutionary War. Since World War II, security assistance has become an institutionalized and continuing program used to advance U.S. interests in a global environment. If the past is prologue, security assistance is not just a short-range program; rather, it will be in existence for many years to come as an important tool of U.S. foreign policy. This chapter examines security assistance terminology, what security assistance entails, and the broad aspects of ongoing U.S. security assistance programs.

0402 SECURITY ASSISTANCE DEFINED

The term "security assistance" itself is subject to differing interpretations. Security assistance is often referred to as an "umbrella" term, an elastic notion with dimly defined boundaries. To further confuse matters, the term security assistance is occasionally used in a parallel context with other equally elusive terms—such as foreign aid, foreign assistance, military assistance, arms transfers, international defense cooperation, and international logistics.

A. The DOD perspective. Security assistance is defined in at least two primary DOD documents.

1. The Department of Defense Dictionary of Military and Associated Terms, JCS Pub. 1-02, defines security assistance as:

> Group of programs authorized by the Foreign Assistance Act of 1961, as amended, and the Arms Export Control Act of 1976, as amended, or other related statutes by which the United States provides defense articles, military training, and other defense related services, by grant, credit or cash sales, in furtherance of national policies and objectives.

2. The Glossary of Selected Terms in the *Security Assistance Management Manual* (SAMM), published by the Defense Security Assistance Agency, defines security assistance in a highly similar manner.

B. Other statutory definitions. Security assistance is broadly defined in the Foreign Assistance Act of 1961, as amended (FAA), and discussed in the Arms Export Control Act, as amended (AECA). The broad definition in section 502B of the FAA, entitled "Human Rights," may reflect congressional intent to provide statutory leverage over a broad range of activities so that the government may effectively carry out its human rights policies. In the other contexts, where the intent of oversight is different, security assistance is more restrictively defined.

C. Other related terminology

1. International logistics. Within DOD, the term "international logistics" is used in an almost synonymous sense to describe certain security assistance management activities. While a high degree of commonality between the two concepts may exist, there are some unique differences. For example, the Economic Support Fund, Peacekeeping Operations and professional military education program aspects of security assistance generally do not equate to international logistics. Conversely, some facets of the NATO rationalization, standardization, and interoperability (RSI) cooperative efforts involve certain international logistics interests, but are not usually categorized as security assistance.

2. International programs. This term, which appears to be coming into popular usage, is broadly defined in U.S. Army Chief of Staff Regulation 5-2 as encompassing "those programs, actions, and initiatives, both foreign and US originated, involving Security Assistance Programs (Foreign Military Sales, Military Assistance Program / Grant Aid, foreign military training FMS and IMET) [etc.]."

3. International logistics support. As defined in JCS Pub. 1-02, the term international logistics support is: "The provision of military logistic support by one participating nation to one or more participating nations, whether with or without reimbursement."

4. Collective security. This term has been used regularly in the annual JCS document entitled United States Military Posture. Generally, security assistance is said to be supplied "in furtherance of the principle of" collective security.

5. International defense cooperation. This phrase, which is found in Section 1 of the AECA, may also appear to border on being a synonym for, or a more broader term which encompasses, security assistance.

6. Military assistance. As a generic term, military assistance is essentially used to describe those security assistance programs administered by the Department of Defense.

7. Military export sales. This term represents another subset of security assistance. According to the SAMM, military export sales are: "All sales of defense articles and defense services made from U.S. sources to foreign governments, foreign private firms and international organizations, whether made by DOD or by U.S. industry directly to a foreign buyer."

8. Grant aid. This term appears today in numerous congressional reports and DOD documents. The SAMM defines grant aid as: "Military Assistance rendered under the authority of the FAA for which the United States receives no dollar reimbursement."

9. Arms transfers. This term, which tends to relate to the "weapons or armaments" aspects of security assistance, can also have a variety of meanings. The U.S. Arms Control and Disarmament Agency (ACDA), in its annual publication, *World Military Expenditures and Arms Transfers*, defines arms transfers as "the international transfer (under terms of grant, credit, barter or cash) of military equipment, usually referred to as conventional,' including weapons of war, parts thereof, ammunition, support equipment, and other commodities designed for military use."

0403 STATUTORY REQUIREMENTS. Statutory requirements regarding security assistance include:

A. Transfers of defense articles or services must be to an eligible country;

B. defense articles or services must be properly used by the purchaser;

C. withdrawal from U.S. stocks requires proper authorization;

D. a purchasing country must pay full value, including applicable costs and surcharges; and

E. the purchaser must agree not to transfer defense articles received from the United States to any third country without U.S. permission.

U.S. SECURITY ASSISTANCE PROGRAM COMPONENTS

0404 SIX MAJOR PROGRAM COMPONENTS

As was noted earlier, according to the Congressional Presentation Document (CPD) for Security Assistance Programs, there are five key security assistance program components which require U.S. Government funding. If we add the Foreign Military Sales and Foreign Military Construction Sales Program, plus Direct Commercial Sales licensed under the AECA, we arrive at a total of seven programs. A detailed examination of each follows:

A. Foreign Military Sales (FMS) and Foreign Military Construction Sales Program. FMS is a nonappropriated program through which eligible foreign governments purchase defense articles, services, and training from the U.S. Government. The purchasing government pays all costs that may be associated with a sale. In essence, there is a signed government-to-government agreement (normally documented on a Letter of Offer and Acceptance (LOA)) between the U.S. Government and a foreign government. Each LOA is commonly referred to as a "case" and is assigned a unique case identifier for accounting purposes. Under FMS, military articles and services, including training, may be provided from DOD stocks (section 21, AECA) or from new procurement (section 22, AECA). If the source of supply is new procurement, on the basis of having a LOA which has been accepted by the foreign government, the U.S. Government agency or military department assigned cognizance for this "case" is authorized to enter into a subsequent contractual arrangement with U.S. industry in order to provide the article or service requested.

1. Foreign Military Construction Sales, as authorized by section 29 of the AECA, involves the sale of design and construction services to eligible purchasers. The construction sales agreement and sales procedures generally parallel those of FMS.

2. The FY 1993 CPD estimated that about 93 foreign countries and international organizations would participate in FY 1992 in the FMS and Foreign Military Construction Sales Program, with total estimated sales of $13.0 billion. However, FMS agreements for FY 1992 actually exceeded $15.0 billion, and FY 1993 FMS sales are probably going to far exceed the CPD estimate of $11.0 billion.

B. The Foreign Military Financing Program (FMF or FMFP) has undergone a variety of substantive and terminological changes in recent years. At present, the program consists of congressionally appropriated ***grants and loans*** which enable eligible foreign governments to purchase U.S. defense articles, services, and training through either FMS or direct commercial sales (DCS) channels. The FMFP is authorized under the provisions of sections 23 and 24 of the AECA, and originally served to provide an effective means for easing the transition of foreign governments from grant aid (i.e., MAP and IMET) to cash purchases.

1. Prior to FY 1985, the majority of FMFP loans (known as FMS credits) were effected through the Federal Financing Bank (FFB) which is administered by the Department of the Treasury. These loans were identified as "guaranty loans" inasmuch as a special appropriations account—the Guaranty Reserve Fund (GRF)—was established by Congress to provide a partial guaranty against country loan arrearages / defaults on the repayment of these loans to the FFB. These FFB guaranty loans were issued at "market rates" of interest (essentially, interest rates which reflected the cost of money to the U.S. Government). In the early 1980s, as market rates rose to 12% and higher, countries accepting FMFP loans found themselves faced with an increasing financial burden. This was often exacerbated by even higher interest rates on other types of loans which these countries received. As the indebtedness levels of these countries escalated, various efforts to resolve their security assistance related financial problems were attempted. One such attempt, which began in FY 1985, involved the issuance to selected countries of directly appropriated loans rather than guaranty loans. These "direct loans" took two forms. First, they were "concessional loans" (i.e., loans below the market rate of interest, but no lower than 5% per annum). Second, a related effort has involved a substantial expansion of the so-called "forgiven loan" (also termed "forgiven credit") program which releases the recipient government from its contractual liability to repay the loan principal and interest, and thus represents another form of grant aid.

2. Prior to FY 1989, this financing program was variously identified as the Foreign Military Sales Credit Program (FMSCP) or the Foreign Military Sales Financing Program (FMSFP). In the Fiscal Year 1989 Appropriations Act, Congress introduced a new title, the Foreign Military Financing Program (FMFP), and the "forgiven loan / forgiven credit" component of the program was identified as "FMFP grants" to distinguish them from repayable direct "FMFP loans." These new terms were continued in subsequent budget proposals and appropriations acts, and are employed throughout this chapter. It should be noted, however, that the various documents supporting the budget proposals (including the FY 1992 and 1993 CPDs) employ the phrase Foreign Military Financing (FMF). Also, the terms "nonrepayable loans / nonrepayable credits" are used by various security assistance organizations (including DSAA) in place of the legislatively based term "FMFP grants."

3. Additionally, in FY 1990, the former Military Assistance Program (MAP) was formally merged with the FMFP, as Congress adopted a Reagan Administration proposal for integrating all MAP grant funding into the appropriations account for the FMF Program. No MAP funds were appropriated for subsequent fiscal years, and the Administration has shown no interest in seeking any such funds for the future. This legislative change, therefore, had the dual effect of:

a. Causing existing MAP-funded programs to lose their former identity and to become newly identified as FMFP-funded programs; and

b. establishing the FMFP as the sole U.S. financing program for the acquisition of U.S. defense articles and services by foreign governments.

4. Congress provided a total of $3,919 million for the FY 1994 FMFP in the FY 1994 Foreign Operations Appropriations Act. This funding represented the ninth consecutive year since FY 1985 of such annual funding reductions. The ***direct loan*** component of FMFP represented an increasing percentage of the FMFP appropriation, and the ***grant*** component a decreasing percentage, continuing a trend which began in the FY 1993 FMFP appropriations.

5. Beginning in FY 1992, the Federal Credit Reform Act of 1990 (Pub. L. No. 101-508) changed the method of accounting and budgeting for all government loans including FMF loans issued under the AECA. This legislation provides a more accurate portrayal of the true cost of loans by providing new budget authority only for the subsidy element of the loan program and is the basis for the establishment of two new financial accounts: one contains only the FMFP grant portion of the program and administrative costs; the other provides the budget authority needed to fund the subsidy element of the proposed concessional loan programs.

C. Direct Commercial Sales (DCS) licensed under the AECA. Recalling that the FAA (section 502B) perspective includes DCS as an element of security assistance for congressional oversight purposes, a basic understanding of DCS policies and procedures is necessary for the security assistance manager. A direct commercial sale licensed under the AECA is a sale made by U.S. industry directly to a foreign buyer. Unlike the procedures employed for FMS, DCS transactions are not administered by DOD and do not involve a government-to-government agreement. Rather, the U.S. governmental "control" procedure is accomplished through licensing by the Office of Defense Trade Control in the Department of State. Commercially licensed sales are authorized under section 38 of the AECA. The day-to-day rules and procedures for these types of sales are contained in the International Traffic in Arms Regulations (ITAR). DCS deliveries (as opposed to new sales agreements) for

FY 1994 were projected to total about $3.44 billion, a substantial decrease from the FY 1993 projection of $17.5 billion.

D. The International Military Education and Training (IMET) Program provides training in the United States and, in some cases, in overseas U.S. military facilities to selected foreign military and related civilian personnel on a grant basis. In earlier years, grant aid training of foreign military personnel was funded as part of the MAP appropriation. Starting with FY 1976, a separate authorization for IMET was established in the FAA. Although historically a relatively modest program in terms of cost, the importance that the Executive Branch attaches to IMET is apparent in this extraction from a February 1990 joint DSAA / Department of State report to the Senate Committee on Appropriations.

> The Administration takes the view (documented in the following pages) that IMET *is* an effective, low-cost component of the $8 billion global U.S. security assistance effort. At the recent [FY 1990] level of $47.4 million per year, the program provides U.S. access to and influences foreign governments far out of proportion to its modest cost. The typical IMET program often costs $100,000 a year or less; 15 programs cost more than $1 million, and even the largest is less than $3.4 million. Over 5,000 students are trained annually from nearly 100 countries. But far more important is the support which IMET provides to U.S. foreign policy and national security goals. For many U.S. Ambassadors or regional military Commanders in Chief, a small IMET program in a particular country has advanced much larger American interests, such as trade and investment, or military or political cooperation. . . .
>
> At a time of declining defense and foreign aid budgets, IMET advances U.S. objectives on a global scale at a relatively small cost. In many countries, having a core group of well-trained, professional leaders with first hand knowledge of America will make a difference in winning access and influence for our diplomatic and military representatives. Thus, a relatively small amount of IMET funding will provide a return for U.S. policy goals, over the years, far greater than the original investment.

1. In 1980, section 644(m) of the FAA was amended to authorize IMET tuition costing in terms of "the additional costs that are incurred by the United States Government in furnishing such assistance." Section 21(a)(1)(C) of the AECA

was also amended to allow IMET recipients to purchase FMS training on an "additional cost" basis. The practical effects of these changes were to substantially reduce tuition costs for IMET-funded students, and thereby increase the amount of training an eligible country can obtain with its IMET grant funds and through FMS purchases.

2. Funding for IMET reached a high point in FY 1987, with an appropriation of $56 million designed to assist 105 countries. Since then the IMET appropriation has fallen to $47.196 million (FY 1991 and FY 1992), $42.5 million (FY 1993), and $21.25 million (a 50% reduction) for FY 1994, the lowest amount ever appropriated for IMET since the program was established in 1976.

3. In FY 1989, Congress introduced a new requirement for country eligibility for IMET funding. For several years, Congress had voiced its concern over Executive Branch requests for IMET funds to be furnished to countries whose high annual personal income levels indicated that such countries were capable of providing their own national funds to satisfy their military training requirements. Finally, in the FY 1989 Appropriations Act (Pub. L. No. 100-461), Congress established a prohibition on the use of IMET funds by any country whose annual per capita gross national product (GNP) exceeds $2,349.00 unless that country agrees to fund from its own resources the transportation costs and living allowances (TLA) of its students. IMET funds thus have been restricted to financing tuition costs for these countries. Subsequent annual appropriations legislation has extended these restrictions on the IMET program through FY 1993, and they are likely to continue. Also, beginning with the FY 1993 program, these "high-income countries" have been limited to no more than $300,000.00 in IMET funds for each such country. The two congressional appropriations committees should be notified of any exceptions to this new limitation.

4. A new IMET activity was introduced in the FY 1991 Foreign Operations Appropriations Act when Congress adopted a Senate-proposed IMET earmark of $1 million to be used exclusively for expanding courses for foreign officers as well as for civilian managers and administrators of defense establishments. The focus of such training is to be on developing professional level management skills, with emphasis on military justice systems, codes of conduct, and the protection of human rights. Section 541, FAA, was amended to permit non-Ministry of Defense civilian personnel to be eligible for this new program if such military education and training would:

a. Contribute to responsible defense resource management;

b. foster greater respect for and understanding of the principle of civilian control of the military; or

c. improve military justice systems and procedures in accordance with internationally recognized human rights.

This "Expanded IMET Program" was expanded in FY 1993 to also include participation by national legislators who are responsible for oversight and management of the military. The FY 1993 IMET appropriation included an earmark of $3.66 million for Expanded IMET. For FY 1994 no specific funds were earmarked, but the "intent of Congress" was that not less than $4 million would be spent on Expanded IMET.

E. The Economic Support Fund (ESF) is authorized by Chapter 4 of Part II of the FAA. This fund was established to promote economic and political stability in areas where the United States has special political and security interests and where the United States has determined that economic assistance can be useful in helping to secure peace or to avert major economic or political crises. ESF is a flexible economic instrument which is made available on a loan or grant basis for a variety of economic purposes, including balance of payment support, infrastructure, and other capital and technical assistance development projects. While a substantial amount goes for a balance of payments type aid, the ESF also provides for programs aimed at primary needs in health, education, agriculture, and family planning. Congress has made it clear that funds from this account should be used to the maximum extent possible for development and to support equitable growth that meets the basic needs of the poor.

1. The ESF program was formerly named "Security Supporting Assistance." The International Security Assistance Act of 1978 repealed the legislative authorities for Security Supporting Assistance and provided authorities for an Economic Support Fund and also for a Peacekeeping Operations Fund. This legislative change served to reflect more accurately the purposes of these funds and to make a more explicit differentiation between politically important economic aid, peacekeeping, and military assistance programs.

2. The ESF program is administered by the United States Agency for International Development (USAID) under the overall policy direction of the Secretary of State. USAID consists of a central headquarters staff in Washington, D.C., and missions and offices overseas.

3. ESF funding for FY 1994 totaled $2,365.00 million. This represented an 11.4% reduction from the FY 1993 appropriation ($2,670.00 million) and an 8.4% cut from the Administration's original budget request for FY 1994 ($2,582.00 million).

F. Peacekeeping Operations (PKOs) are authorized by Chapter 6 of Part II of the FAA. PKO was established to provide for that portion of security assistance

devoted to programs such as the Multinational Force and Observers (MFO) which implement the 1979 Egyptian-Israeli peace treaty and the U.S. contribution to the United Nations Force in Cyprus (UNFICYP). Appropriations for PKO for FY 1994 totaled $76.6 million, the highest funding level in the history of the PKO program dating back to its origin in FY 1979.

G. Nonproliferation and Disarmament (NPD) Fund, a new security assistance program, was enacted for FY 1994 in Pub. L. No. 103-87. The program is designed to fund efforts to control the spread of weapons of mass destruction in the former Soviet Union and elsewhere. The administration sought $50 million to fund NPD, which Congress reduced to $10 million. However, during FY 1994 Congress added another $84 million to the NPD fund, resulting in total appropriations of $94 million.

0405 OTHER RELATED PROGRAMS

In addition to the above six major programs, there are some other related programs worthy of discussion.

A. Excess Defense Articles (EDA) Program. EDA is administered by DOD and involves defense articles no longer needed by the U.S. armed forces. Such items are either sold under the FMS program or transferred as grant assistance under the provisions of sections 516, 517, 518, 519, or 520 of the FAA. Under section 644(g) of the FAA, "excess defense articles" means the quantity of U.S. defense articles owned by the U.S. Government and not procured in anticipation of military assistance or sales requirements, or pursuant to a military assistance or sales order which is in excess of the Approved Force Acquisition Objective and Approved Force Retention Stock of all DOD components at the time of transfer.

B. Stockpiling of defense articles for foreign countries. Section 514(b) of the FAA sets an annual ceiling on the value of additions to stockpiles of defense articles located abroad that may be set aside, earmarked, reserved, or otherwise intended for use as war reserve stocks for allied or other foreign countries (other than those for NATO purposes). For FY 1994, Congress approved an Administration request for additions to the stockpiles of $92 million and on its own initiative added $200 million to be set aside for Israel, for a total of $292 million (Pub. L. No. 103-87). The defense articles in these stockpiles remain U.S. military service-owned stocks as war reserves. Any future transfer of title / control of any of these stocks would require full reimbursement by the purchaser under FMS procedures or from military assistance funds available for that purpose under security assistance legislation prevailing at the time the transfer would be made.

C. Special Defense Acquisition Fund (SDAF). The SDAF was authorized by the International Security and Development Cooperation Act of 1981, which added a new Chapter 5 to the AECA. The SDAF is to be used as a revolving fund under DOD control to finance the acquisition of defense articles and services in anticipation of their transfer (pursuant to the AECA, the FAA, or other legislation) to eligible foreign nations and international organizations. DOD can capitalize the SDAF with: nonrecurring research, development, and production cost recoupments for U.S. military equipment, and asset use and facility rental charges for the use of DOD facilities and equipment. Beginning in 1991, OSD comptroller initiative to tighten the DOD budget began to threaten the SDAF. By March 1993, the Clinton Administration agreed to close down the program. The last SDAF funding was $160 million in the FY 1993 appropriations act, which amount will be used to fund SDAF until it is expended.

0406 REQUESTS FOR SECURITY ASSISTANCE

There is often a fine line between routine goodwill and regulated security assistance. For example, a system demonstration for foreign personnel may constitute training, depending on the detail involved. Devoting U.S. manpower or equipment to a local government project in a foreign country clearly provides a foreign relations benefit, but it may also constitute security assistance. The same applies to disposal of excess or damaged material to foreign authorities. In each case, approval from higher authority may or may not be required. Commanders should refer foreign requests for training, purchase, lease, or donation of equipment to the Security Assistance Organization (SAO) of the local U.S. diplomatic mission and up the chain of command.

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HUMANITARIAN AND CIVIC ASSISTANCE

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CHAPTER FIVE

HUMANITARIAN AND CIVIC ASSISTANCE

0501 INTRODUCTION

This chapter provides an overview of Humanitarian and Civic Assistance (HCA) activities and the Developing Country Combined Exercise Program (DCCEP), together with funding and purpose guidelines.

0502 HUMANITARIAN AND CIVIC ASSISTANCE (HCA)

Title 10 funds may be used to defer the costs associated with two distinct forms of HCA: statutory and de minimis. A third form, based upon the Stevens' amendment of 1985, was specifically overturned by Section 1504(b) of the FY 1994 DOD Authorization Act (Pub. L. No. 103-160.)

A. Statutory HCA. 10 U.S.C. § 401(c)(1) HCA. This form of HCA is to be carried out in conjunction with authorized military operations, such as JCS directed / coordinated exercises and single-service deployments for training (DPT's) and is funded from specifically appropriated Program 10 (Host Nation Support) O&M funds. This form of HCA must:

1. Enhance the security interests of both the United States and the recipient country;

2. enhance the specific operational readiness skills of participating members of the armed forces;

3. complement, not duplicate, any other form of social or economic assistance which may be provided to the country concerned by any other department or agency of the U.S. Government, and serve the basic economic and social needs of the people of the country concerned;

4. not be provided, directly or indirectly, to any individual, group, or organization engaged in military or paramilitary activity;

5. not be provided to any foreign country unless the Secretary of State (or his designated representative) specifically approves the provision of such assistance; and

6. be restricted to medical / dental / veterinary care provided in rural areas of a country, construction of rudimentary surface transportation systems, well-drilling and construction of basic sanitation facilities, and rudimentary construction and repair of public facilities.

B. De minimis HCA. 10 U.S.C. § 401(c)(2) HCA. This form of HCA is also carried out in conjunction with authorized military operations, but consists of de minimis HCA activities for which only minimal expenditures may be incurred. De minimis HCA is funded from specifically appropriated Program 10 (Host Nation Support) O&M funds under 10 U.S.C. § 401(c)(1), not from Program 2 (General Purpose) O&M funds. De minimis HCA is not subject to the requirements set forth above in conjunction with 10 U.S.C. § 401(c)(1) statutory HCA. Congress has set forth the following activities as examples of de minimis HCA:

1. A unit doctor's examination of villages for a few hours, with the administration of several shots and the issuance of some medicine, but not the deployment of a medical team for the purpose of providing mass inoculations to the local populace.

2. The opening of an access road through trees and underbrush for several hundred yards, but not the asphalting of a roadway.

C. Stevens HCA. This HCA which was authorized prior to the FY 1994 DOD Authorization Act, was undertaken "incidental" to authorized military operations (JCS directed / coordinated exercises only). Stevens HCA was funded by Program 2 (General Purpose) O&M funds. Stevens HCA had to:

1. Be conducted incidental to only JCS directed or coordinated exercises;

2. enhance the security interests of both the United States and the recipient country;

3. enhance the specific operational readiness skills of participating members of the armed forces;

4. complement, not duplicate, any other form of social or economic assistance which may be provided to the country concerned by any other department or agency of the United States and serve the basic economic and social needs of the people of the country concerned;

5. not be provided to any individual, group, or organization engaged in military or paramilitary activity; and

6. be "incidental" in nature.

0503 DEVELOPING COUNTRIES COMBINED EXERCISE PROGRAM (DCCEP)

Under 10 U.S.C. § 2010, Program 10 (Host Nation Support) O&M funds may be used to pay the incremental expenses incurred by a developing country as the direct result of its participation in a bilateral or multilateral combined military exercise. The term "combined military exercise" refers to both joint and single service combined exercises conducted in conjunction with host nation military units. Funds may be expended, provided:

A. The exercise is undertaken primarily to enhance U.S. security interests;

B. the participation by the country concerned is necessary to the achievement of the fundamental objectives of the exercise, and these objectives cannot be achieved unless the United States provides the incremental expenses incurred by the country;

C. the country supported *is considered* a "developing country" by the Secretary of the State; and

D. the exercise does not replace (but can, and should, complement) initiatives being funded by another U.S. Government agency or foreign government.

0504 FUNDING GUIDANCE

Funds used for HCA and DCCEP activities must be expended per the following guidelines.

A. HCA activities

1. HCA engineer projects. HCA engineer projects include well drilling and the construction of basic sanitation facilities, rudimentary construction and repair of public facilities, and the construction of rudimentary surface transportation systems. "Rudimentary construction" refers to wood frame or concrete block construction, interior and exterior electrical, rudimentary water supply and sewer systems, and basic carpentry. Funds for these projects may be used to purchase and transport supplies, material, and fuel, as well as for equipment leases.

These funds will not be used to finance the rehabilitation of host country equipment for the purpose of using such equipment in an exercise or to purchase spare parts for host country use during the exercise.

2. HCA medical projects. HCA medical projects include medical, dental, and veterinary care provided in rural areas of a recipient country. Funds for HCA medical projects may be used for medical, dental, or veterinary supplies.

B. DCCEP funding

1. Proper uses. DCCEP funds may be used to pay for the incremental exercise costs of a developing country, to include:

a. The reasonable and proper cost of rations, fuel, training munitions, and transportation required during an exercise. Generally, only common items will be provided (e.g., training munition for weapon systems used by U.S. forces stocked in Panama); ammunition will not normally be procured for other weapon systems.

b. The cost of unit movements and transportation of DCCEP material. Opportunity airlift on military aircraft will not be reimbursable; however, any DOD aircraft dedicated to the support of a developing country will be billed at the AMC DOD user rate.

2. Improper uses. DCCEP funds may not be used for the following reasons:

a. Engineer repair / construction projects;

b. the developing country's labor costs;

c. Common Table of Allowances (CTA) or Table of Equipment (TOE) equipment (current guidance does not allow U.S. forces to purchase these items with exercise funds);

d. military pay and allowances of the developing country's armed forces;

e. utility expenses for the country's camps;

f. claims against the country's armed forces for damages incurred during the exercise;

g. host nation costs incurred in providing support for activities other than combined exercises (e.g., security support provided by the host nation to a "U.S. only" deployment for training; recipients must be participants in a combined exercise);

h. supplies and equipment for use by the developing country's armed forces for HCA purposes;

i. the purchase of spare or repair parts; or

j. the purchase of supplies or ammunition for the purpose of stockpiling by the recipient.

3. Contracting. All goods and services procured for a developing country under this authority must be contracted for by U.S. Government contracting officers, or, when a contracting officer is unavailable, by ordering officers appointed by the appropriate U.S. forces contracting officer. The limit for orders placed by an ordering officer is $2,500.00.

C. Funding guidance applicable to both HCA and DCCEP

1. Expenditure of HCA and / or DCCEP funds or the incurrence of reimbursable charges against these funds must be approved in advance.

2. No accessorial charges will be applied to goods or services provided under either HCA or DCCEP.

0505 REPORTING REQUIREMENTS

A. HCA reporting requirements. Both statutory HCA and de minimis HCA must be reported annually to Congress, via SECDEF. Each report will identify HCA activities for the preceding fiscal year, including:

1. A list of the countries in which HCA activities were carried out;

2. the type and description of HCA activities carried out in each country; and

3. the amount expended in carrying out each HCA activity in each country.

B. DCCEP reporting requirements. An annual report will be submitted to Congress, via SECDEF, concerning the use of DCCEP funds, stipulating:

1. A list of the developing countries for which expenses have been paid by the United States during the preceding year; and

2. the amount of money expended on behalf of each government.

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PART II - OPERATIONAL LAW

CHAPTER SIX

RULES OF ENGAGEMENT (ROE)

0601 INTRODUCTION

United States ROE are the means by which the National Command Authorities (NCA) (i.e., the President and the Secretary of Defense (SECDEF) or their duly deputized alternates or successors) authorize subordinate commanders to employ military force. ROE delineate the circumstances and limitations under which U.S. naval, ground, and air forces will initiate and / or continue combat engagement with enemy forces. At the national level, wartime ROE are promulgated by the NCA, through the Joint Chiefs of Staff (JCS), to unified and specified commanders to guide them in the employment of their forces toward the achievement of broad national objectives. At the tactical level, wartime ROE are task-oriented and frequently mission-oriented. At all levels, U.S. wartime ROE are influenced by, and are consistent with, the law of armed conflict (LOAC). LOAC provides the general framework within which U.S. ROE, during hostilities, are formulated. Because ROE also reflect operational, political, and diplomatic factors, they often restrict combat operations far more than do the requirements of international law. Wartime ROE frequently include restrictions on weapons and targets, and provide guidelines to ensure the greatest possible protection for noncombatants consistent with military necessity. This chapter provides an overview of ROE, recognizing that the classified character of wartime ROE hinders full discussion.

0602 PEACETIME AND WARTIME ROE DISTINGUISHED

The JCS Peacetime ROE provide the authority for and limitations on actions taken in self-defense during peacetime and periods short of prolonged armed conflict for the defense of U.S forces, the self-defense of the nation and its citizens, and the protection of U.S. national assets worldwide. Wartime ROE, on the other hand, reaffirm the right and responsibility of the operational commander generally to seek out, engage, and destroy enemy forces consistent with national objectives, strategy, and LOAC. Even during periods of armed conflict, staff judge advocates (SJAs) must be intimately familiar with both peacetime and wartime ROE to be able

to advise their commanders. The peacetime ROE are not "turned off" when war begins; they will still guide our actions with respect to nations with whom we are not at war.

(Note: At the time of print, JCS Peacetime ROE was undergoing review and possible change of title. However, the general principles discussed in this chapter will still be applicable.)

0603 PURPOSES OF ROE

ROE are one of the most effective tools for implementing strategic decisions made at higher levels, and provide a mechanism for controlling the shift from peace to war. They can be viewed as having three, more specific, purposes.

A. Political purposes. ROE represent a measure of assurance that national policy will be followed in wartime or in sudden emergencies which do not allow time for communications between Washington and the field. The rules should be flexible enough to accommodate changing circumstances. They should be designed to allow military courses or action that advance political intentions with a minimum chance for undesired escalation or reaction. For this reason and others, NCA reserves the authority to employ certain weapons.

B. Military purposes. ROE place limitations on the freedom of the on-scene commander to deploy his / her forces to accomplish the mission. They do not, however, interfere with his / her right and responsibility to protect his command against attack or an imminent threat of such an attack. The ROE should be designed to remove any legal or semantic ambiguity which could lead a commander inadvertently to violate national policy by underreacting or overreacting to some foreign action.

C. Legal purposes. ROE represent operational guidance, including that required for self-defense, which allows the commander to do whatever is necessary to achieve his / her military task within the constraints of stated national policy. Thus, ROE is a major tool for ensuring that a commander's actions stay within the bounds of national and international law.

D. What ROE is not. Under this JCS definition, ROE should not delineate specific tactics, cover restrictions, nor set forth service doctrine, tactics, or procedures. ROE should never be "rudder orders," and certainly should never substitute for a strategy governing the use of deployed forces in a peacetime crisis or in wartime.

0604 THE RIGHT OF SELF-DEFENSE

The United Nations (U.N.) Charter recognizes that all nations enjoy the inherent right of individual and collective self-defense against armed attack. All peacetime ROE are premised on the right of self-defense. This right has two distinct purposes: protecting the command and protecting the nation. Most peacetime ROE contain a warning to the effect that "nothing in these rules is intended to limit the commander's right of self-defense." This simply means that ROE does not address the right to protect the individual, the commanding officer (CO), the unit commander and his / her command from attack or from threat of imminent attack in situations involving localized conflict or in low-level situations that are not preliminary to prolonged engagement. Those situations are always covered by the inherent right of unit self-defense. Rather, peacetime ROE provide guidance on when armed force can be used to protect the larger national interests, such as the territory of the United States, or to defend against attacks on other U.S. forces not under your command.

A. U.S. doctrine. U.S. doctrine on self-defense, set forth in the JCS Peacetime ROE, provides that the use of force in self-defense against armed attack, or the threat of imminent armed attack, rests upon two elements:

1. Necessity (i.e., that a use of force must be in response to a hostile act or hostile intent); and

2. proportionality (i.e., that the use of force be in all circumstances limited in intensity, duration, and scope to that which is reasonably required to counter attack or threat of attack and to ensure the continued safety of U.S. forces).

B. Self-defense defined. Contrary to popular misperception, peacetime ROE does ***not*** require a commander to "take the first hit" before acting in self-defense. Neither the law nor general peacetime ROE require commanders to wait until the opposing force has fired upon them. The legal standard for the use of armed force in self-defense is the same whether to protect the individual, a ship or aircraft, or the nation. First, there must be a situation requiring the use of force (i.e., necessity) and, second, the amount of force used must be proportional to the situation giving rise to the necessity. The requirement of necessity, or present danger, obviously arises when an armed attack occurs; however, the right of self-defense may also involve the use of armed force against a threat of imminent attack. In either case, proportionality requires that the use of force be limited in intensity, duration, and magnitude to what is reasonably required to counter the attack or threat of attack. In peacetime, force may never be used with a view toward inflicting punishment for acts already committed. Reprisals may be authorized only by the NCA.

C. Hostile acts and hostile intent

1. Hostile act. A hostile act is simply the actual use of armed force—attacking. The commission of a hostile act gives rise to the right to respond with the use of proportional force in self-defense by all authorized means available.

2. Hostile intent. Hostile intent is the threat of an imminent attack which may lead to the force being declared hostile. Whether or not a force is declared hostile, where the hostile intent amounts to a threat of imminent attack, the right exists to use proportional force in self-defense by all authorized means available.

D. Pursuit. ROE frequently provide rules regulating the pursuit of hostile forces. The legal limits of pursuit in self-defense should not be confused with the law of the sea (LOS) concept of hot pursuit in a law enforcement context.

1. Self-defense pursuit. Self-defense pursuit, often called immediate pursuit, properly refers to pursuit of hostile forces initiated in response to and in defense against the hostile acts of those forces. Pursuit does not have to be undertaken immediately, but pursuit may be lawfully taken only so long as the hostile force is an immediate threat to one's forces. Frequently, the ROE will impose geographical restraints, such as prohibiting pursuit into the territory of neutral countries or even into the territory of the hostile force, to minimize risk of escalation.

2. Hot pursuit. Frequently it is stated that pursuit must be continuous and immediate. At sea, those restrictions are not legally required to pursue in self-defense. Rather, the requirement for continuous and immediate pursuit derives from the LOS right of "hot pursuit" set forth in article 23 of the 1958 High Seas Convention. The right of hot pursuit only relates to a coastal state's attempts to enforce its domestic laws against foreign ships violating those rules in the coastal state's internal waters, territorial sea, and contiguous zone. (The U.S. Coast Guard Peacetime ROE extends this to fisheries zones and over the continental shelf.) Hot pursuit may not be begun on the high seas, yet that is where pursuit in self-defense usually begins and is exercised. Obviously then, hot pursuit is generally irrelevant in maritime self-defense ROE and is clearly distinguishable from self-defense pursuit.

E. Other self-defense actions. Customary international law has long recognized that there are circumstances during time of peace when nations must resort to the use of armed force to protect their national interests against unlawful or otherwise hostile actions by other nations. A number of legal concepts have evolved over the years to sanction the limited use of armed forces in such circumstances (e.g., intervention, embargo, maritime quarantine). To the extent that

such concepts have continuing validity under the U.N. Charter, they are premised on the broader principle of self-defense.

0605 ANTICIPATORY SELF-DEFENSE

Included within the inherent right of self-defense is the right of a nation (and its armed forces) to protect itself from imminent attack. International law recognizes that it would be contrary to the purposes of the U.N. Charter if a threatened nation were required to absorb an aggressor's initial and potentially crippling first strike before taking those military measures necessity to thwart an imminent attack. Anticipatory self-defense involves the use of armed force where there is a clear necessary that is instant, overwhelming, and leaving no reasonable choice of peaceful means.

0606 JCS REQUIREMENTS

Volume I of the Joint Strategic Capabilities Plan (JSCP) routinely provides that commanders will establish and maintain ROE in conformity with law and rules issued by higher authority applicable to their areas of responsibility. Proposed ROE for situations not covered by existing rules and revisions of existing rules are to be submitted to the JCS for review and approval. ROE for U.S. maritime forces are to be consistent with those approved for North Atlantic Treaty Organization (NATO) maritime forces. Whenever possible, ROE are to be standardized for use by all major commands to facilitate movement between those commands. The Joint Operations Planning System (JOPS) (volume I) provides a format for the ROE appendix to the operations annex of all unified and specified commanders' operations plans.

A. Compilation of ROE. The JSCP also requires the unified and specified commanders and Commander, Raped Deployment Joint Task Force (COMRDJTF) to compile all rules (and changes thereto) for their commands in formats such as instructions, letters, operation plans, or messages. The compilations are to be prepared no later than October 1, each year and provided to the JCS, Service Chiefs, the commanders of other affected unified and specified commands and others if affected, and to commanders of other unified specified commands or COMRDJTF upon request if unaffected. A typical unified commander's compilation would list the commander's central document promulgating his / her basic peacetime ROE, plus any special ROE contained in his / her operations plans.

B. Review of compilation of ROE. The JCS assure appropriate Joint Staff and Service review of such compilations and changes thereto, including a legal review

by the services, to assure consistency of the ROE with applicable domestic and international law, including LOAC.

C. Structure of ROE. ROE should be structured in accordance with JOPS. Basic peacetime ROE, which are to serve as an unambiguous guide for the commander in the conduct of his / her mission, should be declarative; that is, written as actions which define both the conditions and limits of that conduct. In addition, there should be available a series of supplemental measures that may be implemented to expand the authority of, or relax the restrictions on, the commander when the situation exceeds the bounds of the general case.

D. Content of ROE. Depending on the level of the promulgating commander and the contemplated circumstances of application, ROE should contain appropriately generalized or specific guidance on the employment of systems and platforms for surveillance, targeting, and ordnance delivery. ROE may define the conditions for employment of the systems and platforms, but should not define specific tactics. All ROE should contain political and military policy guidance, as well as guidance on those areas of international and domestic law that are subject to misinterpretation. They should not cover safety-related restrictions.

E. Subject matter of ROE. ROE may be general and comprehensive so as to constitute part of the fighting instructions of a fleet and, in this case, they must envision a range of contingencies. Or they may be issued specifically for a particular operation. Peacetime ROE cover such matters as general maritime operations, interception and engagement of aircraft, and defense operations for specific locations.

0607 CONCLUSION

Although they do not and cannot cover all possible situations that may be encountered by the naval commander at sea, the JCS Peacetime ROE provide definitive guidance for U.S. military commanders for the use of armed force in self-defense commensurate with international law and U.S. national security objectives. A principal tenet of ROE is the responsibility of the commander to take all necessary and appropriate action for his / her unit's self-defense. Subject to that overriding responsibility, the full range of options are reserved to the NCA to determine the response that will be made to hostile acts and demonstrations of hostile intent. As noted in the preceding paragraphs of this chapter, those options may involve nonmilitary, as well as military measures. For additional reading, consult NWP-9 (Rev. A) and Captain J. A. Roach, *Rules of Engagement*, Naval War C. Rev., Jan.-Feb. 1983, at 49, on which this chapter was largely adapted. Then study your commander's ROE.

CHAPTER SEVEN

LAW ENFORCEMENT AND DRUG INTERDICTION

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CHAPTER SEVEN

LAW ENFORCEMENT AND DRUG INTERDICTION

0701 INTRODUCTION

A. References

1. DOD Directive 5525.5; Subj: DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS

2. SECNAVINST 5820.7; Subj: COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS

3. COMDTINST M16247.1; Subj: Maritime Law Enforcement Manual (MLEM)

4. 10 U.S.C. §§ 371–381 – Military support for civilian law enforcement agencies

5. 14 U.S.C. § 89 – Coast Guard law enforcement authority

6. 46 U.S.C. §§ 1901 *et seq.* – Maritime Drug Law Enforcement Act

7. 18 U.S.C. § 1385 – Posse Comitatus Act (PCA)

B. Mission

1. Ever since the founding days of the Republic, the Navy, Marine Corps, and Coast Guard have protected the United States from criminal activity on the sea. The present criminal threat to U.S. interests at sea includes international narcotics smuggling, illegal aliens, and illegal trade—as well as modern versions of the old problem of piracy.

2. In 1981, Congress passed new laws calling for significantly greater participation by the Department of Defense (DOD) in law enforcement, based upon its growing concern with the flow of illegal drugs into the United States. The DOD is now the lead agency for detecting and monitoring drug smuggling. In addition, DOD units are tasked with providing a broad range of support to civilian law enforcement agencies and the U.S. Coast Guard. 10 U.S.C. §§ 374, 379. For the

Navy, the changes have resulted in Navy vessels carrying Coast Guard law enforcement detachments (LEDETs) on cruises in drug smuggling areas and providing transportation, security backup, and logistics support during law enforcement operations.

3. The extent of DOD assistance to law enforcement agencies is limited by two principal concerns. First, the Posse Comitatus Act (PCA), codified at 18 U.S.C. § 1385, makes direct law enforcement action—such as arrest, search and seizure—by military personnel a criminal offense. Second, Congress directed that law enforcement support by military units may not be allowed to adversely affect military readiness. 10 U.S.C. § 376.

0702 DOD SUPPORT OF DRUG INTERDICTION AND LAW ENFORCEMENT

A. General. Military forces may provide a wide range of assistance and support to civilian law enforcement agencies (CLEAs), provided they do not engage in "direct participation" in law enforcement activities. Direct participation is defined as "search, seizure, arrest, or other similar activity." 10 U.S.C. § 375. The courts have further clarified the limits on military involvement in law enforcement, distinguishing support as assistance short of law enforcement decision-making. In *United States v. McArthur*, the court noted that the prohibition in the Posse Comitatus Act against use of the military to "execute" law implies an authoritarian act that is regulatory, proscriptive, or compulsory in nature, and causes citizens to be presently or prospectively subject to regulations, proscriptions, or compulsions imposed by military authority. *United States v. McArthur*, 419 F. Supp. 186 (Dist. N.D.), *aff'd*, 541 F.2d 1275 (8th Cir.), *cert. denied*, 430 U.S. 970 (1975).

B. Permissible activities. Under the statutes (10 U.S.C. §§ 371-381), and in accordance with DOD Directive 5525.5 and SECNAVINST 5820.7, Navy units may provide certain support to CLEA's. Specifically, Navy units may assist CLEAs in the following ways:

1. Provide expert advice [10 U.S.C. § 373(2)];

2. provide personnel to maintain and operate equipment (10 U.S.C. § 374);

3. provide detection, monitoring, and communications support for tracking vessels and aircraft outside the United States (10 U.S.C. § 374);

4. intercept vessels and aircraft for the purpose of communicating with them and direct the vessels and aircraft to go to a location designated by civilian officials (10 U.S.C. § 374);

5. provide transportation for federal law enforcement officials and operate a base of operations for them outside of the United States, subject to the approval of the Secretary of Defense and the Attorney General (10 U.S.C. § 374);

6. carry a Coast Guard LEDET on a Navy vessel, and intercept vessels at sea at the direction of the LEDET (10 U.S.C. § 379);

7. take actions to further military or foreign affairs functions of the United States—such as protecting classified material or investigating violations of the Uniform Code of Military Justice (SECNAVINST 5820.7, § 9.a);

8. restore governmental functions in accordance with a declared state of emergency [SECNAVINST 5820.7, § 9.a.(2)(a)];

9. take actions pursuant to other statutory authority—such as participating in cases involving nuclear materials (18 U.S.C. § 831) or assisting in cases involving crimes against members of Congress (18 U.S.C. § 351) [SECNAVINST 5820.7, § 9.2.(f)]; and / or

10. provide attorneys to serve as Special Assistant U.S. Attorneys in civilian prosecutions [28 U.S.C. §§ 515, 543; *United States v. Allred*, 867 F.2d 856, 871 (5th Cir. 1989)].

C. In addition, the courts have found a wide range of DOD support of CLEAs to be lawful, including:

1. Housing and transporting prisoners [*United States v. Yunis*, 924 F.2d 1086, 1093 (D.C. Cir. 1991)];

2. assisting FBI agents to conduct a court-ordered search [*United States of America v. Stouder*, 724 F. Supp. 951 (M.D. Ga. 1989)];

3. conducting surveillance and providing expert advice and equipment maintenance [*United States v. Jaramillo*, 380 F. Supp. 1375 (D.C. Neb.), *appeal dismissed*, 510 F.2d 808 (8th Cir. 1974)];

4. providing information to police regarding criminal activity—including support for "sting" operations [*See, e.g., Applewhite v. U.S. Air Force*, 995 F.2d 997 (10th Cir. 1993); *Hayes v. Hawes*, 921 F.2d 100 (7th Cir. 1990)];

5. providing advice and logistical support [*United States v. Red Feather*, 392 F. Supp. 916 (Dist. S.D. 1975)];

6. transportation of prisoners under supervision of U.S. Marshals [*United States v. Gerena*, 649 F. Supp. 1179 (Dist. Conn. 1986)];

7. providing an interpreter to assist with communications and interrogations [*United States v. Chen*, Dist. Haw. No. CR-92-01420 (1993), *aff'd*, 8 F.3d 31 (9th Cir. 1993) (unpublished case listed in table case summary) (posse comitatus issue not raised on appeal)]; and / or

8. providing on-scene transportation, armed backup, and seizure assistance to a Coast Guard LEDET [*United States v. Del Prado-Montero*, 740 F.2d 113 (1st Cir. 1984); *United States v. Borrego*, 885 F.2d 822, 824 n.1 (11th Cir. 1989)].

0703 POSSE COMITATUS ACT (PCA) - LIMITATIONS ON DOD SUPPORT

A. General. As noted above, the two principal restrictions on the use of military units for civilian law enforcement are the prohibition against reducing military readiness (10 U.S.C. § 376) and the criminal sanction against using military forces as a posse comitatus (contained in the PCA, 18 U.S.C. § 1385).

B. Posse Comitatus Act

1. The PCA is a criminal statute, currently codified at 18 U.S.C. § 1385. It provides:

> 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.

2. The statute applies directly only to the use of the Army and Air Force, not the Navy. *See United States v. Roberts*, 779 F.2d 565, 567 (9th Cir.), *cert. denied*, 479 U.S. 839 (1986) (court "declines to defy [the statute's] plain language by extending it to prohibit use of the Navy"). *Accord United States v. Yunis*, 924 F.2d 1086, 1093 (D.C. Cir. 1991). Nonetheless, the Navy has extended the principles of the PCA to itself as a matter of policy. *See United States v. Roberts*, 779 F.2d 565, 567 (9th Cir. 1986); SECNAVINST 5820.7.

3. The PCA has never applied to the Coast Guard. *See, e.g., United States v. Chaparro-Almeida*, 679 F.2d 423, 425 (5th Cir. 1982), *cert. denied*, 459 U.S. 1156 (1983).

4. The original PCA was enacted in 1878 during the Reconstruction Period following the Civil War, at which time military posses comitatus were used to police state elections in the ex-confederate states. (The term "posse comitatus" refers to the power of a county sheriff to summon citizens to assist him in keeping the peace, pursuing and arresting felons, and other law enforcement activities. *See* Black's Law Dictionary 1046 (Rev. 5th Ed. 1979).) By 1878, a growing concern over the use of federal military troops for law enforcement purposes led to passage of the PCA. The focus of the legislation was to prevent the Army from interfering with and substituting for local law enforcement activities.

5. The PCA, as originally enacted, did not proscribe all military assistance to law enforcement efforts; rather, the PCA proscribed only those activities that would be the equivalent of a "posse comitatus." Furthermore, the PCA exempted any activities expressly authorized by Congress, even if those activities would otherwise be considered a "posse comitatus."

6. Many courts have ruled that the PCA does not apply outside of the United States. *See, e.g., Chandler v. United States*, 171 F.2d 921 (1st Cir. 1948). *Cf. Yunis, supra*, 924 F.2d at 1093 (commenting that "some courts have taken the view that the Posse Comitatus Act imposes no restriction on the use of American armed forces abroad, noting that Congress intended to preclude military intervention in domestic civil affairs"). *See also United States v. Marcos*, 1990 U.S. Dist. LEXIS 2049, at 26-27 (S.D.N.Y. 1990).

7. In addition, the Supreme Court has held that the Constitution does not apply to nonresident aliens outside of the United States. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274-75 (1990).

8. Even if a court finds that a military unit violated the PCA by engaging in active law enforcement, a criminal defendant is unlikely to receive any relief in court. Most courts hold that a PCA violation is in effect a wrong without a remedy. *United States v. Roberts*, 779 F.2d 565, 568 (9th Cir. 1986); *United States v. Rasheed*, 802 F. Supp. 312 (D.Haw. 1992). *See also United States v. Yunis*, which held:

> Reliance on this provision [10 U.S.C. § 375] faces the same remedial hurdle as direct reliance on the Posse Comitatus Act: Under the Ker-Frisbie doctrine, outright dismissal of the charges . . . would not be an appropriate remedy. . . . Nor would a violation of the regulations at issue amount to

> a constitutional violation, making application of an exclusionary rule or similar prophylactic measures inappropriate.

United States v. Yunis, 924 F.2d 1086, 1094 (D.C. Cir. 1991) [citing *United States v. Crews*, 445 U.S. 463, 100 S.Ct. 1244, 1251, 63 L.Ed.2d 537 (1980). *See also United States v. Caceres*, 440 U.S. 741, 99 S.Ct. 1465, 1472-73, 59 L.Ed.2d 733 (1979)].

C. Statutory restriction. The restrictions of the PCA are further delineated by statute. DOD personnel are prohibited from conducting any activity which includes or permits direct participation in law enforcement activities such as search, seizure, arrest, or "other similar activity." 10 U.S.C. § 375.

D. Operational constraints. Law enforcement operations can be time-consuming and dangerous. A CO who determines that participation in a law enforcement operation will significantly degrade the operational capability of the unit may find support in 10 U.S.C. § 376 for declining involvement. The law apparently requires a CO to evaluate the impact of law enforcement support on military preparedness.

0704 REIMBURSEMENT

A. Policy. Under general fiscal law, the costs attributable to law enforcement support provided to CLEAs must be reimbursed by those CLEAs, unless:

1. The support was provided in the normal course of military training or operations;

2. the support results in a benefit to the DOD that is substantially equivalent to that which would otherwise be obtained from training or operations; or

3. the support is provided in accordance with special appropriations.

B. Federal reimbursement. Unless the support is nonreimbursable, the CLEA assisted is required to reimburse DOD for law enforcement support. The Economy Act requires that the providing agency be fully reimbursed for all direct and indirect costs associated with the goods and services it provides to the other agency. The Act also requires reimbursement for pay and allowances and all costs associated with DOD's preparation of an asset for other agency use. 31 U.S.C. § 1535. The assignment of Coast Guard LEDETs aboard Navy vessels is covered under separate authority which provides for Navy-Coast Guard interaction without reimbursement. 10 U.S.C. § 2571.

C. State and local reimbursement. Similarly, state and local governments must reimburse the DOD for law enforcement expenses not otherwise provided for. 10 U.S.C. § 377(a). Further, the Intergovernmental Cooperation Act requires payment of all identifiable costs, including pay. 31 U.S.C. § 6505. DOD Directive 7230.7 provides rates to charge for the use of DOD assets by other agencies. The directive also provides that the charges may be waived or reduced when in the best interests of the program involved.

0705 PRINCIPAL CRIMINAL LAWS

A. Drug interdiction. The principal law against drug smuggling is the Maritime Law Enforcement Act - 46 U.S.C. App § 1901 *et seq.*

1. Elements. It is unlawful for any person on board a vessel of the United States, or on board a vessel subject to the jurisdiction of the United States, or who is a citizen of the United States or a resident alien of the United States on board any vessel, to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance (as defined in 21 U.S.C. §§ 802, 812).

2. Penalties. The offense is a felony. The exact term involved depends on the amount of and the substance involved. *See* 21 U.S.C. §§ 960, 962.

B. Alien interdiction

1. Under 8 U.S.C. § 185, it is unlawful for an alien to enter the United States except in accordance with the various immigration regulations.

2. The principal statute against smuggling aliens is contained in 8 U.S.C. § 1324. The statute contains several sections applicable to alien interdiction. In addition, alien interdiction operations often involve other criminal statutes—such as kidnapping, racketeering, assault, and conspiracy.

3. 8 U.S.C. § 1324(a)(1) proscribes bringing in and harboring certain aliens. The law provides that any person who, knowing that a person is an alien, brings to or attempts to bring to the United States such person in any manner whatsoever, at a place other than a designated port of entry, regardless of any prior permission to enter the United States; or that any person knowing, or in reckless disregard of the facts, that an alien has entered illegally, conceals, harbors, or shields such alien from detection; or that any person who encourages or induces an alien to come to, enter, or reside in the United States, knowing, or in reckless disregard of the facts, that such entry would be illegal, shall be fined and / or imprisoned for not more than five years.

4. 8 U.S.C. § 1324(a)(2) makes criminal the illegal smuggling of aliens. The law provides that any person, knowing, or in reckless disregard of the facts, that an alien has not received prior official authorization to enter the United States, brings to or attempts to bring to the United States that alien in any manner whatsoever, regardless of any official action which may be taken later with regard to such alien, shall be punished as follows:

a. First offense: fined and / or imprisoned not more than one year per alien.

b. Subsequent offenses: fined or imprisoned not more than five years per alien.

5. 8 U.S.C. § 1324(b)(2) provides for the forfeiture of any conveyance used to violate section 1324, except for common carriers used without the knowledge of the owner or master.

C. Miscellaneous criminal statutes

1. Acting against a friendly nation (18 U.S.C. §§ 956-967);

2. conspiracy against a foreign government where the person commits an act in furtherance of conspiracy (18 U.S.C. § 956; punishment up to 3 years' confinement and a fine up to $5,000.00);

3. possession of property in aid of a foreign government against the United States (18 U.S.C. § 957; punishment of 10 years' confinement and a fine up to $1,000.00);

4. taking a commission to serve against a friendly nation (18 U.S.C. § 958; punishment up to three years' confinement and a fine up to $2,000.00);

5. carrying out an expedition against a friendly nation (18 U.S.C. § 960; punishment up to three years' confinement and a fine up to $3,000.00);

6. strengthening an armed vessel of a foreign nation (18 U.S.C. § 961; punishment up to one year confinement and a fine up to $1,000.00);

7. arming a vessel against a friendly nation, or delivering a commission to such a vessel (18 U.S.C. § 962; punishment up to three years' confinement and a fine up to $10,000.00);

8. delivering an armed vessel to a belligerent nation (18 U.S.C. § 964; punishment up to ten years' confinement and a fine up to $10,000.00); and / or

9. plundering a distressed vessel (18 U.S.C. § 658 provides that, whoever plunders, steals, or destroys any money, goods, merchandise, or other effects from or belonging to any vessel in distress, or wrecked, lost, stranded, or cast away, upon the sea, or upon any reef, shoal, bank, or rocks, or in any other place subject to the admiralty and maritime jurisdiction of the United States, shall be punished by confinement up to 10 years and a fine up to $5,000.00).

D. International crimes

1. The most significant international crime that Sea Service units may deal with is piracy. The international crime of piracy involves the use of a private vessel to attack or plunder another vessel for private gain. It does not include attacks by state vessels or attacks without a profit motivation. Despite its romantic legends piracy is not a thing of the past, but an ongoing and very dangerous present-day concern. Pirate attacks on vessels remain very common, particularly in Asia. Recent incidents include the capture of a merchant vessel and the murder by incineration of its crew; an attempted boarding of a Russian frigate; and the attack on a British oil tanker in which the crew was tied up and the ship steamed through an international strait for twenty minutes with no one on the bridge.

2. Considered to be a crime against all nations, piracy against any ship may be prosecuted by any nation. In the United States, piracy is made punishable by 18 U.S.C. § 1651. The statute provides that whoever commits piracy as defined by law, and is afterwards brought into or found in the United States, shall be imprisoned for life.

0706 MARITIME LAW ENFORCEMENT PROCEDURES

A. Jurisdiction. Law enforcement personnel must have proper jurisdiction before they may lawfully take action against suspected criminal activity. In general, the law enforcement official must obtain jurisdiction over the person, the crime, and the place involved.

1. Jurisdiction over the person is established when the suspect involved is either a U.S. citizen within the United States, or commits an offense harming a victim within the United States.

2. Jurisdiction over the crime is established when the suspected offense is a federal crime by statute, or by a regulation derived from statutory authority, and is made expressly applicable to the location involved. For example, federal law enforcement officials do not have jurisdiction over state crimes, regardless of how heinous they may appear.

3. Jurisdiction over the place where the crime is alleged to have occurred must be established by proving either that the crime occurred within the United States, or that the crime is subject to extraterritorial jurisdiction.

a. A crime is within the United States if the crime or its impact occurred either within the United States or within the Special Maritime and Territorial Jurisdiction (SMTJ) defined at 18 U.S.C. § 7. In general, the SMTJ includes U.S. vessels outside state waters, U.S. aircraft in flight outside the states, guano islands, and places outside the jurisdiction of any nation with respect to a crime by or against a U.S. national.

b. Extraterritorial jurisdiction is established either by a statute being made explicitly applicable outside the United States; by "attempts" language in the statute (i.e. the attempted importation of aliens into the United States); or by a crime's status as an international crime.

B. The Presidential Directive (PD-27) process. Because many law enforcement actions involve foreign vessels and persons and create significant foreign policy concerns, the President established a process for initiating State Department consultations for law enforcement actions in PD-27.

1. The PD-27 process is used when a U.S. unit seeks to take law enforcement action against a foreign flag vessel located outside of U.S. territorial waters; when seeking to verify the flag of registry of a vessel, or to confirm a vessel as stateless; or when engaging in actions with diplomatic, international concerns.

2. The PD-27 process is initiated when the On-Scene Commander (OSC) or Operational Commander (OPCON) notifies Coast Guard Headquarters (FLAGPLOT) of the situation via the most expeditious means, followed up by message traffic. FLAGPLOT notifies staff elements at Coast Guard Headquarters and the watch desk at appropriate agencies, including the Department of Justice, the Department of State, the Customs Service, and the Immigration and Naturalization Service. The Department of State contacts the embassy of the involved government to verify the registry of the foreign vessel, brief the embassy on the situation, and seek flag state concurrence in U.S. law enforcement action against their vessel or citizens.

3. When initiating the PD-27 process, the OSC should establish direct liaison with Commandant, U.S. Coast Guard, International Law Division (G-LMI) and Law Enforcement Division (G-OLE) for assistance. The OSC should also initiate the process early, particularly over weekends and holidays, to allow for the lengthy, diplomatic coordination necessary.

4. The result from the PD-27 consultation is usually a *Statement of No Objection (SNO) to "Board, search, and, if evidence warrants, to arrest the crew and seize the vessel."* In addition, the SNO may direct the U.S. unit to take law enforcement action on behalf of the flag state. The SNO is an important legal authorization for specific action. The involved SJA must ensure that it is transmitted precisely to the operating unit and retained in the case file. The U.S. unit is not required to show the document to the foreign nationals involved.

C. Boardings. Boardings at sea are carried out by the embarked Coast Guard LEDET. As long as the boarding team is under the command of the Coast Guard boarding officer, DOD personnel may provide small boat transportation and armed security assistance. In a "routine" boarding situation, the involvement with the other vessel will begin with a series of questions addressed to the target vessel to verify flag of registry, homeport, voyage, cargo, and persons on board. The boarding team proceeds to the vessel via small boat, usually boarding amidships. The boarding team will be comprised of four to six persons, operating as two-person teams. One team will be the boarding officer and the recorder; one team will be a sweep and security team; and the other team, if provided, will be a security team. After meeting the vessel's master, the boarding officer will conduct an initial security inspection (ISI) of the vessel to ensure the safety of the boarding team and secure any loose weapons. The boarding officer will then review the vessel's documentation and paperwork, after which (s)he will inspect or search the vessel as appropriate. The boarding officer may, in his / her discretion, order all crewmembers to muster in an appropriate location on the vessel for safety reasons. At the conclusion of the boarding, the boarding officer debarks the vessel, returns to the unit, and prepares a message boarding report.

D. Use of force

1. Coast Guard personnel are authorized to use force by 14 U.S.C. § 89 and COMDTINST M16247.1, Appendix A (Use of Force and Weapons Policy). In general, Coast Guard use of force is authorized for self-defense, to prevent a crime, to effect an arrest, and to protect government property.

2. The limitations on the use of force are that law enforcement personnel must use only the minimum force necessary to compel compliance and only when reasonably necessary under the circumstances. The goal is to use minimum force resulting in minimum injuries.

3. Deadly force is authorized only when absolutely necessary. In general, it may only be used when a suspect has the means and opportunity to cause death and serious bodily injury to the law enforcement personnel or others, and the suspect evidences an immediate intent to do so. The specific situations in which deadly force is authorized are:

a. Self-defense, but only if the suspect poses an immediate threat of death or serious bodily injury;

b. to prevent a crime, but only if the felony, if not prevented, would pose an immediate threat of death or serious bodily injury; and / or

c. to effect an arrest or prevent an escape, but only if the official has probable cause to believe that the suspect has committed a federal crime involving the use or threatened use of deadly force, the suspect is armed or otherwise still poses a serious threat of death or serious bodily injury, the suspect has failed to obey an order to halt, and the use of force does not seriously endanger any person other than the suspect.

E. Warning shots and disabling fire. 14 U.S.C. § 637 authorizes the Coast Guard to stop vessels through warning signals and disabling fire.

1. In situations where a vessel refuses to heave to for boarding, the OSC must first obtain authority to conduct a boarding either through federal jurisdiction over a U.S. vessel or through the PD-27 process over a foreign vessel. Once the unit has the authority to board the vessel, the unit has the authority to fire warning shots. Warning shots must be fired in a safe direction, preferably by the largest deck gun available, with shots fired well ahead of the bow of the vessel. Shots should be preceded and followed by orders to stop via voice, flag hoist (SQ-1 and SN), sirens, whistles, signal boards, or other means.

2. If the vessel does not comply with the order to stop, the unit may attempt to force the vessel to stop by fouling the vessel's propeller, shooting firehoses into the stack of the vessel, or other means.

3. If the vessel still does not stop, the unit may request authority from its operational control (OPCON) to fire disabling fire. For foreign vessels, the PD-27 process is used to ensure flag state concurrence. The purpose of disabling fire is to stop the vessel while avoiding personal injuries to the crew, to the maximum extent possible. Disabling fire is measured, controlled fire by an appropriate deck gun (such as a 20mm cannon) directed into the rudder, propeller, or engine room of the vessel. Fire should not be directed into living spaces, the bridge, or on deck. As with warning shots, disabling fire should be preceded and followed by orders to stop via voice, flag hoist (SQ-1 and SN), sirens, whistles, signal boards, or other means.

Preferably, the disabling fire will be fired single-shot or in short bursts, followed by orders to stop the vessel.

F. Arrests and seizures. If the boarding officer develops sufficient evidence of a crime, (s)he may seize the vessel and take the persons on board under arrest. The seizure and arrest decisions and actions must be made by an authorized Coast Guard law enforcement officer. Prisoners may be transported either aboard their own vessel or onboard the U.S. unit. In any event, they should be given their rights by the law enforcement officer as soon as possible. In addition, they should be searched for weapons and evidence. Persons under arrest are generally kept in handcuffs or otherwise restrained by flex-ties in a secure area on the unit, although the CO may authorize security personnel to remove restraints as necessary. The unit should provide the prisoners with adequate medical care, sanitation facilities, and meals, recording all interactions with the prisoners in a "Prisoners' Log" to defend against subsequent allegations of maltreatment. On board the seized vessel, the boarding team will conduct a thorough inspection of the vessel to ensure the safety of the custody crew and to gather evidence. Both the suspects and the vessel should be turned over to other law enforcement agencies, at the direction of the OPCON, as soon as possible. DOD personnel may assist the boarding officer by guarding prisoners, translating interrogations, and manning the seized vessel, as long as the boarding officer is clearly in charge and making the law enforcement decisions. If pilferage of drugs or property is a concern, the CO is authorized to order all custody crew personnel to submit to a search before debarking the seized vessel.

G. Prosecution. The U.S. Attorney handling the prosecution of the case will require a case package from the arresting unit. The unit should be prepared to turn over all materials—including deck and communications logs, videotapes, physical evidence, and all other material related to the arrests and seizure—upon hand-off to another agency or arrival in port. Relevant classified material must be included in the case package, but its handling is governed by the Classified Information Procedures Act (CIPA), 18 U.S.C. App. III. Where possible, the unit should seek to declassify materials. Classified material that must be protected should be identified to the U.S. Attorney, who will use the procedures set out in the CIPA to protect the information. The cognizant Coast Guard legal office will be able to assist in holding and screening classified materials. In addition, Coast Guard legal officers routinely work with U.S. Attorneys in prosecuting criminal cases arising at sea and will be able to provide advice and support with case preparation and documentation.

0707 DOD INTERNATIONAL SUPPORT ROLE

The DOD is authorized by 22 U.S.C. § 2392(b) and (c), and may support the State Department in providing international narcotics assistance to foreign governments and international organizations under the Foreign Assistance Act.

22 U.S.C. §§ 2151 *et seq.* Under the Foreign Assistance Act, suppression of international narcotics trafficking is "among the most important foreign policy objectives of the United States." 22 U.S.C. § 2291.

A. Powers. Under the Act, the State Department may:

1. Conclude agreements with foreign countries to "facilitate control of the production, processing, transportation, and distribution of [illegal drugs]";

2. spray herbicides to eradicate drug crops; and

3. transfer to foreign countries "any property seized by or otherwise forfeited to the United States Government in connection with narcotics-related activity" if the foreign country contributed to the seizure in some way.

B. Costs. The State Department and the participating foreign country share the costs of the program. Those costs may be satisfied by "in-kind" contributions from the foreign country.

C. Restrictions on DOD support. The statute prohibits certain police-type actions by "officers and employees of the United States" except in special situations. In general, DOD personnel may not "directly effect an arrest in any foreign country as part of any foreign police action with respect to narcotics control efforts, notwithstanding any other provision of law." 22 U.S.C. § 2291(c)(1). The prohibition, however, is subject to certain specific exceptions:

1. With the "approval of the United States chief of mission," the restriction does not prohibit DOD personnel from "being present when foreign officers are effecting an arrest or from assisting foreign officers who are effecting an arrest." 22 U.S.C. § 2291(c)(2).

2. In addition, DOD personnel may take direct action to protect life or safety if exigent circumstances arise which are unanticipated and which pose an immediate threat to U.S. or foreign officers, government employees, or members of the public. 22 U.S.C. § 2291(c)(3).

3. Further, the foregoing restriction does not apply to maritime law enforcement operations in the territorial sea of a foreign country if the country agrees. 22 U.S.C. § 2291(c)(4).

4. Notwithstanding the above, DOD personnel may not "interrogate or be present during the interrogation of any United States person arrested in any foreign country with respect to narcotics control efforts, without the written consent of such person." 22 U.S.C. § 2291(c)(5).

5. The foregoing prohibitions and exceptions do not apply to DOD personnel who are carrying out U.S. responsibilities under applicable SOFAs. 22 U.S.C. § 2291(c)(6).

D. Additional restrictions. The Foreign Assistance Act prohibits spending funds appropriated for the Act to train, advise, assist, support, or equip "police, prisons, other law enforcement forces . . . or any program of internal intelligence or surveillance" of a foreign country, subject to certain exceptions. 22 U.S.C. § 2420. The restriction does not apply to:

1. Assistance under 22 U.S.C. § 2291(a), International Narcotics Control, Foreign Assistance Act;

2. sharing crime statistics and other information with foreign governments;

3. any authority of the DEA or FBI which relates to crimes of the nature which are unlawful under the laws of the United States;

4. assistance, including training, in maritime law enforcement and other maritime skills;

5. a country which has a longstanding democratic tradition, does not have standing armed forces, and does not engage in a consistent pattern of gross violations of internationally recognized human rights; or

6. when specifically waived or otherwise made inapplicable by Congress.

E. Reimbursement. The Foreign Assistance Act contains its own interagency transaction authorities which require supporting agencies to be reimbursed by the State Department according to a specified standard. 22 U.S.C. §§ 2385(a), 2392(b), (c). The standard is "replacement cost, or, if required by law, at actual cost, or, in the case of services procured from DOD to carry out international narcotics control, the amount of the additional costs incurred by DOD in providing such services, or at any other price authorized by law and agreed to by the owning or disposing agency" determined as follows:

a. Items from stock are reimbursed at replacement cost;

b. Air Mobility Command (AMC) transportation is reimbursed at actual cost (required by a separate law); and

c. services, other than AMC airlift, are reimbursed at the additional costs incurred by DOD to provide the services.

0708 THE ROLE OF THE SJA

A. Principal advisor to the CO. The increasing awareness of the harm caused by illegal narcotics and the decreasing federal budget suggest that DOD cooperation with civilian law enforcement agencies and the Coast Guard will become increasingly important. Because most operational commanders will be unfamiliar with the laws, regulations, and policies involved in the DOD's responsibilities in law enforcement, the SJA plays an important role in advising the commander on the legal parameters and goals involved in law enforcement operations.

B. Coordination with other agencies. For purposes of law enforcement and drug interdiction, the U.S. Government must act as a single entity. Therefore, the complex nature of law enforcement operations demands extensive cooperation between DOD organizations and other agencies such as the Coast Guard, the FBI, the INS, the Customs Service, the U.S. Attorney, the State Department, and others. In addition to more formal arrangements—such as the Memorandum of Understanding (MOU) between the DOD, the Coast Guard, and the Customs Service (reproduced in Appendix A)—informal liaison and cooperation is invaluable to effective operations. The SJA should make a point of establishing contact with peers at the local offices of other agencies to ensure a ready exchange of information and mutual assistance.

APPENDIX A

MEMORANDUM OF UNDERSTANDING (MOU) BETWEEN DOD, COAST GUARD, AND THE CUSTOMS SERVICE

The following MOU, signed May 25, 1989, provides an overview of DOD's detection and monitoring role in the war on drugs.

SUBJECT: DEVELOPMENT AND IMPLEMENTATION OF DETECTION AND MONITORING

I. PURPOSE

This memorandum sets forth the mutual understanding of the signatory agencies as to their involvement in the detection and monitoring of suspected aerial and maritime transit of illegal drugs into the United States.

II. BACKGROUND

The drug interdiction process is composed of a number of functions and activities ranging from initial detection through monitoring / tracking to apprehension and prosecution. In the FY 1989 National Defense Authorization Act, the Department of Defense (DOD) was designated single lead agency of the federal government for such detection and monitoring. The DOD role as single lead agency will be to conduct and coordinate detection and monitoring surveillance activities to eliminate unnecessary duplication and maximize interdiction success. This MOU will not address any functions, relationships, or activities related to apprehension or the subsequent aspects of the drug interdiction process. The following definitions will serve as the common basis for the planning, scheduling and executing of detection and monitoring.

> DETECT – To determine the presence by visual or electronic means of aircraft or vessels suspected of transporting / trafficking illegal drugs into the United States. NOTE: An intelligence tip that indicates the actual or intended location of an aircraft or vessel potentially facilitates but does not constitute detection.
>
> MONITOR – Maintain continuous knowledge of the location of suspect aircraft or vessel. The process can be accomplished through active, passive or a combination of these monitoring methods.

ACTIVE MONITORING - Maintaining awareness of the location of an aircraft or vessel by physically (either clandestinely or overtly) trailing the suspect. NOTE: Non-DOD agencies charged with drug interdiction normally consider this to be "tracking".

PASSIVE MONITORING - Maintaining awareness of the location of an aircraft or vessel through electronic means. NOTE: Conducting simultaneous active and passive monitoring is possible and probable.

SORTING - The dynamic, interactive process involved in differentiating unknown / suspected drug transporting / trafficking aircraft or vessels from legitimate aerial or maritime traffic. This process begins with initial detection or tip on the presence of an unknown / suspect and ends with the final determination (often resulting after search of a suspected trafficker) of legitimacy and the feedback of this information to all involved parties. All involved agencies have distinct and complementary roles to play in this process.

TRACKING - Same as active monitoring.

INTERCEPT - Establish a position relative to vessels or aircraft from which identification and / or activities of the intercepted vehicle can be determined / monitored either visually or electronically.

APPREHENSION - The act of performing an enforcement stop of a vessel or landed aircraft; taking into custody the vehicle, illegal contraband, other implicated conveyances, and the persons involved in transporting the contraband (search, seizure, and arrest).

DETECTION AND MONITORING ASSET - An asset that is suitably equipped to perform aerial or maritime surveillance, either visual or electronic. A number of multi-mission capable aerial / maritime platforms could conceivably be utilized to perform a detection and monitoring function if a priority operational need existed and the owning agent made the asset available. However, for the purposes of developing a detection / surveillance plan, helicopters / fixed wing aircraft and vessels that would normally be used for active monitoring / track and / or apprehension will not be considered.

III. RESPONSIBILITIES

With the fullest recognition that the aforementioned agencies each contribute an integral part to the successful accomplishment of detection and monitoring and that the accomplishment of detection and monitoring is inherent in the interdiction process, we, the undersigned, agree that the execution of this multi-agency effort will be facilitated by agreement and recognition of the following:

A. The DOD is the single lead agency for the accomplishment of detection and monitoring of suspected aerial and maritime transit of illegal drugs into the United States. As such, DOD has the responsibility to conduct detection and monitoring activities and to coordinate and integrate the multi-agency effort.

B. The DOD, U.S. Coast Guard, U.S. Customs Service, and the intelligence agencies will be jointly responsible for determining illegal drug detection and monitoring requirements. The law enforcement agencies will play a major role in establishing detection and monitoring requirements. The responsibility for the drug interdiction program, exclusive of detection and monitoring for which DOD has responsibilities as annotated above, will remain with law enforcement agencies.

C. The successful accomplishment of this difficult task is dependent in large part upon effective coordination between all involved. To that end, U.S. Coast Guard and the U.S. Customs Service will designate representatives to serve as liaison officers with military staffs to facilitate continuous coordination. In addition, DOD will assign personnel to law enforcement Command, Control, Communications and Intelligence Centers to facilitate communications between all involved and to ensure positive hand-off of suspected vessels and aircraft.

D. Other agencies will provide detection and monitoring assets as requested by DOD to the extent possible. They will also play a major role in determining detection and monitoring requirements and submit these determinations to the appropriate DOD element for coordinated response.

E. DOD elements will keep the U.S. Coast Guard and the U.S. Customs Service advised of action contemplated on all detection and monitoring requirements.

F. In order to effect an interactive planning and execution process, it is necessary for the regional / local representatives of the aforementioned agencies to conduct continual dialogue.

G. The National Air and Maritime Interdiction Strategy and the Defense in Depth Strategy will serve as a useful basis for the development of iterative detection and monitoring surveillance plans.

H. In order to achieve the effective and efficient implementation of a detection and monitoring surveillance plan, it is necessary for the signatory agencies to make available those detection and monitoring assets under their control so that they may be incorporated into a detection and monitoring plan which avoids unnecessary duplication of effort. Non-DOD detection and monitoring assets will be made available for finite periods as pre-agreed between DOD and affected agencies on a case-by-case basis.

I. The success of this effort is largely dependent upon mutual trust and understanding between all involved. This spirit must be conveyed to the regional / local representatives of the signatory agencies to assist in fostering the necessary cooperation and coordination at the operational level to effect real improvement in the detection and monitoring aspects.

J. Conflicts arising between agencies in the implementation of this agreement will be resolved at the lowest possible operational or management level, or referred through appropriate channels for resolution.

K. This understanding becomes effective upon signature. Proposals for modification of rescission of this understanding will be subject to consultation by all signatories.

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INTELLIGENCE OPERATIONS AND OVERSIGHT

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CHAPTER EIGHT

INTELLIGENCE OPERATIONS AND OVERSIGHT

0801 REFERENCES

A. SECNAVINST 3820.3D, Subj: OVERSIGHT OF INTELLIGENCE ACTIVITIES WITHIN THE DEPARTMENT OF THE NAVY

B. DOD Directive 5240.1, Subj: DOD INTELLIGENCE ACTIVITIES

C. DOD Directive 5240.1-R, Subj: PROCEDURES GOVERNING THE ACTIVITIES OF DOD INTELLIGENCE COMPONENTS THAT AFFECT UNITED STATES PERSONS

D. Exec. Order No. 12,333, "United States Intelligence Activities," 4 December 1981

0802 BACKGROUND

SECNAVINST 3820.3D implements the other references listed above and confirms SECNAV's unequivocal authority and responsibility for Navy intelligence oversight and to promulgate policies and procedures governing the collection, retention, and dissemination of information concerning U.S. persons; the conduct of intelligence activities by DON intelligence components; and the assignment of responsibility for intelligence oversight functions within DON. This chapter seeks to familiarize the SJA with the important provisions of intelligence operations and oversight activities.

0803 SCOPE OF SECNAVINST 3820.3D

While Executive Order No. 12,333 and DOD Directive 5240.1 are primarily confined to activities which affect U.S. persons, SECNAVINST 3820.3D covers all DON intelligence activities. Further, the instruction covers intelligence units that support unified or specified commands, intelligence staffs, offices supporting military commanders at all levels, and other DON military personnel and civilian employees when they are engaged in intelligence activities even though they may not be assigned to an intelligence unit. SECNAVINST 3820.3D does not,

however, serve as the authority for any intelligence mission or function; that authority must be found in some other specific delegation document. Generally, specific authorizations for intelligence activities within the DON are found in the organization's missions and functions documents. The instruction serves as a standard regulating mechanism for those missions and functions, prescribing outer limits and procedural guidance to ensure all DON intelligence activities are conducted lawfully. The instruction does not apply, however, to law enforcement activities conducted by DON intelligence components or to physical or personnel security investigations by NCIS.

0804 DON POLICY UNDER SECNAVINST 3820.3D

A. General. The collection of any information by a DON intelligence component must:

1. Not infringe upon the constitutional rights of any U.S. persons;

2. be based on an assigned function;

3. employ the least intrusive lawful technique when collecting information about U.S. persons; and

4. comply with all regulatory requirements of SECNAVINST 3820.3D and other related laws, regulations, and instructions.

B. Special activities. Special activities are activities conducted in support of national foreign policy objectives abroad which are planned and executed so that the role of the U.S. Government is not apparent or publicly acknowledged. The term does not include activities which are intended to influence U.S. political processes, public opinion, or media, and do not include diplomatic activities or the collection and production of intelligence or related support functions. DON intelligence activities are prohibited from "conducting or providing support to special activities" except in time of war or unless the activities have been approved by the President and directed by SECDEF. Only the CIA is authorized to conduct special activities, and it will do so only by express direction of the President. In addition, the instruction states specifically that "under no circumstances shall any DON employee engage in or conspire to engage in assassination."

0805 DOD REGULATION 5240.1-R ORGANIZATION

DOD Regulation 5240.1-R is divided into "Procedures." Procedure 1 is introductory. Procedures 2 through 4 provide the sole authority by which intelligence components may collect, retain, and disseminate information concerning U.S. persons. Procedures 5 through 10 set forth applicable guidance with respect to the use of certain collection techniques to obtain information for foreign intelligence and counterintelligence purposes. Finally, Procedures 11 through 15 govern other aspects of DON intelligence activities including oversight of such activities.

0806 GENERAL PROVISIONS

Procedure 1 emphasizes that the purpose of these combined procedures is to enable intelligence components to perform their authorized functions effectively while ensuring activities affecting U.S. persons are carried out in a manner that protects their constitutional rights and privacy. Procedure 1 provides for the referral of all questions of interpretation to the cognizant legal office (i.e., OJAG). Requests for exception to the Procedures must be referred to the Deputy Under SECDEF for policy via JAG. Procedure 1 also charges DON intelligence activities with the responsibility of providing details related to potential crimes uncovered during the course of lawful intelligence activities to appropriate law enforcement agencies.

0807 COLLECTION OF INFORMATION ABOUT U.S. PERSONS UNDER PROCEDURE 2

A. "Collection" defined. Under DOD Regulation 5240.1-R, information is collected "only when it has been received for use by an employee of a DOD intelligence component in the course of his official duties." Thus, "collection" is officially gathering or receiving information and an affirmative act leading to use of that information. For example, information received from the FBI about a terrorist group is not "collected" unless and until that information is included in a report, entered into a data bank, or used in some other manner which constitutes an affirmative intent to use that information. Electronic data is "collected" only when processed into intelligible form.

B. "U.S. person" defined. "U.S. person" is a term of art which describes the class of persons most intelligence-related legal restraints are designed to protect. The term includes U.S. citizens, permanent resident aliens, U.S. corporations, and unincorporated entities comprised primarily of U.S. persons. Unless specific information to the contrary is obtained, persons or organizations outside the United States and aliens inside the United States shall be presumed not to be U.S. persons.

C. Prerequisites to collection. Information which identifies a U.S. person may be collected by a DON intelligence component *only* if the information is necessary to the conduct of a function assigned to that component *and* the information falls into one of the following categories:

1. Publicly available information;

2. information about a person who consents to its collection;

3. information necessary for administrative purposes;

4. overhead reconnaissance not directed at specific U.S. persons;

5. information arising out of a lawful personnel, physical, or communications security investigation;

6. information concerning persons who are reasonably believed to be potential sources of assistance to intelligence activities for the purpose of determining their suitability or credibility;

7. information needed to protect the safety of any persons or organizations;

8. information about a U.S. person who is reasonably believed to be engaged in international narcotics activity;

9. information can be collected about a U.S. person if necessary to protect foreign intelligence or counterintelligence methods from unauthorized disclosure, provided that the person in question has access to, had access to, or is otherwise in possession of information concerning foreign intelligence or counterintelligence sources and methods (Within the United States, intentional collection of such information shall be limited to persons who are present or former DOD employees; present or former intelligence agency contractors or their present or former employees; or applicants for any such employment or contracting.);

10. information constituting counterintelligence may be collected about a U.S. person if there is a reasonable suspicion that person is engaged in, or about to engage in, intelligence on behalf of a foreign power, or international terrorist activities (Information may also be collected about persons in contact with an individual described in the preceding sentence for the purpose of identifying such persons and assessing their relationship with said individual.); or

11. subject to very stringent limitations, particularly within the United States, information may be collected about a U.S. person if the information constitutes foreign intelligence. To constitute foreign intelligence, the person about whom information is sought must, in general, be acting for a foreign power, involved with international terrorism or international narcotics traffic, prisoners of war, missing in action, or victims or targets of terrorists. Such information may be collected only by overt means unless the head of the DOD intelligence component concerned, or his single designee approves, after indicating that certain specified conditions are met.

0808 HANDLING QUESTIONABLE INFORMATION

If an agency receives information which is not "collectible," the information should not be accepted; if already accepted, the agency should burn the document, erase the data, purge it from the system, etc. If the information pertains to the functions of another governmental agency, it may be sent to such agency for possible use. If doubt exists about the collectibility of a particular piece of information, the agency must seek a "collectibility determination." An agency is authorized to retain the information temporarily in its files for up to 90 days pending the receipt of such a determination. No dissemination is permitted, except directly to a collectibility determination authority. Legal determinations may be made with the assistance of a supporting SJA or OJAG (Code 015) Special Programs Office.

0809 OTHER POLICY CONSIDERATIONS. Procedure 2 makes three important policy points.

A. The collection of information relating to U.S. persons is ***not*** authorized solely because of lawful domestic activities which are opposed to government or administration policy.

B. Regardless of where collected and the category of the information, collection of information about U.S. persons must be accomplished by the ***least intrusive means*** possible (as discussed below).

C. Within the United States, "Foreign Intelligence Information" concerning U.S. persons may only be collected by overt means, unless specific written approval had been granted by DNI, COMNAVINTCOM, DIRINT (Marine Corps), or the Director of the NCIS for some alternative means of collection.

0810 RETENTION OF INFORMATION

Procedure 3 governs the kinds of information about the U.S. persons that may knowingly be retained by a DON intelligence component without the consent of the person whom the information concerns.

A. Retention defined. "Retention" means more than merely retaining information in files; it is retention plus retrievability by reference to the person's name or other identifying data. Where retention of information is required for administrative purposes, or where such retention is required by law or court order, the rules and restrictions of Procedure 3 do not apply. In addition, information acquired prior to 1 December 1982, the effective date of Executive Order No. 12,333 may be retained without screening so long as retention was in compliance with applicable law and previous executive orders. An intelligence component cannot circumvent the spirit of this rule by simply filing uncollectible or unauthorized information about U.S. persons in a manner not retrievable by reference to the person's name or other identifying data.

B. Deletion of information. DON does not retain information about U.S. persons if not necessary to an ongoing mission or function. If necessary, a DON intelligence component may delete the names of U.S. persons from some files and substitute generic terms or symbols in their place, but only when retention of the documents is otherwise necessary. When a DON intelligence component is advised that information is not collectible pursuant to a Procedure 2 collectibility determination, that information must be removed from the component's files.

C. Incidentally acquired information. To be retainable, incidentally acquired information on U.S. persons must first have been collectible under one of the Procedure 2 categories as if it were intentionally acquired. The information must also fall under one of three additional criteria:

1. The information must be necessary to understand or assess foreign intelligence or counterintelligence;

2. the information must be either foreign intelligence or counterintelligence which has been collected from electronic surveillance; or

3. the information must be incidental to other authorized collection and indicates some involvement in activities that may violate federal, state, local, or foreign law.

D. Duration of Retention. Duration of retention is governed by SECNAVINST 5210.8C, or other specific records management instructions for unique functions (e.g., SECNAVINST 3820.2D). Access to retained information is limited to those with a need to know.

0811 DISSEMINATION OF INFORMATION

A. Procedure 4. Procedure 4 governs the criteria for dissemination of information about U.S persons, without their consent, which a DON intelligence component has collected and retained. If consent has been given, dissemination is permitted consistent with that consent. Procedure 4 does not apply to information collected solely for administrative purposes or dissemination pursuant to law or a valid court order, nor does it justify dissemination in violation of the Privacy Act.

B. Dissemination determinations. Dissemination determinations involve a two-step process. First, the holder of the information must make a determination that the prospective recipient will use the information for a lawful government function and that the information is needed by the prospective recipient for that particular function. Once this threshold test is met, then the information must fit into one of five categories before it may be disseminated without consent. Any dissemination beyond the permissible limits of Procedure 4 must be approved in advance by the OJAG or OGC, following coordination with the DOJ and the DOD General Counsel. If the prospective recipient is:

1. A DOD employee or contractor, the information must be needed in the course of that employee's official duties;

2. a federal, state, or local law enforcement entity, the information must indicate involvement in activities which may violate laws that entity is responsible to enforce;

3. an agency within the intelligence community, the information may be disseminated without advance determination of potential need to allow the prospective recipient agency to determine its relevancy;

4. a non-law enforcement, non-intelligence agency of the federal government, then the information must be related to the performance of a lawful government function of that agency; or

5. a foreign government, then the information must be authorized for dissemination and undertaken pursuant to an agreement or other understanding with that government.

0812 RULE OF THE LEAST INTRUSIVE MEANS

This rule prescribes the hierarchy of increasingly intrusive collection techniques which must be considered before an intelligence component engages in collection of information. First, to the extent feasible, information must be collected from publicly available materials or with the consent of the person or persons concerned. Next, if collection from these sources is not feasible, then cooperating sources may be used. Third, if neither publicly available information nor cooperating sources are sufficient or feasible, then collection may be pursued using other lawful investigating techniques which require neither a judicial warrant nor the approval of the Attorney General of the United States. Finally, when none of the first three approaches has been sufficient or feasible, then the collecting intelligence component may seek approval for use of one of the techniques which require a warrant with the approval of the Attorney General.

0813 LIMITATIONS ON COLLECTION OF FOREIGN INTELLIGENCE

Where special collection techniques are employed in the United States, foreign intelligence concerning U.S. persons may be collected only where the information sought is significant, coordination has been effected with the FBI, and the use of other than overt means has been approved by the head (or designee) of the intelligence component concerned.

0814 JURISDICTION IN COUNTERINTELLIGENCE INVESTIGATIONS

Where counterintelligence investigations are involved, coordination with the FBI is not required if the subject of the investigation is solely under the Navy's investigative jurisdiction. These include active-duty Navy personnel and investigations of incidents involving Navy reservists which occurred while on active duty within the Navy, NCIS has jurisdiction over counterintelligence investigations. Though not required, in most cases coordination may be desired to ensure thoroughness of results.

0815 ELECTRONIC SURVEILLANCE

Procedure 5 is confined to electronic surveillance activities of DON intelligence components for foreign intelligence and counterintelligence purposes, domestic counterintelligence purposes, and to certain technical aspects of electronic surveillance which are closely allied with foreign intelligence collection and counterintelligence activities. The policies, procedures, and restrictions governing interception of wire and oral communications in the use of pen registers and related

devices for law enforcement purposes, both in the United States and abroad, are covered by other instructions (e.g., SECNAVINST 5820.7 and OPNAVINST 1620.2). Procedure 5 applies to the following DON intelligence activities:

A. All electronic surveillance conducted WITHIN the United States to collect "foreign intelligence information";

B. all electronic surveillance conducted OUTSIDE the United States by DON intelligence components, for intelligence and counterintelligence purposes, and directed against U.S. persons who under the circumstances have a ***reasonable expectation of privacy***;

C. signals intelligence activities by elements of the Department of the Navy signals intelligence components that involve collection, retention, and dissemination of foreign communications in military tactical communications;

D. Navy intelligence use of electronic equipment for technical surveillance countermeasures purposes;

E. developing, testing and calibration by DOD intelligence components of electronic equipment that can be used to intercept or process communications and noncommunications signals;

F. training of personnel by DOD intelligence components in the operation and use of electronic communications and surveillance equipment; and

G. the conduct of vulnerability and hearability surveys by DOD intelligence components.

0816 FISA

Procedure 5 implements the Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. § 1801 *et seq*. FISA covers certain intelligence activities in the United States. The requirements of DOD Regulation 5240.1-R, however, extend beyond those boundaries to any and all electronic surveillance of U.S. persons outside the United States carried out by any DON intelligence component, regardless of target, location, or purpose.

A. FISA requirements. FISA requires a judicial warrant authorizing the following activities WITHIN the United States, for foreign intelligence or counterintelligence purposes, before such an activity may begin:

1. The acquisition of a wire or radio communications sent to or from the United States by intentionally targeting a known U.S. person in the United States under circumstances in which the person has a reasonable expectation of privacy and where a warrant would be required for law enforcement purposes;

2. a wire tap to intercept a wire communication (such as a telephone, telegraph, teleprinter, facsimile and digital communications);

3. radio intercepts of private radio transmissions in which all of the communicants are located within the United States; or

4. the use of any electronic, mechanical, or other monitoring devices to acquire information other than a wire communication or radio communication under certain circumstances in which a person has a reasonable expectation of privacy and where a warrant would be required for law enforcement purposes.

B. FISA judges. Under the FISA, the Chief Justice of the U.S. Supreme Court designates seven U.S. district court judges, each of whom will hear applications for and grant orders (i.e., warrants) approving electronic surveillance under the Act. FISA further provides for the Chief Justice to designate three additional judges from the U.S. District Court, or courts of appeals, to sit as a special appellate court to hear appeals by the United States from denials of application made by any one of the seven District Court judges. Finally, under the FISA, the government may further appeal denials from the special appellate court to the Supreme Court.

0817 OBTAINING FISA WARRANTS

The Navy obtains its FISA warrants, as do other federal agencies, through the U.S. Attorney General. All DON requests are coordinated with OJAG and OGC and must be submitted through the DOD General Counsel to the Attorney General.

0818 ELECTRONIC SURVEILLANCE

"Electronic surveillance" is acquisition of a nonpublic communication by electronic means without the consent of a person who is a party to an electronic communication or, in the case of a nonelectronic communication, without the consent of the person who is visibly present at the place of the communication. Electronic surveillance is either consensual or nonconsensual. Nonconsensual electronic surveillance involves the concept of a reasonable expectation of privacy; consensual does not. The regulatory framework of Procedure 5 may be further subdivided into nonemergency and emergency situations, situations which occur within or outside the

United States, and activities which affect U.S. persons or non-U.S. persons. No approval is required for consensual surveillance; the approval required in various nonconsensual scenarios is discussed below.

A. In the United States. Activities directed at any U.S. person or other person inside the United States must be approved by the FISA court upon a showing that probable cause exists to believe that the target is a foreign power or agent thereof and that the targeted place is about to be used by that power or agent. In emergency situations, activities may be authorized by the Attorney General's certification in writing that the targeted surveillance is communications exclusively between and among foreign powers and that the targeted place is under open and exclusive control of a foreign power. Even in emergency circumstances, all such requests must be submitted through the chain of command for approval by the Attorney General. Electronic surveillance in these cases must be preceded by the approval by the Attorney General, pending securing a FISA warrant within 24 hours.

B. Outside the United States

1. U.S. persons. In nonemergency situations, the Attorney General may authorize nonconsensual electronic surveillance where necessary to obtain significant foreign intelligence or counterintelligence information which is not available through less intrusive means and based upon probable cause that the target is a:

a. Person involved in clandestine intelligence activities, sabotage, or international terrorism on behalf of a foreign power;

b. an officer or employee of a foreign power;

c. a person unlawfully acting for a foreign power;

d. a corporation or other entity owned or controlled by a foreign power; or

e. a person in contact or collaboration with a foreign power's intelligence or security service for purposes of providing access to U.S. classified information or material.

2. Emergency situations. In emergency situations, nonconsensual electronic surveillance may be directed at U.S. persons abroad at the order of: SECDEF; Deputy SECDEF; SECNAV; Under SECNAV; the Director, National Security Agency (NSA); the Deputy Director for Operations, NSA; or a general or flag officer at the overseas location in question having responsibility for either the subject of the surveillance or responsibility for the protection of persons, installations, or

property endangered. Exercise of approval in these circumstances is limited to cases where securing approval of the Attorney General is not practical because:

a. The time required would cause failure or delay in obtaining significant foreign intelligence or counterintelligence and such a failure or delay would result in substantial harm to the national security;

b. a person's life or physical safety is reasonably believed to be in immediate danger; or

c. the physical security of a defense installation or government property is reasonably believed to be in immediate danger.

3. Non-U.S. persons. Nonconsensual electronic surveillance may be directed at non-U.S. persons abroad to support any lawful function assigned to the Navy intelligence component, regardless of whether an emergency situation exists.

0819 SIGNALS INTELLIGENCE ACTIVITIES

A. Certain DON elements are a part of the U.S. signals intelligence system. The US SIGINT system is the unified organization for US SIGINT activities under the direction of the Director, National Security Agency / Chief, Central Security Service (DIRNSA / CHCSS), is comprised of the NSA / CSS, the components of the military services authorized to conduct SIGINT activities, and certain other activities authorized by the National Security Counsel or SECDEF to conduct SIGINT collection, processing, and / or dissemination activities.

B. All U.S. SIGINT operations are conducted by the authority of the DIRNSA / CHCSS who maintains direct contact with the Attorney General for the purposes of securing emergency approval for electronic surveillance (ie., nonconsensual) under the FISA and for the purposes of securing warrants from the FISA court.

0820 DEFINITIONS OF SIGINT

A. DOD Regulation 5240.1-R defines SIGINT as "a category of intelligence including communications intelligence, electronic intelligence, foreign instrumentation signals intelligence—either individually or in combination."

B. "Generic" SIGINT is a broad category of intelligence which includes, but is not limited to, nonconsensual electronic surveillance. SIGINT encompasses much more than nonpublic communications. It includes the interception of public communication signals and of other noncommunications electronic signals.

C. For purposes of SIGINT activities under SECNAVINST 3820.3 and the underlying regulatory and statutory framework, however, Procedure 5 only governs certain nonconsensual electronic surveillance activity. Specifically, it covers only those SIGINT activities which involve the collection, retention, and dissemination of foreign communications and military tactical communications. Therefore, Procedure 5 does not apply to SIGINT activities to collect public communications and noncommunications electronic signals.

0821 INCIDENTAL ACQUISITION OF INFORMATION ABOUT U.S. PERSONS

A. Because SIGINT collection activities are so extensive, they may accidentally involve the acquisition of information concerning U.S. persons without their consent, and the interception of communications originated or intended for receipt in the United States without the consent of a party to the communication. Because of the pervasive difficulty, if not impossibility, in discriminating between signals in such a manner as to preclude "electronic surveillance" of U.S. persons, the underlying regulatory control system reaches to and controls all SIGINT activities which are directed toward nonpublic communications, even those characterized as foreign. The system presumes those communications are protected under the fourth amendment and thus requires action of the law whenever there is a reasonable potential that there will be incidental acquisition of a U.S. person's communications.

B. For the purposes of SIGINT, communications concerning a U.S. person are those in which a U.S. person is identified in the communications. A U.S. person is identified when that person's name, unique title, address, or other personal identifier is revealed in the communication in the context of activities conducted by that person or activities conducted by others and related to that person. [U.S. person for SIGINT purposes is defined slightly differently.]

0822 APPLICABILITY OF THE FISA TO SIGINT

The FISA applies to any SIGINT activity involving communications sent to or from the United States in which the communicants have a reasonable expectation of privacy; any wiretap for SIGINT purposes in the United States; acquisition of private radio signals where all communicants are located in the United States; and use of SIGINT devices within the United States.

0823 CONTROL AND OVERSIGHT OF SIGINT OPERATIONS

The policies and procedures for the control and oversight of SIGINT operations are contained in various US SIGINT system directives (USSID) pertaining to SIGINT activities and organizations within the US SIGINT system. General guidance is published in USSID 18, the distribution of which is strictly controlled and limited to those organizations within the US SIGINT system which have a need to know.

0824 TECHNICAL SURVEILLANCE COUNTERMEASURES (TSCM)

TSCM refers to the use of electronic surveillance equipment, or electronic or mechanical devices solely determining the existence and capability of electronic surveillance activity being attempted by unauthorized persons, or for determining susceptibility of electronic equipment to such unlawful electronic surveillance (e.g., detecting "bugs," "wiretaps," etc). TSCM activity may be undertaken only following authorization or consent of the official or commander in charge of the installation, facility, or organization which is the object of such services. TSCM services must be limited in duration to the minimum time required to accomplish the specific TSCM mission, and access to the informational contents of communications acquired during any particular TSCM activity must be strictly controlled. DOD Instruction 5240.5; DOD Directive 5200.19; OPNAVINST C-5510.93E.

0825 DEVELOPING, TESTING AND CALIBRATING EQUIPMENT

The regulation of activities pertaining to developing, testing, and calibration of electronic equipment under DOD Regulation 5240.1-R reaches to the protection of communications signals in the laboratory environment. The parameters of signals and types of signals which may be used are limited in such a manner as to ensure the protection of any communicant's reasonable expectation of privacy, even where use and acquisition of the underlying signals carrying those protected conversations are in a laboratory context.

0826 TRAINING ACTIVITIES

The training of personnel in the operation and use of electronic communications and surveillance equipment is also regulated by DOD Regulation 5240.1-R. Procedure 5 covers three specific areas: training guidance, training limitations, and the retention and dissemination of information collected during training.

0827 VULNERABILITY AND HEARABILITY SURVEYS.

These surveys are signal security (SIGSEC) assessment techniques and are to be used only for communication security (COMSEC) purposes. "Vulnerability Surveys" refer to the acquisition of radio frequency propagation and its subsequent analysis to determine empirically the vulnerability of the transmission media to interception by foreign intelligence services. "Hearability Surveys" refer to monitoring radio communications to determine whether a particular radio signal can be received at one or more locations and, if reception is possible, to determine the quality of reception over time.

0828 CONCEALED MONITORING

"Concealed monitoring" is the subject of Procedure 6. Concealed monitoring is comprised of five essential elements. The first element is "targeting" (i.e., the monitoring is being specifically directed against "a particular person or group of persons" and "without their consent"). For the activity to be characterized as concealed monitoring, it must be done by "electronic, optical, or mechanical devices." Concealed monitoring must be conducted in a "surreptitious and continuous manner." Monitoring is surreptitious when it is targeted in a manner designed to keep the subject of the monitoring unaware of it. Monitoring is continuous if conducted without interruption for a substantial period of time.

0829 SCOPE OF CONCEALED MONITORING. Navy intelligence components may use concealed monitoring only in connection with lawful operational activities designed to collect:

A. Foreign intelligence (i.e., information relating to capabilities, intentions, and activities of foreign powers, organizations, or persons); or

B. Counterintelligence (i.e., information gathered to protect against espionage, other intelligence activities, sabotage, or assassinations conducted for or on behalf of foreign powers, organizations, persons, or international terrorist activities—but not including personal, physical, document, or communications security programs information).

0830 TESTS FOR CONCEALED MONITORING

To come within the ambit of Procedure 6, concealed monitoring must be conducted within the United States *or* be directed against a U.S. person outside the United States. Concealed monitoring of non-U.S. persons abroad may be conducted

for any lawful function assigned to the specific DON intelligence component. In addition, the person who is the subject of concealed monitoring under Procedure 6 must not have a reasonable expectation of privacy in the activities to be monitored. Within the context of Procedure 6, a reasonable expectation of privacy is the extent to which a reasonable person in a particular circumstance is entitled to believe his actions are not subject to monitoring by electronic, optical, or mechanical devices. (The presence or absence of this reasonable expectation of privacy is the most fundamental distinction between "concealed monitoring" and "electronic surveillance.") Thus, since no reasonable expectation of privacy is involved, no warrant would be required if similar activity were carried out for law enforcement purposes.

0831 AUTHORITY FOR CONCEALED MONITORING

Requests for approval for concealed monitoring should be coordinated with the legal advisor to the approval authority. Within the Navy, approval authorities are: the Director, Naval Intelligence; the Director of Intelligence, U.S. Marine Corps; and the Director, Naval Criminal Investigative Service. Delegation of this approval authority is not permitted.

0832 PHYSICAL SEARCHES

"Physical searches" are the subject of Procedure 7. DON intelligence personnel have limited arrest powers, depending on the organization involved. Where lawful arrests are made, the arresting DON intelligence personnel enjoy "search incident to arrest" powers to the same extent as any other law enforcement officer. Similarly, intelligence personnel may conduct a *Terry* pat-down / frisk for weapons as necessary while performing legitimate intelligence functions; reasonable suspicion is required and contraband found may be seized.

0833 MATTERS OUTSIDE THE SCOPE OF PROCEDURE 7

The provisions of Procedure 7 are not intended to impinge upon the commander's authority (including commanders of DON intelligence components) under the Military Rules of Evidence to authorize probable cause searches of persons and places under their control in exercising their law enforcement responsibilities and to conduct searches and inspections under the appropriate circumstances. Procedure 7 does not restrict consensual searches or examinations of areas under the plain view doctrine, provided that view is not enhanced by technological means in a manner to invade a reasonable expectation of privacy, nor does Procedure 7 govern examinations of abandoned property.

0834 NONCONSENSUAL PHYSICAL SEARCHES

A. In the United States. Under Procedure 7, searches may be conducted only for counterintelligence purposes and only of the person or property of active duty military personnel. Absent exigent circumstances, the search must be authorized by a military judge or a military commander under Mil.R.Evid. 315(d) and based on a finding of probable cause to believe the subject of the search is acting as an agent of a foreign power. Requests may be made of the FBI or other law enforcement agencies to conduct other searches beyond this limited authority where necessary.

B. Outside the United States. United States persons do not forfeit fourth amendment protections while overseas. Using the same standards as for searches within the United States, searches of servicemembers may be authorized by appropriate officials under Mil.R.Evid. 315(d). For nonmilitary U.S. persons the standards are the same, but approval must be obtained from the U.S. Attorney General. Nonconsensual physical searches of non-U.S. persons may be performed for any lawful function assigned to the searching Navy Intelligence activity.

0835 SEARCHES AND EXAMINATION OF MAIL

Procedure 8 applies to all mail opening and mail cover for any lawful function assigned to a DON intelligence component. A letter, package, or other item becomes "mail" as soon as it enters the U.S. postal system and it retains its character "mail" till it leaves that system, either by delivery to the intended addressee or the addressee's agent. Opening mail is a search for fourth amendment purposes.

A. First class mail. Intelligence components are prohibited from detaining or opening first class mail within U.S. postal channels for foreign intelligence or counterintelligence purposes and from even requesting such action by the U.S. Postal Service. For postal regulation purposes, first class mail is considered sealed against inspection; searches of first class mail on the U.S. postal channels may be authorized only for law enforcement purposes, including the limited law enforcement responsibilities of DON intelligence components. First class mail may be searched pursuant to a lawful search warrant duly issued by a Federal court. Further, such mail may be detained upon reasonable suspicion for a brief period of time to assemble evidence sufficient to satisfy the probable cause requirement for a search warrant and to apply for, obtain, and execute the warrant. DMM para. 115.31.

B. Other mail. Second, third, and fourth class mail is termed not sealed against inspection and may be detained, inspected, or opened in a variety of legitimate circumstances by postal officials, including pursuant to an approved DON intelligence component mail cover.

0836 MAIL COVERS

Mail cover means the process by which a record is made of any data appearing on the outside cover of any class of mail matter as permitted by law, other than that necessary for the delivery of mail or administration of the Postal Service. It also includes checking the contents of any second, third, or fourth class mail to obtain information in the interest of: protecting national security; locating a fugitive; or obtaining evidence of commission or attempted commission of a crime. DOD Regulation 4525.6-L, Chap. 8 § I.8.a(3); U.S. Post Office Rules and Regulations, 39 C.F.R. Part 233.

A. Authorization. Mail covers may be conducted pursuant to an order issued by an appropriate postal official based upon a written request from a law enforcement agency which contains a stipulation of the facts demonstrating the required grounds. For purposes of seeking mail covers, counterintelligence elements of the DON intelligence component are considered law enforcement agencies, but their jurisdiction is limited to counterintelligence matters with criminal law implications (such as espionage, sabotage, and international terrorism).

B. Overseas. DOD 4525.6-L provides that, within the military postal system overseas, the senior military official who has responsibility for postal operations of each major command within each military service may order mail covers within the geographic area of the command to which they are assigned. Limited delegation of this authority is authorized; however, delegation is not permitted to approve requests for covers on the grounds of national security. For other elements within the U.S. postal system, mail cover may be ordered pursuant to the authority of the chief postal inspector of the Postal Service and according to procedures and standards specified in 39 C.F.R. § 233.3.

0837 MILITARY POSTAL SYSTEM OVERSEAS

The *DOD Postal Manual*, DOD 4525.6-L, provides that military commanders, including naval intelligence commanders exercising special court-martial jurisdiction and military judges have the authority under Mil.R.Evid. 315 to authorize probable cause searches and seizures of all four classes of mail when such search or seizure is to occur within the military postal system overseas; such an order is not required for second, third, or fourth class mail. Judicial warrants to search first class mail in other portions of the U.S. postal system must be secured in a federal judicial proceeding pursuant to Rule 41 of the Federal Rules of Criminal Procedure. 39 C.F.R. § 233.3.

0838 EMERGENCY SITUATIONS

Within U.S. postal channels, any military postal clerk or postal officer (or any person acting under the authorization of such a clerk or postal officer) may detain, open, or remove from postal custody, and process and treat mail of any class reasonably suspected of imposing immediate danger to life or limb or an immediate or substantial danger to property, without a search warrant or authorization. This detention, however, is limited to the extent necessary to determine and eliminate the danger. A complete written report must be filed promptly.

0839 MAIL OUTSIDE U.S. POSTAL CHANNELS

Opening mail to or from U.S. persons found outside U.S. postal channels, including APO or FPO channels, is permitted only with the approval of the U.S. Attorney General based on probable cause that the subject of the search is acting as an agent for a foreign power. Where non-U.S. persons are involved, searches may be conducted for any lawful function assigned a DON intelligence component. DON intelligence components may also request mail cover of mail to or from a US person which is outside U.S. postal channels, or covers of non-US persons outside U.S. postal channels, per the appropriate law and procedure of the host government and any SOFA.

0840 PHYSICAL SURVEILLANCE

Procedure 9 covers physical surveillance of U.S. persons by intelligence components for foreign intelligence and counterintelligence purposes. The term "physical surveillance" has two alternative definitions; each contains four **essential** elements. If any element is not met, the activity is not subject to the provisions of Procedure 9.

A. First alternative. Physical surveillance involves "systematic and deliberate observation." Systematic and deliberate means that the activity must be both methodical or done with purposeful regularity, *and* be intentional or premeditated. The surveillance must be "of a person" (i.e., a natural person), not a corporation or similar entity. The physical surveillance may be conducted "by any means" and must be "on a continuing basis." On a continuing basis means conducted without interruption for a substantial period of time.

B. Second alternative. Physical surveillance is alternatively defined as the acquisition of a nonpublic communication by a person, not a party thereto or visibly present threat, through any means, not involving electronic surveillance. The information need only be acquired; the two-fold Procedure 2 analysis for collection

(collection plus action indicating intent to use) is inapplicable here. Nonpublic communication is difficult to define; its Procedure 9 meaning differs from its meaning under Procedure 5 for electronic surveillance purposes. If an activity contemplates acquisition of a communication in which the parties have a reasonable expectation of privacy (i.e., that the contents of their communication will remain private) it cannot be physical surveillance. (Where communications are concerned, a reasonable expectation of privacy must exist on the part of all communicants for the "sphere" to retain its protection from intrusion. If one communicant consents to governmental intrusion, then the fourth amendment rights of all communicants are effectively vitiated.) Information is available publicly if it has been published or broadcasted for general public consumption, is available on request for a member of the general public, could lawfully be seen or heard by a casual observer, or is made available at a meeting open to the general public. Thus, a nonpublic communication is a communication which is neither available for general public consumption nor lawfully available to the casual observer.

C. Physical surveillance and concealed monitoring compared. Physical surveillance and concealed monitoring are similar: concealed monitoring always involves the use of some electronic, optical, or mechanical device; physical surveillance need not. Concealed monitoring must be surreptitious, while physical surveillance may be done with the subject's knowledge. Both are nonconsensual, and there are some circumstances: in which the techniques may overlap.

0841 PHYSICAL SURVEILLANCE WITHIN THE UNITED STATES

DON intelligence components may conduct nonconsensual physical surveillance of U.S. persons in the United States only for foreign intelligence and counterintelligence purposes and only against persons within the investigative jurisdiction of the component conducting the surveillance.

A. These persons include:

1. Present or former employees of the DON intelligence component concerned;

2. present or former contractors of that DON intelligence component and their present or former employees;

3. applicants for employment with the DON intelligence component concerned or with the contractors of that component; and / or

4. military servicemembers.

B. Other restrictions. DON intelligence components may also conduct physical surveillance of a person in contact with any of the above subjects, but only to the extent necessary to identify that person. In addition, any physical surveillance of a U.S. person which occurs outside a DOD installation in the United States must be coordinated with the FBI and other law enforcement agencies that may be appropriate. DON intelligence components may conduct physical surveillance of non-U.S. persons within the United States for any lawful function assigned to that particular component, subject to the jurisdictional limitations imposed by "the agreement between the Deputy Secretary of Defense and Attorney General, April 5, 1979."

0842 PHYSICAL SURVEILLANCE OUTSIDE THE UNITED STATES

Outside the United States, DON intelligence components may conduct physical surveillance of the same U.S. person subjects as permitted within the United States and of any other U.S. persons in the course of lawful foreign intelligence and counterintelligence investigations, subject to the following conditions:

A. Such surveillance must be consistent with the laws and policies of the host government and may not violate any SOFA;

B. any physical surveillance of a U.S. person abroad to collect foreign intelligence may be authorized only to obtain significant information that could not be obtained by other means; and

C. physical surveillance may be conducted of non-U.S. persons abroad for any lawful function assigned to the DON intelligence component concerned.

0843 THE NECESSITY FOR COVERT ARRANGEMENTS

Covert arrangements of intelligence organizations are essential to the performance of foreign intelligence and counterintelligence missions. By definition, however, covert dictates an element of deception which must be practiced within the United States as well as within foreign countries. In recognition of the risk of conflict with various regulatory statutes and other legal requirements, Procedure 10 contains a number of controls on covert arrangements which attempt to ensure compliance with applicable laws and to minimize governmental intrusion on individual privacy.

0844 UNDISCLOSED PARTICIPATION IN ORGANIZATIONS

Procedure 10 applies to the participation as an official duty by DON intelligence personnel in two broad categories of organizations: any organization located within the United States; and any organization outside the United States which qualifies as a "U.S. person." Under Procedure 10, participation is defined very broadly and includes virtually any action undertaken within the structure or framework of an organization. Procedure 10 does NOT apply to an individual's participation in an organization where it is *solely* personal (i.e., at the individual's own initiative and expense and not on behalf of the intelligence component). Participation is "on behalf of the intelligence component" only when the participant is asked to take some action within an organization for the benefit of the requesting agency. This rule obtains even if the intelligence component may acquire some incidental benefit as a result of the individual's participation. Even if outside the pale of Procedure 10, however, activities must still be based on a legitimate mission requirement; intelligence components do not enjoy wholesale license to penetrate organizations outside the purview of Procedure 10.

0845 CONCEPT OF "U.S.-PERSON ORGANIZATIONS"

A. Organization. For the purposes of Procedure 10, an organization can be virtually any group which has some sort of formal structure. Outside the United States, Procedure 10 is concerned about those organizations constituting U.S. person organizations. Within the United States, Procedure 10 applies both to U.S.-person and non-U.S.-person organizations.

B. U.S.-person organization. A U.S.-person organization is:

1. A unincorporated association substantially composed of U.S. citizens or permanent resident aliens; or

2. a corporation incorporated in the United States, unless it is directed and controlled by a foreign government or governments. (A corporation, a branch, an office, or a corporate subsidiary outside the United States, even if owned "wholly or partially" by a corporation incorporated in the United States, is not a U.S.-person organization. Any organization which is located outside the United States may be presumed not to be a U.S.-person organization unless specific information to the contrary is known to the DON intelligence component.)

0846 UNDISCLOSED PARTICIPATION

Participation in an organization by DON intelligence personnel on behalf of any entity in the intelligence community is permitted only if the participant's affiliation with naval intelligence is disclosed or unless the undisclosed participation is approved by proper authority.

A. Disclosure. When disclosure is required, it must be made to an organization's executive officer or to officials in charge of membership, attendance, or the records of the organization. Disclosure on a membership application is sufficient to meet this requirement, and the disclosure may be made by the individual's organization or by some other component in the intelligence community that is otherwise authorized to take such action on behalf of naval intelligence.

B. Approval. The CO may approve the following activities, recognizing that approval in these circumstances is limited to collection of significant foreign intelligence that is generally made available to participants at such meetings and does not involve the domestic activities of the organization or its members:

1. Participation in meetings open to the public;

2. participation where other persons acknowledged to the organization to be U.S. government personnel participate;

3. participation in educational or professional organizations to enhance skills, knowledge, or capabilities; and

4. participation in seminars and similar meetings where disclosure of participants affiliations is not required.

C. Higher approval authority. Activities within the DON intelligence component's mission, but beyond the approval authority of the CO, must be approved by: the Deputy Under SECDEF (Policy); the Director, Defense Intelligence Agency (DIA); the Assistant Chief of Staff for Intelligence, Department of the Army; the Commanding General, U.S. Army Intelligence and Security Command; the Director of Naval Intelligence; the Director of Intelligence, U.S. Marine Corps; the Assistant Chief of Staff, Intelligence, U.S. Air Force; the Director, Naval Criminal Investigative Service; or the CO, Air Force Office of Special Investigations. These officials may designate a single delegate to exercise this approval. Within the Navy, all requests in this category to engage in undisclosed participation must be submitted via OGC or OJAG.

0847 COOPERATING SOURCES

Procedure 2 defines "cooperating sources" as persons or organizations who knowingly and voluntarily provide information to intelligence components, or access to information, at the request of those components or on their own initiative. Examples include: law enforcement authorities, credit agencies, academic institutions, employers, and foreign governments. Neither Procedure 10 nor any other provision of DOD Regulation 5240.1-R seek to restrict legitimate cooperation of persons with U.S. intelligence activities. Any information of potential value to the United States may be received from cooperating sources by DON intelligence components and, in instances where this information is not within the jurisdiction of the Navy, the information may be passed to an appropriate agency. If a cooperating source furnishes information to an intelligence component or one of its employees who is a participant in an organization with the cooperating source, this action is merely gratuitous unless the employee had been given prior direction or tasking by the intelligence component to collect such information. This principle applies to family members, members of organizations / associations, etc., and even to walk-in sources at the DON intelligence offices.

0848 CONTRACTING FOR GOODS AND SERVICES

Procedure 11 applies to contracting or other arrangements with U.S. persons for the procurement of goods and services by or for DON intelligence components within the United States and with contractors abroad who are U.S. persons. It does not apply to contracting with government entities.

0849 DISCLOSURE REQUIREMENTS

A. Disclosure to academic institutions. Prior to entering contracts with academic institutions, DON intelligence components must disclose their sponsorship to appropriate officials of the institution.

B. General exception to disclosure requirement. DON intelligence components may enter into contracts with commercial organizations, private institutions, and individuals WITHOUT revealing their sponsorship IF the contract is for:

1. Published material available to the general public;

2. routine goods or services necessary for support of approved activities; or

3. other items incident to approved activities.

C. Approved nondisclosure. In other contractual relationships, nondisclosure of DON intelligence sponsorship must be supported by a written determination that concealment is necessary to protect the component's activities.

1. This determination may be made by: SECNAV; Under SECNAV; Director, NSA; Director, DIA; or Deputy Under SECDEF (Policy). For DON intelligence components, requests to conceal sponsorship must be submitted per SECNAVINST S3810.5A and / or 5510.31B.

2. The form of such a written determination need not be a specific request generated under Procedure 11. In most cases, the determination will have been made in some other fashion, such as in the promulgation or directive. In addition, where activities are carried out pursuant to an operations plan which is approved by one of those officials, and that operations plan includes provisions for concealed sponsorship of contracting or acquisitioning, the operations plan will satisfy this requirement.

0850 CONTRACTING METHODOLOGY

Procedure 11 does not affect government contracting methodology. In almost all cases, when an intelligence component contracts for goods and services, it must follow the provisions of the Federal Acquisition Regulations (FAR) and implementing directives. Exceptions are permitted to this general rule on certain acquisitions using intelligence contingency funds (ICF) under SECNAVINST S7042.7H in approved special access programs (SAP) under SECNAVINST S5460.3B (i.e., a justified use of SECNAV's emergency and extraordinary expense authority).

0851 ASSISTANCE TO LAW ENFORCEMENT

Procedure 12 applies to the provision of assistance by DON intelligence components to civilian law enforcement authorities and incorporates the specific limitations of such assistance contained in Executive Order No. 12, 333, together with the general limitations of approval requirements of SECNAVINST 5820.7 and OPNAVINST 1620.2 relative to support to civilian law enforcement. These provisions apply to approved DON intelligence resources in support of any federal, state and local civilian law enforcement agency. *See generally* "Posse Comitatus" in Chapter 21 of this Deskbook.

0852 EXPERIMENTATION ON HUMAN SUBJECTS

Procedure 13 implements the restriction in Executive Order No. 12,333 that "[n]o agency within the intelligence community shall sponsor, contract for, or conduct research on human subjects, except in accordance with the guidelines issued by the Department of Health and Human Services." Suffice to say, for purposes of DON intelligence components, human experimentation is not an option. DON involvement in such activities is further regulated by SECNAVINST 3900.39B.

0853 EMPLOYEE CONDUCT

Procedure 14 covers essentially three levels of "conduct" or responsibilities: individual, intelligence component and departmental. This Procedure sets forth the responsibility of employees of DON intelligence components to conduct themselves in accordance with DOD Regulation 5240.1-R and other applicable policies, regulations, directives, and laws. It also provides that intelligence components ensure that information of these policies, guidelines, laws, and regulations are made known to the members of those components. Finally, Procedure 14 lays out six specific responsibilities which must be met by SECNAV as the Head of a DOD activity containing intelligence components. These include ensuring the free flow of employer reports of questionable activities and ensuring that sanctions are imposed on violators of regulations and instructions affecting intelligence components.

0854 IDENTIFYING, INVESTIGATING, AND REPORTING QUESTIONABLE ACTIVITIES

A. "Questionable activity" defined. Under Procedure 15, "questionable activity" refers to any conduct that constitutes, or is related to, an intelligence activity that may violate the law, any Executive Order or Presidential Directive, including Executive Order No. 12,333, or any applicable DOD or Navy policy (including DOD 5240.I-R and SECNAVINST 3820.3D).

B. Reports. In addition to the general responsibility to report possible criminal activity, any employee or servicemember assigned to an intelligence component has a basic responsibility to report any questionable intelligence activity. Within the Navy, a questionable activity should be reported by message through the chain of command to OGC, OJAG, or the Navy or Marine Corps IG as appropriate. Procedure 15 requires that reports of questionable activity be submitted not later than 5 days after discovery and that each report be investigated to determine the facts and assess whether the activity is legal and is consistent with applicable policy. The format for such reports is as follows:

1. Description and the nature of the questionable activity;

2. date, time, and location of the occurrence;

3. individual or unit responsible for the questionable activity;

4. summary of the incident (to include references to particular portions of SECNAVINST 3820.3D, *etc*); and

5. status of the investigation of the incident.

0855 THE INTELLIGENCE OVERSIGHT FRAMEWORK

A. Congressional oversight. The heads of departments with components involved in intelligence activities are required to keep congressional intelligence committees fully and currently informed of intelligence activities, including significant anticipated intelligence activities, and to report any illegal or improper intelligence activity along with any corrective action taken or planned. 50 U.S.C. § 413.

B. The President's intelligence oversight board (IOB). The IOB was created in 1975 to establish an independent oversight process to monitor the intelligence community's compliance with the restrictions created by Executive Order No. 11,905. The IOB's powers are now found at Executive Order No. 12,334 of 4 December 1981, 46 Fed. Reg. 59,955. The IOB informs the President of unlawful or improper intelligence activities; forwards reports of those activities to the Attorney General; reviews the internal guidelines of members of the intelligence community concerning the lawfulness of intelligence activities; reviews the intelligence oversight practices and procedures of the Inspectors General and General Counsels of the intelligence community; and conducts investigations necessary to carry out the above functions.

C. DOD. The Assistant to the Secretary of Defense (Intelligence Oversight) is the DOD conduit to the President's IOB (DOD Directive 5148.11 of 1 December 1982). The ASD(IO) reports directly to the Deputy SECDEF and is responsible for the independent oversight of all DOD intelligence activities for the purpose of ensuring their compliance with the applicable statutes, executive orders, and directives. The ASD(IO) reports at least quarterly to SECDEF and the IOB.

D. DON. Intelligence oversight within DON is guided by SECNAVINST 3820.3D. The Navy system, comporting with the presidential and DOD systems, establishes reporting procedures for the Navy intelligence community and permits the Navy Inspector General, Navy General Counsel, and the Judge Advocate General to identify questionable intelligence activities and report them to the ASD(IO) and IOB.

1. CNO and CMC. CNO and CMC are responsible for ensuring that SECNAV, the Under SECNAV, Assistant SECNAV (RE&S), Navy General Counsel, and the Judge Advocate General are provided an annual listing of DON intelligence components and kept informed of all intelligence activities; and identifying to the Navy IG, the Marine Corps IG, General Counsel, and JAG other DON units which engage in intelligence activities.

2. IG. The Navy IG and the Marine Corps IG for Marine Corps intelligence components are primarily responsible for inspecting DON intelligence components and investigating reports of questionable activities. The Navy and Marine Corps IG's submit a Quarterly Intelligence Oversight Report (QIOR) to the ASD (IO) via JAG, Navy General Counsel, and the Under SECNAV. The QIOR identifies intelligence activities determined to be improper, lists significant intelligence oversight activities that took place that quarter, and contains any suggestions for improving the intelligence oversight process. The IG's of the DON intelligence components are responsible for carrying out the responsibilities assigned in DOD Directive 5240.1-R; ensuring reports are made to Navy General Counsel, Navy or Marine Corps IG, and JAG; and assisting the Navy and Marine Corps IG's as required.

3. Navy General Counsel and the Judge Advocate General. The Navy General Counsel and JAG are principally responsible for determining whether questionable activities are, in fact, unlawful or improper.

4. OJAG Special Programs Office (Code 11). In February 1988, the JAG Special Programs Office was made a Division within OJAG. The division supports JAG in carrying out his intelligence responsibilities. The new status reflects the growing importance of legal issues that affect our intelligence and operational clients. The division has three specially cleared judge advocates and a civilian secretary who have developed needed expertise. The JAG, the Deputy JAG, and Assistant and Deputy Assistant JAG who discharge "Special Programs" responsibilities attend the monthly breakfasts sponsored by the Standing Committee and follow the work of that Committee. The division maintains close professional contacts among the general counsel offices of the various intelligence agencies and departments within the executive branch. The Special Programs Division also supports DOJ in civil litigation on classified matters, such as assertion of the State Secret privilege. In February 1990, SECNAV revised SECNAVINST 5000.34A, the directive governing the oversight of sensitive activities within the Department of the Navy. Examples of such activities include counter-terrorist training activities and sensitive support of counter-narcotics law enforcement efforts. The directive designates the Special Programs Division as one of two principal sources for legal advice to field judge advocates or commanders conducting, contemplating, or supporting sensitive activities.

5. Quarterly Intelligence Oversight Review Board. The Quarterly Intelligence Oversight Review Board is composed of the Under Secretary of the Navy, the Navy Inspector General, Navy General Counsel and the Judge Advocate General. Summaries of existing and potential intelligence activities of significance, or which may contravene legal constraints, are required to be submitted to the Board by the Director of Naval Intelligence and the Director of Intelligence, USMC.

CHAPTER NINE

TERRORISM

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CHAPTER NINE

TERRORISM

0901 REFERENCES

A. 1983 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.

B. DOD Directive 2000.12 of 27 Aug 1990, Subj: DOD COMBATTING TERRORISM PROGRAM.

C. Arts. 0802, 0809, and 0826, *U.S. Navy Regulations, 1990*

D. FMFM 7-14, Combating Terrorism (5 Oct 90)

0902 INTRODUCTION

The development of an effective legal regime to control and reduce terrorist violence will provide one of the greatest challenges to the world community in the 1990's. Unfortunately, it is not only radical groups which must be considered. Covert state involvement has emerged as the chosen instrument for a new and vicious pattern of international bargaining. At the same time, nations will continue to be hampered in preventing and suppressing terrorist violence, as a collective body, because of their inability to reach agreement on those acts which should be condoned as political responses by the weak against the powerful in unjust political relationships. The political element of terrorist violence differentiates it from common criminal activity.

0903 DEFINING TERRORISM

International terrorism is the premeditated, politically motivated violence perpetrated against noncombatant targets in or from a second state by subnational groups or individuals. International terrorism is defined to have the following elements: (1) a subversive, violent act or threat thereof in a foreign state or against a foreign national; (2) an intended political outcome which might include

expansion of political control or political change; and (3) a target, whether civilian or material, whose death, injury, or destruction can be expected to influence the desired political outcome. State involvement or direction of terrorist activity adds an additional element.

0904 STATE SPONSORSHIP OF TERRORISM

State-supported international terrorism refers to those countries that support international terrorist groups or engage in terrorist attacks to influence policies of other countries, to establish or strengthen their regional or global influence, and, in some cases, to eliminate or terrorize dissident exiles and nationals from adversary countries. State involvement in terrorist activity is dictated by practical as well as ideological considerations. The strategic thinking involved incorporates the view that terrorism is a suitable substitute for traditional warfare when that warfare becomes too risky or too expensive. State-sponsored terrorism is truly "war on the cheap." State support can include propaganda and political support, funding, intelligence, training, and supply of weapons at one end of the spectrum, and direct covert involvement at the other.

A. Growth. The factor contributing most to the increase in state-supported terrorism for political change is the synergistic or multiplier effect it has in its impact. Its low cost and limited training and weapons requirements make it a strategy ideally suited for less sophisticated states. Like other forms of low-intensity warfare, terrorism is ambiguous. The fact that it throws victim nations off-balance and that they must then grope for an appropriate means of response only increases its effectiveness.

B. The legal context. Even if state support can be clearly identified, placing it in a legal context has proven difficult. France and Venezuela, for example, do not distinguish between individual and group terrorism and state-supported terrorism. The former defines all terrorism as "heinous acts of barbarism," while the latter considers terrorism to include any act that "endangers or takes innocent human lives, or jeopardizes fundamental freedoms."

C. Law of armed conflict. By relating state involvement in the terrorist use of force to an effort to change national political imperatives in another state, however, the law of armed conflict is invoked and the right of self-defense triggered. The law of armed conflict is that branch of international law, often called the law of war, which regulates the conduct of states and combatants engaged in armed hostilities, at whatever level of intensity.

0905 LEGAL RESPONSE TO TERRORISM

An effective counter-terrorism strategy must ensure that enforcement measures are not legally constrained and that those responsible for terrorist acts are consistently held accountable for their behavior. To this end, the Western nations have worked with concerned regional and international organizations to develop a matrix of conventions addressing such terrorist related issues as hostage-taking, aircraft hijacking, and extradition. This expanding body of international law, when coupled with increasingly more effective national implementing legislation, appears at last to be arming the victims of terrorism with some of the legal instruments necessary to combat the threat.

A. Background. It was not until the assassination at Marseilles on October 9, 1924, of King Alexander of Yugoslavia and Mr. Louis Barthou, Foreign Minister of the French Republic, that the world community began an intensive consideration of international terrorism at the official level. This concern led to the Convention for the Prevention and Punishment of Terrorism, concluded at Geneva under the auspices of the League of Nations on November 16, 1937. Twenty-three states undertook to treat as criminal offenses acts of terrorism—including conspiracy, incitement, and participation in such acts—and, in some cases, to grant extradition for such offenses. In a supplementary convention signed on the same day, ten of the twenty-three participants of the principal convention agreed to the creation of an International Criminal Court to which the parties would be entitled to hand over the accused if they decided neither to extradite nor prosecute in their own courts. Unfortunately, only two states ratified either of these conventions and they never went into force. States were reluctant to ratify because of the breadth of the definition of terrorism, a problem which continues today in the drafting of international agreements on the subject. Under the 1937 Convention, terrorism was defined broadly to include criminal acts directed against a state and intended to create a state of terror in the minds of particular persons, or a group of persons, or the general public.

B. OAS Convention. Where the 1937 Geneva Convention failed, two subsequent conventions addressing the protection of diplomats and other internationally protected persons from terrorist attacks succeeded. The Inter-American Convention on the Kidnapping of Diplomats, which concluded in Washington on February 2, 1971, was called by the Organization of American States (OAS) as a result of an extreme number of political kidnappings in Latin America. Activist political groups had repeatedly kidnapped high-ranking foreign diplomats and businessmen in an attempt to force political concessions from the various national governments. Although the 1971 Convention was organized by the OAS, states from outside the region were invited to participate. The operative articles focus on punishment of specific acts through national legislation and agreement on the extradition of offenders. Special emphasis is given to the classification of all

condemned acts as serious common crimes not permitting political offender treatment or the granting of asylum. The Convention creates, much in the same manner as the conventions on genocide, slavery, and piracy, a new category of international crimes against humanity punishable by any member state regardless of the locus of the crime.

C. U.N. action. Two years after the drafting of the OAS Convention, the United Nations General Assembly adopted, by resolution, the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents. This 1973 Convention addressed serious crimes such as murder, kidnapping, or other attack on diplomats and other internationally protected persons. The key provision, Article 7, requires prosecution in cases where extradition is denied. This provision is nearly identical to similar provisions in The Hague and Montreal Conventions dealing with aircraft hijacking.

1. U.N. Charter and other declarations. In other areas as well, the United Nations has succeeded in promulgating principles of human rights which leave no doubt that international terrorism and violence are violations of acceptable world community norms. The United Nations Charter provides for the promotion and encouragement of respect for human rights. The Universal Declaration of Human Rights, adopted by the United Nations in 1948, further provides that" [e]veryone has the right to life, liberty and security of person," and that "[n]o one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment." The preamble to the International Covenant of Civil and Political Rights, which entered into force in 1977 absent U.S. ratification, emphasizes the individual's right to enjoy "freedom from fear." Article 6 of this Covenant declares that every individual has the right to life, and that "[n]o one shall be arbitrarily deprived of his life." Preservation of life and related values often the target of terrorism are similarly addressed in the U.N.-sponsored 1948 Genocide Convention. Prohibited acts under that Convention include (a) killing members of a group; (b) causing either serious bodily harm or severe mental distress to a particular group; and (c) deliberately inflicting conditions on a group calculated to bring about its physical destruction in whole or in part.

2. Work remaining. Despite these successes, the United Nations has been unable to legislate in three areas historically considered exclusive of international criminal jurisdiction. The first category includes just wars against aggression, struggles for self-determination or national liberation, and struggles by the oppressed against the oppressor. The second area includes terrorist attacks on combatants, on noncombatants where directly involved in the conflict, and on military targets. The third area of legal exclusion includes propaganda strategies and acts of reprisal.

0906 PROSECUTION AND EXTRADITION

While customary international law, at least until recently, probably did not require the prosecution or extradition of terrorists whose acts fell within one of the above three categories, the Western nations, including the United States, have persistently pressed for international agreements which would do so. Among international organizations, the International Civil Aviation Organization (ICAO) has enjoyed the greatest success in implementing effective counter-terrorism procedures.

A. The Tokyo Convention. The 1963 Tokyo Convention, sponsored by ICAO, provided clarification on jurisdiction over crimes in the air, for prompt restoration of aircraft and cargo to its rightful owner, and for the speedy resumption of an interrupted flight. Despite these provisions, nowhere in the Convention was "hijacking" defined or listed as a crime, and nowhere was it provided that the state where the hijacked craft landed was required to prosecute or extradite the perpetrators.

B. The Hague Convention. The Hague Convention of 1970 remedied some of these remaining concerns. At The Hague, ICAO members carefully defined those offenses associated with hijacking, while at the same time requiring that contracting states extradite or punish hijackers, leaving the choice to the state's discretion. The delegates at The Hague, however, failed to state what they meant by their call for "severe penalties" for aircraft hijacking. They also failed to adopt measures dealing with aviation offenses committed *on the ground or* with criminal interference with navigation facilities and service. These matters were left to the Montreal Convention which convened the following year.

C. The Montreal Convention. The 1971 Montreal Convention greatly increased the scope of activities covered by the Tokyo and Hague Conventions. It expanded protection to cover the period between the start of preflight preparation and a termination point 24 hours after landing. It also added coverage to include destruction or damage to air navigational facilities. What none of the Conventions addressed, however, was an effective mechanism to impose sanctions upon states which refused to extradite or prosecute aerial terrorists.

D. Sanctions. Although a Sanctions Convention was proposed jointly by the United States and Canada at the 1973 ICAO meetings, member states were unable to agree on the criteria to be used or the measures to be imposed. The greatest success concerning sanctions against nations not adhering has been achieved by the seven leading Western nations in their annual Economic Summit Conferences. Beginning with the Bonn Conference in 1978, the Western leaders, representing Canada, the United States, Federal Republic of Germany, France, Italy, Japan, and the United Kingdom, have annually addressed issues related to mutual cooperation in reducing terrorism and hostage-taking. Since 1978, for example, these nations

have been in agreement that they will cease all flights and take other agreed upon economic measures against any country which does not extradite or prosecute terrorists or return hijacked aircraft.

E. Bilateral agreements. Bilateral agreements, such as the Supplementary Extradition Treaty entered into between the United Kingdom and the United States on June 25, 1985, hold promise as well. This agreement excludes specified offenses typically committed by terrorists from the political offense exception in their 1972 Extradition Treaty. It is clear that a combination of bilateral and multilateral agreements, coupled with an effective domestic legal regime, is required if nations are to reduce effectively acts of international violence and hold the perpetrators accountable.

0907 LEGAL RESPONSE TO STATES SPONSORING TERRORISM

State-sponsored terrorism is a strategy that does not follow traditional military patterns. In fact, one fundamental characteristic is its violation of established legal norms. International law requires that belligerent forces, including irregulars, identify themselves, carry arms openly, and observe the laws of armed conflict. Principal among those laws are the principles of necessity of action, proportionality of response, and target discrimination. Military necessity is the principle which justifies a measure of regulated force not forbidden by international law to eliminate an imminent military threat. Discrimination is an aspect of targeting which requires that the objects of attack bear a military relationship to the participant state. Under the law of armed conflict, only military installations and personnel (or their agents in the case of state-sponsored terrorism) may properly be targeted for destruction. This last principle confirms the basic immunity of the civilian population during armed conflict at whatever level.

A. Differing perspectives. Terrorists and their state sponsors purposefully blur the distinction between civilians and members of the armed forces in the target state. When a state-sponsored terrorist attack occurs, a number of legal and policy considerations arise. Foremost is an understanding that certain states' ideological views of the weight to be accorded international law may differ from the Western perspective. In the Middle East, for example, the military imbalance between the United States and states with interests at variance with the United States can result in perceived justification for extra-legal measures. The former Soviet Union and its surrogates, conversely, choose to characterize the law, as do all states to a varying degree, in their own national interest. Analysis of U.S.S.R. decision-making revealed that identical principles of international law applied by Western and Socialist states cannot be placed in parallel columns and compared by their terminology alone. The purpose of Soviet law was determinative of its characterization. The Soviets did not consider a commitment to noninterference in the internal affairs of sovereign states

to be inconsistent with promoting class struggle in those same countries, or with supporting national liberation movements in Asia, Africa, and Latin America. While the Soviet Union has disappeared, its actions and approach highlight why national leaders must ensure those international law commitments clarified in the U.N. Charter are not subject to loose interpretation by any state.

B. Article 2 of the U.N. Charter. The basic provision restricting the threat or use of force in international relations is Article 2, Paragraph 4, of the U.N. Charter. That provision states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in a manner inconsistent with the purposes of the United Nations."

1. Purpose. The underlying purpose of Article 2, Paragraph 4, to regulate aggressive behaviors between states, is identical to that of its precursor in the Covenant of the League of Nations. Article 12 of the Covenant stated that League members were obligated not "to resort to war." This terminology, however, left unmentioned hostilities which, although violent, could not be considered war.

2. Wordsmithing. The drafters of the U.N. Charter wished to ensure that the legal niceties of a conflict's status did not preclude cognizance by the international body. Thus, in drafting Article 2, Paragraph 4, the term "war" was replaced by the phrase "threat or use of force." The wording has been interpreted as prohibiting a broad range of hostile activities including not only "war" and other equally destructive conflicts, but also applications of force of a lesser intensity or magnitude.

3. Application. The actions of states supporting terrorist activities clearly fall within the scope of Article 2, Paragraph 4. The illegality of aid to terrorist groups has been well established by the U.N. General Assembly in Resolutions 2625 and 3314. These Resolutions prohibit the "organizing," "assisting," or "financing" of "armed bands" or "terrorists" for the purpose of aggression against another state.

C. Self-defense. The right of self-defense is codified in Article 51 of the U.N. Charter. That article provides: "Nothing in the present Charter shall impair the inherent right of individual or collective self defense if an armed attack occurs against a Member of the United Nations. . . ." The use of the word "inherent" in the text assures that the right of self-defense is broader than merely providing a right to respond to a devastating armed attack which has already been absorbed. Article 51, like Article 2(4), has its roots in customary international law. Customary international law embraces a comprehensive conception of permissible or defensive coercion, honoring appropriate response to threats of an imminent nature. It is precisely this anticipatory element of lawful self-defense that is critical to an effective policy to counter an imminent threat of state-sponsored terrorism.

Governmental response to state-supported terrorist violence, where the elements of necessity and proportionality are met, is clearly supported by customary international law and the U.N. Charter.

0908 UNITED STATES POLICY

United States' 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 anti-terrorism and are used by the DOD to reduce the vulnerability of DOD personnel, their dependents, facilities, and equipment to terrorist acts. Counter-terrorism, 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 identify clearly 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 counter-terrorism efforts override standard public affairs procedures.

0909 AGENCY RESPONSIBILITIES

A. 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.

B. Outside military installations in the United States. 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. 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 a 1983 Memorandum of Under-

standing (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.

C. On military installations in the United States. 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. Normally, this notification is effected by NCIS who is responsible for liaison with other law enforcement agencies and other investigative assistance. 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 0802, 0809 and 0826 of *U.S. Navy Regulations, 1990*. 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 as may be necessary to protect life or property.

D. Outside the United States. 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.

0910 JUDGE ADVOCATE'S ROLE

The SJA 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 United States, or the State Department and host country representatives abroad. For an overview of potential SJA issues and responsibilities, *see* Bowman, *The Military Role in Meeting the Threat of Domestic Terrorism*, 39 Naval L. Rev. 209 (1990).

CHAPTER TEN

PERSONNEL AND INFORMATION SECURITY

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CHAPTER TEN

PERSONNEL AND INFORMATION SECURITY

1001 REFERENCES

A. OPNAVINST 5510.1, Subj: DEPARTMENT OF THE NAVY INFORMATION AND PERSONNEL SECURITY PROGRAM REGULATION

B. SECNAVINST 5510.30, Subj: DEPARTMENT OF THE NAVY PERSONNEL SECURITY PROGRAM

C. OPNAVINST 5529.1, Subj: PROCEDURES FOR DETERMINING SENSITIVE COMPARTMENTED INFORMATION (SCI) ACCESS ELIGIBILITY AND REQUESTING FURTHER CONSIDERATION OF DETERMINATION OF INELIGIBILITY

D. DOD Directive 5525.7, Subj: IMPLEMENTATION OF MOU BETWEEN THE DEPARTMENT OF JUSTICE AND DOD RELATING TO THE INVESTIGATION AND PROSECUTION OF CERTAIN CRIMES

1002 SECURITY CLEARANCES

A security clearance is a determination of eligibility for access to classified information. The clearance is an affirmation that an individual's reliability, honesty, loyalty, judgment, and trustworthiness are such that allowing access to classified material is clearly consistent with the issues of national security. Once clearance has been granted, eligibility is retained until there is reason to remove it. Any doubt is resolved in favor of the national security.

A. Eligibility. Eligibility for clearance is based on all available information, favorable and unfavorable, about the individual. Sources of information include the application, security forms, personnel, medical, law enforcement or legal files, and investigative reports. This information is provided to an adjudicator who decides whether clearance is appropriate for a given individual. The framework in which the adjudicator operates is built on security criteria / factors identified as having significance in security determinations. Some of the criteria apply directly to the

person's loyalty to the United States, others deal with questions of character and conduct. The general criteria are contained in OPNAVINST 5510.1.

B. Disqualifying behavior. Common disqualifying behavior includes desire for money, alcohol or drug abuse, sexual misconduct, and / or disregard for laws / regulations. The kinds of disqualifying conduct described in the adjudication criteria are often what hostile intelligence services look for in targeting and recruiting individuals for use against the United States. Recently, reviews of security clearance have placed greater emphasis on excessive or irresponsible indebtedness.

C. Denial / revocation of a servicemember's clearance. The CO decides whether to deny or revoke a member's security clearance and whether to reassign a servicemember whose clearance has been revoked. The person concerned will be given a written statement of the reason for revocation or denial, an opportunity to reply in writing, a written response to any input, and an opportunity to appeal to the Chief of Naval Personnel.

D. Centralization of Navy military security clearances. The Department of the Navy Central Adjudication Facility (DON CAF) began central processing of all active duty and Reserve Navy military personnel security clearances on July 1, 1989. Several changes have flowed from this modification of the previous practice of local command security clearance processing. Navy military personnel no longer report to a gaining command in possession of a security clearance. Eligibility for clearance remains unchanged, however, and clearance may be reestablished upon request to DON CAF by the member's new command. Commanding officers of intermediate and ultimate duty stations may grant interim clearance contemporaneous with a request to DON CAF to grant the required final security clearance. Commanding officers retain authority and responsibility for controlling individual access to classified information. On detachment, DON CAF will administratively withdraw the member's clearance. Security questions should be addressed to Code 11 as the Naval Legal Service Command security manager.

1003 CIVIL SERVICE EMPLOYEE SECURITY CLEARANCES

The basic authority for the Federal Civilian Personnel Security Program is Executive Order No. 10,450 which requires that investigations be conducted on all persons entering the federal civilian service. An additional personnel security investigation is required before a person will be granted a clearance. The various types of investigations are described in OPNAVINST 5510.1. Appointment of a civilian employee is subject to investigation. NCPCINST 5521.1. The type of investigation conducted depends on whether the position is critical / sensitive, noncritical / sensitive, or nonsensitive.

A. Emergency appointments. An employee cannot be appointed to a sensitive position until a background investigation is completed, except in an emergency, where, in the CO's determination, a delay in appointment would be harmful to the national security. Guidance on when emergency appointments are appropriate can be obtained from CNO (0P-009P). OPNAVINST 5510.1.

B. Denial / revocation of clearance of a civilian employee. If a civilian does not meet the criteria for a security clearance, clearance will be denied or revoked by the Director, Naval Civilian Personnel Command (NCPC). OPNAVINST 5510.1. The CO does not have the power to revoke a civilian employee's security clearance; however, the CO does have the power to restrict or suspend that employee's access to classified information. Restriction or suspension of access may only be used as a temporary measure until the individual's eligibility for access has been resolved by NCPC. A civilian employee has detailed appeal rights if security clearance is denied or revoked.

C. Loss of employment when security clearance revoked. An employee who has a permanent appointment and has completed a probationary period cannot be removed from employment solely because his security clearance has been revoked. Civ. Pers. Reg. No. 752-1, Subch. 53(b)(8) (23 July 76). If possession of a security clearance is a requirement of the position which the employee fills, however, the employee may be removed following clearance revocation for failure to meet this position requirement.

1. If an employee has a job that requires a security clearance and loses that clearance, the Navy must exercise due diligence before removal to place that employee in a job within the same command that does not require a security clearance. An employee should not be removed from employment for security-related reasons if effective action can be taken under nonsecurity regulations. OPNAVINST 5510.1; SECNAVINST 5510.30, para. 4c.

2. An employee against whom removal action is proposed has statutory response rights under 5 U.S.C. § 7513(d), including notice, a right to respond, and the right to an attorney. If the employee is removed after this appeal procedure has been followed, the employee concerned has a statutory right to appeal that action to the Merit Systems Protection Board (MSPB) within twenty days following the effective date of the action. 5 C.F.R. § 1201.22.

1004 SENSITIVE COMPARTMENTED INFORMATION (SCI)

SCI is classified information concerning or derived from intelligence sources, methods, or analytical processes that is required to be handled exclusively within formal access control systems established by the Director of Central Intelligence. SCI includes all information and materials requiring special intelligence community controls indicating restricted handling within present and future community intelligence collection programs and their end products. These special community controls are formal systems of restricted access established to protect the sensitive aspect of sources, methods, and analytical procedures for foreign intelligence programs. Communications intelligence, as defined by 18 U.S.C. § 798, is an example of SCI and is normally derived from intercepted communications.

A. Authority. The authority for SCI control systems is based upon the statutory responsibility of the Director of Central Intelligence (DCI), under the National Security Act of 1947, for the protection of intelligence sources and methods, and upon Executive Order No. 12,356, which authorizes the DCI to create special access programs for especially sensitive intelligence activities.

B. Special protection. The compromise of technical collection systems, or the information derived from them, can tell potential adversaries the capabilities of our systems and how to take effective countermeasures. Worse, once the target country's government knows what the systems collect and how it is collected, that country has the option of conducting deception operations (i.e., providing misleading data which may result in dangerously defective U.S. foreign and defense policies).

C. Other clearances distinguished. Persons cleared for confidential, secret, or top secret information are not automatically eligible by virtue of those clearances for access to SCI. Conversely, the denial of SCI approval does not necessarily mean denial or revocation of top secret clearance. SCI simply involves a more sensitive aspect of security than non-SCI security.

D. SCI eligibility. The personnel security criteria for access to SCI are established by the Director of Central Intelligence in Director of Central Intelligence Directive (DCID) 1/14. Paragraph 15 of DCID 1/14 provides that "[a]ny doubt concerning personnel having access to SCI shall be resolved in favor of the national security." A determination to grant SCI eligibility will be made by either Commander, Naval Intelligence Command or Commander, Naval Security Group Command or their deputies, as appropriate, following an investigation conducted by the Defense Investigative Service. OPNAVINST 5510.1. Two determination authorities appointed respectively by COMNAVINTCOM and COMNAVSECGRU will make all decisions to deny or revoke SCI access eligibility. OPNAVINST 5529.1, para. 5a.

E. Obtain SCI access and appeal rights. A special background investigation must be completed by the Defense Investigative Service before SCI will be granted. In recent years, obtaining SCI access has taken from three to thirteen months. The specific appeal procedures for denial or revocation of SCI access have been prescribed by COMNAVINTCOM and COMNAVSECGRU per OPNAVINST 5529.1. Paragraph 6 of OPNAVINST 5529.1 and Annex B to DCID 1/14 describe the basic appeal rights for a person whose access to SCI has been denied or revoked. That person is entitled to notice of the denial or revocation, and the procedures by which the reasons for such denial or revocation may be obtained. Such person also has the right to supplement the record and submit a written appeal to the designated appellate authority. A second appeal may be made to COMNAVINTCOM or COMNAVSECGRU, as appropriate, as the Navy SCI final appeal authorities.

1005 CONTROL OF CLASSIFIED MATERIAL

Detailed rules on the safeguarding of classified information are contained in chapter 13 of OPNAVINST 5510.1.

A. Mailing. Generally, secret material will be sent by registered mail. Confidential material can be sent certified or first class mail within the United States and its territories. When classified material is mailed it must be enclosed in two envelopes, and the outer envelope will not bear evidence of its classified contents. Top secret material and SCI may not be transmitted by mail.

B. Handcarrying. Handcarrying classified material outside of the command must be approved by the CO or his designee. The security manager must be advised when anyone in a travel status needs to handcarry classified material to or from the command. The security manager will then advise the traveler on the appropriate precautions described in chapter 16 of OPNAVINST 5510.1. Classified material may not be read or displayed on a public conveyance.

1006 COMPROMISE

Compromise is defined as a security violation which has resulted in confirmed or suspected exposure of classified information or material to an unauthorized person.

A. Investigation. An inquiry and / or investigation is required by OPNAVINST 5510.1, chapter 4, whenever classified material is subject to compromise. A preliminary inquiry shall be conducted in every confirmed or suspected case of compromise and then forwarded to the next senior in the chain of command if it is determined that: (1) there is minimal risk to the national security;

(2) no significant activity security weakness is found; and (3) punitive action is inappropriate. If any of those criteria are not met, a JAGMAN investigation shall be conducted. Serious cases shall be referred to NCIS in addition to conducting the JAGMAN investigation.

B. Reporting requirements. The rules concerning protection of classified information in chapters 4 and 5 of OPNAVINST 5510.1 include:

1. Any person who learns that classified material has been compromised or has been subject to compromise must notify "the most readily available command".

2. The custodian of classified material, who becomes aware of actual or possible compromise, must report that fact to his superior officer immediately.

3. Any person who becomes aware that classified information may have been compromised as a result of disclosure in the public media has an obligation to notify the cognizant sponsor of the information, or CNO (OP-009P), if the sponsor is unknown.

4. Individuals becoming aware of possible acts of espionage, sabotage, or other subversive activities should immediately notify their CO, who will notify the local NCIS office. *See* SECNAVINST 5520.3. If the local NCIS office cannot be notified immediately and the case involves a serious security threat to classified information through espionage or the immediate flight or defection of an individual, a classified PRIORITY message should be sent to the Director, NCIS with an info copy to CNO (0P-009P).

5. Any form of contact with any citizen of a Communist-controlled country shall be reported to NCIS (contact encompasses any form of encounter, e.g., by radio, telephone, letter, etc.). Because of the dissolution of the Soviet bloc, you should check with NCIS to determine which countries this covers.

6. Any suicide or attempted suicide by a person who has had access to classified information should be reported to the nearest NCIS office and the Director, NCIS.

7. A CO should conduct an inquiry concerning any unauthorized absentees who had access to classified information (if the result of inquiry indicates national security concerns, the incident should be referred to the local NCIS office.).

8. If a classified material container is found unlocked and unattended, the senior duty officer is to be notified and will take further action and notify the CO.

C. Espionage investigations. Section 603 of the FY 90 Intelligence Authorization Act addressed FBI investigations of espionage by persons employed by or assigned to U.S. diplomatic missions abroad. Pub. L. No. 101-193, 103 Stat. 1710. Section 603 provides:

> Subject to the authority of the Attorney General, the FBI shall supervise the conduct of all investigations of violations of the espionage laws of the United States by persons employed by or assigned to United States diplomatic missions abroad. All departments and agencies shall report immediately to the FBI any information concerning such a violation. All departments and agencies shall provide appropriate assistance to the FBI in the conduct of such investigations. Nothing in this provision shall be construed as establishing a defense to any criminal, civil, or administrative action.

1007 NATIONAL SECURITY CASES

A. Defined. JAGMAN, § 0159a defines "national security" to mean the national defense and foreign relations of the United States and specifically includes: a military or defense advantage over any foreign nation or group of nations; a favorable foreign relations position; or a military or defense posture capable of successfully resisting hostile or destructive action from within or without, overt or covert. That section provides an illustrative laundry list of examples of national security cases including: deliberate compromise or willful disclosure of classified information; aiding the enemy; spying or espionage; harboring or concealing certain persons; gathering, transmitting, or losing defense information; sabotage; treason, rebellion, insurrection, or sedition; disclosing restricted data; conspiracy to commit any of the above offenses; violating an order with regard to any of the above activities; and soliciting another to commit any of the above offenses.

B. Jurisdiction. Military authorities and federal civil authorities have concurrent jurisdiction over offenses committed by military personnel which are serviceconnected and violate both federal criminal law and the UCMJ. Offenses involving national security issues commonly involve federal criminal law. JAGMAN, § 0125 contains guidelines on which authority, military or civilian, has jurisdiction to investigate and prosecute particular cases. NCIS is responsible for coordination with federal civil authorities on such investigations. Every incident which appears to involve espionage, subversion, aiding the enemy, sabotage, spying, or the knowing and willful compromise of classified information must be referred immediately to NCIS. NCIS will then notify OJAG, who will consult the Department of Justice. The procedure for delivering military offenders to civilian authorities is discussed in

R.C.M. 106, MCM, 1984 and in the *JAG Manual*, chapter VI. DOJ gets first crack at prosecuting national security cases. OJAG, Code 11 (Special Programs), monitors all national security investigations and briefs DOJ when a prosecution decision must be made. If DOJ declines the case, we may then prosecute.

C. Convening authority limitations. Under R.C.M. 306(a) and 401(a), MCM, 1984, SECNAV has withheld authority to dispose of national security cases. Per JAGMAN, § 0126c, Navy GCMA's are: CNO; CINCLANTFLT; CINCPACFLT; CINCUSNAVEUR; Commanders, Sixth and Seventh Fleets and Eastern Atlantic; Commanders, Naval Air, Submarine, and Surface Forces, U.S. Atlantic and Pacific Fleets; and CNET. For the Marine Corps, the authorized GCMA's for national security cases are: CMC, FMFPAC, FMFLANT, MCCDC, and CG, MCB's in Japan, Lejeune, and Pendleton. All officers otherwise empowered to dispose of offenses who receive reports or charges of offenses involving national security shall, after notifying NCIS, forward reports or charges for disposition directly and without delay to an authorized GCMA. In time of war, Article 43(e), UCMJ, authorizes SECNAV to extend the statute of limitations to six months after the termination of hostilities where prosecution is not in the best interest of national security.

D. Referral. Offenses against national security generally involve incidents which have the potential for serious and irreparable damage to the United States. Consequently, these cases are typically referred to trial by general court-martial if referral of charges is warranted at all. The prosecution of charges involving national security matters may in some circumstances hinder the prosecution of war or harmful to national security interests. The GCMA should, after weighing national security considerations, dismiss the charges, authorize a court-martial, or forward the charges to SECNAV pursuant to R.C.M. 407(b), MCM, 1984, and OPNAVINST 5510.1. - Mil.R.Evid. 505 gives the convening authority options when a claim of privilege from disclosure of classified information has been made by the head of the government agency or department concerned. These options include dismissal of the charges or specifications to which the classified information pertains and limited disclosure of the classified material in accordance with Mil.R.Evid. 505(g). The matter can be taken before the military judge for an in camera proceeding. Mil.R.Evid. 505(g).

E. Grants of immunity. A proposed grant of immunity in cases involving espionage, subversion, aiding the enemy, sabotage, spying, or violation of regulations. Concerning classified information or U.S. foreign relations must be forwarded to the DOD General Counsel for consultation with the Department of Justice. Judge Advocate General approval can be obtained by the cognizant officer exercising general court-martial jurisdiction by forwarding a request to the Judge Advocate General (Code 20) in the form prescribed by JAGMAN, §§ 0138d, 0139. This procedure is required by a 1984 MOU between DOJ and DOD. DOD Directive 5525.7 of 22 January 1985; SECNAVINST 5520.3.

F. Discovery. Mil.R.Evid. 505 and R.C.M. 701(f) protect classified information from disclosure when disclosure would be detrimental to national security. If the classified material is relevant and necessary to establish an element of an offense or a defense, generally there must be full or limited disclosure of the classified material or the charges and specifications pertaining to that material may be dismissed with or without prejudice. Mil.R.Evid. 505(i)(4)(E). The privilege not to disclose classified Navy information under Mil.R.Evid. 505(c) may be claimed only by SECNAV. Consequently, early submission of a request for assertion of the privilege is desirable. Coordinate with the OJAG (Code 20).

G. Pretrial agreements. JAGMAN, § 0137c states that no DON official is authorized to enter into a pretrial agreement in any national security case without first obtaining SECNAV permission. If the accused or defense counsel offers to plead guilty, the authorized GCMA may enter into pretrial agreement discussions. These cases typically contain detailed provisions for counterintelligence debriefing of the accused and polygraph confirmation of truthfulness. If discussions result in terms which are mutually agreeable to the convening authority and the accused, the convening authority shall request, by priority message, SECNAV permission to enter into a written pretrial agreement embodying those terms with information copies to JAG and CNO or CMC.

1. SJA's, TC's, and DC's should recognize that additional time and effort will be required to reach agreements in national security cases. Effective coordination among interested parties is critical, especially when the accused is in pretrial confinement, witnesses are geographically distant, or other conditions complicate and frustrate speedy disposition. SECNAV will scrutinize such agreements to ensure that they satisfy broad national security interests. Critical factors therefore can include strength of the government's case; consistency with sentences in similar cases, both military and civilian; applicable range of sentences for comparable federal offenses under the Federal Sentencing Guidelines, 18 U.S.C. App.; counterintelligence benefits of leveraged debriefing; need for consultation with other agencies; notoriety and deterrent effect; accused's venality and nature and degree of the trust violated; effect of conviction on accused's entitlement to public office and / or retirement [e.g., 5 U.S.C. § 8312 or 18 U.S.C. §§ 201(b), 2071(b)]; damage to the national security, effected or intended; undesirable risks of classified disclosures during contested trial now to be obviated; avoided appellate issues; and, of course, extenuating or mitigating circumstances.

2. If a tentative agreement is reached, the GCMA shall request SECNAV permission by priority message (with info copies to CNO or CMC and JAG). The message will state: the exact text of the proposed agreement; the factual background of the offense(s); information pertaining to the accused's identity; a summary of the government's evidence on the merits and in sentencing; and a summary of the factors warranting acceptance of the agreement.

3. All concerned should beware of the possible effect of Mil.R.Evid. 410 and decline to receive evidence or statements of the accused in the plea negotiation process if to do so could create an unintended use immunity. For negotiation and drafting of pretrial agreements, Code 11 can provide both administrative and substantive support in national security or other classified cases. Contact Code 11 immediately if a pretrial agreement is contemplated or if the convening authority has entered into pretrial negotiations.

H. Post-trial considerations. Mil.R.Evid. 1104(b)(1)(D) and OPNAVINST 5510.1 prescribe procedures to be followed when the record of trial contains classified information. Per JAGMAN, § 0159, only SECNAV may remit or suspend, pursuant to Article 74(a), UCMJ, any part or amount of the approved sentence in any case involving national security.

1008 PRODUCTION OF CLASSIFIED INFORMATION IN CIVILIAN COURTS

Whenever a subpoena issued by a federal or state court of record calls for production of classified information, the subpoena shall immediately be referred to OJAG (Code 015), who will coordinate the response with CNO (OP-009P). JAGMAN, chapter VI. OPNAVINST 5510.1 outlines special procedures if classified documents are to be introduced in a civil court. Classified material will not be authorized for introduction into a civil trial before a jury. The Classified Information Procedure Act, Pub. L. No. 96-456, governs the use of classified information in federal courts for criminal cases. Following a collision, a survey of a naval ship will not be permitted if it would require access to classified information. OPNAVINST 5510.1.

1009 PUBLICATION OF NATIONAL DEFENSE INFORMATION BY THE MEDIA

A. Injunctions. If the government learns that sensitive national defense information is about to be published, it can seek to enjoin publication. The injunction may be sought on constitutional or statutory authority, depending on the circumstances of the case. For example, an injunction is expressly authorized by 42 U.S.C. § 2280 for threatened publication of "restricted data" [which is defined in 42 U.S.C. § 2014(y)]. *See also United States v. Progressive*, 467 F. Supp. 990 (D.C. Wisc.), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979), *reconsideration denied*, 486 F. Supp. 5 (government enjoined publication of an article describing the method of manufacturing and assembling a hydrogen bomb); *Snepp v. United States*, 444 U.S. 507 (1980) (court enjoined further publication of a book by a former CIA employee for failure to comply with prepublication review agreement); *New York Times Co. v.*

United States, 403 U.S. 713 (1971) (government denied an injunction against publication of the so-called Pentagon Papers for its failure to demonstrate a "direct, immediate, and irreparable damage to our Nation or its people"). Even when a legal basis to support an injunction exists, policy considerations may make it undesirable. By seeking an injunction, the government may implicitly confirm the accuracy of any information which has been disclosed. Further, litigation attracts greater attention to the information the government seeks to suppress.

B. Demand for return of secret documents. The Espionage Act, 18 U.S.C. § 793, appears to give the United States the right to demand the return of certain national defense information. When return of national defense information is sought, it is advisable in most cases to first contact the JAG Special Programs Office (Code 015). Threatened or attempted prosecution for refusal to return national security information which was lawfully obtained may fall to first amendment considerations. There is argument that, if publication of national defense information is protected from prior restraint by the first amendment unless publication would result in direct, immediate, and irreparable damage to the United States or its people, retention of documents preparatory to such publication must also be so protected. If no first amendment considerations exist, refusal to return national defense material is undeniably a criminal offense even if the material was acquired legally. *AST / Serve Systems v. United States*, 449 F.2d 789 (Ct. Cl. 1971).

C. Criminal prosecution. Different first amendment standards apply to prosecution of someone who publishes national defense information than to an attempt to impose a prior restraint on publication. Criminal prosecution may be successful in the same case in which an injunction was denied. Statutes imposing criminal penalties for publication of national defense information include: 18 U.S.C. § 952 (diplomatic codes); 42 U.S.C. § 2274(b) (nuclear weapons data); 18 U.S.C. § 798 (cryptographic information); and 18 U.S.C. § 797 (photographs or graphic representations of any vital military installations, equipment, or documents).

1010 PROCEDURES FOR PREDISCLOSURE REVIEW

All classified information and certain unclassified official information must be reviewed by appropriate authority before it can be disseminated outside official channels.

A. Classified information. In general, classified material originating within DOD cannot be disseminated outside DOD without the consent of the originator or higher authority. The sole exception permits the dissemination of secret and confidential material to other executive departments and agencies unless specifically prohibited by the originator.

B. Unclassified information. Naval personnel, including members of the Ready and Standby Reserve, may not engage in informative activities (including speaking, writing, appearances, and lectures), with or without compensation, that are dependent upon information obtained as a result of their government employment except when the information has been published or is generally available to the public, or will be made generally available to the public and the official authorized to release such information gives written authorization for the use of nonpublic information on the basis that its use is in the public interest.

C. Release authority. In addition, certain categories of unclassified information require review and clearance before public release. The information must be submitted to the Office of the Assistant Secretary of Defense (Public Affairs) via the Chief of Naval Operations (OP-009P). These categories of information are contained in OPNAVINST 5510.1 and SECNAVINST 5720.44 and include information which has the potential to become an item of national or international interest; information which concerns high-level military, DOD, or U.S. Government policy; information which concerns military operations or potential operations; and other categories designated by the Office of the Secretary of Defense. Both speeches and writings are subject to review. In addition, DOD members who are students, and who prepare manuscripts for publication in an unofficial capacity, must submit their manuscript for DOD review prior to submission for publication.

CHAPTER ELEVEN

SPECIAL INCIDENT REPORTING

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CHAPTER ELEVEN

SPECIAL INCIDENT REPORTING

1101 REFERENCES:

A. OPNAVINST 3100.6F, Subj: SPECIAL INCIDENT REPORTING (OPREP-3, NAVY BLUE AND UNIT SITREP) PROCEDURES

B. OPNAVINST 5102.1C, Subj: MISHAP INVESTIGATION AND REPORTING

1102 INTRODUCTION

The Special Incident Reporting System provides procedures for worldwide reporting of events and special incidents which may attract national and / or high U.S. Navy interest. This system applies to all Navy units. Fleet Marine Force units under U.S. Navy cognizance, Military Sealift Command (MSC) shore commands, and those United States Naval Ship (USNS) having been designated by the lowest level command and having knowledge of the event, except for those incidents where provision for rapid notification by a higher command has been established by separate directive. The reporting command must have access to a communications network capable of relaying the report to a communications system serving the National Military Command Center (NMCC). For reports involving nuclear weapons or nuclear weapon delivery systems, the commander of the organization having physical possession of the weapon / delivery system has the final responsibility for ensuring that the initial report is made.

1103 SYSTEM DESCRIPTION

A. The OPREP-3 system is a library of standard sets which bring together elements of information for drafting and transmitting reports of special incidents to higher authority. Each message text is based on an ordered collection of formatted data sets plus narrative information in the form of free-text sets. Sets are further subdivided into data fields, each of which contains a discrete piece of information (e.g., time, location, weapon type, or number of casualties). Reports within the OPREP-3 system will be transmitted by voice and hard-copy message. Voice reports

are made using the voice message template from OPNAVINST 3100.6F (*see* pages 12 and 13). Hard-copy message reports are composed of selected sets from the library sets in chapter three of OPNAVINST 3100.6F.

B. An initial OPREP-3 report is normally the first indication to senior authority that an incident has occurred which is of ***national level interest (OPREP-3 PINNACLE series)*** or of ***high U.S. Navy interest (OPREP-3 NAVY BLUE series)***. The ***Unit Situation Report (UNIT SITREP)*** is intended to report significant events or incidents which do not meet the OPREP-3 (PINNACLE or NAVY BLUE) reporting criteria. National level interest is presumed when it is conceivable that the National Command Authority (NCA) and / or the highest levels of government will desire timely knowledge of the incident. Incidents which are not of interest to the NCA, but are of great concern to the Chief of Naval Operations (CNO) and other senior naval command, are considered of high U.S. Navy interest.

1104 TIMELINESS

A. Reporting commands must pass special incident / event information to the proper recipients as soon as possible after the occurrence. Incidents / events of high national level interest will be passed immediately to the NMCC. The emphasis of the report is on immediacy rather than content. The initial report is to be made by ***voice within 5 minutes*** of knowledge of the incident / event. This voice report is to be followed by a ***record message within 20 minutes*** after knowledge of the incident / event.

> *Note*: OPREP-3 PINNACLE / NUCFLASH messages require both an amplifying voice report ***and*** an initial record message report ***within 5 minutes*** after transmitting the initial voice report.

B. Initial OPREP-3 PINNACLE series reports will use "***FLASH***" precedence. Initial OPREP-3 NAVY BLUE series reports will use "***IMMEDIATE***" precedence. Initial UNIT SITREP reports will use a precedence deemed appropriate by the originator.

> *Note*: OPREP-3 NAVY BLUE / FADED GIANT reports will use "***FLASH***" precedence.

C. All OPREP-3 and UNIT SITREP reports are exempt from MINIMIZE conditions.

D. Flagwords are used to indicate the significance of the reports and to ensure fast handling (e.g., OPREP-3 PINNACLE / NUCFLASH or OPREP-3 NAVY BLUE / FADED GIANT).

E. Initial voice and message reports are not to be delayed to obtain further information nor are seniors in the chain of command authorized to require complete initial reports. The Remarks (RMKS) data set for each report (excluding OPREP-3 PINNACLE / NUCFLASH) will be used to briefly explain any excessive delay in reporting which might be inferred from comparison of the incident time and the Date-Time-Group (DTG) of the initial report.

1105 CLASSIFICATION. All OPREP-3 and UNIT SITREP reports will be classified as follows:

A. For immediacy and when there is reasonable doubt about the appropriate level of classification, a tentative classification at a higher level may be made by an originator until an Original Classification Authority (OCA) can make a final determination.

B. Unnecessary or higher than necessary classification should be avoided. A report should be classified because of the information it contains or because of the information it may reveal when associated with other information. Reports should be classified only to protect national security.

C. In the absence of a secure voice telephone, commanders may transmit classified reports on any nonsecure circuit regardless of classification when, in their judgment, even brief delays in transmission would not be acceptable.

D. The voice reports may be abbreviated if operational security considerations make this absolutely necessary; however, the reporting command must carefully weigh the security considerations against the senior commands' need for timely information for each incident.

1106 SERIALIZATION

-- All OPREP-3 and UNITS SITREP ***record*** (hard copy) message reports, regardless of flagword type, are serialized in sequence by ***incident***, beginning with 001 which is assigned to the first incident of each ***calendar year***. Both reports are to use the same series of sequential serial numbers vice using one set of serial numbers for OPREP-3 reports and a separate set for UNIT SITREPs.

Additional record message reports concerning the same incident will be assigned sequential letter suffixes (i.e., 001A, 001B, 001C, etc.). The first record message report of a new incident will be serialized 002, with subsequent record message reports concerning this incident assigned successive suffixes (i.e., 002A, 002B, 002C, etc.) At the end of the calendar year, should an incident require amplifying reports, continue with the serialization suffixes (i.e., 101A, 101B, etc.) until the final report of the incident.

> ***Note***: ***Voice*** report messages of an incident will ***not*** be serialized.

1107 POLICY

A. From the time a unit is aware of an incident or event requiring a report, the OPREP-3 system will be the only external report with which the unit will be concerned until the unit checks out of the system by filing its last (final) OPREP-3 for the incident. Only Critical Intelligence (CRITIC) reports; Missing, Lost, Stolen, or Recovered (MLSR) reports of incidents involving arms, ammunition, and explosives; and MISHAP reports constitute exceptions to this policy.

B. Where doubt exists as to whether an incident is of national or Navy interest, use the appropriate OPREP-3 PINNACLE series report.

C. Any incident reported via the OPREP-3 NAVY BLUE series, which is subsequently considered by the originator or higher authority to be of national level interest, will be changed to the appropriate OPREP-3 PINNACLE series report and processed as such. All concerned commands will be advised of the change, and subsequent reports for that incident will be PINNACLEs. Sequence numbers will not be changed since they are ***incident***-related.

D. Responsibility for ensuring that all affected commands are informed of an incident rests with the report originator and recipients. Originators will include as addees all commands which may have action required of them. Required addees are as follows:

1. Action: CNO WASHINGTON DC
   FLTCINC:
   CINCPLACFLT PEARL HARBOR HI//FCC//
   CINCLANTFLT NORFOLK VA//CDO//
   CINCUSNAVEUR LONDON UK
   (IMMEDIATE OPERATIONAL AND ADMINISTRATIVE COMMANDERS)

2. Info: (CHAIN OF COMMAND)
NAVOPINTCEN SUITLAND MD
NAVY JAG ALEXANDRIA VA
COMNCISCOM WASHINGTON DC//22D//
UNIFIED COMMANDER:
USCINCLANT NORFOLK VA
USCINCPAC HONOLULU HI
USCINCEUR VAIHINGEN GE
COMNAVAIRSYSCOM WASHINGTON DC (AIRCRAFT ACCIDENTS)
CMC WASHINGTON DC (MARINE CORPS RELATED INCIDENTS)
COMNCISCOM WASHINGTON DC// 22D/23/02/21/24// (NOTE 1)
COMSC WASHINGTON DC (MSC RELATED INCIDENTS)
COMNAVSEASYSCOM WASHINGTON DC (DIVING ACCIDENTS)
NAVDIVINGU PANAMA CITY FL (DIVING ACCIDENTS)
NAVSAFECEN NORFOLK VA//00/02/10/11/12/13/14/ 20/30/43/50/60/70/80/90/054//
CHNAVPERS WASHINGTON DC (NOTE 3)
CNO OP ZERO ONE WASHINGTON DC (NOTE 3)
COMNAVMEDCOM WASHINGTON DC (NOTE 3)
NAVINSGEN WASHINGTON DC (FRAUD, WASTE, ABUSE)
COMNAVSEASYSCOM WASHINGTON DC (NAVAL NUCLEAR POWERED SHIPS, NUCLEAR HAZARD, RADIATION)

Note 1: For actual, suspected, or threatened major violations of law or good order and discipline; for counterintelligence matters; for incidents resulting in loss of life; for those other situations in which NCIS participation is required by SECNAVINST 5520.3B, Subj: CRIMINAL AND SECURITY INVESTIGATIONS AND RELATED ACTIVITIES WITHIN THE DEPARTMENT OF THE NAVY.

Note 2: When reporting fires, flooding, grounding, explosions, collisions, or other accidents to U.S. Navy units.

Note 3: Incidents involving death or serious injury, serious misconduct, attempts to willfully destroy property of the U.S. Navy, or racial incidents.

E. Recipients should review each report to determine whether additional addressees are required.

F. Originators are also responsible for noting, on the ***final*** OPREP-3 ***only***, whether a MISHAP report is required per OPNAVINST 5102.1C. Commanders submitting OPREP-3, NAVY BLUE, or UNIT SITREP reports will review OPNAVINST 5102.1C to determine if the incident / event meets MISHAP reporting requirements. The ***final*** OPREP-3, NAVY BLUE, and UNIT SITREP ***record*** message reports will include one of the following statements in the RMKS set:

1. "MISHAP REPORT NOT REQUIRED";

2. "MISHAP REPORT TO FOLLOW"; or

3. "MISHAP REPORT SUBMITTED."

G. The initial OPREP-3 message will sometimes be the final OPREP-3 report. Additional messages may be required for amplifying information of the same significance. Amplifying information of lesser significance will be reported in NAVY BLUEs, UNIT SITREPs, or other reports applicable to the incident.

H. Units shall report using their administrative title (e.g., USS PRINCETON vice CTE 35.1.3.5) in the FROM line of the message.

I. The initial voice report will be listed as a reference (in a REF set) in the initial record message report of the event. Follow-on record messages need ***not*** reference previously sent voice or record messages.

1108 UNIT SITUATION REPORT (UNIT SITREP)

A. The UNIT SITREP is used to inform higher authority of events or incidents which do not meet the criteria for OPREP-3 reporting, or to augment OPREP-3 reporting. Redundancy between UNIT SITREPs and OPREPs is not desired, except for clarity. Major features distinguishing a UNIT SITREP from OPREP-3 reports are as follows:

1. UNIT SITREPs are normally addressed for action to the Immediate Superior In Command (ISIC) and for information to other commands with a need to know.

2. Precedence and classification of UNIT SITREPs are as deemed appropriate by the originator.

3. Voice reporting is ***not*** required.

4. Content of a UNIT SITREP may be more detailed than that of an OPREP-3, and include developments during the progress of an incident which are not of immediate interest to national or high Navy commands.

B. Bomb threats which are evaluated by the reporting unit as a probable hoax will be reported via UNIT SITREPs. Only actual bombings or those bomb threats which the reporting unit believes to be valid will be reported as an OPREP-3 NAVY BLUE. UNIT SITREPs concerning bomb threats will not include CNO as an addressee, but will include COMNCISCOM WASHINGTON DC as an information addressee.

1109 OPREP-3 PINNACLE REPORT

A. The OPREP-3 PINNACLE report provides the National Command Authorities (NCAs) and naval commands with information on any ***incident of national level interest*** which is not reportable in one of the other OPREP-3 PINNACLE series reports. The following are ***some, but not all***, incidents requiring an OPREP-3 PINNACLE report:

1. Any national or international incident resulting in actual or potential ***international*** repercussions creating tension or undesirable relations between the United States and other countries.

2. Natural or man-made disasters or civil disorders which may be of national level interest.

3. Defection of U.S. or foreign personnel.

4. Military operations or unusual incidents which may result in news inquiries ***at the national level*** or of an ***unusual*** intensity.

5. National level events or incidents which may seriously change current operations or involve ongoing military undertakings.

6. Acts of, or attempts at, sabotage by foreign nationals against U.S. forces or installations.

7. Serious personal injury of a civilian, or loss of / substantial damage to civilian property caused by military equipment such as aircraft or ships when national level interest is indicated.

8. Loss or, or substantial damage to, major military equipment such as aircraft or ships when national level interest is indicated.

9. Significant and unorthodox changes in the composition or structure of foreign governments.

10. Any other incident when it is reasonable that the highest level of government will desire timely knowledge.

B. The initial report will be a ***voice report***. You must make the report not later than ***5 minutes*** after the incident. Follow-up the voice report with the initial message report within ***20 minutes*** of the incident. You will find blank voice report templates and message blanks at the end of this chapter. The Communications Center will type your message if required.

1110 OPREP-3 PINNACLE / NUCFLASH is used by any unit to report an accidental or unauthorized incident involving a possible detonation of a nuclear weapon which could create risk of outbreak of nuclear war. ***OPREP-3 PINNACLE/ NUCFLASH*** messages require ***both an amplifying voice report and an initial record message report within 5 minutes after transmitting the initial voice report***. This message has the highest precedence in the OPREP-3 reporting structure.

1111 OPREP-3 PINNACLE / FRONT BURNER is used by any unit to provide immediate notification to the NCA and appropriate naval commanders of any occurrence having the potential for rapidly moving into a contingency or general war situation—such as armed attack, harassment, or hostile act against U.S. shipping interests or forces.

1112 OPREP-3 PINNACLE EMERGENCY DESTRUCTION / DISABLEMENT is used by any unit to provide the NCA and appropriate naval commanders with immediate notification of those operations involving the emergency destruction or disablement of nuclear weapons.

1113 OPREP-3 PINNACLE / EMERGENCY EVACUATION is used by any unit to provide the NCA and appropriate naval commanders with immediate notification of those operations involving emergency evacuation of nuclear weapons.

1114 **OPREP-3 PINNACLE / BROKEN ARROW** provides the NCA and appropriate naval commanders with immediate notification of an accident, incident, or event involving nuclear weapons or nuclear components which does ***not*** create risk of outbreak of nuclear war.

1115 **OPREP-3 NAVY BLUE** reports are used to provide the CNO and other naval commanders with immediate notification of incidents of military, political, or press interests which are of ***high Navy***, vice national, level interest. The initial report for OPREP-3 NAVY BLUE messages is transmitted ***immediate*** precedence with the exception of the ***OPREP-3 NAVY BLUE / FADED GIANT***, which is transmitted ***FLASH*** precedence. The initial report is made by ***voice within 5 minutes*** of knowledge of the incident / event. The voice report is to be followed by a ***record copy message within 20 minutes*** after knowledge of the incident / event.

-- OPREP-3 NAVY BLUE reports are submitted to provide "as it happens" information on the following types of incidents:

1. Instances of misconduct which may be reported by local press;

2. significant damage to civilian property resulting from actions of members of the Department of the Navy;

3. near or actual collisions of minor significance of Navy ships or aircraft with civilian ships or aircraft;

4. discharges or spills of materials or fluids that might be considered pollutants which endanger critical water areas, have the potential to generate public concern, become the focus of enforcement action, or pose a threat to public health or welfare;

5. events involving radioactive material or radiation exposure which do not present a hazard to life, health, or property, but which are of such a nature as to warrant immediate notification of cognizant higher commands (included in this category are those events having domestic or international implications and those which are likely to give rise to inquiries by the public or press);

6. labor strikes which may significantly impair operational readiness, high priority industrial production for Navy projects, or mobility;

7. acts or attempts to willfully destroy property of the U.S. Navy;

8. bomb threats which are evaluated by the reporting officer as probably valid (use a UNIT SITREP for those bomb threats determined to be a hoax);

9. disorders or natural disasters of minor significance if naval assistance is provided or requested;

10. death of, critical injury to, or missing commanding officers or senior officers (flag officers or equivalent);

11. fires, flooding, explosions, collisions, groundings, or other accidents to naval units;

12. initial report of a submarine incident (SUBMISS / SUBSUNK);

13. the diagnostics of any disease of potential epidemic significance, the presumptive diagnosis of any international quarantinable disease of such widespread proportions among naval personnel that it may affect operational readiness;

14. actual or suspected duress situation or unusual occurrence affecting any nuclear capable unit;

15. notification of a search and rescue (SAR) incident in the alert or uncertainty phase (Not all SAR incidents may require continuous submission of OPREP-3 NAVY BLUE reports. The initial OPREP-3 NAVY BLUE for the incident, followed by submission of a daily UNIT SITREP to notify CNO and interested commands of the progress of ongoing SAR operations.);

16. serious incidents with racial overtones which indicate a serious lack of racial harmony and which could become a matter of high Navy interest;

17. the loss at sea of any ships, boats, aircraft, missiles, torpedoes, warheads, live ordnance, cryptology equipment, high technology equipment, or other valuable items;

18. violation of the letter or spirit of the US-USSR agreement for prevention of incidents on and over the high seas (INCSEA AGREEMENT);

19. major fraud, waste, or abuse, which could involve high-level naval interest, media inquiry, or gross inefficiency or mismanagement;

20. incidents involving death, serious injury, or serious illness in which the adequacy of medical care is reasonably in question; and / or

21. any incident of high-level naval interest which does not fall into the category of any other report in the OPREP-3 PINNACLE or NAVY BLUE series.

1116 OPREP-3 NAVY BLUE / FADED GIANT is used to provide CNO and other naval commanders with immediate notification of any nuclear reactor accident or radiological accident involving naval reactors, other naval nuclear energy devices (excluding nuclear weapons), or radioactive materials under the custody of the Navy.

1117 OPREP-3 NAVY BLUE / BENT SPEAR is used by any unit to provide CNO and appropriate naval commanders with immediate notification of an unexpected occurrence involving nuclear weapons or nuclear components that does not fall into the NUCFLASH or BROKEN ARROW categories.

1118 OPREP-3 NAVY BLUE / DULL SWORD is for any unexpected occurrence involving nuclear weapons / components which is not a nuclear accident.

1119 MISCELLANEOUS INFORMATION

-- Include the following information in the appropriate data set:

1. Include the following in the GENTEXT / INCIDENT IDENTIFICATION AND DETAILS set as available:

a. When reporting death or serious injury of U.S. military personnel, names will be withheld pending notification of next of kin unless positive identification is deemed necessary. In such cases, the names can be listed provided the following statement is included: "***FOR OFFICIAL USE ONLY. NEXT OF KIN HAVE NOT BEEN NOTIFIED***."

b. Give an account of the personnel and / or unit losses or damages which were incurred as a result of the incident.

2. Report the following in the ***RMKS*** DATA SET:

a. The commanding officer's estimate of the situation, the impact of the incident on the reporting unit, and the ability of the unit to operate;

b. any press interest in the incident or press releases generated from the incident; and

c. the status of NCIS notification / participation, if any.

APPENDIX A

SAMPLE
VOICE TEMPLATE

TITLE: OPREP-3 NAVY BLUE (OPREP-3)

LIMA FOUR BRAVO THIS IS ECHO TWO ROMEO OPREP THREE NAVY BLUE OVER

ECHO TWO ROMEO THIS IS LIMA FOUR BRAVO SEND OPREP THREE NAVY BLUE OVER

THIS IS ECHO TWO ROMEO

IMMEDIATE

UNCLASSIFIED

OPREP THREE NAVY BLUE

LINE TWO	POSSIBLE HOMICIDE OLONGAPO CITY REPUBLIC OF THE PHILIPPINES
LINE THREE	ECHO THREE APPREHENDED BY SHORE PATROL WHILE ATTEMPTING TO DISPOSE OF BLOOD-STAINED UNIFORM PERIOD MAY HAVE KILLED FEMALE FOREIGN NATIONAL PERIOD INCIDENT UNDER INVESTIGATION BY NCIS AND LOCAL AUTHORITIES

OVER

APPENDIX B

SAMPLE
VOICE REPORT TEMPLATE

TITLE: OPREP-3 NAVY BLUE (OPREP-3)

addressee THIS IS originator OPREP-3 NAVY BLUE OVER

addressee THIS IS originator SEND OPREP-3 NAVY BLUE OVER

addressee THIS IS originator

IMMEDIATE (Transmit the precedence of this message)

TOP SECRET SECRET (Circle and transmit the security classification of this message)

CONFIDENTIAL UNCLASSIFIED

OPREP-3 NAVY BLUE

(NOTE: Transmit the line number and the line identifier *or* just the line number (e.g., "LINE 4 TIME 1450Z" or "LINE 4 1450Z"). Transmit only the lines required to pass essential information.)

LINE 1 SERIAL _____ (Serial number assigned to this report–NOT USED FOR NAVY-ONLY VOICE REPORTS)

LINE 2 INCIDENT _____ (Information identification, location, and details)

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LINE 3 NARRATIVE _____

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LINE 4 TIME _____ (Hour–Minute–Zone of message transmission/ authentication time (e.g., 2220Z). Enter if line 5 is used)

LINE 5 AUTHENTICATION IS _____ (Message Authentication in accordance with applicable procedures)

OVER

CHAPTER TWELVE

AUTHORITIES FOR CRISIS ACTION

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CHAPTER TWELVE

AUTHORITIES FOR CRISIS ACTION

1201 INTRODUCTION

Authorities which support various extraordinary measures which may be taken by the U.S. Government have been compiled for this Deskbook by Colonel J. P. Terry USMC according to the conditions which must exist before they can be implemented. They have been further categorized by the area with which they deal (Manpower, Force Generation / Operations, Logistics, Industrial Preparedness, Infrastructure, and Other). Three conditions are used in this compilation:

A. Increased preparedness / preconflict conditions. Conditions under which the government might wish to take various actions in the absence of Presidential or congressional declarations of national emergency or other formal declaration.

B. Presidential declaration of national emergency. Conditions of sufficient severity to require a specific declaration by the President with regard to the situation.

C. Congressional declaration of national emergency. Crisis conditions resulting in congressionally declared crisis or war.

1202 INCREASED PREPAREDNESS / PRECONFLICT CONDITIONS

A. Manpower

Action	Authority	Conditions / Remarks
Examine & classify draft registrants	50 U.S.C. App. 54a	Continuing authority.
Screen IRR	10 U.S.C. 2	Continuing authority.
Voluntary call of IRR / IMA	10 U.S.C. 672(d)	Continuing authority.
Call IRR / IMA for 15 days	10 U.S.C. 672(b)	Continuing authority.

Action	Authority	Conditions / Remarks
Call IRR for training (30 days)	10 U.S.C. 270(4)(2)	Continuing authority.
Call IMA Res any operational mission	10 U.S.C. 673b(A)	Presidential authorization; to augment the active force.
Voluntary recall of retirees	10 U.S.C. 672(d)	Continuing authority.
Involuntary recall of Regular and retirees	10 U.S.C. 688	In the interest of national defense.
Involuntary extend members of Coast Guard	14 U.S.C. 367(a)(4)	When essential to interest; not exceeding 30 days.
Increase end strength 5%	10 U.S.C. 138(c)(1)(A)	If SECDEF determines in the national interest.
Cancel military leaves	10 U.S.C. 704(b)(3)	Continuing authority; action to be taken consistent with military regulations.
Employ Red Cross under armed forces	10 U.S.C. 2602(a)	Whenever President finds it necessary.

B. Force generation / operations

Action	Authority	Conditions / Remarks
Call 200,000 selected reservists for 180 days	10 U.S.C. 673(b)	To augment the active force for any operational mission; increased in 1989.
Force deployment in hostilities situations where hostilities are imminent	50 U.S.C. 1542-1544 (War Powers Act)	Continuing authority; requires withdrawal within 60 days or Congress extends.
Use armed force in the Middle East	22 U.S.C. 1962	President determines it necessary; to counter Communist aggression.

Action	Authority	Conditions / Remarks
Transfer Coast Guard to the Navy	14 U.S.C. 3	When the President directs or upon declaration of war.
Detail military assistance personnel	10 U.S.C. 712(a)	By President upon application of the country concerned; to any Republic in North, Central, or South America - 22 U.S.C. 2761(e) requires reimbursement.
Initiate exercise	Current Def Authority	Continuing authority; may require reprogramming of funds.
Establish naval sea areas and airspace reservations	48 U.S.C. 1706(a)	When deemed necessary for national defense; establishes defense areas around Guam, American Samoa, and Virgin Islands
Call selected reservists for training (15 days)	10 U.S.C. 762(b)	Continuing authority; National Guard requires consent of Governor.

C. Logistics

Action	Authority	Conditions / Remarks
Purchase	41 U.S.C. 11(a)	Continuing necessary supplies; allows purchase of certain supplies not to exceed current year's requirements.
Reposition afloat prepositioning forces	Operational authority of CNO	Continuing authority.
Provide NATO allies logistic support, supplies, and services	10 U.S.C. 2322	Continuing reciprocal authority; requires action.

Action	Authority	Conditions / Remarks
Suspend or cancel FMS contracts	22 U.S.C. 2791(e)(1)	Under unusual or compelling circumstances if the national interest requires; law requires contract implementing provisions.
Release war reserve stocks	Operational authority of responsible commander	Continuing authority.

D. Industrial preparedness

Action	Authority	Conditions / Remarks
Prioritize orders	50 U.S.C. App. 2071(a)	To promote national defense.
Sponsor voluntary agreements	50 U.S.C. App. 2158(c)	Under conditions which pose a direct threat to the national defense or its preparedness programs.
Expedite contract process	50 U.S.C. 1431; 165(a)	To facilitate national defense.
Require acceptance and prioritization of orders	50 U.S.C. App. 468	In the interest of national security.
Allocate materials and facilities	50 U.S.C. App. 2071	To promote the national defense.
Guarantee loans; make government loans	50 U.S.C. App. 2091	When essential to national defense, material / product / service would not otherwise be available in a timely manner; best alternative, and demand equal to or greater than domestic capability; or upon a declaration of national emergency by Congress or the President.

Action	Authority	Conditions / Remarks
Make advance payments on contracts	10 U.S.C. 2307	In the public interest; limited to $25M without congressional review.
Provide subsidy payments	50 U.S.C. App. 2093(c)	To promote national defense.
Purchase materials and encourage strategic mineral development	50 U.S.C. App. 2093	When essential to the national defense, material would not otherwise be available in a timely manner; best alternative, and demand equal to or greater than domestic industrial capability; or declaration of national emergency by Congress or the President.
Execute right of first refusal of natural resources	43 U.S.C. 1341(b)	In time of war or when necessary for the national defense, and Congress or the President shall so prescribe.
Restrict specific imports	19 U.S.C. 1962	After Secretary of Commerce conducts an investigation and the President determines the article threatens to impair national security.
Prohibit / curtail export of goods or technology	50 U.S.C. App. (2)(A) & App. 2404(a)	If it would make a significant contribution to the military potential of any other country which would prove detrimental to national security.
Release strategic and critical materials	50 U.S.C. 98(f)	Whenever disclosure would be detrimental to national security.

Action	Authority	Conditions / Remarks
Restrict production of nonessential products	50 U.S.C. App. 2071	To promote the national defense; implied authority.
Activate machine tool trigger order program	50 U.S.C. App. 2092	When essential to the national defense, material would not otherwise be available in a timely manner, and demand is equal to or greater than domestic industrial capability; or declaration or a national emergency by Congress or the President.
Prohibit hoarding	50 U.S.C. 2072	To promote national defense.
Suspend competitive procedures	10 U.S.C. 0304(c)(7)	When necessary in the public interest; requires prior report to Congress.
Install equipment in private facilities	50 U.S.C. App. 2093(e)	To aid national defense.
Take possession of facilities	50 U.S.C. App. 488	In the interest of national security.
Possess water power projects	16 U.S.C. 809	When, in the opinion of the President, the safety of the United States so demands.

E. Environmental and health exemptions

Action	Authority	Conditions / Remarks
Waive water pollution control regulations	33 U.S.C. 1323(a)	If the President determines it is in the paramount interest of the United States; exempts federal affluent sources except new construction and toxic waste.
Waive prohibition of contracts with water pollution control violators	33 U.S.C. 1368(d)	If the President determines it is in the paramount interest of the United States.
Exempt government facilities from solid waste disposal regulations	42 U.S.C. 6961	If the President determines it to be in the paramount interest of the United States.
Waive toxic substance controls	15 U.S.C. 2621	Determination by the President that a waiver is necessary in the interest of national defense.
Exempt new cars and engines from pollution control standards	42 U.S.C. 7522(b)(1)	When the Administrator of EPA finds it necessary for reasons of national security.
Waive prohibition of contracts with air pollution control violators	42 U.S.C. 7606(d)	If the President determines it is in the paramount interest of the United States.
Exempt government facilities from noise control	42 U.S.C. 4903(b)	If the President determines it is in the paramount interest of the United States.
Make exemptions to occupational health and safety standards	29 U.S.C. 665	To avoid serious impairment of the national defense.

Action	Authority	Conditions / Remarks
Exempt government from provisions of the Endangered Species Act	16 U.S.C. 1536(j)	If SECDEF finds it necessary for reasons of national security; granted by Endangered Species Committee; not restricted to industrial preparedness requirements.

F. Infrastructure

1. Strategic lift

Action	Authority	Conditions / Remarks
Obtain priority service for transportation	50 U.S.C. App. 2071(a)	To promote national defense.
Activate CRAF I, II, III	Exec. Order 11,490; DOD-DOT MOU	During a national security situation, short of a declared defense-oriented emergency; when expanded civil augmentation of military activity is required.
Activate voluntary tanker agreements	50 U.S.C. 2158(a)	When the Maritime Administrator finds that a maritime tanker emergency exists.
Activate War Air Service	50 U.S.C. App. 2071(a)	To promote national defense; authorized under the President's general authority to establish priorities and require performance.
Terminate charter agreements	46 U.S.C. 1202(d)	Whenever the President proclaims the security of the nation makes it advisable.

Action	Authority	Conditions / Remarks
Activate National Defense Reserve Fleet	50 U.S.C. 1744(a); 46 U.S.C. 1242(a)	(same as above)
Increase capability under the Sealift Read-inner Program	46 U.S.C. 1248	Upon agreement between SECDEF and SECTRANS; involves commitment by certain shippers contracted to United States.
Requisition of foreign vessels lying idle in U.S. waters	46 U.S.C. 196	A proclamation that the security of the nation makes it advisable or Declaration of National Emergency.
Take possession of foreign flag vessels	50 U.S.C. 191(a)	Whenever the President proclaims the security of the national defense makes it advisable or during a national emergency declared by the President.
Arm vessels and aircraft	10 U.S.C. 351	During war or when the President determines security is threatened.

2. Real estate and facilities

Action	Authority	Conditions / Remarks
Terminate leases on nonexcess property	10 U.S.C. 2667	To promote the national defense; law does not give blanket, but requires inclusion of provisions in leases.
Construct, expand, rehabilitate, and equip RC facilities	10 U.S.C. 2233(a)(1)	Continuing authority; excess of $400 K requires 21-day congressional notification.

Action	Authority	Conditions / Remarks
Begin emergency construction	10 U.S.C. 2803	When vital to the national security and urgency precludes delay until the next Military Construction Act; limited to $300M 21 days after notification of Congress.
Acquire land	10 U.S.C. 2672(a)	In the interest of national defense; requires 30 days advance notice to Congress.

3. Overseas infrastructure

Action	Authority	Conditions / Remarks
Negotiate overflight / basing rights and host nation support agreements	General authority of Executive Department	Continuing authority.
Exercise overflight / basing rights and host nation support agreements	Bilateral agreements with appropriate nations	Per agreement.

G. Other

Action	Authority	Conditions / Remarks
Forbid financial transactions with belligerent states	22 U.S.C. 447	After the President issues a proclamation naming the belligerent states.
Prohibit collection of funds for belligerent states	22 U.S.C. 448	(Same as above)

Action	Authority	Conditions / Remarks
Prohibit travel on vessels of belligerent states	22 U.S.C. 445	After the President issues a proclamation naming the belligerents.
Evacuate noncombatants	Exec. Order 11,490; DODD 5100.51	In the event of actual or imminent hostilities or civil disturbances.
Reallocate funds	Pub. L. No. 99-145, Sec. 1401	When necessary in the national interest; allows transfers among various DOD agencies.
Detain armed vessels	18 U.S.C. 963	During a war in which the United States is a neutral nation; within U.S. jurisdiction or on the high seas.
Contract for health care	10 U.S.C. 1091	Continuing authority.
Relocate the national leadership	50 U.S.C. 404(b)(6); Exec. Order 11,490	As may be necessary to assure performance of essential functions.

1203 PRESIDENTIAL DECLARATION OF NATIONAL EMERGENCY

A. Manpower

Action	Authority	Conditions / Remarks
Exceed end-strength limitations	10 U.S.C. 138(c)(4)	During war or national emergency; 60-day limitation.
Call delayed entry personnel	10 U.S.C. 673(a)	In time of war or national emergency declared by the President.

Action	Authority	Conditions / Remarks
Suspend laws regarding promotion, involuntary retirement or separation of commissioned and warrant officers	10 U.S.C. 644	In time of war or national emergency declared by Congress or the President; applies to Army, Air Force, Navy, and Marine Corps.
Involuntarily extend reservists	10 U.S.C. 679(d)	If service agreement expires during war or national emergency declared by Congress or the President.
Involuntarily extend members of the Coast Guard	14 U.S.C. 367(3)	During a period of national emergency as proclaimed by the President, and in the interest of national defense.
Call the IRR	10 U.S.C. 673(a)	In time of national emergency declared by the President.
Recall regular Coast Guard retirees	14 U.S.C. 331; 359	In time of war or national emergency.
Suspend grade distribution for Naval and Marine Corps officers	10 U.S.C. 5451	During a war or national emergency.
Increase the number of flag / general officers	10 U.S.C. 526	In time of war or national emergency declared by Congress or the President.
Increase the number of retired flag / general officers on active duty	10 U.S.C. 688(c)	In time of war or national emergency declared by Congress or the President.

Action	Authority	Conditions / Remarks
Increase the strength of commissioned officers in grades O4–O6	10 U.S.C. 526; 3202(c)	(Same as above)
Temporarily appoint commissioned officers	10 U.S.C. 603(a)	(Same as above)
Use the Public Health Service as a branch of the armed services	42 U.S.C. 217	In time of war or emergency proclaimed by the President.
Make emergency indefinite civilian appointments	FMS, Chap. 230–1, Sub. Chap. 4	During a national emergency declared by the President or Congress.
Appoint retired military to civilian DOD positions	5 U.S.C. 3326	During a state of national security; waives 180–day period.
Activate the National Executive Reserve	50 U.S.C. App. 2160	During periods of emergency defense.
Authorize travel expenses and allowances for members of the Civil Air Patrol	10 U.S.C. 9441(b)(7)	In time of war or national emergency declared by Congress or the President.
Retain civilian positions of employees who enter the military service	5 U.S.C. 8332(g)	During a period of war or national emergency proclaimed by the President or Congress.

B. Industrial preparedness

Action	Authority	Conditions / Remarks
Impose trade restrictions	50 U.S.C. 1701–02	During a Presidentially declared national emergency; economic sanctions would most likely be imposed long before a declaration.

Action	Authority	Conditions / Remarks
Amend contracts to protect assignees against reductions or set-offs	31 U.S.C. 3727(d); 41 U.S.C. 15	During a war or national emergency proclaimed by the President or declared by law.
Suspend leases on the outer continental shelf	43 U.S.C. 1341(c)	During a state of war or national emergency declared by Congress or the President.
Suspend sale of helium	50 U.S.C. 167c(d)	Whenever Congress or the President declares war or a national emergency.
Increase working hours	10 U.S.C. 4025; 9025	During a national emergency declared by the President; authorizes working hours for laborers and mechanics working for the Army and Air Force producing military supplies or munitions to exceed 40 hours per week.
Suspend wage restrictions for laborers and mechanics	40 U.S.C. 276a-5	In the event of a national emergency.
Transport private plant employees	10 U.S.C. 2632(a)(1)(B)	During a war or national emergency declared by Congress or the President; allows military departments to transport employees of private plants manufacturing material for those departments to and from work.

Action	Authority	Conditions / Remarks
Prosecute individuals who damage defense material	18 U.S.C. 2153	Whenever the United States is at war or in times of national emergency declared by the President or Congress.

C. Force generation / operations

Action	Authority	Conditions / Remarks
Activate the National Disaster Medical System	Voluntary agreements between government and individual hospitals	When need exists in accordance with individual agreements; provides civilian hospital beds for military use.
Detail military assistance personnel	10 U.S.C. 712(a)	During war or national emergency, upon application of the country concerned if the President deemed it in the interest of national defense.
Exceed troop ceiling in Europe	Pub. L. No. 98-525, Sec. 1002(f)	Upon declaration of war, armed attack on NATO country, or President deems in the interest of national defense.
Suspend restrictions on chemical agents	50 U.S.C. 1515	(Same as above); allows deployment of chemical munitions.
Call selected reservists to active duty	10 U.S.C. 673(c)	In time of national emergency declared limitation by President.

Action	Authority	Conditions / Remarks
Transfer NOAA assets	33 U.S.C. 855	Whenever, in President's judgement, a sufficient national emergency exists; vessels, equipment, military stations, departments, and commanding officers.

D. Infrastructure

1. Strategic lift

Action	Authority	Conditions / Remarks
Prioritize traffic	49 U.S.C. 11128	During time of war or threatened war.
Waive requirement to ship 50% of tonnage on private U.S. flag vessels	46 U.S.C. 1241(b)(1)	After declaration of emergency by Congress, the President or SECDEF.
Suspend the requirement for U.S. crews	46 U.S.C. 8103(a)	During a proclaimed national emergency.
Requisition U.S.-owned ships	46 U.S.C. 1242(a)	When the President proclaims that the security of the national defense makes it advisable in entirety.

Action	Authority	Conditions / Remarks
Take possession and control of vessels	50 U.S.C. 191	After Presidential declaration of a national emergency if necessary to secure such vessels from damage or injury; prevent damage or injury to harbors or waters of the United States; to secure the observance of the rights and obligations of the United States; transfers control of vessels in territorial waters to the government.
Prohibit transfer of vessels or shipping facilities	6 U.S.C. 835	When the United States is at war or during any national emergency, the existence of which is proclaimed by the President.

2. Real estate and facilities

Action	Authority	Conditions / Remarks
Make most efficient and economical use of RC facilities	10 U.S.C. 2231(4), 2235(b)(2), 2236(d)(2)	In time of war or national and emergency.
Lift certain lease restrictions	40 U.S.C. 278b	During a war or national emergency declared by Congress or the President.

Action	Authority	Conditions / Remarks
Begin urgent construction projects	10 U.S.C. 2808	In the event of a declaration of war or a Presidential declaration of national emergency; projects may be undertaken only within the total amount of funds that have been appropriated for military construction.
Waive requirements to dispose of surplus property through public bidding	40 U.S.C. 484(e)(3)	If necessary in the public interest during a period of national emergency declared by the President or Congress; national security will be promoted; public exigency will not admit of delay; delay would adversely affect national economy, established fair-market value, and other satisfactory terms can be obtained by negotiation.
Recapture former military real property	Individual deeds and Acts of Congress dealing with various sales.	Vary depending on specific instrument.
Recapture airports	50 U.S.C. App. 1622(g)(2)(E)	During a national emergency declared by the President or Congress; allows control session of airports at which previously disposed surplus property is located.
Build temporary air bases or fortifications	10 U.S.C. 4776; 9776	In an emergency when the President considers it urgent.

Action	Authority	Conditions / Remarks
Withdraw public lands	43 U.S.C. 155	In time of war or national emergency declared by the President or Congress.
Waive construction permits, licenses, and renewals for communication stations	47 U.S.C. 308(a)	During a national emergency proclaimed by the President or declared by Congress.
Amend rules; close or control wire communications facilities	47 U.S.C. 606(c)	Upon Presidential proclamation of war or threat of war.
Control or close communications stations	47 U.S.C. 606(c)	Upon Presidential proclamation of war or threat of war, a state of public peril or disaster, other national emergency, or to preserve U.S. neutrality.
Control banking	12 U.S.C. 95(a)	During an emergency proclaimed by the President.

E. Other

Action	Authority	Conditions / Remarks
Allow transport of designated persons on Naval vessels	10 U.S.C. 7224	In time of war or during a national emergency declared by the President.
Furnish VA medical care to active duty armed forces	38 U.S.C. 5011(a)	During a war or national emergency declared by the President or Congress that involves that use of armed forces in armed conflict.

1204 CONGRESSIONAL DECLARATION OF NATIONAL EMERGENCY

A. Manpower

Action	Authority	Conditions / Remarks
Call standby reservists	10 U.S.C. 672(a) & 674(b)	In time of war or national emergency declared by Congress when the Service Secretary determines there are insufficient qualified members of the Ready Reserve.
Recall retired reservists	10 U.S.C. 762(a)	In time of war or national emergency declared by Congress when enough individuals in active Reserve status or ING are not available.
Suspend federal recognition provisions for National Guardsmen	32 U.S.C. 111	In time of war or national emergency declared by Congress.

B. Industrial preparedness

Action	Authority	Conditions / Remarks
Expedite government contracts	50 U.S.C. 82	In time of war; allows production to place / modify orders for war material, take over uncooperative facilities, and purchase products.
Take possession of manufacturing plants	10 U.S.C. 4501	In time of war or when war is imminent; if manageable plant fails to manufacture war materials for the Army.

C. Infrastructure

1. Strategic lift

Action	Authority	Conditions / Remarks
Activate NATO / Korean Civilian Aircraft Augmentation Program	Bilateral agreements with participating nations	(Classified)
Take possession of transportation systems	10 U.S.C. 4742; 974	In time of war.

2. Real estate and facilities

Action	Authority	Conditions / Remarks
Lease buildings in the District of Columbia	10 U.S.C. 4780	In time of war or when war is imminent.
Recapture TVA property	16 U.S.C. 8315	In case of war or national emergency declared by Congress; provides capability for the government to manufacture explosives and other war materials.

D. Other

Action	Authority	Conditions / Remarks
Prioritize communications	47 U.S.C. 606(a)	During war; allows President to establish preference and priority to wire and radio communications carriers.
Transfer FAA functions to DOD	49 U.S.C. 1343(c)	In the event of war.

Action	Authority	Conditions / Remarks
Remove enemy aliens	50 U.S.C. 21	Whenever there is a declared war or any invasion or predatory incursion is perpetrated or threatened against the United States.
Authorize electronic surveillance	50 U.S.C. 1811	Following a declaration of war by Congress; allows surveillance without a court order to acquire foreign intelligence.

1205 ADDITIONAL MEASURES

A. Increased preparedness / preconflict. Additional measures include registration of health care professionals and filling POMCUS and PWRMS.

B. Presidential declaration of national emergency. In these circumstances, the government may:

1. Provide for induction (currently prohibited by 50 U.S.C. App. 467(c));

2. provide for health care professional draft;

3. authorize production from petroleum reserves [currently prohibited by 42 U.S.C. 6504(a)];

4. authorize expedition of waivers of any state or federal regulation that could impede the production or transportation of goods and services procured by DOD;

5. small business set-aside requirements;

6. relax labor constraints (e.g., freeze wages, mandatory transfer of labor from non-defense industry, authority to suspend clause in labor contracts which limits selection and assignment);

7. waive warranty requirements;

8. waive contractual liability with co-production sources;

9. provide for anti-trust exemptions for international agreements;

10. provide capability for DOD to extend effectively all arms sales and security assistance capabilities deemed necessary to waging war in Europe to cover any other geographical area of the world;

11. provide exemptions to Freedom of Information Act and Privacy Act requirements during national emergency; and

12. relax truth in negotiating requirements.

C. Congressional declaration of national emergency. In these circumstances, the service academy instruction may be reduced to 3 years and the government may impose controls on wages, salaries, prices, and rents.

PART III

OVERSEAS ISSUES

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FOURTEEN	LIBERTY RISK
FIFTEEN	PRIVATE INTERNATIONAL LAW
SIXTEEN	FOREIGN CLAIMS
SEVENTEEN	COMMAND SPONSORSHIP
EIGHTEEN	CUSTOMS
NINETEEN	IMMIGRATION AND NATURALIZATION

CHAPTER THIRTEEN

FOREIGN CRIMINAL JURISDICTION

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PART III - OVERSEAS ISSUES

CHAPTER THIRTEEN

FOREIGN CRIMINAL JURISDICTION

1301 REFERENCES

A. *U.S. Navy Regulations, 1990*, arts. 0822, 0828

B. DOD Directive 5525.1, Subj: STATUS OF FORCES POLICIES AND INFORMATION

C. SECNAVINST 5710.25, Subj: INTERNATIONAL AGREEMENTS

D. OPNAVINST 3100.6 Subj: SPECIAL INCIDENT REPORTING (OPREP-3, NAVY BLUE AND UNIT SITREP) PROCEDURES

E. JAG Manual, Chapters 6 and 10

F. Fleet Deployment / Legal Manual

G. Applicable Status of Forces Agreement

1302 AFLOAT

An American warship is considered an instrumentality of the nation in the exercise of its sovereign power, an extension of U.S. territory. As such, it is under the exclusive jurisdiction of the United States and 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.

A. 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 (CO) of a ship shall not permit his / her ship to be searched by foreign authorities nor shall he / she allow personnel to be removed from the ship by foreign authorities. If the foreign authorities use force to compel submission, the CO should resist with the utmost of his / her power. Except as provided by international

agreement, the rules for a shore activity are the same. *U.S. Navy Regulations, 1990*, Art. 0822, 0828.

B. The laws, regulations, and discipline of the United States may be enforced on board a U.S. warship 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.

1303 OVERSEAS ASHORE

A. Servicemembers. Military personnel visiting or stationed ashore overseas are subject to the civil and criminal laws of the particular foreign state ("territorial jurisdiction"). Under most status of forces agreements (SOFA's), the question of whether the U.S. servicemember will be tried by U.S. authorities or by foreign authorities for crimes committed depends on which country has "exclusive" or "primary" jurisdiction.

1. 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.

2. The host country will retain the primary right to exercise jurisdiction in all other concurrent jurisdiction situations. If a member 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.

B. 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, but this exercise will usually be 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. nonmilitary personnel while on the base are generally triable in foreign criminal courts. Despite recent efforts to secure legislation, it remains questionable whether any U.S. court has jurisdiction to try U.S. civilians for crimes committed overseas absent a time of war.

C. U.S. policy. As a matter of policy, we attempt to maximize U.S. jurisdiction and seek waivers in cases where the United States does not have primary jurisdiction. Requests for waiver of jurisdiction will be made for all serious offenses committed by servicemembers regardless of the lack of a SOFA or the claims of exclusive jurisdiction by the host country.

D. Reporting. Whenever a servicemember is involved in a serious or unusual incident outside the United States, report the matter to the Judge Advocate General. Reports are also required via OPREP 3 / NAVY BLUE under OPNAVINST 3100.6 for major incidents involving foreign criminal jurisdiction. The report to JAG will be satisfied if the operational report (OPREP) contains JAG as an info addressee. The message must provide information regarding: identity of the servicemember; nature of alleged offenses; status of individual when incident occurred; and present status of individual. Fleet legal manuals contain examples of messages with appropriate via addressees. Ensure that all follow-up OPREPS or situation reports (SITREPS) are sent. Serious or unusual incidents will include any case in which any 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.

E. Custody rules. When a servicemember is arrested and accused of a crime, the existing SOFA with the host country determines which country retains custody of the individual. Generally, the United States will maintain custody where we have primary jurisdiction over the offense. When the foreign nation has primary jurisdiction over a servicemember arrested by the United States, we will retain custody until the member is charged; if the host country made the arrest, it may maintain custody or turn the member over to U.S. authorities until the criminal proceedings are completed.

F. Delivery. 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, § 0609.

G. Foreign pretrial confinement. 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 CO should report the matter to the Judge Advocate General and other higher authorities for guidance.

1. Seek release. 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. An informal personal request can be made by the: senior shore patrol officer; CO's designee; senior officer present afloat (SOPA); or U.S. Country Representative in the area. Foreign authorities may be assured that the release will not affect jurisdiction; the alleged offender will be made available for questioning and returned for trial. In appropriate cases, military authorities may order pretrial restraint of servicemembers in a U.S. facility to ensure their presence at trial on foreign charges.

2. Visitation. While in foreign custody, commands must ensure the member is treated fairly. Legal assistance, medical attention, food, bedding, clothing, and other health and comfort supplies will be provided to the member. The command must ensure a physical examination is conducted within the first 48 hours of confinement or whenever reasonably practicable. The conditions of confinement and health and welfare must be observed by the CO or his / her designee and reported at least every 30 days. A DD Form 1602 Report of Visit–US Personnel in Foreign Penal Institution (NAVJAG 5820-2) must be prepared for each visit. The member should also be visited by a medical representative and chaplain.

H. Procedural safeguards. If a servicemember is to be tried for an offense in a foreign court, he / she is entitled to certain safeguards. These rights vary somewhat, depending on how the SOFA is couched. To illustrate, the rights guaranteed a servicemember under the North Atlantic Treaty Organization (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;

3. to be confronted with the witnesses;

4. to compel the appearance of witnesses in the servicemember's favor if they are within the jurisdiction of the state;

5. to have legal representation of 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 trial.

I. Right to counsel. The member will have the right to counsel paid for by the United States if:

1. The act complained of occurred in the performance of official duty;

2. the sentence that is normally imposed includes confinement, whether or not suspended;

3. capital punishment might be imposed;

4. an appeal is made from any proceeding in which there appears to have been a denial of the substantial rights of the accused;

5. conviction of the alleged offense could form the basis for administrative discharge proceedings for misconduct as a result of civilian court disposition; or

6. the case, although not within the criteria above, is considered to have significant impact on the relations of U.S. forces with the host country, or involve any other U.S. interest.

J. Hiring counsel. The member will select counsel from a list of qualified, competent, and experienced trial attorneys. Fees will be reasonable and will be paid by the U.S. Government. The contract will be signed only for the present trial; a separate contract will be signed if necessary for any appeal. The contracting officer will normally be a local judge advocate.

K. Other costs. Under 10 U.S.C. § 1037, the government will also pay for other costs including: court costs; bail costs (reimbursement required); charges for copies of records; printing and filing fees; interpreter fees; witness fees; and other necessary and reasonable expenses, but not actual fines or damages. Payment is made by the command's disbursing officer in local currency.

L. Trial observers. Local judge advocates designated by Chief of the Diplomatic Mission, selected for their competence, experience, and maturity of judgment, will act as trial observer and will attend all proceedings and note the progress of the trial. A judge advocate may not serve in such capacity after having served in a legal capacity for the accused in a matter arising out of the same circumstances. The 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. Before trial, the observer should review police reports and supporting documents to become familiar with the facts of the case. If appropriate, the observer may advise counsel of the accused's rights under the SOFA and assist the court and defense counsel in obtaining witnesses and evidence available from U.S. sources if requested. After trial, they submit a formal report containing a factual description or summary of the proceedings and an informed judgment on any failure to comply with the procedural safeguards under the SOFA (i.e., whether the accused received a fair trial). In particular, the observer should note any discrimination based on race, creed, color, or national origin.

M. Trials in absentia. Check the laws of the particular country to see if they allow trials in absentia. Such trials are allowed in Italy for example. This tool allows the accused to leave the country before the completion of judicial proceedings. On receiving an absentia request, the foreign authorities typically will consent to the removal and either agree or refuse to waive their right to try the individual in absentia. If the foreign authorities refuse to waive their right to try the individual in absentia, the accused must be advised that he may be tried in absentia and convicted. The member may be removed if he consents in writing despite the prospect of trial and conviction in absentia.

1304 SOLATIA

In certain countries (i.e., Japan), custom dictates offering a victim or his / her family a token gift of fruit, flowers, or money for injury, death, or property damage. Depending on the local culture, such token expressions of remorse can affect the resolution of criminal charges. The Office of the Comptroller of the Navy (NAVCOMPT) permits the payment of solatia from operation and maintenance (O&M) funds under certain circumstances, as determined by the appropriate country commander. Consult the area coordinator or the nearest NLSO to determine the propriety of paying solatia from official funds in a particular country.

APPENDIX A

DEPLOYMENT CHECKLIST

This checklist helps one prepare for deployment / combat. It aids the staff judge advocate (SJA) in general planning for deployment from the time of assignment to the unit through the actual deployment. It is divided into three sections: ***preparation***, ***predeployment***, and ***deployment***. It is not all inclusive, but can be used as a guide to increase readiness.

I. PREPARATION

A. Personal considerations. Personal readiness reduces turmoil and uncertainty, increases individual confidence, and helps establish credibility.

1. Take care of personal affairs. Consider: a will, power of attorney, automatic deposits / payment of bills, child care plans, etc. Encourage subordinates to do the same.

2. Are your dog tags correct (particularly your blood type)? Do you have any? Get them and wear them!

3. Do you have a ***Top Secret*** security clearance? Get one if possible! Operational decisionmaking is based on Top Secret and compartmentalized information.

4. Are your shots (and shot records) up to date?

5. Is your "Sea Bag" packed and ready to go? Appropriate uniforms, wash khakis, boots?

B. General office considerations

1. Is the SJA office on the distribution list for message traffic and for all OPLANS / CONPLANS?

2. Is a JAG attending all staff briefings? By becoming part of the normal staff team, you won't be overlooked during deployment planning.

3. Do you have a military and / or international driver's license?

4. Do you have the necessary office supplies?

5. Are there flashlights and batteries?

6. Is the deployment library ready? JAGMAN, *Manual for Courts-Martial* (MCM), JAGC Directory? Laptop computer and disks?

7. Do all office personnel have serviceable safety gear? ***Inspect it!***

8. If you are a parent, have you made plans for the care of your children?

C. Operational law considerations

1. Are there copies of all Status of Forces and Supplementary Agreements, with maps of countries where deployment is likely? For classified agreements, contact higher headquarters (HQ), the Unified Command (i.e., SOUTHCOM, CENTCOM, etc.) or OJAG (International Law / Code 10).

2. Ensure regular and thorough instruction in the Law of Armed Conflict (LOAC), Law of the Sea (LOS), and Code of Conduct is provided. It should include the treatment of property and the taking of war trophies. Training on INCSEA and Rules of Engagement (ROE) should be given.

3. Ensure LOAC and operational law problems are included in field problems and exercises.

4. Regularly review operations and contingency plans for the unit. Pay close attention to the ROE, targeting, and prisoner of war (POW) portions of the plans. Numerous LOAC (and "front page") issues can spring from these areas if they contain misleading, incorrect, or illegal information.

5. Determine potential legal problems in the countries of probable deployment (e.g., unique religious laws that would affect U.S. personnel, limitations on the use of military vehicles in country, unique customs or currency laws, and any significant terrorist threats). Your public affairs officer (PAO) will often have some of this information. If potential legal problems exist, they should be addressed in the OPLAN or CONPLAN for that country.

6. Become part of the operational team by attending all coordination and planning conferences.

7. When working in planning groups, assist in areas other than the law. Become a team player.

8. Make sure that your deployment "package" has a camera and film! A camera with instant developing film works best.

9. Consider solving recurring issues such as ROE,ontracting, admiralty, etc. by working them into the standard operating procedures (SOPs), exercises, and the like. Make key contacts now!

D. International law references

1. NWP-9A (Annot.) (If nothing else, take this!)

2. U.N. Convention of Law of the Sea

3. U.N. Charter

4. Universal Declaration of Human Rights

5. AR 27-50, Status of Forces Policies, Procedures, and Information

6. AR 350-30, Code of Conduct Training

7. DA Pam 27-1, Treaties Governing Law Warfare

8. DA Pam 27-1-1, Protocols to the Geneva Conventions of 12 August 1949

9. DA Pam 27-24, Selected International Agreements, Vol. II

10. DA Pam 27-161-1, The Law of Peace, Vol. I

11. DA Pam 27-161-2, International Law, Vol. II

12. FM 27-2, Your Conduct in Combat Under the Law of War (formerly TC 27-1)

13. FM 27-10, The Law of Land Warfare with Change 1

14. FM 41-5, Joint Manual for Civil Affairs

15. TC 27-10-1, Selected Problems in the Law of War

16. TC 27-10-2, Prisoners of War

17. TC 27-101-3, Instructor's Guide to the Law of War

18. AF Pam 110-20, Selected International Agreements

E. Claims considerations. Review JAGMAN, Chapter VIII.

1. It is paramount you establish an on-going, positive working relationship with the supply officer(s).

2. Ensure that all relevant supply officers understand how to establish a pay account to pay for foreign claims. Additionally, remind them that foreign claims will be paid in local currency. Also, the supply officer will usually enter into local contracts for services. Sometimes, the amount owed is disputed after the fact; sometimes the disputed claim overlaps with admiralty claims (e.g., damage to watercraft, liberty ferries, and painting barges).

3. Ensure that foreign claims commissions are available (*see* JAGMAN, Chapter VIII, Part B).

4. Determine if single-service responsibility exists for probable areas of deployment. If it does not exist, then coordinate with the chain of command to establish one (if necessary).

5. Review legal studies and materials dealing with the area of operations (AO).

6. Always be conscious of Operational Security (OPSEC)

7. Review the *Standard Organizational Manual* (SORM)

F. Required forms

1. SF 95, Claim for Damage or Injury, with simplified instruction forms.

2. JAGMAN, Chapter VIII, Part A-8-a, Release Form for Foreign Claims.

G. Criminal law considerations

1. Ensure the criminal law materials are up-to-date and forms are present.

2. Determine availability of Mobile JAG Team (MOJAG) assets and review procedure for obtaining MOJAG services.

3. Determine who has Area Coordinator responsibilities for military justice matters.

4. Have you coordinated with the Area Coordinator and NLSO regarding pending trials? Will any witnesses have to be left behind? Who will do the CA's action?

H. Required forms

1. DD Form 457, Investigating Officer's Report (50 each)

2. DD Form 458, Charge Sheet (200 each)

3. DD Form 497, Confinement Order (50 each)

4. SFs 1156, 1157, Witness Payment Forms (50 each)

5. Local forms, form letters, disposition forms forwarding charges, referring cases to trial, etc.

II. PREDEPLOYMENT

These are issues that may arise and considerations that should be addressed from the point of the alert, or notification of deployment, up to the time of actual deployment.

A. Operational law considerations

1. Obtain a copy of the Operations Order (OPORDER). If the OPORDER is based on an OPLAN previously reviewed by the SJA office, compare the two for changes. Look particularly for changes in the mission, assumptions, and rules of engagement (ROE).

2. What is the legal basis for the military action? Particularly in Low-Intensity Conflict (LIC) and rescue missions this question may arise. Brief commanders on the legal basis (or bases). Ensure the reasons you cite are consistent with the chain of command, up to the National Command Authority. If a Freedom of Navigation Operation (FONOP) exercise is planned, be well-versed regarding Law of the Sea. (*See* NWP-9A (Annot.) and *Maritime Claims Reference Manual*.)

3. Monitor (or man) the Combat Information Center (CIC)

4. Review the legal annex to ensure that it supports the mission and that your office can support the requirements set out in the annex.

5. Keep notes or record lessons learned, ideas, details of incidents, etc. These will be invaluable when you later have to prepare an after-action report.

6. Always be conscious of Operational Security (OPSEC)

7. Review the Standard Organization Manual (SORM)

8. Does each SJA section have copies of the Status of Forces Agreement (SOFA), maps, etc. of the deployment area?

9. Review the OPLAN / OPORDER for potential problems. If it has been previously reviewed, look for changes and focus on the mission statement, assumptions and ROEs.

10. Give briefings on the Law of War, Law of the Sea, and ROE to personnel / units preparing to deploy.

B. Legal assistance considerations

1. Are there sufficient forms to handle last-minute legal assistance problems at departure site?

2. Organize and initiate legal assistance briefings for dependents. This should be planned out well before deployment. Contact local NLSO to assist you.

C. Legal assistance references and forms

-- DL Wills is now available. If down load unable to access, use the most recent editions of:

a. *All States Will Guide*;

b. *All States Marriage and Divorce Guide*;

c. *All States Guide to Garnishment Laws and Procedures*;

d. *All States Consumer Law Guide*; and

e. *Legal Assistance Officer's Deskbook and Form Book.*

D. Required forms

1. Simple forms Wills

2. Form letters

a. Form letter to creditor requesting extension of payment date because of deployment.

b. Form letter to landlord / mortgagor requesting extension because of deployment.

c. Form letter: Soldiers' and Sailors' Civil Relief Act (e.g., request for stay of proceedings).

3. Internal Revenue Service (IRS) forms requesting extension of filing deadline or local JAG office form letter requesting extension because of deployment.

4. Form letters to state or municipal tax authorities requesting extension because of deployment.

5. Power of Attorney (deploying unit size +250).

6. General Power of Attorney forms.

7. Special Power of Attorney form with standard clauses for special situations (e.g., sale of car, sale of house, ability to engage in particular banking transactions).

E. Criminal law considerations

-- Determine of a SOFA exists or arranagements have been made for exclusive jurisdiction over U.S. personnel. Plan for continued military operations. Depending on the anticipated duration, consider the following:

1. Should a military judge deploy to try cases at the location?

2. Have the Trial Judiciary and Circuit Chief Judge been notified?

3. How will article 32 investigations be conducted at location of deployment?

4. How will pretrial confinement be established?

5. How will summary court officers be drawn (line officers, staff officers, or SJAs)?

6. Will prisoners serving sentences locally be released to deploy with their units?

7. Ensure personnel are briefed concerning conditions on liberty in their deployment area (*see* Chapter 14, Liberty Risk).

F. Administrative separations (ADSEPS)

-- Who will take the last-minute cases? Stay behind or go with you? Contact NAVSTA / Base SJA.

III. DEPLOYMENT

These are issues that may arise and considerations that should be addressed from the time of actual deployment until the final redeployment of forces.

A. Operational law considerations

1. Be involved in the planning and do a review of all FONOPs.

2. If involved in a noncombatant evacuation, be involved in the review of the ROE. Be prepared to advise the command on the seizure and requisition of government and private property. General rules are:

a. Movable property, such as vehicles belonging to the enemy state, may be used for military purposes. Real property belonging to the enemy state may also be used, as appropriate.

b. Private property cannot be confiscated.

c. Private property may be seized for use by U.S. Forces if it has a direct military use, such as ammunition, weapons, vehicles, or communication devices. At the end of hostilities, however, the property must be returned and compensation must be paid for its use. Thus, records and receipts must be kept of all seizures.

d. Property and services may be requisitioned and, to the extent necessary, force may be used to effect requisition. Requisitions are based on military necessity and are made pursuant to the authority of the senior area commander. Payment or receipt must be given for the requisition. There are humanitarian limits on the ability to requisition. For example, medical supplies and foodstuffs may be requisitioned only for the use of the occupying force and only after due consideration for the needs of the population.

3. In a permissive environment, the SJA should advise the commander to provide a liaison officer (preferably the SJA or one of his / her officers) to the U.S. Embassy in order to represent the commander at country team, political, or military meetings, etc.

4. In a permissive environment in which U.S. forces are assisting in the stabilization phase, determine whether the Host Nation (HN) has granted authority to U.S. Military Police (MPs) or other security personnel to apprehend or arrest local nationals. This will normally be accomplished through an ordinance or executive proclamation.

5. In a permissive environment, coordinate with HN national police authorities concerning the status of U.S. force in country. Ascertain whether members of the HN police force understand the status of U.S. nationals.

6. As the hostilities stabilize and the combat phase ends, coordinate with the Provost Marshal (PM) and the International Committee of the Red Cross (ICRC) to arrange repatriation of POWs.

B. Claims consideration

-- Establish a central location for the receipt of claims. (*See* Chapter 36, Claims.)

C. Legal assistance considerations. *See* Part VII.

1. Respond to inquiries from soldiers in country.

2. Establish liaison with U.S. Consulate at deployment location for overseas marriage and adoption coordination, in addition to emergency leave procedures.

3. Coordinate with communications, transportation, and aviation elements on the installation to ensure contact and courier service with deployed legal assistance advisors (LAAs).

4. Be prepared to brief and assist survivor assistance officers.

D. Contract law considerations

1. Establish immediate contact with the contracting officer and civil affairs element which identify and coordinate acquisition of locally available materials and services.

2. Provide legal advice and other assistance, as required, on all contract and fiscal law matters.

3. When procuring legal property by requisition or seizure (as opposed to contracting), ensure that receipts describing the items seized, the location, the owner, and the custodian are prepared.

4. Ensure that minor and emergency construction comply with applicable law and regulation.

5. To the extend possible, accompany contracting personnel dealing with the local populace. In the alternative, ensure they are briefed regarding the federal, domestic, and international aspects of their actions.

E. Criminal law considerations

1. Ensure that, where necessary, testimony of local witnesses is preserved by deposition. A deployed or MOJAG court reporter and interpreter may be used for this purpose. The local legal agencies should be consulted to determine whether the HN's laws place restrictions on local nationals giving depositions (particularly if they are local officials).

2. Coordinate with PM to determine whether:

a. Evidence-handling procedures are adequate; and

b. pretrial confinement facilities, if any, have been established.

3. Ensure that, if article 32 investigations and courts-martial will be conducted during the deployment, courtroom facilities have been located and equipped.

4. If it is a short-term deployment, ensure that, if nonjudicial punishment (NJP) is to be administered during the deployment, the attendant paperwork is safeguarded.

5. Ensure that allegations of LOAC violations are thoroughly investigated and that the evidence has been preserved.

6. If in an area where a SOFA is applicable, ensure that a waiver of jurisdiction is obtained prior to redeployment of an accused.

CHAPTER FOURTEEN

LIBERTY RISK

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CHAPTER FOURTEEN

LIBERTY RISK

1401 REFERENCES

A. JAGMAN, § 0104 (administrative withholding of privileges)

B. Art. 0921, *U.S. Navy Regulations, 1990* (the senior officer present shall regulate leave and liberty)

C. Art. 0917, *U.S. Navy Regulations, 1990* (the senior officer present shall impress upon officers and enlisted personnel the duty to avoid any conflict with foreign authorities and local inhabitants)

D. MILPERSMAN, art. 3030150 (liberty may be denied when a health risk exists)

1402 BASIS

There are two recognized purposes behind a lawful liberty risk program: (1) the essential protection of the foreign relations of the United States, and (2) international legal hold restriction. The commander has substantial discretion in deciding to place a member on liberty risk; however, the decision should generally be limited to cases involving a serious breach of the peace or flagrant discredit to the Navy. Contrary to the beliefs and desires of many commanding officers (COs), the program applies ***only*** overseas, either in a foreign country or in foreign territorial waters. Remember that the deprivation of normal liberty, except as specifically authorized under the UCMJ, is illegal.

1403 DUE PROCESS

The commander must afford adequate administrative due process safeguards. After reviewing each case individually, the commander should advise the member in writing of assignment to the program, the basis for the action, and the opportunity to respond (e.g., request mast). The commander should consider whether less restrictive means (e.g., liberty hours) will be effective in a given case before curtailing all liberty. The command should use incremental categories ("A," "B," "C,"

"D") where possible. The CO must periodically review each assignment to assess whether continued curtailment of liberty is justified.

1404 PROCEDURES

The program is administrative, not punitive, restraint; thus, a servicemember's liberty may be curtailed regardless of whether charges are pending at a court-martial or nonjudicial punishment (NJP). Conversely, members punished at NJP or a court-martial should not be automatically placed on liberty risk unless their offense and predilections otherwise justify that assignment. No service record entries are made. Members on liberty risk should ***not*** be required to muster or work with members undergoing punitive restriction. If not proper, assignment to liberty risk may constitute a prior punishment or pretrial restraint, thereby inadvertently starting the speedy trial clock. Other legitimate bases for limitations on liberty outside the military justice system include: extra military instruction (EMI), bona fide training, operational necessity, medical reasons, safety / security of personnel, and command integrity. Liberty may also be denied if a member's appearance is contentious, inflammatory, lewd, or unlawful.

CHAPTER FIFTEEN

PRIVATE INTERNATIONAL LAW

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CHAPTER FIFTEEN

PRIVATE INTERNATIONAL LAW

1501 INTRODUCTION

Private international law is the body of national laws applicable to disputes between private persons, in domestic courts or private arbitration, arising from activities having connection to two or more nations.

A. Application. The SJA may encounter private international law issues in a variety of contexts [e.g. commercial and business transactions (sales, trade, taxation, etc.); family law matters (child abduction across international boundaries, intercountry adoption, etc.); and civil litigation (service of documents abroad, choice of law, proof of documents, enforcement of foreign judgments, etc.)]. In the United States, these areas have traditionally been governed by state rather than federal law.

B. Conflicts of law. International conflicts of law is less developed than domestic (i.e., interstate conflicts of law). In recent years, the United States has become more active in international organizations seeking unification and harmonization of private international law. The United States participates in the United Nations Commission on International Trade Law (UNCITRAL) (primarily commercial law); The Hague Conference on Private International Law; the International Institute for the Unification of Private Law (UNIDROIT); and the Organization of American States (OAS). Nevertheless, the United States is party to few of the conventions and statutes drafted by these organizations.

1502 INTERNATIONAL BUSINESS TRANSACTIONS

A. International sale of goods. The U.N. Convention on Contacts for the International Sale of Goods (1980) [51 Fed. Reg. 6262-80 (March 26, 1987); 52 Fed. Reg. 46014 (December 3, 1987)] governs contracts for sale of goods where the places of business of both parties are in states party to the Convention. This Convention entered into force for the United States on 1 January 1988.

B. Other UNCITRAL conventions. The United States is not a party to several other conventions including: the Convention on the Limitation Period in the International Sale of Goods (1974, with 1980 Protocol); the Convention on the Carriage of Goods by Sea (1978) ("Hamburg Rules" - not yet in force); and the

Convention on International Bills of Exchange and International Promissory Notes (1988). Hague agreements are being drafted or considered in areas of electronic fund transfers, liability of operators of transport terminals, standby letters of credit and guarantees, etc.

1503 INTERNATIONAL TAXATION

Treaties exist to avoid double taxation. Over 35 bilateral treaties limit U.S. tax on nonresidents in the United States (primarily multinational enterprises). Status of Forces Agreements (SOFA) provisions (e.g., Article X of NATO SOFA) exempt members from local income tax based on their physical presence in the country. On the domestic side, the Foreign Earned Income Exclusion, I.R.C. § 911, excludes up to $70,000 of foreign earned income. In that context, foreign earned income does not include U.S. government salaries, but does include income from nongovernment U.S. organizations. In addition, foreign tax credits and deductions exist for foreign source income taxes (e.g., I.R.C. §§ 901, 904).

1504 FAMILY LAW MATTERS

A. Marriage. Host country law generally controls the validity of a marriage. Substantial private international law on marriage exists in Europe. See the immigration chapter in this Deskbook for additional information on immigration of foreign spouses.

B. Child custody. The Hague Convention on Civil Aspects of International Child Abduction, 19 I.L.M. 1501 (1980) [51 Fed. Reg. 10,494-516 (March 26, 1986)], entered into force for the United States on January 1, 1988. The Convention is implemented by the International Child Abduction Remedies Act, 42 U.S.C. §§ 11601 *et seq*. Countries are required to return an abducted child promptly to his country of habitual residence without inquiring into the merits of competing parental claims. Central authorities may order the return of children without judicial involvement. No prior custody order is required. In the United States, either state or federal court actions may be brought. An exception to the expeditious return rule exists where return would expose the child to physical or psychological harm or place the child in an intolerable situation. Thus far, the exception has been narrowly interpreted. *Mohsen v. Mohsen*, 715 F.Supp. 1063 (O. Wyo. 1989); *Sheikh v. Cahill*, 546 N.Y.S.2d 517 (Sup. Ct. 1989).

C. Wills. Several international provisions in this area exist but are not in force for the United States [e.g., Convention Providing a Uniform Law on the Form of an International Will (1973); Hague Convention on the Law Applicable to Trusts

and on their Recognition (1984) (signed by United States, but not in force)]. To date, only six states have implemented the Uniform International Wills Act.

D. Other provisions. Other Hague and U.N. Conventions not in force for the United States include those concerned with marriage (draft), matrimonial property (draft), recognition of divorce, maintenance, enforcement of child support orders, intercountry adoption, protection of minors, etc.

1505 CIVIL LITIGATION

A. Service of process. A party since 1969, the United States must observe the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention), 20 U.S.T. 361 (1965).

1. Party nations. This Convention requires service through a central authority or by postal service unless this is objected to by a state. *See* U.S.C.A. sections following Fed. R. Civ. P. 4; *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 108 S. Ct. 2104 (1988).

2. Nonparty nations. In countries not a party to the Convention, direct service of process or use of letters rogatory is required. Direct service [e.g., Fed. R. Civ. P. 4(e) and (i)], may violate receiving state law. Letters rogatory are sent from domestic courts through diplomatic channels, but tend to take a long time to process. The 1975 Inter-American Convention on Letters Rogatory, with 1979 Additional Protocol, entered into force for the United States on August 27, 1988. This Convention created a legal regime for service of process similar to Hague Service Convention.

3. SOFA. Some SOFA's provide for service of civil process by German courts on SOFA personnel through the sending state liaison office. The provisions may not be applicable to U.S. court documents.

B. Evidence. Entered into force for the United States in 1972, The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention), 23 U.S.T. 2555 (1970), is designed to ameliorate problems of direct discovery and blocking statutes. Letters of request are sent through designated central authorities. The letters must be followed when the evidence is located in a signatory country. *Societe Nationale Industrielie Aerospatiale v. U.S. District Court*, 107 S.Ct. 2542 (1987). A regional counterpart, the Inter-American Convention on the Taking of Evidence Abroad (1975, with 1980 Protocol), is not in force for the United States. Similarly, the United States is a signatory to the Convention Abolishing the Requirement for Legalization of Documents Used Abroad, T.I.A.S. No. 10072 (1981), but the Convention is not in force.

C. Recognition and enforcement of foreign judgments. Under principles of comity, foreign judgments will be recognized in U.S. courts. *Hilton v. Guvot*, 159 U.S. 113 (1885). Generally, a summary judgment can be obtained unless one of the exceptions to the general rule encouraging recognition under comity or the Uniform Act applies. Sixteen states have enacted the Uniform Money Judgments Recognition Act, 13 Unif. Laws Annot. 269-70 (1980). The United States is not a party to The Hague Convention on Enforcement of Judgments. Consider also the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), 21 U.S.T. 2517 (1958).

1506 COMPLIANCE WITH COURT ORDERS OVERSEAS

SECNAVINST 5820.9, Subj: COMPLIANCE WITH COURT ORDERS BY DEPARTMENT OF THE NAVY MEMBERS, EMPLOYEES, AND FAMILY MEMBERS OUTSIDE THE UNITED STATES, implements DOD Directive 5525.9, and establishes procedures for returning servicemembers, dependents, and DON employees to the United States to comply with federal and state court orders when the individual has been charged with or convicted of a felony, or ordered to show cause in contempt proceedings. The regulations are intended to prevent servicemembers from using overseas duty assignments as a refuge in child custody disputes. The SECNAVINST makes CMC the decisional authority for Marine Corps cases and limits delegation of this authority to within Headquarters Marine Corps.

CHAPTER SIXTEEN

FOREIGN CLAIMS

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CHAPTER SIXTEEN

FOREIGN CLAIMS

1601 REFERENCES

A. Foreign Claims Act (FCA), 10 U.S.C. § 2734

B. JAGMAN, Chapter 8

C. DOD Directive 5515.8, Subj: SINGLE-SERVICE ASSIGNMENT OF RESPONSIBILITY FOR PROCESSING OF CLAIMS

D. JAGINST 5890.1, Subj: ADMINISTRATIVE PROCESSING AND CONSIDERATION OF CLAIMS ON BEHALF OF AND AGAINST THE UNITED STATES

1602 PURPOSE AND SCOPE

The Foreign Claims Act (FCA) seeks to promote friendly relations with, and in, foreign countries through the prompt settlement of claims. The FCA covers claims of death, injury, property damage, or loss at the hands of U.S. military forces or otherwise incident to noncombatant activities. Geographically, the claim must arise outside the United States and its territories, commonwealths, or possessions.

A. Valid claimants. Valid FCA claimants include foreign countries, their political subdivisions, and their inhabitants. Inhabitants do not include servicemembers, government employees, dependents, or U.S. tourists vacationing overseas.

B. Claims not payable. Although FCA coverage is broad (e.g., even crimes are compensable), some areas have been carved out. Specifically, the FCA cannot redress admiralty claims, patent infringement claims, or subrogated claims; nor can the FCA be used when the claim arises out of a member's private contractual obligations or paternity. FCA claims will not be paid on compassionate grounds or where the claimant has been contributorily negligent, when that doctrine is followed under local law.

1. Combatant claims. Claims of national governments (including their political subdivisions and controlled corporations) engaging in combat with the United States or its allies shall not be paid. Claims resulting from combat activities are not payable, except that claims arising from an accident or malfunction incident to aircraft operations, including airborne ordnance, occurring while preparing for, going to, or returning from, a combat mission may be paid.

2. Scope of employment. As a general rule, scope of employment is immaterial to a claim under the FCA. If, however, a claim arises from the act of a U.S. employee who is an indigenous person, a prisoner of war, or an interned enemy alien, the act must have been in the scope of employment for the United States to assume responsibility under the FCA. Claims arising from the operation of a U.S. armed forces vehicle by a prisoner of war or interned enemy alien should be settled if local law imposes liability on the owner of the vehicle under the circumstances.

C. Single-service claims responsibility. DOD Directive 5515.8 assigns "single-service claims responsibility" to individual military departments for processing claims in specified foreign countries. This may restrict the use of the regulations in this chapter by authorizing the assigned military department to process claims that would otherwise be cognizable under this chapter. Consult DOD Directive 5515.8 regarding geographic responsibility assignments before processing FCA claims to ensure your action is authorized. The Officer in Charge (OIC) of the U.S. Sending State Office for Italy, for example, has authority to process all FCA claims arising in Italy.

1603 PRESENTING THE CLAIM

FCA claims must be presented in writing to the appropriate U.S. military authorities within two years after the incident giving rise to the claim. The claim must state the time, date, place, and nature of the incident; state the nature and extent of any injury, loss, or damage; and request compensation in a definite amount in the local currency. A properly completed Standard Form 95 or other written demand, signed by the claimant or an authorized agent, containing the same essential information, is sufficient. A claim may be signed by either the injured party or an authorized agent (e.g., the claimant's lawyer). Agents must show their title or legal capacity and present evidence of their authority to sign the claim.

1604 PROCESSING

The FCA provides only an administrative remedy to claimants. All claims are processed by the Foreign Claims Commission. All commanding officers (COs) of the Navy and Marine Corps have authority to appoint a commission unless

restricted by a competent superior commander. For FCA purposes, the term "commanding officer" also includes: the Judge Advocate General (JAG); the OIC of the U.S. Sending State Office for Italy; Chiefs of Naval Missions (including chiefs of the naval section of military missions); Chiefs of Military Assistance Advisory Groups (including chiefs of the naval section of such groups); and naval attaches. The CO can appoint a commission for each claim or have a standing commission to hear all claims. The commission's settlement authority depends on the number and type of officers appointed to the commission.

A. Composition of the commission. A commission shall be composed of either one or three members. Alternate members may be appointed where circumstances require and may be substituted for the principal members for specific cases by order of the appointing authority. The appointing orders should indicate which member is president of a three-member commission.

B. Qualifications of members. Members appointed to serve on a commission shall be commissioned officers of the Navy or Marine Corps of sufficient grade and experience to carry out the purpose of the commission consistent with the FCA. Whenever possible, at least one member of the commission should be a judge advocate. An officer of another armed force may serve on a Navy or Marine Corps commission only with the consent of the Secretary of his department, or a designee, and will perform duties according to the *JAG Manual*. When an officer of the Navy or Marine Corps is asked to serve on a commission of another armed force, the immediate commander of the officer requested may determine availability pursuant to 10 U.S.C. § 2734(a).

C. Investigation. No formal procedures control the investigation of a foreign claim. Typically, an investigation not requiring a hearing will satisfy the commission's fact-finding needs. A transcript of witness testimony is not required; a summarization of the substance, preferably signed, will suffice. Formal rules of evidence do not apply.

D. Commission action. The commission will review the claim and the investigation. If necessary, the commission may direct additional investigation. In addition, the commission:

1. Will recommend the appropriate adjudication of the claim by majority vote;

2. may negotiate any private, voluntary settlement between the claimant and any wrongdoers;

3. may negotiate for settlement of the FCA claim within the limit of the adjudicating authority;

4. will report its recommendation and reasons therefor to the appropriate adjudicating authority (a checklist for the commission's report appears in appendix A to this chapter);

5. will prepare appropriate documents to notify the claimant of actions taken;

6. will pay any approved claim, as discussed below; and

7. will prepare and obtain the signed release of the claimant upon acceptance of payment.

E. SJA role. The SJA provides advice, guidance, and review to the CO, commission, and claims investigating officer on policies and procedures. The cognizant NLSO may also lend assistance.

1605 ADJUDICATING AUTHORITY

A commission may consider claims in ***any*** amount and may recommend payment, in full or in part, or denial of a claim.

A. Claims not exceeding $20,000.00. Commission recommendations for payment or denial of claims up to $20,000.00 may be approved by the appointing authority in whole or in part. The amount which may be ***paid*** depends on the commission's composition:

1.	One officer commission:	$5,000.00.
2.	One judge advocate commission:	$10,000.00.
3.	Three officer commission:	$10,000.00.
4.	Three officer commission with at least one judge advocate:	$20,000.00.

B. Claims in excess of limits or $20,000.00. Commission recommendations for payment or denial of claims in excess of the limits of their adjudicating authority or in excess of $20,000.00 shall be forwarded through the appointing authority for action by higher authorities as discussed below.

1606 FORWARDING REPORTS

A. Claims within adjudicating authority. The commission sends the original of the report and all related papers to the appointing authority for action. The appointing authority may approve or disapprove the recommendation and claim, in whole or in part, and pay the claim as appropriate. In the alternative, the appointing authority may return the claim with instructions to the commission.

B. Claims in excess of adjudicating authority. The commission sends the original of the report and all related papers to the appropriate higher authority, via the appointing authority, for action. The following officers may approve or disapprove the recommendation and the claim, in whole or in part, pay the claim, or return the claim with instructions to the appointing authority or the commission:

1. The Deputy JAG, the AJAG (General Law), or the Deputy AJAG (Claims and Tort Litigation), and, with respect to claims arising in Italy, the OIC of the U.S. Sending State Office for Italy, may act on FCA claims up to $50,000.00;

2. the JAG may act on FCA claims between $50,000.00 and $100,000.00; and

3. SECNAV may pay the first $100,000.00 of any FCA claim and report the excess to the Comptroller General for payment under 10 U.S.C. § 2734(d).

1607 NOTIFICATION

Appointing authorities shall promptly notify the claimant in writing when claims within their adjudicating authority have been approved or denied. Notifications should advise the claimant of the approved recommendation or commission action with a brief explanation of their reasons. In addition, they should notify the claimant when the claim has been referred to higher authority for action, but the claimant will not be told the amount recommended by the commission or be shown the commission's report. Final action taken by higher authority will be forwarded to the claimant via the appointing authority with a copy to the commission. Where resources permit, the appointing authority should translate the notification into the claimant's language.

1608 PAYMENT

A. Documentation. When the appropriate authority has approved a recommendation for payment, the appointing authority shall submit the original and one copy of the approved commission report to the nearest Navy or Marine Corps disbursing officer for payment of the claim. If no Navy or Marine Corps disbursing officer is reasonably available, the appointing authority shall send the documents to the nearest U.S. disbursing officer of any agency and ask them to pay the claim. The approval authority may approve advance payments. All payments shall be made in the currency of the country in which the claim arose or the claimant now resides.

B. Voucher. Copies of paid vouchers shall be forwarded immediately to the Naval Regional Finance Center, Code 72, Building 28-2, Washington Navy Yard, Washington, D.C. 20374-0282 and to the Office of the Judge Advocate General of the Navy, 200 Stovall St., Alexandria, VA 22332-2400.

C. Accounting data. Foreign claims are paid under an open allotment with fund citation from NAVCOMPT Manual, Volume 2, Chapter 2, paragraph 201 under the title Judge Advocate General Defense Claims: appropriation symbol 1791804, subhead .122B, class 006, control 00013, authorization accounting activity 000179, transaction type 2D, cost code 00000999252A.

D. Release. A release shall be obtained from the claimant when payment of an award is accepted. The suggested form for the release from the JAG Manual is reproduced in appendix B to this chapter.

1609 APPEAL AND RECONSIDERATION

The claimant has no right to appeal the action of the commission. The commission can, however, reconsider its action upon the request of the claimant or on its on initiative, or at the direction of higher authority. The claimant's request should specify a legal or factual basis for any error alleged. If, after reconsideration, the commission concludes its original recommendation was correct, it will affirm the recommendation, notify the claimant, and forward an informational memorandum to or via the appointing authority.

APPENDIX A

COMMISSION REPORT CONTENTS CHECKLIST

_____ Appointing order and any modifications

_____ Claim document by the claimant containing notice of time, place, nature of the incident, and an estimate of the damage or claim

_____ Claim signed by the claimant; if signed by agent, authority to act is shown

_____ Investigative report

_____ Summaries of witnesses' testimony or signed statements by witnesses

_____ Proposed settlement agreement and release when payment is recommended

_____ Commission memorandum which states:

- _____ Dates of the proceedings
- _____ Amount of the claim in foreign and U.S. currency, as of the official exchange rate on the date the claim was initially considered
- _____ Brief summary of the essential facts:
  - _____ Date of incident; date claim filed
  - _____ Circumstances of incident; nature and extent of injury or damage
  - _____ Basis for determining whether the claim is payable
- _____ A summary of local laws, standards, and customs
- _____ Date of adjudication by the commission
- _____ Amount of any recommended award, stated in local and U.S. currency at the official exchange rate, applicable on the adjudication date
- _____ Statement of the recommendations of the commission and an explanation of the basis

APPENDIX B

SETTLEMENT AGREEMENT

KNOW ALL MEN BY THESE PRESENTS, that the undersigned hereby agree(s) to accept the sum of _____ in full satisfaction and final settlement of any and all claims (I) (we) now have or may in the future have against the UNITED STATES OF AMERICA, or any of its agents or employees, arising out of

_____

_____

_____

(I) (We) agree that, upon receipt of the aforesaid sum, the UNITED STATES OF AMERICA, and its agents and employees, shall be forever discharged from any and all claims, demands, damages, actions, causes of action, or suits of any nature or kind whatsoever arising out of the aforesaid matter.

IN WITNESS WHEREOF, the undersigned (have) (has) signed these presents this ____ day of _____, 19___.

_____

_____

WITNESS:

_____

CHAPTER SEVENTEEN

COMMAND SPONSORSHIP

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CHAPTER SEVENTEEN

COMMAND SPONSORSHIP

1701 INTRODUCTION (OPNAVINST 5352.1 & MILPERSMAN 6810105)

The appropriate military commander, usually the area coordinator at the overseas duty station, must grant entry approval and sponsorship for a dependent of either a military member or a civilian employee to accompany the member or employee overseas. Sponsorship gives the dependent certain protection under the Status of Forces Agreement (SOFA) and entitlement to use of the Navy Exchange, Commissary, Navy housing, station allowances for dependents, and environmental morale leave (EML) flights, etc. Command sponsorship carries with it, travel and transportation entitlements and shall not be rescinded while the dependents are at the overseas duty station, unless authorized by the Secretary of the Navy (SECNAV) via Chief of Naval Personnel (CHNAVPERS) (Pers 20). Such rescission will not affect transportation entitlements, but will affect station allowance payments and use of dependent support facilities. Regardless of command sponsorship, dependents shall be furnished medical services.

1702 TYPICAL PROBLEMS

Frequently, the command will get requests to have the dependents returned to the continental United States (CONUS) early. Requests are made for a variety of reasons, including marital difficulty, the inability of the family to adjust to a new culture, or the spouse can't find work, etc. Early return is intended as a last resort. In some cases, the command is able to judge that a situation cannot be resolved or will likely recur. In such cases, commands may determine it better to send the dependents home than to spend inordinate amounts of administrative time on solutions most likely to be only temporary. Many early return of dependents requests are processed through the Family Service Center (FSC) or the area coordinator, and you will not become involved except for a command endorsement or an involuntary return of dependents. Sometimes the staff judge advocate (SJA) may work with the administration department to arrange for early return of dependents.

1703 RELATED ISSUES

Problems occasionally arise when the family returns to CONUS, but the member continues to reside in overseas government family quarters. SJAs should ensure adequate procedural checks are in place to prevent this. For example, some commands have established a reporting requirement for the FSC to notify the Assistant Public Works officer when each early return of dependents is approved so that the housing office can check its records to ensure that government quarters are made available for eligible families and the military member is not holding over. In addition, where the member has abandoned the family in quarters and moved off base or has not resided with the family for 60 days, the family is no longer eligible for housing and must vacate the quarters.

The area coordinator has no disciplinary authority over civilians. However, if a particular civilian demonstrates a tendency to commit misconduct or abuses privileges of being a U.S. citizen overseas, sponsored by the Navy, the area coordinator is authorized to revoke clearance for overseas command sponsorship of the employee and / or his / her dependents.

1704 SAMPLE DOCUMENTS

The documents on the following pages are based on the efforts of the SJA, Naval Air Station (NAS) Sigonella, to cope with these and other challenges.

APPENDIX A

SAMPLE COMMAND SPONSORSHIP LETTER

MEMORANDUM

From: Staff Judge Advocate, NAS Sigonella
To: Commanding Officer, NAS Sigonella
Via: Executive Officer

Subj: COMMAND SPONSORSHIP

Ref: (a) Status of Forces Agreement
(b) CINCUSNAVEUR Instruction 5711.7A

1. At NAS Sigonella, certain individuals are granted command sponsorship when they accompany the forces overseas in accordance with reference (a). Command sponsorship allows certain privileges for medical care, Navy Exchange, commissary, and other base privileges. Currently, no strict format exists on board NAS Sigonella to control command sponsorship privileges.

2. Reference (a) allows members of the forces and their dependents who accompany those forces to enjoy certain tax-free benefits. Such benefits include the tax free importation of automobiles, household goods, and other goods for personal use. This privilege is granted only to those members of the force who are brought overseas to perform the mission of the U.S. Navy and their dependents who are granted command sponsorship. In the NAS Sigonella community, we have a number of deployed units. These deployed units frequently have dependents accompanying them. Normally, dependents of this nature are not allowed in other European countries' U.S. military exchanges, commissaries, or medical care facilities. Because of the nature of the mission performed here at NAS Sigonella, it is recommended that a privilege card unique to NAS Sigonella be provided. This card, in conjunction with the current green ID card of the military members and the brown ID card of military dependents and U.S. civilian workers, would allow the individual access to the commissary, exchange, and other facilities on board the station. This would prevent those who are not accompanying the forces and have not been granted command sponsorship from abusing the facilities located herein.

3. At NAS Sigonella, we have a number of problems with dependents that have remained after the sponsor has departed the station. There is an unwritten understanding at NAS Sigonella that dependents will be allowed to stay 60 days after the sponsor has departed the station. Under reference (a), dependents are allowed

to stay only as long as the sponsor is present in the area. I recommend that any dependent who desires to stay beyond the sponsor's tour length be required to submit a written request to CO, NAS Sigonella (this must also include all tenant commands). Because CO, NAS Sigonella is the area coordinator, he must grant the request to have the command sponsorship extended for a period of time, preferably not to exceed 60 days. Currently, guidelines exist to allow dependents to extend in a duty station for 60 days while awaiting quarters at Guantanamo Bay. Presently, we have a number of dependents of military members who have remained in Sigonella working as vendors in the Navy Exchange, working for MWR or recreational services, or in some other capacity. These people, based on the issuance of their ID card, are allowed to shop in the commissary and exchange. Under Italian law, if these people have remained in Italy for a period of 12 months after the sponsor has departed the station, they are considered an ordinary resident in Italy and should not be allowed to work on board the station. Reference (a) does not envision having a large number of dependents remaining in Italy using tax-free goods and services provided by the U.S. Navy.

4. Under a provision granted by the U.S. Ambassador in 1980, retirees of U.S. military forces have been granted commissary, exchange and medical privileges on board military installations in Italy. This is unique in the European theater; no other country affords such privileges to retirees. For instance, in Spain, retirees are not allowed to shop on board the station. We have received reports of retirees who are apparently abusing their privileges in both the commissary and exchange. Such reports include a retiree going to the commissary and buying two or more carts full of groceries three times a week on a regular basis. Reportedly, this individual owns a commercial establishment in the Motta area.

5. The privilege card that I described above, if issued to naval members and dependents, would be similar to the privilege card that is issued in Rota, Spain. It would be unique to Italy and NAS Sigonella. This privilege card would readily identify the individual as being allowed to shop in our facilities located here at Sigonella; it is not intended to unduly fetter those individuals who may be visiting the area. Such cards would allow the Navy Exchange and commissary personnel to readily identify those people who are allowed to shop at those facilities. It would also serve as a means for CO, NAS Sigonella to remove the shopping privileges of those who abuse them. Removal of privileges has been an issue at NAS for persons who have committed misconduct against Navy Exchange and commissary facilities. Such misconduct has included the theft of thousands of dollars from the Navy Exchange, blackmarketing of Navy Exchange goods to local nationals, and providing commissary goods to personnel who are not entitled to commissary privileges. The card could be issued annually by Security Pass and ID to eligible personnel. If privileges are to be limited, the limitations can be overstamped on the card. The color of the privilege card would change annually and would have the year stamped boldly on the front. A photograph on each card may also be desirable.

APPENDIX B

SAMPLE REQUEST FOR EARLY RETURN OF DEPENDENTS INCIDENT TO UNUSUAL OR EMERGENCY CIRCUMSTANCES

From: (Sponsor's rate / grade, full name, USN, SSN)
To: Commanding Officer, U.S. Naval Air Station Sigonella
Via: (1) Director, Navy Family Service Center
(2) (Appropriate department head or tenant command CO / OIC)

Subj: REQUEST FOR EARLY RETURN OF DEPENDENTS INCIDENT TO UNUSUAL OR EMERGENCY CIRCUMSTANCES

Ref: (a) Joint Federal Travel Regulations para U5240-D2 (specify subparagraph letter)
(b) Joint Federal Travel Regulations para U5370-D
(c) Joint Federal Travel Regulations para U5410-B

Encl: (1) Appropriate documents

1. Per the references, and for reasons stated in the enclosure, I request early return transportation for my command-sponsored dependents presently residing at (street address and city / town in Sicily) to (city and state in CONUS / Hawaii / Alaska / Puerto Rico / other U.S. territory or possession):

a. (Full name / relationship / age)

b. (Full name / relationship / age)

2. To enable my dependent(s) to establish a residence in the area cited in paragraph (1) above, I request that shipment of personal property (and POV) be authorized per the references.

3. I make this request with full knowledge of applicable regulations and understanding that I do not expect to be transferred from my present duty station until (projected rotation date). I also understand that the return of my dependents to the overseas area is subject to approval of the Secretary of the Navy or designated representatives and is granted only under unusual circumstances. I further understand that, should my dependents desire to rejoin me at this duty station at some future time, they would not be entitled to command sponsorship or travel at government expense.

(Signature of sponsor)

Copy to: Service record / personnel file

APPENDIX C

SAMPLE RESPONSE TO REQUEST FOR EARLY RETURN OF DEPENDENTS

From: Commanding Officer, U.S. Naval Air Station, Sigonella
To:

Subj: TRANSPORTATION OF DEPENDENTS INCIDENT TO UNUSUAL OR EMERGENCY CIRCUMSTANCES

Ref: (a) Joint Federal Travel Regulations para U5240-D2 (specify subparagraph letter)
(b) Joint Federal Travel Regulations para U5370-D
(c) Joint Federal Travel Regulations para U5410-B

Encl: (1) Member's letter
(2) Substantiating documentation

1. In response to enclosure (1), early return of dependents is hereby approved for member's dependents listed below. Available evidence in support of subject request (enclosure (2)) has been reviewed and it is found that, due to circumstances described by enclosure (1), transportation of the following dependents and household goods is authorized per references (a) and (b) at government expense to: (Must be in CONUS, Alaska, Hawaii, Puerto Rico, or other U.S. territory or possession).

DEPENDENT	RELATIONSHIP	AGE

DEPENDENT	RELATIONSHIP	AGE

2. Shipment of members POV to an authorized port of entry in CONUS is also authorized in accordance with reference (c). In addition, member is required to vacate government housing quarters effective on the dependents' departure.

3. Member is to be reminded that transportation is authorized in consideration of unusual or emergency personal reasons and not to accrue additional entitlement or benefits; therefore, caution should be exercised in the execution of orders. Orders should be used in a timely manner and under no circumstances following receipt of permanent change of station orders. Member is encouraged to become familiar with the provisions contained in Joint Federal Travel Regulations and Navy Travel Instructions concerning dependent and personal property transportation entitlements under subsequent PCS orders.

4. In view of the above, _____ is requested to issue appropriate written orders to effect transportation of dependents as indicated in paragraph 1 above and to make appropriate Page 13 entries.

E. D. PLATT

Copy to:
BUPERS -Detailer
Member
SJA
Family Service Center
Comptroller
Civilian Personnel Department (if applicable)
Housing Office (if applicable)

APPENDIX D

SAMPLE ENDORSEMENT ON COMMAND SPONSORSHIP REQUEST

FIRST ENDORSEMENT ON OIC, Navy Resale Activity ltr of 12 Sep CY

From: Staff Judge Advocate
To: Commanding Officer
Via: (1) Director, Navy Family Service Center
(2) Executive Officer

Subj: SPONSORSHIP OF MR. LARRY FINE

Ref: (a) NATO Status of Forces Agreement
(b) Bilateral Infrastructure Agreement Implementing Article III of the North Atlantic Treaty
(c) OPNAVINST 1300.13

1. Forwarded, recommending denial.

2. Article III of reference (a) and Article VI of reference (b) preclude the Navy from allowing family members of military or civilian sponsors to remain in Italy after the sponsor has transferred. Under the provisions of reference (a), the Navy must notify the Italian Government that the child will be remaining in Italy without U.S. military sponsorship. His continued presence here will be at the pleasure of the Italian government. The provisions of references (a) and (b) are designed to prevent U.S. personnel from remaining in Italy and establishing residences without going through the regular channels of immigration. The provisions apply to the United States as a sending state as well as a receiving state.

3. When Mr. Fine detaches from the NEX, his status as a member of the civilian component will terminate. Concurrently, the status of his family members as dependents of a member of the civilian component will terminate. The impact of this termination is that the individuals involved will forfeit any entitlement to protections or privileges granted under the NATO SOFA. Specifically as it relates to this case, the son would not be entitled to Navy Exchange or commissary privileges, nor would he be entitled to any of the protections afforded a recognized individual involved with the Italian criminal justice system.

4. Although the Navy Resale Activity has offered to sponsor Mr. Fine's son, Moe, that offer is not within the purview of reference (c), the instruction dealing with command sponsorship. Reference (c) recognizes neither the requested sponsorship by a command nor the sponsorship by a family friend, LTJG Shemp Howard. Without this command sponsorship, government housing would not be available.

5. For Moe to remain in Italy to finish the school year, the family would need to obtain a tourist passport and visa as well as a sojourn permit. The family would not be entitled to process the sojourn permit through this office. If arrangements can be made for the care of the child by someone in the Sigonella community, and the legal documentation could be obtained, the child could attend the school as a tuition student. The child's privileges would be limited, however, to attending the school. Since the family sponsor would no longer be employed by the Navy Exchange here, the child might not even be entitled to medical care at the Branch Hospital, even on a paying basis.

6. In summary, pertinent international agreements preclude the Navy from unilaterally allowing this individual to remain beyond the time of his father's detachment. If the family can obtain the required legal documentation, the command would merely have to notify the Italian authorities of the son's intention to remain in Italy. The final decision would be made by the Italian government. As previously noted in other similar cases, I recommend that we not unilaterally authorize the sponsorship extension for this young man. I recognize that this will create a hardship for the family, but I believe that our hands are tied by the NATO SOFA.

RICK E. STRONGARM

CHAPTER EIGHTEEN

CUSTOMS

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CHAPTER EIGHTEEN

CUSTOMS

1801 REFERENCES

A. U.S. Customs laws, 19 U.S.C. § 1 *et seq.*; regulations, 19 C.F.R. § 1 *et. seq.*

B. DOD Directive 5030.49, Subj: CUSTOMS INSPECTION

C. SECNAVINST 5840.6, Subj: CUSTOMS INSPECTION

D. OPNAVINST 5840.3, Subj: CUSTOMS INSPECTION

E. Article 0860, *U.S. Navy Regulations, 1990*

F. OPNAVINST 3120.32, paragraph 510.14, Subj: STANDARD ORGANIZATION AND REGULATIONS OF THE U.S. NAVY

G. JAGMAN, Chapter 11

1802 INTRODUCTION

Awareness of local customs regulations can ensure a smooth start to a successful port call. SJA's should review chapter 11 of the *JAG Manual* for a comprehensive discussion of customs regulations drafted by an officer who is a senior official in the Customs Service when not wearing his Naval Reserve uniform. In addition, U.S. Consulates and military shore detachment teams will provide U.S. ships and aircraft with local customs information prior to arrival. The rules outlined in this chapter are under the direct control of the Commissioner of Customs and may be changed without legislative action. Consequently, SJA's should check with the local District Director of Customs or U.S. Consulate for information on recent changes. Locations and telephone numbers of Customs District Directors are listed in A-11-a of the *JAG Manual*.

1803 U.S. CUSTOMS SERVICE

The U.S. Customs Service is charged with enforcing laws relating to the importation and exportation of merchandise and ***all*** federal laws at U.S. borders and ports. The "customs territory of the United States" includes the 50 states, the District of Columbia, and Puerto Rico. The other territories and possessions of the United States have their own local customs laws which vary from territory to territory. Customs law enforcement jurisdiction falls into four main categories: customs enforcement (Title 19, U.S. Code); drug enforcement (Controlled Substances Import and Export Act); export restriction enforcement (Arms Export Control Act and the Export Administration Act of 1979); and currency law enforcement (the Bank Secrecy Act and the Money Laundering Control Act of 1986). Customs officers have broad search and investigative powers. Customs officers may search persons, conveyances, baggage, cargo, and merchandise entering or leaving the United States without a warrant and without suspicion of criminality. Military personnel, vessels, aircraft, and other vehicles are ***not*** exempt from such searches. Also, customs officers are authorized to stop vehicles and board vessels and aircraft without a warrant to perform customs inquiries and border searches. Any merchandise or vehicle involved in a customs violation is generally subject to civil forfeiture and may be seized by customs officers without a warrant. Customs offenses by military personnel may be prosecuted either in federal court or at a court-martial.

1804 SJA ROLE

The SJA can assist commanding officers (COs) and aircraft commanders in facilitating the clearance of customs by their vessels or aircraft. In particular, advice on duty exemptions and import and export restrictions can assist in preparing declarations and avoiding infractions. SJA's can also help commanders educate crewmembers about customs rules, the existing exemptions, and the possible consequences of abuses (such as forfeiture of the goods involved, penalties, prosecution in federal court or by court-martial, and possible loss of the privileges for all).

1805 ARRIVAL AND ENTRY OF VESSELS

Article 0860 of *U.S. Navy Regulations, 1990*, requires the CO of a naval ship or the senior officer of ships in company, returning to the customs territory of the United States from a foreign country, to report arrival to the Customs District Director for the first port of entry. Commanding officers are required to facilitate U.S. customs and immigration inspections of the vessel and must satisfy themselves that proper immigration clearance is obtained for any military or civilian passengers. Notice must be given to military or civilian port authorities of the presence of

passengers prior to arrival in port. The CO is also responsible for distributing customs declaration forms under paragraph 510.14 of OPNAVINST 3120.32B and completing military customs inspection of the vessel before arrival under DOD Regulation 5030.49R and OPNAVINST 5840.2. Customs regulations normally impose no additional notification requirements for naval vessels. If, however, a naval vessel is carrying cargo, the CO must file a Cargo Declaration (Customs Form 1302) with the District Director of Customs within 48 hours of arrival (defined as coming to rest, whether at anchor or at a dock, in any harbor within the customs territory of the United States). If the vessel is transporting anything other than U.S. property and passengers traveling on official business of the United States, it must make entry in the same manner as a civilian merchant vessel within 48 hours of arrival. Contact the District Director of Customs for procedures. *See* appendix A following this chapter for sample inspection procedures. Appendix B contains a sample U.S. Customs certificate and declaration.

1806 ARRIVAL AND ENTRY OF AIRCRAFT

Customs regulations require all aircraft entering the customs territory of the United States to give advance notice of arrival to the Customs District Director at or nearest the place of first landing. The aircraft commander is responsible for making notification by radio, telephone, or other direct means, or through FAA flight notification procedures. Notice must include: (1) type of aircraft and registration number; (2) name of the aircraft commander; (3) place of last foreign departure; (4) place of intended landing; (5) number of alien passengers; (6) number of citizen passengers; and (7) estimated time of arrival. In addition, the aircraft commander is responsible under military regulations for notice, distribution of declarations, and inspections as listed above for vessels. Military aircraft are normally exempt from customs entry, but, like vessels, must make entry if carrying anything other than U.S. property and passengers traveling on official business of the United States. If required, entry must be made upon first landing at an airport in the customs territory of the United States. *See* appendix A following this chapter for sample inspection procedures.

1807 ARTICLES ACQUIRED BY RETURNING RESIDENTS

Residents, as defined in *JAG Manual*, section 1105, are entitled to an exemption from duty and internal revenue tax on articles for personal or household use that were acquired abroad merely as an incident of a journey to an area outside the U.S. customs territory for a period of at least 48 hours (measured exactly). This exemption does not apply to articles intended for sale or acquired for the account of another person, with or without compensation for the service rendered, but may include articles intended for use as bona fide gifts. *See JAG Manual*, section 1106

for special rules pertaining to Mexico and the U.S. Virgin Islands. Rules relating to nonresidents are discussed in *JAG Manual*, section 1107.

A. Value limitations. The aggregate fair retail value in the country of acquisition of such articles shall not exceed $400.00 or, in the case of a resident arriving directly or indirectly from American Samoa, Guam, or the U.S. Virgin Islands, $800.00 of which not more than $400.00 shall have been acquired elsewhere than American Samoa, Guam, or the U.S. Virgin Islands. The articles representing the $400.00 acquired elsewhere must accompany the passenger. If the resident claimed an exemption within 30 days immediately preceding this arrival (excluding the day of arrival), only $25.00 worth of articles for personal or household use will be exempted.

B. Alcoholic beverages. Customs will not release alcoholic beverages for use in any state in violation of its laws. Generally, residents over 21 may include alcoholic beverages in their exemption, subject to the following limitations:

1. One liter in the case of an individual who does not arrive directly or indirectly from American Samoa, Guam, or the U.S. Virgin Islands; and

2. four liters in the case of an individual who arrives directly or indirectly from American Samoa, Guam, or the U.S. Virgin Islands not more than one liter of which shall have been acquired elsewhere than American Samoa, Guam, or the U.S. Virgin Islands.

C. Cigars and cigarettes. Not more than 200 cigarettes and 100 cigars may be included in the exemption. Subject to this limit, U.S. domestic cigars and cigarettes that were exported under internal revenue laws and regulations without the payment of tax may be included in the exemption. *See also* JAGMAN, § 1117.

D. Flat-duty rate. Articles valued at up to $1,000.00 in excess of the exemption are subject to a ten percent rate of duty based on the fair retail value in the country of acquisition when they accompany the returning resident. The flat rate is five percent for articles acquired in American Samoa, Guam, or the U.S. Virgin Islands. This five percent rate applies whether or not the articles accompany the resident.

E. Family grouping. When members of a family residing in one household travel together, their individual exemptions may be grouped and allowed without regard to which member is the owner of the articles (except alcoholic beverages, for which owners must be 21). The flat rate of duty on articles valued at up to $1,000.00 in excess of the exemption may also be grouped.

1808 HOUSEHOLD GOODS SHIPMENTS

This exemption is available to any person in the service of the United States who returns to the United States upon the termination of assignment to extended duty at a post or station outside the customs territory of the United States, or to returning members of his / her family who have resided with the member at such post or station, or to any person evacuated to the United States under government orders or instructions, whether in the service of the United States or not. Employees of the American Red Cross, employees of U.S. Government contractors and military banks, and persons in a comparable category are ***not*** considered in the service of the U.S. Government even though they are on duty with the Navy in an overseas area.

A. Extended duty requirement. Generally, the extended duty requirement will be met by members: returning PCS; returning at the end of a tour of duty of at least 140 days duration; or returning from continuous service on a U.S. naval vessel which departed from the United States on an intended deployment of 120 days or more outside the customs territory of the United States (regardless of actual deployment duration). By contrast, a member returning from overseas before the end of a tour while on leave or TAD is not entitled to the exemption.

B. Articles exempted. This exemption from duty and internal revenue tax applies to personal and household effects of the eligible individuals. It does not apply to articles intended for sale or imported for the account of any person not entitled to the exemption. Although this does not prohibit the subsequent use of such articles as bona fide gifts, any reimbursement or compensation, even though there is no profit to the importer, will disqualify an article as a bona fide gift.

C. Possession abroad requirement. Articles not in the possession of the person claiming the exemption while abroad cannot be considered personal and household effects within the meaning of the customs regulations. No particular period of use abroad is required, but the person claiming the exemption must have, at a minimum, been in such proximity to the specific property that immediate control or possession could have occurred at or after the purchase. This requirement will not be satisfied by the possession of the purchaser's agent or direct shipment to the United States.

D. Motor vehicles. Military and civilian employees of the U.S. Government returning at the end of an assignment to extended duty outside the United States may include a vehicle among their duty-free personal and household effects.

1. Generally, a motor vehicle manufactured on or after January 1, 1968, will not be permitted entry into the United States unless it conforms to applicable safety standards in effect at the time the vehicle was manufactured.

Additionally, imported automobiles must comply with federal pollution control standards contained in EPA regulations. The former one-time exemption for 5-year-old vehicles was discontinued.

2. Compliance with applicable safety standards and pollution control, standards must be established at the time of entry with proper certificates of compliance. Vehicles manufactured to U.S. safety and emissions standards will have plates so certifying affixed by the manufacturer. Vehicles which were not manufactured to U.S. safety standards must be entered under bond. Information on safety standards may be requested from: U.S. Department of Transportation, National Highway Traffic Safety Administration, Office of Vehicle Safety Compliance (NEF-32), 400 Seventh Street, SW, Washington, D.C. 20590.

3. Vehicles which were not manufactured to U.S. pollution control standards may be imported only through an importer licensed by the EPA. Lists of current certificate holders may be obtained from: Investigation / Imports Section (EN-304F), U.S. EPA, Washington, DC 20460. Post-1975 vehicles previously exported from the United States must have their catalytic converters and / or oxygen sensors replaced upon entry. A bond may be required for the completion of this procedure.

E. Pleasure boats. A pleasure boat may be included in the personal and household goods exemption. Foreign manufactured noncommercial pleasure boats entering the United States are subject to the Federal Boat Safety Act of 1971 and Coast Guard Safety Regulations. Evidence of compliance required for entry generally includes a certificate of compliance affixed to the vessel by the manufacturer or importer. Vessels may enter without certification if the member files a declaration that the boat was manufactured before the effective date of the safety standards or has been altered to comply with the standards (with appropriate certification). The boat will also be allowed to enter if it has been previously exempted from the standards by the Coast Guard or the member certifies that the boat will be brought into compliance within 90 days following entry, and that the boat will neither be sold nor used prior to compliance (bond required).

1809 SPECIAL EXEMPTION FOR SEA-STORE CIGARETTES

When a U.S. naval vessel has proceeded beyond the territorial limits of the United States, sea-store cigarettes may be sold to members. The Commissioner of customs allows an administrative exemption from duty and any internal revenue tax on limited quantities of sea-store cigarettes when the vessel does not visit a foreign port or other port outside the customs territory of the United States on such a trip and if the requirements relating to "extended duty" are not met. Under these circumstances, two opened packs of sea-store cigarettes may be taken ashore within

the customs territory of the United States by a crewmember at any one time for his / her own personal use without duty or internal revenue tax liability and without customs entry. The total quantity of such cigarettes brought ashore by any member under this exemption after any voyage beyond the territorial limits of the United States shall not exceed 15 packs. The CO is responsible for enforcement of these rules. In discharging that responsibility, the commander is free to impose additional or more restrictive regulations.

1810 GIFTS SENT FROM FOREIGN COUNTRIES

Any person in a foreign country is eligible for this exemption; however, the articles must be bona fide gifts. The total value of all exempt gift shipments received in one day by any donee may not exceed $50.00, or $100.00 for gifts from American Samoa, Guam, or the U.S. Virgin Islands. "Value" is the aggregate fair retail value in the country of shipment. Alcoholic beverages and tobacco products are not included in this exemption from duty, nor are perfumes containing alcohol if the shipment is valued at more than $5.00. Gifts may be sent in any manner other than on the person or in accompanied or unaccompanied baggage of the donor or donee. Detailed mailing procedures are in OPNAVINST 5112.6 and U.S. Navy Postal Instructions, chap. 7, sec. 4.

1811 PROHIBITED IMPORT ARTICLES

Certain merchandise is absolutely prohibited from entry into the United States. Prohibitions change frequently and SJA's should contact the nearest U.S. Consulate or Customs District Director for a current list. Typically, prohibited articles include lottery tickets, illegal drugs and paraphernalia, obscene material, printed matter advocating treason or insurrection against the United States, counterfeit currency and stamps, unlicensed weapons, and certain plants and plant products.

1812 RESTRICTED IMPORT ARTICLES

Certain merchandise, notably food products, may enter the United States only if it meets the requirements of U.S. laws and regulations. Many of these laws and regulations are administered by agencies other than the Customs Service, although the Customs Service conducts most border enforcement activities. As with prohibited articles, the list of restricted articles changes frequently, and guidance in specific cases should be sought from a U.S. Consulate, Customs District Director, or from the federal agency which administers the restriction. *See JAG Manual*, section 1113 for rules pertaining to importation of embargoed articles.

A. Pets. The importation of birds, cats, dogs, monkeys, and turtles is subject to the requirements of the U.S. Public Health Service, Center for Disease Control, Quarantine Division, Atlanta, GA 30333, and the Veterinary Service of the Animal and Plant Health Inspection Service, Department of Agriculture, Hyattsville, MD 20732. Pets taken out of the United States and returned are subject to the same requirements as those initially entering.

B. Knock-offs. The importation of merchandise of foreign manufacture is prohibited if it bears a mark or name that copies or simulates a trademark or trade name recorded with the Treasury Department. Persons arriving in the United States with a trademarked article are allowed an exemption, usually of one article of a type bearing a protected trademark, as long as the article is for personal use and is not for resale. This exemption would apply to an article bearing a counterfeit or confusingly similar trademark, as well as, an article bearing a genuine trademark. If sold within 1 year of importation, the exempted article or its value is subject to forfeiture. This exemption may be used only once each 30 days by the same person for the same type of merchandise. Greater quantities of trademarked goods may be imported with the written consent of the owner of the protected trademark or trade name. The consent does not apply to articles mailed to the United States nor to articles imported for resale. A copy of the list of protected items may be obtained from any U.S. Customs office.

C. Endangered species protection. The importation of these items (e.g., scrimshaw or ivory carvings) is prohibited, with certain exceptions. Importation typically requires Department of Commerce permit, certification, or registration. For further information, contact the U.S. Fish and Wildlife Service, P.O. Box 28006, Washington, D.C. 20005.

1813 IMPORTING PRIVATELY OWNED FIREARMS AND AMMUNITION

The Gun Control Act of 1968 controls the transportation, shipment, receipt, and importation of privately owned firearms and ammunition. The Director, Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury, is responsible for the administration and enforcement of the Act. The Customs Service enforces the import restrictions through clearance of imported firearms and ammunition. Generally, military members may import not more than three nonautomatic long guns (rifles or shotguns) and 1,000 rounds of ammunition without presentation of an approved firearm import permit to U.S. Customs. Surplus military firearms of any description are prohibited entry. Firearms and ammunition previously taken out of and returned to the United States by the same person may be released upon presentation to U.S. Customs of adequate proof of prior possession (i.e., bill of sale, household goods inventory showing serial numbers, or prior registration with

Customs on Form 4455 or Form 4457). Chapter 10 of DOD Regulation 5030.49R contains detailed instructions implementing the provisions of the Gun Control Act of 1968 and related laws and regulations as they apply to the importation of firearms and ammunition by DOD personnel. The chapter, however, does not apply to the control, registration, or shipment of war trophy firearms which is governed by OPNAVINST 3460.7 and MCO 5800.6.

1814 CURRENCY REPORTING REGULATIONS

The amount of money or monetary instruments which may be brought into or taken out of the United States is not limited. If, however, a person transports, attempts to transport, or causes to be transported more than $10,000.00 in monetary instruments on any occasion into or out of the United States, a report (Customs Form 4790) must be filed with U.S. Customs.

1815 FOREIGN CUSTOMS

A nation may tax persons and activities within its territory. For visiting forces, the host nation normally will waive a portion of this power. The applicable SOFA usually specifies what customs provisions will apply.

A. North Atlantic Treaty Organization (NATO) example. Under the NATO SOFA, for example, the "force" may import its equipment and reasonable quantities of provisions, supplies, and other goods for its exclusive use free of duty. Official documents under seal are not subject to customs inspections, and official vehicles are not subject to road use taxes. Petroleum, oils, and lubricants for use in official vehicles and equipment of the force may likewise be imported duty free. The visiting force may also operate exchanges and commissaries, fleet post offices, banking facilities, newspapers (such as Stars and Stripes), and morale, welfare, and recreation activities. SOFA's with many other countries (such as Japan, Korea, and the Philippines) have similar provisions. There are variations, however, and the applicable SOFA must be reviewed in each case.

B. Individual responsibility. In their individual capacities, members of the force and the civilian component and dependents are generally subject to the customs laws and regulations of the host nation. The NATO SOFA provides some special privileges, however, such as the ability to import private vehicles, household goods, and personal effects duty free, and to export them at the end of tour. Although there may be exceptions in some countries, such privileges usually do not extend to retired personnel and their dependents. Goods imported duty free may not be transferred by sale or gift to persons not authorized duty-free privileges, except as the host country may permit. In most countries, the unauthorized transfer of duty-free goods is a serious criminal offense.

APPENDIX A

SAMPLE SHIP / AIRCRAFT CUSTOMS INSPECTION PROCEDURES

1. Establish inspection team(s) of responsible, mature officers and petty officers designated in writing by the commanding officer (CO). Team members will be available to customs officials for discussion of inspection routine to be used prior to arrival at port of entry.

2. Conduct thorough inspections of all ship and aircraft spaces, cargo, personnel and lockers. Ensure that provision is made for precluding movement of contraband from space to space to avoid detection. This inspection is to take place between the time the unit departs its last foreign port and the arrival at the port of entry. Insofar as possible, the inspections will be carried out on an unannounced basis. The drug interdiction effort, although occurring in the final inspection en route to ***conus***, is envisioned as a continuing process lasting throughout the deployment.

3. In addition to the inspection in paragraph 2 above, the ship or aircraft commander will conduct at least one unannounced inspection of spaces randomly selected at the discretion of the CO.

4. All personnel aboard the ship or aircraft will prepare customs declaration forms. These forms will be checked against the crew list by a designated officer or chief petty officer (CPO) to ensure that all have submitted a declaration. The declarations will be delivered to customs personnel upon boarding unless pre-arrival delivery arrangements have been made. The items declared will be available for customs inspection upon demand. Declarations will be segregated into four categories as follows and will be under a cover letter.

a. Declarations from military personnel who have served on board the ship continuously since its last departure from the customs territory of the United States.

b. Declarations from embarked military personnel who, even though they were not serving on board the ship when it last departed the customs territory of the United States, have been outside the customs territory of the United States for 140 or more continuous days.

c. Declarations from military personnel who do not fall in either of the above two categories.

d. Declarations from civilians (less dependents whose military sponsor has prepared a family declaration).

5. The CO's of ships returning from outside the customs territory of the United States shall ensure that all mail, except letter mail, is dispatched in pouches or sacks labeled "Supposed Liable to Customs." Letter mail suspected of containing merchandise or contraband shall be enclosed in official envelopes and addressed to the Administrative Officer, U.S. Customs Mail Division at either 1675 7th Street, Oakland, CA 94615; 404 South Lander Street, Seattle, WA 98134; or 201 Varick Street, New York, NY 10014, as appropriate.

6. Commanding officers of ships or aircraft will prepare a written declaration certifying that they have completed the required inspection and that, to the best of their knowledge, the ship is free of drugs or other contraband. They will present this document to the boarding customs official.

7. Adequate working space will be made available for customs officials on board.

8. For those ships having the capability, customs declaration forms may be flown to the port of entry in advance of arrival for delivery to customs officials if prior arrangements have been made.

9. Ships or aircraft having classified equipment or cargo, which customs personnel wish to inspect, will provide an officer or petty officer to do the actual examination in the presence of a customs official.

10. There is no provision under U.S. law for the official collection of duties or taxes until the merchandise has been imported. Accordingly, military personnel will not assess or collect any taxes at any time, either in the United States or overseas. If duties are due, a U.S. Customs Officer will compute the amount of duty to be paid based on the customs declarations when they are received either on board by U.S. Customs Officials or at the appropriate U.S. Customs Office. This policy, however, shall not be construed to bar the development of procedures designed to calculate potential duties and to have personnel voluntarily set aside the amount of the potential duty.

11. In all instances where an individual is suspected of having committed a customs violation, he / she will be advised of his / her rights under the provisions of Article 31, UCMJ (or, in the case of a civilian, advised of his / her rights under the fifth amendment of the Constitution), and of his / her right to counsel before questioning.

12. The CO or aircraft commander should take every opportunity to explain the inspection procedures and the necessity for their thorough and conscientious accomplishment. It should be explained that the self-inspection procedure results in less inconvenience to the crew and in faster debarkation upon arrival at the port where dependents are waiting.

APPENDIX B

UNITED STATES CUSTOMS CERTIFICATE

(USS _____)

(USN FLIGHT # _____)

PORT OF ENTRY _____

This is to certify that I, _____, Commanding Officer / Aircraft Commander, (USS _____), (USN FLIGHT # _____), have caused to be conducted a complete and through inspection of this ship / aircraft and all personnel on board and that, to the best of my knowledge and belief, the same are free of any drugs or other contraband.

Date: _____

(Signature)
Commanding Officer / Aircraft Commander

****

UNITED STATES CUSTOMS DECLARATION

(USS _____)

PORT OF ENTRY _____

Attached hereto are DD Forms 1854, Accompanied Baggage Declaration, prepared by all personnel on board this ship, listing all articles acquired by them overseas, which lists are correct to the best of my knowledge and belief.

Date: _____ _____

(Signature)
(Grade)

CHAPTER NINETEEN

IMMIGRATION AND NATURALIZATION

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CHAPTER NINETEEN

IMMIGRATION AND NATURALIZATION

1901 REFERENCES

A. Immigration and Nationality Act, 8 U.S.C. §§ 1101-1525

B. Immigration and Naturalization Service (INS), 8 U.S.C. §§ 1551-1557

C. 8 C.F.R. Chapter 1 (INS regulations)

D. 22 C.F.R. Parts 41, 42 (State Department visa regulations)

E. DOJ "Guide to Immigration Benefits," Pub. L. No. M-210 (Rev. 1982)

F. JAGMAN, § 1008

1902 INTRODUCTION

This chapter provides an overview of the issues the SJA may encounter in the ever changing field of immigration and naturalization law. Comprehensive treatment of this broad subject is beyond the scope of this Deskbook. For detailed information and advice, contact the nearest Immigration and Naturalization Office stateside; the nearest U.S. Consulate overseas; or Headquarters Marine Corps (HQMC) (JAL), PERS-071, or Office of the Judge Advocate General (OJAG), Code 13.

1903 CITIZENSHIP BY BIRTH

A. Domestic births. The general rule is that everyone born in the U.S. is a United States citizen. The fourteenth Amendment; 8 U.S.C. § 1401(a). An alien who has been a permanent resident for five years is eligible for naturalization if otherwise qualified. 8 U.S.C. § 1427(a).

B. Births abroad. Persons born abroad to parents (both of whom are U.S. citizens) are U.S. citizens so long as one of the parents resided in the United States anytime prior to the child's birth. 8 U.S.C. § 1401(c). Persons born abroad (on or after December 24, 1952) to one citizen and one alien parent are U.S. citizens if the

citizen parent has been physically present in the United States for a total of five years, at least two of which were after age 14. 8 U.S.C. § 1401(g)). The parent's service in the armed forces overseas or time spent overseas as a dependent of a servicemember counts toward this "physical presence" requirement. Children born out of wedlock to a citizen mother are granted citizenship if the mother, at any time before the child's birth, lived in the United States for a continuous 1-year period. 8 U.S.C. § 1409(c). Children born out of wedlock to a citizen father are granted citizenship as of birth if the blood relationship is established by clear and convincing evidence; the father states in writing that he will provide financial support until the child is 18; and, before the child reaches 18, the child is legitimated or paternity is formally acknowledged or judicially established. 8 U.S.C. § 1409(a).

C. Births aboard vessels and aircraft. A person born on a foreign vessel in U.S. territorial waters or in a port of the United States acquires U.S. citizenship at birth. Birth of a child to alien parents onboard a U.S. vessel or aircraft outside of our territorial waters does not confer U.S. citizenship.

D. Dependents born overseas. Members should establish the U.S. citizenship of their children born overseas as soon as possible. A certificate of birth issued by a military hospital is not proof of U.S. citizenship. The document that is proof is Form FS-240, "Report of Birth Abroad of a Citizen of the United States of America." This form is prepared by the member, accepted and sworn to at your personnel or other appropriate office and sent for approval to the U.S. Embassy or consulate. A consular officer examines the information on the form and accompanying documents to determine if the child acquired U.S. citizenship at birth.

1. An approved Form FS-240 is recognized by U.S. law as primary evidence of U.S. citizenship and can be used to obtain a passport, to enter school, and for most other purposes where a birth certificate is needed. A permanent record of the child's approved Form FS-240 will be placed in the Department of State's Office of Passport Services in Washington, D.C.

2. To register the overseas birth of a U.S. citizen child, the member will need to bring the following to the personnel or other designated office:

a. The child's local birth certificate (from the military hospital or from local authorities);

b. primary evidence of the U.S. parent's citizenship (a valid U.S. passport, naturalization certificate, or certified copy of a U.S. birth certificate) (Note: If both parents are U.S. citizens, you must submit proof of citizenship for both parents);

c. a certified copy of the marriage certificate; and

d. certified copies of divorce decrees or death certificates from any earlier marriages.

3. Members' children need a U.S. passport to live overseas. Moreover, the child cannot enter the United States without a passport. To save time, the member should apply for the child's passport when the birth is reported by including:

a. A completed passport application (Form DSP-11);

b. two passport photos of the child; and

c. the fee (if other dependents are on the member's travel orders, the new child's passport will be a no-fee passport, and instead of the fee, include a completed Form DD-1056, "Authorization to Apply for a 'No-fee' Passport and / or Request for Visa)".

1904 ACQUIRING CITIZENSHIP

The Department of the Navy has no authority to grant alien members either citizenship or lawful permanent resident status. An alien who has served in the U.S. armed forces does not automatically become a citizen. For those who have not served during the designated wartime periods, discussed below, applying for U.S. citizenship is normally a two-step process: acquiring lawful permanent resident status and naturalization.

1905 ACQUIRING LAWFUL PERMANENT RESIDENT (LPR) STATUS

A. Acquiring a green card. Lawful permanent residence (LPR), commonly known as "Green Card" status, is acquired in two ways. The first method is the obtainment of an immigrant visa overseas. The second method is referred to as "Adjustment of Status" which takes place in the United States. Both methods result in the issuance of an alien registration receipt card, I-551, but there are substantial differences both legally and procedurally in the two processes. The key point to the practitioner, however, is that the status acquired under both of these methods is precisely the same for all future benefits including the acquisition of citizenship. Immigrant visas are formal documents issued by the State Department to aliens overseas to proceed to the United States as immigrants. "Adjustment of Status" is a somewhat more informal method whereby the INS grants lawful permanent residence status to aliens who are already in the United States.

1. Obtaining an immigrant visa. Immigrant visas are issued by the State Department officers overseas. These visas are issued by consular officers at Consulates-General or Consulated located in major cities abroad. Sometimes the Consulate-General is located at the American Embassy. At some of the larger Consulates-General, the State Department officers are assisted by INS representatives; however, the issuance of all immigrant visas and nonimmigrant visas is solely the function of the Department of State. The issuance of a visa does not necessarily guarantee entry into the United States; however, it does permit travel to the United States' entry points. At the point of entry, the determination whether to admit or exclude the alien is made by immigration officers. Aliens who are U.S. servicemembers do not need visas to enter the United States. They are admissible upon the display of military identification, and orders if required. Note also that this section addresses the limited privilege and duration, and are customarily issued to tourist, students, temporary workers, and other persons traveling to the United States for a limited purpose and duration. A hybrid nonimmigrant visa, the "K" fiance visa, is the one example of a nonimmigrant visa issued to persons who are traveling to the United States to reside permanently. This procedure is addressed in subparagraph C below.

2. The spouse, child under age 21, or parent of an adult U.S. citizen is immediately eligible for an immigrant visa and LPR status. Visas for other immigrants are subject to quota limitations and are distributed in categories known as preferences. For some countries, the waiting list for a quota may be extremely long.

B. Adjustment of status. If an alien in the United States becomes eligible for permanent residency (for example, by marriage to a U.S. citizen), he / she may be eligible to adjust his / her status from nonimmigrant to immigrant. This adjustment of status is available to aliens who ***entered*** the United States lawfully, notwithstanding their status at the time of adjustment. For example, if an alien entered with a student nonimmigrant visa which has since expired, the alien would still be eligible to adjust status notwithstanding the fact that his / her period of admission had expired, or he / she has violated his / her nonimmigrant status by failing to attend school, or even graduating. On the other hand, if the alien who marries a citizen initially entered the country illegally (e.g., by sneaking across the border), that person is statutorily ineligible for adjustment of status. 8 U.S.C. § 1255. The burden of proof as to the alien's initial lawful entry is upon the alien. While the INS will perform some limited search of its records to assist the alien in establishing that the alien entered legally initially, nonetheless, the presumption is that the alien entered illegally unless the alien can prove otherwise. This is important because adjustment of status in the United States is less expensive than the alternative of traveling back to the alien's country of origin to obtain an immigrant visa. Previously, the INS permitted perspective immediate relative immigrants to travel to either Canada or Mexico to obtain immigrant visas there and reenter the United

States. This privilege, however, is no longer extended. While these procedures appear to be arbitrary and onerous, they were motivated by Congress' intent to preclude aliens from avoiding the immigrant visa process by simply sneaking into the United States and getting married to defeat deportation.

1. To make an adjustment of status, the alien files a petition (Form I-130) and adjustment application (Form I-485) at the INS district office with jurisdiction over the alien's U.S. residence. Among other details, the application provides information on past residences, associations, political beliefs, and grounds for excludability. The FBI conducts a background check which typically takes 60 days, followed by an interview at the INS office, at which time permanent residence status is granted or denied.

2. The alien must apply for permission to travel abroad while the application is pending; failure to do so may result in exclusion from the United States upon attempted return. The normal prohibition on "adjustment," if the alien illegally accepted employment in the United States, does not apply to spouses of citizens or certain preference category applicants.

C. Alien residing overseas. Special "nonimmigrant" visa procedures exist for aliens seeking to travel to the United States to marry a citizen. 8 U.S.C. §§ 1101(a)(15)(K), 1184(d); 8 C.F.R. § 214.2(k). The citizen to be married files a petition (Form I-129F) for the visa at the INS district office for the U.S. residence. The petition must show that the parties had met in person within 2 years of filing the petition and that they have the intent and legal capacity to marry within 90 days. Once approved, the petition is sent to the consulate for the area where the alien lives. There, the matter is handled in substantially the same manner as an application for an immigrant visa. Upon approval, a K-1 visa is issued for the intended alien spouse. Separate K-2 visas must be obtained for each of the alien's children who will go to the United States. The visa is valid for four months after issuance. The marriage must occur within 90 days of the alien's admission to the United States. After the marriage, the alien applies for an adjustment of status. The processing time is about the same as for an immigrant visa; however, if the citizen and alien both reside in a foreign country, the immigrant visa is usually faster.

1906 NATURALIZATION

Naturalization can only occur upon the candidate appearing before a proper INS official and filing a preliminary application while in the United States; naturalization cannot be accomplished without actually traveling to the United States even if residency requirements are waivable.

A. General requirements for adults. After acquiring LPR status, an applicant must reside in the United States continuously for five years before filing a petition for naturalization. The applicant must have been physically present in the United States for at least one-half the residence period and residency for the last three months must be in either the state where the petition is to be filed or in the same INS district. Continuous "residence" from the date of filing same until receipt of citizenship is required; although the applicant may make short visits outside the United States, long or repeated absences may cancel previous periods of residency. The applicant must demonstrate the ability to read, write, and speak ordinary English and an understanding of the history and fundamentals of American government. Good moral character and good "citizenship" are also requirements. For military spouses, the residence and presence tests can be waived if the alien intends to reside overseas with the citizen spouse at the latter's duty station or the citizen spouse dies during a period of honorable active duty service and the parties were then living together in marriage.

B. Children. Children can be derivatively naturalized with parent(s) if the children are: lawfully admitted and present in the United States at the time of naturalization; unmarried and under the age of 18 when naturalized; and both parents are naturalized or the parent with custody is naturalized. 8 U.S.C. § 1432. Children can be naturalized upon petition of a citizen parent if under the age of 18; present in the United States when naturalized; and residing in the United States with the citizen parent or overseas with the adoptive citizen parent who is employed by the United States 8 U.S.C. § 1433.

C. Administrative conferral of citizenship on adopted children. Under 8 U.S.C. § 1452(c), a child born outside the United States and adopted by a U.S. citizen (by birth or by naturalization) before the child's 16th birthday may receive a certificate of citizenship. The citizen parent must apply for the certificate before the child reaches 18, and the child must be residing in the United States in the custody of the adoptive parent pursuant to a lawful admission for permanent residence.

D. Peacetime military service. Once the member is an LPR and has served honorably for three continuous years, special exemptions apply. The member may apply immediately for naturalization; the petition does not have to be filed in the place of residence. To qualify for these exemptions, the member must file the petition for naturalization while on active duty or within six months after discharge. *See* MILPERSMAN 6210180 and MCO 5802.2A for more information on naturalization of service personnel.

E. Wartime service. Aliens who served honorably in WWI, WWII, the Korean War, Vietnam War, Grenada, Panama, and the Gulf War can be naturalized *if* they were in the United States at the time of enlistment or induction. Under 8 U.S.C. § 1440, any alien with honorable active service during any part of the above

wartime periods has the opportunity to become a citizen. LPR status is ***not*** required if the member was inducted, enlisted, or reenlisted at any time in the United States, the Panama Canal Zone, or American Samoa. Similarly, residency in the United States or in a particular jurisdiction is ***not*** required. The member may file a petition for naturalization with INS.

F. Spouses of U.S. citizens. The spouse of a U.S. citizen is eligible for immediate LPR status and is then eligible for naturalization after three years of marriage. The spouse must have been physically present in the United States for 1 1/2 years during this period, residing at least three months within the state where the petition is to be filed or in the INS district, and be of good moral character.

G. LPR spouses of military personnel ordered overseas. The law permits naturalization, without regard to length of residence, of an LPR who is about to accompany a U.S. citizen spouse overseas pursuant to official orders. *See* MILPERSMAN 6210200 and Chapter 3 of NMPCINST 4650.2, Subj: ISSUANCE OF THE NAVY PASSENGER TRANSPORTATION MANUAL (PTM) or MCO 5802.2A.

1907 PROCEDURE FOR IMMIGRANT VISA FOR SPOUSE UPON OVERSEAS MARRIAGE

Marriage overseas is governed by service regulations. Any member planning to marry a foreign national must submit an application for permission to marry to the area commander or designated representative. *See* MILPERSMAN 6210160; BUPERSINST 1752.1, Subj: MARRIAGE IN OVERSEA COMMANDS; MCO 1752.1C. Intended spouses receive medical screening and background investigations to ensure eligibility for immigrant visas. Visas may be denied for such reasons as drug trafficking, criminal convictions, contagious diseases, and prostitution. After obtaining command approval and getting married, the member may petition for an immigrant visa for the spouse at the U.S. Consulate in the country where the spouse resides. Petitions cannot be filed in the United States.

A. A valid marriage. The marriage must be valid under the law of the jurisdiction where it was performed. The parties must have had legal capacity to marry and not be disqualified by reason of age, blood relationship, invalid prior divorce, or other legal impediment. For immigration purposes, proxy marriages are not valid unless consummated. 8 U.S.C. § 1101(a)(35). "Sham marriages," entered into to confer an immigration benefit, will not be recognized for immigration purposes. A marriage will presumed to be a sham marriage if entered into within two years of immigration and dissolved within two years of arrival or the immigrating spouse refuses to fulfill the marital agreement. 8 U.S.C. § 1251(c). The parties must still be married when the immigration benefit is conferred. The

separation of the parties may be some evidence of a sham marriage, but it will not automatically negate the validity of the marriage.

B. Filing. The citizen member files a petition (Form I-130) to establish immediate-relative qualification. The citizen is the "petitioner"; the alien spouse is the "beneficiary." The member files at the INS district office for location of petitioner's residence (or consulate, if petitioner resides overseas). The petition must be accompanied by proof of the member's citizenship, birth certificate (or authorized substitutes under 8 C.F.R. § 204.2(a)), the marriage certificate, all prior divorce decrees and spousal death certificates, and the filing fee. After the INS investigates, the petition is approved or denied. If denied, the member can appeal to the Board of Immigration Appeals within 15 days of the mailing of the notification of denial. If approved, the petition is forwarded to the appropriate consulate for State Department action on the application for an immigrant visa. The member receives a Form I-191 (Notice of Approval of Immediate Relative Petition).

C. Visa processing. The U.S. Consulate serving the area where the beneficiary resides sends an immigrant visa application packet to the beneficiary. 22 C.F.R. Part 42. The beneficiary prepares a "biographic data sheet" (Form 179) and gathers necessary documentation including a passport, birth certificate, police certificates, court records, military records, evidence of support or employment in the United States, marriage certificate, etc. When the beneficiary advises that all the documents are gathered, the consulate schedules an interview with the alien. The interview will likely be brief and address only the marital relationship and major grounds for exclusion. The visa is then issued or denied. If issued, the visa is valid for only four months, renewable only upon a showing that it was not used for reasons beyond the beneficiary's control. 8 U.S.C. § 1201(c). The processing time may range from a few weeks to several months. The visa fee must be paid, together with the cost of the physical exam. A separate petition (Form I-130) and visa application (Form 230) must be processed for each child.

1. If the member is a U.S. citizen, the spouse's visa can be issued without regard to quota limitations. If the member is an LPR, a visa may be issued to the spouse upon receiving a numerical quota. Depending on the country of origin, waiting periods for a quota can be lengthy. By applying for "humanitarian parole" status, a member's spouse and children may be able to join the member in the United States while waiting for a quota. Applications for humanitarian parole should be forwarded to INS via OJAG.

2. If the member is a nonresident alien (no LPR status), the spouse and children may be allowed to enter the United States on a 6-month B-2 visa. Before the B-2 visa expires, the member should apply to INS to change the spouse's or child's status to "indefinite voluntary departure" until the end of the member's

service commitment. Although permission to work is not guaranteed, an alien spouse with indefinite voluntary departure status may also request a work permit from INS.

D. Permanent resident status. When the visa petition is approved, or parole granted, the alien spouse may travel to the United States. While in a parole status, family members should not depart the United States without first obtaining a right of reentry from INS. Formerly, all alien spouses received full permanent resident alien status upon arrival. This rule now applies only if the parties were married for 24 months or longer before the alien enters the United States. If the marriage is less than 24-months-old at the time of entry, the alien now receives permanent resident status on a conditional basis.

E. Removal of conditional status. Under 8 U.S.C. § 1186a, the conditional status is removed on a showing that the valid marriage is still intact. Unless the citizen spouse has died, both parties must file the petition for removal of the conditional status. The petition must be filed within the 90 days preceding the second anniversary of the alien's receiving conditional permanent residence status. Failure to file within the window results in termination of resident status unless good cause can otherwise be shown. The contents of petition, specified in 8 U.S.C. § 1186a(d), are designed to satisfy INS that the marriage is not a sham. The truth of the matters stated in the petition are evaluated in an interview with the parties conducted by an INS agent within 90 days of the filing of the petition (can be waived by the INS in "appropriate cases"). If INS determines that the marriage is valid, the conditional status is removed and the alien becomes a permanent resident alien. The time spent in the conditional status counts for purposes of qualifying residence for naturalization. Removal of conditional status may be affected by filing of a Form I-751.

1908 EXCLUSION OF ALIENS

Under 8 U.S.C. § 1182(a), aliens can be excluded on a variety of grounds. Grounds for exclusion include mental defects, disabilities affecting the alien's ability to earn a living, conviction of crimes involving moral turpitude, immoral sexual conduct, and drug offenses. Exclusion can result in visa denial or in denial of admission even if a visa has been issued. 8 C.F.R. Parts 235, 236. Many grounds afford a hearing and appeal to the Board of Immigration Appeals.

1909 STATUS OF IMMIGRANTS IN THE UNITED STATES

Once entered, an immigrant is a "person" within the meaning of the Constitution. Consequently, immigrants are subject to taxation and military induction to the same extent as citizens.

A. Travel. Immigrants must report changes in address within 10 days and are subject to deportation under 8 U.S.C. § 1251 for crimes and other misdeeds. Immigrant travel abroad is subject to the requirements of 8 C.F.R. Part 211 unless the immigrant has LPR status or is a U.S. servicemember. Each entry is an "admission to the U.S." The alien must travel on a valid passport and may present an alien registration card in lieu of an immigrant visa. The absence must be temporary (i.e., one year or less), without relinquishment of U.S. "residence." If the absence will exceed one year, the alien must apply for a nonrenewable, 2-year reentry permit before departure from the United States. 8 C.F.R. Part 223. An alien registration card, however, is sufficient for re-entry documentation after an extended absence abroad for a spouse or child of a civilian U.S. employee or servicemember provided that alien resided with the employee or member abroad with whom they will be reunited within four months of the employee's or servicemember's return. 8 C.F.R. § 211.1(b).

B. Dual nationality. Upon naturalization, the new U.S. citizen takes an oath "to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which the petitioner was before a subject of citizen . . ." 8 U.S.C. § 1448. Further, the naturalized citizen loses U.S. citizenship by obtaining naturalization after age 18 in a foreign state. 8 U.S.C. § 1481.

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PART IV - INSTALLATION LAW

CHAPTER TWENTY

PHYSICAL SECURITY

2001 THE COMMANDER'S AUTHORITY

The military commander of a shore installation has broad power to establish the necessary regulations for the protection and security of places and property within the command. This authority has been implemented in the Navy by SECNAVINST 5511.36, Subj: AUTHORITY OF MILITARY COMMANDERS UNDER THE INTERNAL SECURITY ACT OF 1950 TO ISSUE SECURITY ORDERS & REGULATIONS FOR THE PROTECTION OR SECURITY OF PROPERTY / PLACES UNDER THEIR CMD. In addition to the inherent power of a commanding officer (CO), this authority is premised on two statutes.

A. Power to regulate. The Internal Security Act of 1950, 50 U.S.C. § 797, provides that violation of any regulation issued by a military commander for the protection or security of property and places, subject to military jurisdiction, shall be a criminal violation subject to up to one year in jail and a $5,000.00 fine.

B. Trespass. The second statute, enforced primarily against people who are not subject to the UCMJ, is 18 U.S.C. § 1382, which provides:

> Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation; or
>
> Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof --
>
> Shall be fined not more than $500 or imprisoned not more than six months, or both.

2002 JURISDICTION AND LAW ENFORCEMENT

Installation commanders discharge their responsibility for maintaining law and order in part through security personnel at their installations. The authority of security is derived from their status as federal employees and from the authority of the CO. The type of legislative jurisdiction on an installation does not affect the authority of security personnel to enforce the laws on the base. As security personnel travel between areas of different types of federal jurisdiction on the base, their authority to maintain law and order, by detaining suspects to hand over to appropriate state or federal authorities, does not change. Modification of the federal legislative jurisdiction at a base will not increase or decrease the authority of security personnel to enforce laws on the base. Where appropriate, training of base security personnel should address this matter. *See* Chapter 2, *Navy Law Enforcement Manual* (OPNAVINST 5580.1) for a discussion of federal jurisdiction and law enforcement authority. The Federal Government holds land under varying degrees of jurisdiction. These fall into four categories:

A. Exclusive legislative jurisdiction. The Federal Government has exclusive legislative jurisdiction when a state grants to the Federal Government all of its authority to enact and enforce general laws and regulations with the sole reservation by the state of the power to serve civil and criminal process for activities occurring off the base. To provide a comprehensive system of criminal laws for ceded areas under legislative jurisdiction, Congress enacted the Assimilative Crimes Act, 18 U.S.C. § 13, that adopts state criminal laws as federal law. Thus, conduct amounting to violations of state criminal law in areas under exclusive legislative jurisdiction can be prosecuted in the federal court system. State and local police have no authority to enter and make arrests or conduct investigations for crimes committed in such areas unless so requested by an appropriate authority to do so. *See* Appendix XVI of OPNAVINST 5530.14, Subj: DEPARTMENT OF THE NAVY PHYSICAL SECURITY AND LOSS PREVENTION entitled: *Assistance of State Law Enforcement Officers Aboard Exclusive Federal Jurisdiction Military Enclaves.*

B. Concurrent legislative jurisdiction. State and federal laws are applicable in a concurrent legislative jurisdiction area. Either federal or state authorities, or both, have the authority to prosecute crimes committed in this area. The Assimilative Crimes Act, by its terms, applies to areas under concurrent legislative jurisdiction.

C. Partial legislative jurisdiction. This jurisdictional status occurs where the state grants to the Federal Government the authority to exercise certain powers within an area but reserves for exercise only by itself, or by itself as well as the Federal Government, other powers constituting more than merely the right to serve civil and criminal process. As to those state powers granted by the state to the Federal Government without reservation, administration of the federal area is the

same as if it were under exclusive federal jurisdiction. As to powers reserved by the state for exercise only by itself, administration of the area is the same as though the United States had no jurisdiction. The right most commonly reserved by a state is the right to tax.

D. Proprietary interest only. The Federal Government has no legislative jurisdiction over lands held by a proprietary interest only, but has the same rights in such lands as does any other landowner. The United States only occupies the property. In these areas, state authorities must be called upon to prosecute most crimes.

E. Legal effect. Regardless of the legislative jurisdictional status of the property concerned, the United States may exercise in all places the authority essential to the performance of its constitutional functions without interference from any source. Normally, states may not exercise authority that would interfere with or restrict the United States in the use of its property or obstruct the exercise of any of the powers the states relinquished to the United States under the Constitution. However, in some areas—such as environmental legislation—Congress has waived sovereign immunity, granting states authority to restrict federal activity. While the type of federal jurisdiction over the area of an offense can be an important issue when civilian authorities prosecute crimes committed on base, it does not affect the authority of base security personnel to enforce the laws and maintain order on a base. The SJA can get information on the type of federal jurisdiction on their base from the regional office of the Naval Facilities Engineering Command.

2003 ACCESS TO INSTALLATIONS

Admission to a military installation is contingent on the commander's approval. Article 0810, *U.S. Navy Regulations, 1990*. The commander has inherent authority to ensure the installation is maintained in a state of military readiness. That authority includes the power to exclude civilians from a military installation.

2004 ENTRY FOR AN UNLAWFUL PURPOSE

The first part of 18 U.S.C. § 1382 establishes criminal penalties for entry upon a military installation for a purpose prohibited by law.

A. Mere trespass. Violation of a base regulation prohibiting entry without permission of the CO is an entry for a purpose prohibited by law. The "purpose" can consist of unauthorized entry itself (i.e., the government need not prove that the trespasser committed a crime other than the entry itself). The persons must have actual notice that entry upon a military reservation is prohibited if unlawful entry

is the sole basis of the government prosecution. Notice can be established by a fence around the perimeter of an installation with signs posted at appropriate intervals.

B. Entry to violate the law. Entry upon a military reservation for the purpose of damaging government property violates 18 U.S.C. § 1382. Specific intent to damage government property probably need not be shown. The primary statute making damage of government property a criminal offense is 18 U.S.C. § 1361, which provides for felony penalties if the value of the property damaged exceeds $100.00. Other pertinent criminal statutes include 18 U.S.C. § 2071 (removal, mutilation, or destruction of government records and documents) and 18 U.S.C. § 2153(a) (attempting to destroy war material, war premises, or war utilities).

2005 REENTRY AFTER A BAR ORDER

The second part of section 1382 establishes criminal penalties for reentry onto a military reservation after being ordered not to reenter. An installation commander normally issues a "bar letter" to accomplish this purpose (i.e., a letter informing a person not to reenter a particular military reservation).

A. Who must issue the bar letter. The installation commander must authorize the bar letter. The bar letter (AKA "persona non grata" (PNG) letter) must be signed by the installation CO, acting CO, or a person authorized to sign by direction of the CO. Appendix A, following this chapter, contains a sample civilian bar letter. Appendix B provides a sample letter to bar former military members discharged by reason of misconduct.

B. Delivery and knowledge. The person barred from reentering onto a military installation must receive notice of this fact. The best means of delivering a bar letter is to personally hand it to the recipient, with a record made of the date of delivery and the person making the delivery. Delivery can also be shown by registered mail with return receipt. The addressee of the bar letter must personally sign for the bar letter. If personal delivery is attempted and refused, the order should be read to the person—with a notation to that effect made on the letter.

C. Due process

1. Reasonableness of bar order. A commander's decision to exclude civilians must not be unreasonable, arbitrary, or capricious. A person cannot be excluded solely by reason of his / her race or religion.

2. Notice and hearing requirements. Generally, a CO need not give prior notice nor grant a hearing before excluding a civilian from an installation. Denial of notice and a hearing has been upheld even when the bar effectively nullifies

the recipient's privileges to use exchange, commissary, and recreational facilities. Different standards of due process may apply if a person is excluded from the base for exercise of first amendment or other constitutional rights. Although the law is unsettled in this area, notice and a hearing would be the safest way to proceed if the sole basis for exclusion was exercise of constitutional rights. *See* sample notice and hearing documents (Appendices C, D, E, and F) at the end of this chapter. First amendment freedoms are discussed in more detail later in this part of the Deskbook.

D. Access to medical facilities. If the recipient of the bar letter is entitled to military health care, the bar letter should be crafted to accomplish the commander's goal of protecting the installation without infringing on this important individual privilege. The limited bar can permit the recipient to enter the installation only when driving to and from the medical facilities by the most direct route. If that is inappropriate, the order can establish advance scheduling and escort requirements. A dependent should be denied access to medical facilities when barred from an installation ***only*** if specific ***vital*** interests in command security, safety, or good order will be risked in providing access to the medical facilities. Limited bar orders may also be appropriate in other circumstances involving dependents, members of Reserve units, or Civil Service employees.

E. Enforcement during an open house. Installations periodically hold an "open house" during which members of the public are invited to visit the installation. A person may not claim immunity from prohibition on entry merely because the military has temporarily opened a military facility to the public.

F. Contents of bar order. Detailed recommendations on the content of a bar letter are contained in Comment, *Unlawful Entry and Re-Entry Into Military Reservations in Violation of 18 U.S.C. § 1382*, 53 Mil. L. Rev. 137 (1971).

2006 LAW ENFORCEMENT AND SECURITY PERSONNEL

A. The use of force. If security responsibilities cannot be discharged without using force, personnel shall use the minimum amount of force necessary to discharge their assigned responsibilities. Base police need not be "deputized" as state officers. Base police may apprehend civilian offenders or fugitives on base and deliver them to civil authorities under Article 0809, *U.S. Navy Regulations, 1990*. Appointment as state officers would ***not*** give civilian base police any special arrest and delivery authority; rather, it would only create procedural complications in the apprehension and delivery of military members.

B. Deadly force. Deadly force is that force which a person uses with the purpose of causing or which he knows, or should know, would create a substantial risk of causing death or serious bodily harm. Rules regarding the use of force,

including deadly force, are contained in SECNAVINST 5500.29, Subj: USE OF FORCE BY PERSONNEL ENGAGED IN LAW ENFORCEMENT AND SECURITY DUTIES and OPNAVINST 5580.1, Subj: *NAVY LAW ENFORCEMENT MANUAL.* These instructions should be consulted before giving any advice concerning the use of force. Generally, deadly force is justified only under conditions of extreme necessity as a last resort—when all lesser means have failed or cannot reasonably be employed—and only under one or more of the following circumstances:

1. Self-defense;

2. to protect property involving national security;

3. to protect property not involving national security, but inherently dangerous to others; and / or

4. to prevent serious offenses against persons.

C. Gate inspections

1. Scope. An inspection upon entry or exit from a military installation is expressly permitted under Mil.R.Evid. 313. Civilians as well as servicemembers can be subject to these inspections. Examination of pedestrians as well as vehicles is permissible under the rule. The examination can be thorough—including inspecting luggage, briefcases, and wallets. Pat-down examinations of the person have also been held to be acceptable. The scope and frequency of the gate inspections should be linked to specific command concerns.

2. Refusal to permit inspection. Individuals refusing to permit an examination of their person, vehicle, or possessions upon entry to the installation should not be inspected over their objection, but should be denied entry. Such refusal to permit an inspection is a basis to bar a civilian from the installation pursuant to 18 U.S.C. § 1382. Inspecting vehicles and pedestrians ***leaving*** the installation can be legally conducted despite objection.

3. Authority. Though not clearly specified by Mil.R.Evid. 313(b), OPNAVINST 5530.15, Subj: PHYSICAL SECURITY, para. 12 and OPNAVINST 5530.14B, section 0509(f), establishes the installation commander as the person who should prescribe the procedures for entry and exit inspections. The installation commander should sign the inspection procedure personally, particularly to avoid problems concerning illegal searches and seizures.

4. Inspector discretion. A valid gate inspection procedure in the United States requires that the personnel conducting the inspection have no discretion in most aspects of implementing the inspection. The order authorizing the

inspection should specify the time the inspection will be conducted, the method of randomly selecting the vehicles to be stopped (e.g., every tenth car), the location of the inspection, and the procedures to be followed if something is discovered. The scope of the inspection should be specified in as much detail as possible. Because of the compelling interests overseas, personnel conducting gate searches overseas are allowed "considerable discretion" under Mil.R.Evid. 314(c) in determining whom to question or search.

D. Sobriety checkpoints. The fourth amendment does not forbid the brief stop and detention of all motorists passing through a highway roadblock set up to detect drunk driving. Neither probable cause nor reasonable suspicion are required; the stop is constitutionally reasonable. SJA's should assist base law enforcement personnel in developing standard operating procedures (SOP's) to address the practical issues: how long should the checkpoint last; what procedures will be followed; who will authorize; what notice will be given to the public; what procedures will be followed when a driver is found to be impaired; etc.

E. Aircraft hijacking

1. FAA responsibility. Under 49 U.S.C. § 1357(e), the Federal Aviation Administration (FAA) has exclusive responsibility for directing U.S. law enforcement activity affecting the safety of persons aboard aircraft which are "in-flight" and involved in an air hijacking. The statute is implemented in the Navy by OPNAVINST 3750.6, Subj: NAVAL AVIATION SAFETY PROGRAM. For purposes of this instruction, an aircraft is considered to be "in-flight" from the moment all external doors are closed following embarkation until the moment any such door is opened for disembarkation. The FAA's exclusive law enforcement responsibility for in-flight aircraft extends to military aircraft and military contract aircraft—on or off military installations—worldwide.

2. CO responsibility. A CO has the inherent authority and responsibility to DOD property and functions (e.g., combat air operations). Articles 0802 and 0826, *U.S. Navy Regulations (1990)*. The FAA's responsibility for U.S. law enforcement does not limit the CO's authority and responsibility to protect DOD property and functions. Action taken by DOD personnel in furtherance of a CO's authority and responsibility to protect DOD property and functions, even if such action incidentally involves quasi-law enforcement activity, takes precedence over law enforcement activity and is not subject to the direction of the FAA.

F. Marine Corps Security Force (MCSF). The MCSF provides physical security for those portions of naval activities or vessels to which they are assigned and operates under the direct operational control of the activity or ship to which assigned. A detailed list of appropriate and inappropriate duties for MCSF personnel

is contained in SECNAVINST 5530.4, Subj: NAVAL SECURITY FORCES ASHORE AND AFLOAT.

G. Nuclear weapons accidents and incidents. There are several types of nuclear incidents that may require a response from a command—such as an aircraft accident involving nuclear weapons or a terrorist incident involving an improvised nuclear device. An appropriate response to these incidents requires advance planning. General guidance is contained in OPNAVINST 3440.15, Subj: MINIMUM CRITERIA AND STANDARDS FOR NAVY AND MARINE CORPS NUCLEAR WEAPONS ACCIDENT AND INCIDENT RESPONSE.

-- Release of information concerning nuclear weapons. Members of the naval service shall not reveal, purport to reveal, or cause to be revealed any information, rumor, or speculation with respect to the presence or absence of nuclear weapons or components on board any ship, station, or aircraft—either on their own initiative or in response, directly or indirectly, to any inquiry. OPNAVINST 5721.1, Subj: RELEASE OF INFORMATION ON NUCLEAR WEAPONS AND ON NUCLEAR CAPABILITIES OF U.S. FORCES.

2007 BOMB THREAT PROCEDURES

A. Bomb threats. The authority to search persons or property after receipt of a bomb or unconventional threat is contained in Mil.R.Evid. 314(i), which provides that "[i]n emergency circumstances to save life or for a related purpose, a search may be conducted of persons or property in a good faith effort to render immediate medical aid, to obtain information that will assist in the rendering of such aid, or to prevent immediate or ongoing personal injury." Probable cause is not required.

1. No prior approval. A search for a bomb ***under this rule*** does not require prior CO approval, even though the search may be of an area in which a person has a reasonable expectation of privacy.

2. Investigation after the bomb search. If a search conducted to resolve the bomb threat reveals evidence of a crime, police may remain for a reasonable time to investigate. Entry after a reasonable time has elapsed must be made pursuant to a proper search authorization if the area is one where a person has a reasonable expectation of privacy.

B. Telephonic threat. In the case of a telephone threat, alert another person without warning the caller. Be sure to keep the caller on the line as long as possible in order to complete the Telephonic Threat Complaint Form (OPNAV Form 5527/8. *See* OPNAVINST 5530.14, Appendix III, Part 3), alert the on-scene coordinator, and notify the police. Try to find out:

1. When and where the bomb is to go off;

2. what kind of bomb it is; and

3. what the bomb looks like.

C. Other than telephonic. If the suspected bomb is in a package, letter, etc., ***do not handle***. Call the police and initiate evacuation plan.

D. On-scene coordinator. When an explosives dog team is not available, muster and assign search teams; when one is available, assist the Military Working Dog (MWD) Team as a spotter and coordinate scene activity.

E. Evacuation. If an explosives dog team is not available, evacuate to 300 feet at conclusion of the initial sweep. If an explosives dog team is available, evacuate to 300 feet immediately. If an object is found, evacuate the surrounding 300 yards and all buildings having windows facing the danger area within 400 yards. An order to evacuate may be given by the CO or officer in charge (OIC) (or representative or by the on-scene coordinator of a bomb threat area). When declared by the on-scene coordinator, the order will be transmitted to the senior member of the command or activity present.

F. Search procedure

1. Dog team not available. Teams of two search the immediate area for suspicious objects as discreetly as possible to avoid alarming employees. If nothing is found, prepare for a second sweep. Evacuate all personnel 300 feet from the building and begin an in-depth sweep of the area. If an object is found, ***do not handle***. Evacuate all personnel to 300 yards from the danger area.

2. Dog team available. Evacuate to 300 feet from the danger area. Use MWD to conduct thorough sweep of the building. If an object is found, evacuate to 300 yards from the danger area.

2008 RESTRICTED WATERS

Threats to the physical security of Navy ships and installations can come from the water as well as from the land. Five different statutes authorize restrictions on waters adjacent to naval installations and property. These restrictions generally include the right to control access of persons and vessels to the restricted waters. The statutes vary in two primary respects: who has the authority to establish a restricted area and what is the extent of enforcement powers for the restricted area. Even where Navy personnel have enforcement powers concerning restricted waters,

allowing law enforcement personnel (e.g., Coast Guard) to enforce restricted waters regulations may be preferable in appropriate cases. The statutes discussed in this section generally are inapplicable to physical security of Navy ships and installations in foreign countries.

A. Gunnery danger zones. The Secretary of the Army is empowered by 33 U.S.C. § 3 to prescribe regulations "for the use and navigation of any person or area of the navigable waters of the United States or waters under the jurisdiction of the United States endangered or likely to be endangered by Artillery fire in target practice or otherwise, . . . or at any Government ordnance proving ground . . . on or near such waters, and of any portion or area of said waters occupied by submarine mines, mine fields, submarine cables, or other material and accessories pertaining to seacoast fortifications. . ."

1. Navy application. Despite the use of the term "Artillery," the congressional intent evidently was to give the statute such comprehensive scope as to embrace areas endangered by naval gunnery exercises and other analogous activities required to be conducted in the national defenses. Gunnery danger zones are listed in 33 C.F.R. § 334.

2. Enforcement. Regulations establishing gunnery danger zones commonly provide that the gunnery danger zone regulations shall be enforced by a specified CO and such agencies as he / she may designate. Navy personnel and vessels may lawfully enforce gunnery danger zone regulations when so designated by the cognizant CO. The Posse Comitatus Act is not a bar given the express congressional authority. Enforcement powers available under 33 U.S.C. § 3 include the authority to bar entry into a restricted area by physical means; order or warn any violator to vacate the area; forcibly eject the violator and craft from the area for failure to comply; forcibly prevent the violator's reentry into the area; and file a formal complaint to initiate a federal prosecution. However, 33 U.S.C. § 3 does not grant naval personnel arrest authority.

3. Other agencies. The U.S. Coast Guard has enforcement authority and responsibility, including arrest authority, through regulations promulgated under 33 U.S.C. § 3. *See* 14 U.S.C. §§ 2 and 89 and 33 C.F.R. 1.07 Appendix. In addition, U.S. marshals for the judicial district in which the subject waters are situated have authority and responsibility to execute in those waters the laws of the United States and all orders issued under the authority of the United States. *See generally* 28 U.S.C. §§ 569-570 and 18 U.S.C. § 305.3.

B. Internal security act regulations. Commanding officers have the authority to issue regulations for the protection of vessels, harbors, ports, piers, waterfront facilities, and other places subject to their jurisdiction pursuant to 50 U.S.C. § 797, as implemented in the Navy by SECNAVINST 5511.36. The

commander must have jurisdiction over the body of water to issue regulations under this statute, and any regulations promulgated under this authority must be conspicuously posted. Naval personnel can enforce regulations issued under 50 U.S.C. § 797. As with gunnery danger zones, they can physically bar entry or reentry and physically eject violators. Although no arrest authority is conferred on naval personnel by 50 U.S.C. § 797, detaining suspected violators is allowed under Article 0809, *U.S. Navy Regulations*. Coast Guard and U.S. marshals can enforce regulations promulgated under 50 U.S.C. § 797 and arrest violators.

C. Security zones. A security zone is a restricted area established by the Coast Guard, pursuant to 50 U.S.C. § 191, to protect U.S. vessels or property. A security zone is an area of land, water, or land and water which is so designated by the Captain of the Port. Regulations under this authority vest certain powers in the "Captain of the Port," who is a Coast Guard officer responsible for law enforcement activity in a specified area. 33 C.F.R. § 165.30. The Captain of the Port may establish security zones "to prevent damage or injury to any vessel or waterfront facility, to safeguard ports, harbors, territories, or waters of the United States or to secure the observance of the rights and obligations of the United States." The Coast Guard has the authority under the regulation to issue an order restricting access to portions of a harbor during the launching of a submarine. For Navy personnel, enforcement authority includes the right to forcibly bar entry or reentry and to forcibly eject violators. Navy personnel do not have arrest authority. Coast Guard personnel and U.S. marshals can enforce security zone regulations.

2009 MILITARY PROTECTIVE ORDERS

Military protective orders (MPO's) may be directed to military members. Directives to civilians are limited to orders commensurate with the CO's authority to maintain security and control the activities of employees, residents, and guests on the installation. These include debarment orders, employer directives, and housing area directives. Safe homes or other secure locations to secure safety of endangered family members should be designated by base commanders. Commanding officers should seek the advice and assistance of local family advocacy team members since family violence ignores traditional professional borders. Both state and military health care professionals, social workers, law enforcement personnel, and attorneys will all play a significant role. Early intervention and cooperation is essential.

A. Nature and purpose. MPO's are similar to civilian temporary restraining orders (TRO's). They may be ex parte; that is, issued after hearing only one side of the story if the issuing authority considers it necessary to ensure the safety and security of persons for whom the command is responsible. If ex parte, their duration should be as short as possible to ensure safety—normally not more than ten days. If a longer duration is required, the individual should be given an

opportunity to be heard and to respond to allegations. In cases not requiring ex parte determinations, a person should be given the opportunity to be heard and to respond before being given an MPO. Formal hearings are not required. MPO's are based upon a balancing of interests. The greater the crisis and the need to protect, the greater the need to move quickly and to focus on the safety of the persons needing protection. As the crisis abates and long-term solutions are considered, the greater the need for considering the rights of all persons involved.

B. Contents. An MPO may specify a finite duration or that it remains in effect until further notice by the issuing authority. MPO provisions may include:

1. Direction to refrain from contacting, harassing, or touching certain named persons;

2. direction to remain away from certain specified areas (i.e., the home, place of spouse's employment, schools, and day care centers); and / or

3. direction to do or refrain from doing certain acts or activities.

C. Form. MPO's need not be in writing; however, to avoid confusion and misinterpretation, written orders are recommended. If written, orders should not be placed in personnel service records—although the factors surrounding the orders may be.

D. *See* sample MPO at Appendix G at the end of this chapter.

2010 TRAFFIC REGULATIONS

The Navy's traffic safety program was revised with the promulgation of OPNAVINST 5100.12, Subj: ISSUANCE OF NAVY TRAFFIC SAFETY PROGRAM. The major changes in the instruction which may be of interest to the SJA are listed below, ***followed by the applicable paragraph number***.

A. Alcoholic beverages. "While on any DOD installation, the operator / passenger(s) of a motor vehicle are prohibited from having open containers of alcoholic beverages in their possession." (Paragraph 12).

B. Radar detection devices. "The use of radar detection devices to indicate the presence of speed recording instruments or to transmit simulated erroneous speeds is prohibited on DOD installations." (Paragraph 13).

C. Motorcycles. "Each operator of a motorcycle shall successfully complete the Motorcycle Safety Foundation's Motorcycle Rider Course—Riding and Street

Skills or other training approved by the Naval Safety Center. Each operator of an all-terrain vehicle shall successfully complete the All-Terrain Vehicle Safety Institute ATV Rider Course or other training approved by the Naval Safety Center." [Paragraph 2.b. of enclosure (1)]. Specific courses for motorcycles and ATV's are identified as approved courses.

1. Motorcycle protective clothing. In addition to a helmet, eye protection, and hard-soled shoes with heels, the following personal protective clothing is required: "Properly worn long-sleeve shirt or jacket, long-leg trousers and full-finger leather or equivalent gloves." [Paragraph 2.e.(3) of enclosure (1)].

2. Safety vest. Properly worn (as an outer garment) a brightly colored safety vest with retro-reflective strips with a minimum of 130 square inches of reflective area [Paragraph 2.e.(5) of enclosure (1)].

3. Operator licensing. "Where state or local laws require special licenses to operate privately owned motorized bicycles (mopeds), motor scooters and all-terrain vehicles, such license requirements, as a minimum, shall apply to operation of those vehicles on naval stations." [Paragraph 2.f. of enclosure (1)].

4. Motorcycle rear-view mirrors. "Government-owned (non-tactical) and privately owned motorcycles, motor scooters, mopeds and all-terrain vehicles operated on naval stations shall not be operated without a rear-view mirror mounted on each side of the handlebars." [Paragraph 2.h. of enclosure (1)].

D. Driver improvement. "American Automobile Association's Driver Improvement Program instructors shall not instruct unless they have been recertified within the previous three years." [Paragraph 3.b. of enclosure (1)].

E. Emergency vehicle operators. "Individuals shall not be assigned as a driver of Navy police vehicles, ambulances, fire trucks and crash-and-rescue vehicles until they have successfully completed the National Highway Traffic Safety Administration's Emergency Vehicle Operator Course (EVOC). . . . Operators shall complete this training every three years thereafter to ensure competency in the safe operation of such vehicles. EVOC instructors shall not instruct unless they have been recertified within the previous three years." [Paragraph 3.c.(1) of enclosure (1)].

F. High-mishap incidence locations. Military Police shall identify high-mishap incidence locations. "Military police and safety organizations will present this data to installation organizations responsible for highway design, construction, maintenance and traffic engineering for the purpose of analysis and initiation of appropriate improvements. This data will be provided to the Military Traffic Management Command." [Paragraph 7.b(3) of enclosure (1)].

G. Joggers. "Personnel are not authorized to jog on main roads and streets on naval installations with high traffic density during peak traffic periods. [Peak traffic periods, and roads and streets with high density traffic for the locale shall be defined and published by local commanders.] Jogging on roads and streets on naval installations should be avoided; personnel should be encouraged to use jogging facilities when available. When jogging on roads and streets, personnel shall jog in patrolled areas and wear light-colored clothing. During periods of reduced visibility conditions (i.e., nighttime, fog, rain, etc.), personnel shall wear retro-reflective clothing and obey traffic rules and regulations. Personnel shall jog facing traffic and obey traffic rules and regulations. [Paragraph 10.a of enclosure (1)].

2011 LOSS OF DRIVING PRIVILEGES

The inherent authority of an installation commander to provide for the health, welfare, safety, and security of the command includes the implicit authority to regulate the operation of motor vehicles on that installation. That authority may be affected, however, by the class or category of the person involved (e.g., servicemember, dependent, civilian employee, or civilian visitor) and the nature of the installation (e.g., controlled or limited access or open to the general public). At a controlled access installation, the commander can administratively withhold on-base driving privileges as a valid nonpunitive measure against those subject to the UCMJ. Exercising the authority to withhold a privilege must not be arbitrary or capricious, and the privilege to be withheld should be logically related to the conduct or behavior to be corrected or prevented. The military commander must also have a legitimate interest in controlling or preventing that conduct or behavior. Adequate due-process protections must be afforded. On-base traffic court can suspend or revoke base driving privileges for driving under the influence of alcohol or other drugs and other "moving violations" of base traffic regulations.

A. Introduction of drugs on board a military installation. Article 0824, *U.S. Navy Regulations, 1990*, imposes the responsibility on CO's to conduct a rigorous program to prevent the illegal introduction, transfer, possession or use of marijuana, narcotics, or other controlled substances and to exercise utmost diligence in preventing illegal importation of those substances on board the command. This article articulates the installation commander's legitimate interest in preventing introduction and use of drugs and controlled substances on that installation. Consequently, using a motor vehicle on a military installation—either as a means of introducing prohibited substances onto the installation or as a place where prohibited substances may be transferred, possessed, or used on the installation—may legitimately result in that vehicle being barred through the exercise of the commander's authority to withhold or rescind the privilege of registering the vehicle and allowing base access. Whether the privilege should be withheld or rescinded in any particular case may depend upon the vehicle owner's actual involvement in or

knowledge of the use of his / her vehicle for the illegal purpose as well as other variable factors.

B. Seizure. Additional action involving the vehicle may be taken in some cases by referring the matter to the appropriate Drug Enforcement Administration (DEA) office. Regional administrators of that agency have been designated as custodians to receive and store all property seized pursuant to the Controlled Substances Act, specifically, 21 U.S.C. § 881 [21 C.F.R. § 1316.73]. That section provides, generally, for the forfeiture of all vehicles, subject to certain exceptions, that are used to transport or to facilitate the transportation, sale, receipt, possession, or concealment of controlled substances that have been acquired in violation of the Controlled Substances Act (21 U.S.C. §§ 801-904). The rules implementing 21 U.S.C. § 881 indicate that any special agent of the DEA may adopt a seizure initially made by any other officer or by a private person. 21 C.F.R. § 1316.71(d). As a practical matter, adoption seizures are governed by several case-by-case considerations, such as the quantity and identity of the controlled substances, the value of the vehicle, and a basis to believe that the vehicle will be used illegally again. Although forfeiture may not be available in every instance, the DEA resident agent in charge should be consulted if the other alternatives are deemed inadequate.

APPENDIX A

SAMPLE CIVILIAN BAR LETTER

LETTERHEAD

SSIC
Code
Date

From: Commanding Officer, _____
To: SR _____, USN

Subj: ORDER NOT TO REENTER THE DEPARTMENT OF THE NAVY'S INSTALLATION AT _____

Ref: (a) NAVSTAINST 5500.1

1. You are being removed as a trespasser from the _____ and ordered not to reenter the confines of this installation without permission of the commanding officer or an officer designated by him to issue a permit to reenter.

2. Your attention is invited to the provisions of Title 18, U.S. Code § 1382, which state in part:

> Whoever reenters or is found on any such reservation after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof shall be fined not more than $500.00 or imprisoned not more than six months, or both.

3. The provisions of Title 18, U.S. Code § 1301 also apply to the commission of any unlawful act on the military reservation.

SIGNATURE

ACKNOWLEDGMENT

I have read and understand the information above.

_____ _____
(Date) (Signature)

Witnessed:
(Insert Name, Grade, Service, Title, Command)

APPENDIX B

SAMPLE BAR LETTER FOR DISCHARGED MILITARY MEMBER

LETTERHEAD

SSIC
Code
Date

From: Commanding Officer, _____
To:

Subj: PROHIBITION FROM ENTRY TO _____

1. You are hereby advised that, due to your discharge from the U.S. Navy by reason of misconduct, you are restricted from further entry to all government property under the cognizance of the Commanding Officer, _____, _____. The following areas are specifically included: Naval Air Station main complex; Navy Exchange-Commissary Mall Complex on highway 1; Carney Housing and Charles Field. Should you be found within the limits of these restricted areas, you will be guilty of trespassing in violation of 18 U.S.C. § 1382 and will be subject to a fine of not more than $500.00 and imprisonment in a federal penitentiary for not more than six months.

2. You are therefore advised that, effective the date and hour of your discharge, you are permanently prohibited from coming aboard this station or any of the above-specified areas. In the event you should be found within the limits of any of these areas, you shall be prosecuted in federal court for violation of the above-mentioned statute.

J. P. FLAGG

Copy to:
Legal Officer, NAS
CO (parent command)
Security Officer, NAS
Discipline Officer, NAS
Master-at-Arms, NAS

I hereby acknowledge receipt of this letter:

Signature:
Date:
Time:
Witness:

APPENDIX C

SAMPLE CIVILIAN MISCONDUCT BOARD NOTICE

MEMORANDUM

From: Station Judge Advocate
To: Civilian Misconduct Board Members

Subj: CIVILIAN MISCONDUCT BOARD MEETING ICO _____

Ref: (a) Station Instruction

1. Per reference (a), a meeting of the Civilian Misconduct Board will be held at (date and time) in the station administrative conference room. Please notify this office if you will be unable to attend.

STATION JUDGE ADVOCATE

Copy to:
CMAA

APPENDIX D

SAMPLE DEPENDENT MISCONDUCT BOARD NOTICE

LETTERHEAD

SSIC
Code
Date

From: Commanding Officer, _____
To: (Military Sponsor)

Subj: CIVILIAN MISCONDUCT BOARD

Ref: (a) Local Instruction

1. I have received reliable evidence that your dependent, (NAME), has been involved in the following incident of misconduct: (INSERT INFORMATION HERE)

2. The allegation against your dependent is based on the following information: (INSERT INFORMATION HERE)

3. Per the reference, your dependent's case has been scheduled for a hearing before the Civilian Misconduct Board at (TIME) on (DATE) in the Administrative Conference Room. The board will hear all information in regard to the alleged misconduct and will provide the commanding officer a recommendation as to the appropriate administrative action (if any) to be taken. Administrative actions that may be taken as a result of the hearing include:

a. Dismissal (with or without a warning);

b. formal warning;

c. suspension / revocation of base privileges;

d. termination of military family housing privileges;

e. early return of dependents; and

f. referral to civilian criminal authorities.

3. You and your dependent have a right to submit matters for the board's consideration. These matters may be submitted orally by personally appearing before the board at the scheduled time or may be submitted in writing to the station judge advocate prior to the hearing. In addition, you and your dependent have the right to have witnesses attend the proceeding if their statements will be relevant and if they are reasonably available. A witness is not reasonably available if the witness requires reimbursement by the United States for cost incurred in appearing, cannot appear without unduly delaying the proceedings, or, if a military witness, cannot be excused from other important duties.

4. If you and your dependent desire to appear at the hearing and / or present witnesses or other evidence, contact the station judge advocate at (PHONE NUMBER) prior to (DATE).

By direction

APPENDIX E

SAMPLE CIVILIAN MISCONDUCT BOARD GUIDE

CHAIR: The board will come to order. This meeting of the Civilian Misconduct Board is convened per [local instruction]. The following regular board members are present:

Deputy Commander
Executive Officer
Chaplain
Station Judge Advocate
Command Master Chief
Command Ombudsman

A quorum of more than 3 members is present.

CHAIR: [To Alleged Offender] You are suspected of having committed the following incident of misconduct:

(Read relevant portion of case summary)

I will now advise you of your rights in connection with this hearing and of administrative actions that may be taken in this case:

You and your sponsor have the right to appear at this hearing, to be informed of the allegations against you, and to present evidence and call witnesses in your behalf at no cost to the government and in a manner not to delay the proceedings.

Findings of misconduct must be made by a majority vote. In case of a tie vote on the issue of whether or not misconduct has occurred, no adverse action may be recommended.

In the event a finding of misconduct is reached, the board may recommend the following administrative actions:

Issuance of a formal letter of warning;
Suspension or revocation of base privileges;
Notification of misconduct to Human Resource Office;
Revocation of Navy family housing privileges;
Early return of dependents; and
Referral to civilian criminal authorities.

There are several procedural rules in connection with this board which I shall explain to you.

First, this board is an administrative proceeding, and the rules of evidence do not apply. The members of this board will independently consider all relevant evidence presented and determine the proper weight to be given the evidence.

Second, the Master-at-Arms will present the evidence against you. After a witness testifies, you will be given an opportunity to direct questions to the witness. Any board members desiring to ask questions of a witness may then do so after first obtaining recognition by myself as Chairman. After presentation of the evidence against you, you will be asked whether you wish to call any witnesses, present any evidence, or make any statement.

Third, following presentation of all the evidence, you and your sponsor will retire while the board deliberates. You will be recalled to the meeting when the board has reached its findings and recommendations and will be informed of the board's action.

Do you have any questions concerning your rights or the procedures of this board?

CHAIR: [To Master-at-Arms] Please present the case against _____.

MAA: The case against _____ is based upon:

(Cite documents, witnesses, etc.)

The first witness to be called in this case is _____.

CHAIR: [To Witness] You have been asked to appear before this board to offer information concerning an allegation of misconduct that has been brought against _____. You will be expected to provide this information to the board in a truthful and factual manner. Please proceed.

MAA: (At the conclusion of all evidence) This completes the case against _____.

CHAIR: [To Alleged Offender] Do you desire to present matters to this board? (If yes) You may proceed.

(Presentation of sponsored dependent's case):

CHAIR: Do you have other matters to present? (If not): You may retire to the waiting area until the board has reached its findings.

NOTE: At this time, the board will discuss the case and then vote on whether misconduct has occurred. If misconduct is found by a majority vote to have occurred, the board will discuss an appropriate recommendation for action. The board will then determine by a majority vote what action will be recommended. After the vote, the sponsor and dependent will be recalled to the meeting.

CHAIR: [Dependent's name], this board has found that you have / have not committed misconduct as alleged.

(If no misconduct: You are excused. Thank you for your participation in this hearing.)

(If misconduct: The board has elected to recommend the following action to the commanding officer: _____.

You have three working days to submit matters in writing to the commanding officer, via this board, prior to the recommendations being forwarded.

You will be notified in writing of the final action in this case by the commanding officer.

You and your sponsor are excused. This hearing is adjourned.)

APPENDIX F

PRIVACY ACT STATEMENT - CIVILIAN MISCONDUCT BOARD

This statement is provided in compliance with the provisions of the Privacy Act of 1974 (Pub. L. No. 93-579) which require that federal agencies must inform individuals who are requested to furnish personal information about themselves as to certain facts regarding the information stated below.

1. Authority. 5 U.S.C. § 301; 10 U.S.C. § 2774 (as amended by Pub. L. No. 92-453).

2. Principal purposes. To assist in the arrangement, supervision, and administration of personal services, benefits, and entitlements for U.S. armed forces members, DOD employees, and their dependents.

3. Routine uses. Law enforcement; congressional inquiries; private relief legislation; disclosures required by international agreements; disclosure to state and local taxing authorities; disclosure to the Office of Personnel Management; disclosure to the Department of Justice for Litigation; disclosure to military banking facilities overseas; disclosure to the National Archives and Record Administration; and disclosure to the Merit Systems Protection Board.

4. Mandatory or voluntary disclosure and effect on individual not providing information. Disclosure is voluntary and, if you do not provide the requested information, any determinations or evaluations made as a result of this board will be made on the basis of the evidence contained in the record.

ACKNOWLEDGEMENT

Today, _____, 19___, I acknowledge that I have received the above Privacy Act Statement from _____.

SIGNATURE

APPENDIX G

MILITARY PROTECTIVE ORDER

LETTERHEAD

SSIC
Code
Date

From: Commanding Officer, _____
To:
Via:

Subj: MILITARY PROTECTIVE ORDER ISSUED TO _____ CONCERNING ALLEGATIONS OF CHILD / SPOUSE ABUSE

Ref: (a) SECNAVINST 1752.3

I. You are hereby directed to abide by and obey the following Military Protective Order issued under reference (a). Violation of this order may result in administrative or disciplinary action under the Uniform Code of Military Justice.

2. This order is strictly an administrative action to ensure the safety and security of the person(s) listed below. It is also intended to protect you from further allegations concerning family abuse while the order is in effect. This order is not the beginning of disciplinary action against you, nor does it mean that you cannot or will not be punished for any actions taken before or after its issuance.

3. This order is issued concerning your association and contact with the following person(s):

4. You are directed to:

5. This order shall remain in effect until [date] [not later than ten days after issuance] [unless sooner canceled by me or higher authority].

SIGNATURE

CHAPTER TWENTY-ONE

RELATIONS WITH CIVIL AUTHORITIES

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CHAPTER TWENTY-ONE

RELATIONS WITH CIVIL AUTHORITIES

2101 REFERENCES

A. JAGMAN, Chapter VI

B. SECNAVINST 5822.2, Subj: SERVICE ON STATE AND LOCAL JURIES BY MEMBERS OF THE NAVAL SERVICE

C. SECNAVINST 5820.7, Subj: COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS

D. SECNAVINST 5820.8, Subj: RELEASE OF OFFICIAL INFORMATION FOR LITIGATION PURPOSES AND TESTIMONY BY DEPARTMENT OF THE NAVY (DON) PERSONNEL

E. SECNAVINST 5820.9, Subj: COMPLIANCE WITH COURT ORDERS BY DEPARTMENT OF THE NAVY MEMBERS, EMPLOYEES, AND FAMILY MEMBERS OUTSIDE THE UNITED STATES

2102 DELIVERY OF PERSONNEL

A. Federal civil authorities. Members of the armed forces will be released to the custody of federal authorities (FBI, DEA, etc.) upon request by a federal agent. The only requirements which must be met by the requesting agent are that the agent display both proper credentials and a federal warrant issued for the arrest of the servicemember. The command should consult a Navy or Marine judge advocate before delivery if reasonably practicable. JAGMAN, § 0608.

B. State civil authorities. Procedures that are to be followed when custody of a member of the naval service is sought by state, local, or U.S. territorial officials depend on whether the servicemember is within the geographical jurisdiction of the requesting authority. As when custody is requested by federal authorities, the requesting agent must not only identify him / herself through proper credentials, but must also display the actual warrant for the servicemember's arrest.

1. Delivery within territorial limits of requesting state. When a member or civilian employee is located onboard a military installation or vessel within the same territorial jurisdiction as the state seeking his / her arrest, the commanding officer (CO) is authorized to deliver the person to the state authorities. State, local, and U.S. territorial officials must sign a delivery agreement providing for the no-cost return of the servicemember after civilian proceedings have terminated. State officials completing the agreement must show their authorization to bind the state to the terms of the agreement. A sample agreement appears in appendix A-6-b of the *JAG Manual*. JAGMAN, § 0603.

2. Delivery beyond territorial limits of requesting state. If the member is stationed in the United States, but outside the territorial jurisdiction of the requesting state, the member must be informed of the right to require extradition. If (after consultation with a judge advocate or civilian legal counsel) the service-member waives extradition in writing, the servicemember may be released without an extradition order. If the member does not waive extradition, the requesting state officials must obtain a local arrest warrant. If the local jurisdiction requests delivery of a servicemember wanted by another state (usually based upon a fugitive warrant), the member will normally be delivered—provided all requirements discussed above are met. The member will then have the opportunity to contest extradition within the courts of the local state. In any event, delivery under these conditions can be made by an officer exercising general court-martial jurisdiction (OEGCMJ), someone designated by him / her, or any CO after consultation with a judge advocate of the Navy or Marine Corps. JAGMAN, § 0604.

3. Overseas. If the member to be arrested is overseas or is deployed and is sought by U.S. federal authorities, the request must be made by the Department of Justice to the Secretary of the Navy (SECNAV) via Office of the Judge Advocate General (OJAG). If received by the command, it must be forwarded to OJAG, General Litigation Division (Code 34). SECNAV will authorize the member's transfer to the military installation in the United States convenient to the Navy and to the Department of Justice, where he / she will be held until the requesting authority is notified and complies with the provisions of JAGMAN, § 0608. When delivery of any member in the Navy or Marine Corps, or any civilian employee or dependent is desired for trial by state or local authorities, the procedures in SECNAVINST 5820.9, Subj: COMPLIANCE WITH COURT ORDERS BY DEPARTMENT OF THE NAVY MEMBERS, EMPLOYEES, AND FAMILY MEMBERS OUTSIDE THE UNITED STATES, will be followed. JAGMAN, § 0605.

C. Restraint of military offenders for civilian authorities. Under R.C.M. 106, a servicemember may be placed in restraint by military authorities for civilian offenses upon receipt of a warrant for the member's apprehension, or upon receipt of information establishing probable cause that the servicemember committed an offense, ***and*** upon reasonable belief that such restraint is necessary under the

circumstances. Such restraint may continue only for such time as is reasonably necessary to effect the delivery. This provision does not allow the military to restrain a servicemember on behalf of civilian authorities pending trial. For delivery of a servicemember to foreign authorities, consult the applicable treaty or Status of Forces Agreement (SOFA) and JAGMAN, § 0609.

D. Circumstances in which delivery is refused

1. Member pending court-martial. If a servicemember is alleged to have committed several offenses—including federal or state offenses and purely military offenses—and delivery is requested, the military offenses may be investigated and the accused servicemember retained for prosecution by the military. Refusal of delivery must be reported immediately to OJAG and the OEGCMJ. 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, § 0610b(1).

2. Sentenced members. Where a servicemember is serving the sentence of a court-martial, the delivery of the servicemember to civil law enforcement authorities is governed by JAGMAN, § 0613. If a request for delivery from civil authorities properly invokes the Interstate Agreement on Detainers Act, the DON, as an agency of the Federal Government, shall comply with the Act. The Act is designed to avoid speedy-trial issues and to aid in rehabilitation efforts by securing a greater degree of certainty about a prisoner's future. The Act provides a way for a prisoner to be tried on charges pending before state courts, either at the request of the prisoner or the state where the charges are pending. When refusal of delivery under Art. 14, UCMJ, is intended, comply with JAGMAN, § 0610d.

3. Extraordinary circumstances. If a commander considers that extraordinary circumstances exist, delivery may be denied. Such denial is authorized by JAGMAN, § 0610b(2).

4. Reporting. In any case where it is intended that delivery will be refused, the CO shall report the circumstances to OJAG (Code 34), 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, § 0610d and App. A-6-c.

2103 RECOVERY OF MILITARY PERSONNEL FROM CIVIL AUTHORITIES

Generally, 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.

A. Official duty exception. No state authority may arrest or detain for trial a servicemember 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. This freedom from interference by the state applies only when the proper performance of a military duty ***requires*** violation of a state law.

1. 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 CO should make a request to the nearest U.S. Attorney for legal representation via the area coordinator or NLSO, if practicable.

2. 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 OJAG. Where the U.S. Attorney declines or is unable to provide legal services, advise OJAG in writing. In those cases in which the date set by the court for answer or appearance is such that time does not permit this communication through the usual methods, contact Code 34 (General Litigation Division) by phone at DSN 221-9870.

B. Local agreements. In many areas where major naval installations are located, arrangements have been made between naval commands and the local civilian officials regarding the release of servicemembers to the military before trial. These agreements are local and informal. There is no established Navy-wide procedure and their success depends solely upon the practical relationships in the particular area. All commands within the area must 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, or SJA.

C. Command representatives. The command does not owe legal advice to an accused held by civil authorities in the United States 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. 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 the accused's voluntary written consent or an order from the court trying the case.

D. Conditions on release

1. If the member is released on personal recognizance or on bail to guarantee return for trial, the command may receive the servicemember. The CO, 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. JAGMAN, § 0611. Personal recognizance is an obligation of record entered into before a court by an accused in which he / she promises to return to the court at a designated time to answer the charge against him / her. Bail involves the accused's providing some security beyond mere promise to appear at the time and place designated and submit 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.

2. Accepting custody of an accused upon any conditions which would bind naval authorities is not advised. Commands may inform civilian authorities of the Navy's customary policy of granting leave or liberty to permit attendance at civilian trials, but the *JAG Manual* states that Navy policy is to permit servicemembers to attend their trials, not to compel that attendance. JAGMAN, § 0611. Further, military authorities are without power to place an accused in any sort of pretrial restraint based on the civilian charges. Members cannot be accepted from civil authorities on the condition that disciplinary action will be taken against them. Issues, such as accuser concepts or selective prosecutions, could preclude command action.

2104 MEMORANDUM OF UNDERSTANDING (MOU) WITH LOCAL AUTHORITIES

Local authorities frequently provide law enforcement assistance to military installations for various purposes—such as responding to civilian demonstrators. It is helpful if details on such assistance are contained in a MOU. The MOU should provide that nothing contained therein will limit the statutory authority and functions of any federal agency. Notwithstanding any MOU, a base commander has the authority under the Supremacy Clause of the Constitution to exclude or limit access by state and local law enforcement officials if there is a legitimate security need. *See* sample at Appendix A (at the end of this chapter).

2105 SPECIAL SITUATIONS

A. Interrogation by federal civil authorities. Requests to interrogate suspected military personnel by the FBI or other federal civilian investigative agencies should be promptly honored. Any refusal and the reasons therefor must be reported immediately to JAG. JAGMAN, § 0612.

B. Writs of habeas corpus or temporary restraining orders. Upon receipt of a writ of habeas corpus, temporary restraining order, or service of process in any case involving the named member's official duties or position, the nearest Navy / Marine Corps judge advocate or Office of General Counsel attorney shall be contacted immediately. The legal counsel will then contact the nearest U.S. attorney for assistance. A message or telephone report of the delivery of the process or notification of the hearing must be made to SECNAV via (OJAG). An immediate request for assistance is necessary because such matters frequently require a short-fused court appearance with an appropriate response by the government. 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 OJAG (Code 34). JAGMAN, § 0615.

C. 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 / her are referred for trial, notification to his nearest consular office may be required. Advise the foreign national that the consul will be notified unless he / she objects. If the member objects, JAG will determine whether an applicable international agreement requires notification irrespective of the member's wishes. SECNAVINST 5820.6, Subj: CONSULAR PROTECTION OF FOREIGN NATIONALS SUBJECT TO THE UNIFORM CODE OF MILITARY JUSTICE, provides guidance and details on consular notification.

2106 SERVICE OF PROCESS AND SUBPOENAS

Chapter VI, Part B, of the *JAG Manual* deals with service of process and subpoenas upon personnel. Service of process establishes a court's jurisdiction over a person by the delivery of a court order to that person advising him / her of the subject of the litigation and ordering him / her to appear or answer the plaintiff's allegations within a specified period of time or else be in default. Properly served, the process makes the person subject to the jurisdiction of a civil court.

A. 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 OJAG. JAGMAN, § 0616c (*see* App. A-5-a).

B. Within the United States

1. Within the jurisdiction of the issuing court. The commander shall permit the service except in unusual cases where 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 CO has been obtained. Where practicable, the CO shall require that process be served in the presence of the CO or another designated officer. Commanding officers are required to ensure that the nature of the process is explained to the member. This can be accomplished by referring the member to a legal assistance officer. JAGMAN, § 0616a(1).

2. Beyond the jurisdiction of the issuing court. Commanders will permit the service under the same conditions as within the jurisdiction, but shall ensure that the member understands that he / she need not indicate acceptance of service. In certain jurisdictions, service of process can be accomplished by merely leaving the documents in the presence of the person even if they refuse to accept them. Therefore, it is important to avoid bringing the member and process server together. The person named in the process should be contacted, made aware of the situation, and advised that he/she need not accept the service of process. The commander should advise the person concerned to seek legal counsel. When process is mailed to the commander with the request that it be delivered to a person within the command, it may be delivered if the member voluntarily agrees to accept it. When the member does not voluntarily accept the service, the process should be returned with a notation that the named person has refused to accept it. JAGMAN, § 0616a(2).

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, notify the CO and provide copies of the process and pleadings. The command shall ascertain the pertinent facts, coordinate with the local NLSO or area coordinator to notify OJAG (Code 34) immediately by telephone, and forward the pleadings and process to that office. JAGMAN, § 0616b.

D. Service not allowed. In any case where the commander refuses to allow service of process, report the matter to OJAG (Code 34) as expeditiously as circumstances allow. JAGMAN, § 0616e.

E. Leave or liberty. In those cases where personnel either are served with process or voluntarily accept service of process, leave or liberty should be granted to comply with the process unless the member's absence will have an adverse impact on naval operations. JAGMAN, § 0616d.

2107 SUBPOENAS

A subpoena is a court order requiring a person to testify as a witness in either a civil or criminal case. 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 United States in criminal and civil actions or where the witness is a prisoner.

A. Witness on behalf of the Federal Government. Where DON interests are involved and departmental personnel are required to testify for the Navy, BUPERS 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. If DON interests are not involved, the member's command will issue orders and the Navy will be reimbursed by the federal agency concerned. JAGMAN, § 0618a.

B. Witness on behalf of a defendant in federal court. When members are served with a subpoena and the appropriate fees and mileage are tendered, commanders 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 CO 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, § 0618b(1).

C. Witness on behalf of a nongovernmental party. The commander 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 commander is authorized to issue the member permissive orders at no expense to the government. JAGMAN, § 0618b(2) and § 0617(d).

D. Prisoner witnesses. Written request must be submitted to JAG for permission for a prisoner to testify as a witness in a criminal case. However, prisoners will not be released to appear as a witness in a civil action—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. JAGMAN, § 0619.

E. Pretrial interviews concerning matters arising out of official duties. Requests for interviews or statements by parties to private litigation must be handled according to the guidance contained in SECNAVINST 5820.8. JAGMAN, § 0620.

2108 RELEASE OF OFFICIAL INFORMATION

SECNAVINST 5820.8 prescribes what information, testimonial and documentary, by military and civilian DON personnel is releasable to courts and other government proceedings and the means of obtaining approval for releasing such information. For more detailed information, see Chapter 34.

2109 JURY DUTY

Active-duty servicemembers are exempted by 28 U.S.C. § 1863(b)(6) from service on federal juries. Service on state juries is governed by SECNAVINST 5822.2 which implements 10 U.S.C. § 982.

A. Categorical exemption. SECNAVINST 5822.2 exempts all personnel who:

1. Hold flag or general rank;

2. are in command;

3. are assigned to the operating forces;

4. are in a training status; or

5. are stationed outside the United States.

B. Case-by-case exemption. Officers authorized to convene special courts-martial may conclusively declare a servicemember exempt from state or local jury duty when that service would:

1. Unreasonably interfere with the performance of the servicemember's military duties; or

2. adversely affect the readiness of the member's command.

C. Procedures. The commander notifies the appropriate state official, typically the clerk of court, as soon as the exemption determination is made. Telephonic notification should be confirmed in writing. Commanders who do not have special court-martial convening authority are required to forward the request, with a recommendation and supporting justification, to the next superior in the chain of command who is authorized to make an exemption determination or to the area coordinator. If members 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.

2110 POSSE COMITATUS

A. References

1. Posse Comitatus Act, 18 U.S.C. § 1385

2. Military Cooperation with Civilian Law Enforcement Officials, 10 U.S.C. §§ 371-378

3. DOD Directive 5525.5 of 15 Jan 1986, Subj: DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS

4. SECNAVINST 5820.7, Subj: COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS

B. Purpose and scope

1. The Posse Comitatus Act (PCA) 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.

2. Although not expressly applicable to the Navy and Marine Corps, the PCA is regarded as a statement of federal policy which has been adopted by DON in SECNAVINST 5820.7.

3. The prohibitions are applicable to active-duty members of the Navy and Marine Corps acting in an official capacity. Accordingly, the policy does not apply to:

a. A servicemember off-duty, acting in a private capacity, and not under the direction or control of DON authorities;

b. a member of a Reserve component not on active duty or active duty for training;

c. civilian special agents of the Naval Criminal Investigative Service (NCIS) performing assigned duties under SECNAVINST 5520.3; or

d. military forces outside the jurisdiction of the United States.

C. Direct participation prohibited. Military personnel are prohibited from providing the following forms of direct assistance to civilian law enforcement officials:

1. Interdiction of a vehicle, vessel, aircraft, or other similar activity;

2. a search or seizure;

3. an arrest, apprehension, stop and frisk, or similar activity; and

4. use of military personnel for surveillance or pursuit of individuals, or as informants, undercover agents, investigators, or interrogators.

D. Exceptions

1. Express statutory authority. Some laws permit direct military participation in civilian law enforcement including: suppression of insurrection or domestic violence (10 U.S.C. §§ 331-334); protection of the President, Vice President and other designated dignitaries (18 U.S.C. § 1751); assistance in the case of crimes against members of Congress (18 U.S.C. § 351); and foreign officials and other internationally protected persons (18 U.S.C. §§ 112, 1116). Additional exceptions are listed in paragraph 9(a)(2)(f) of SECNAVINST 5820.7.

2. Drug interdiction. Under 10 U.S.C. § 124, DOD is the lead federal agency for detecting and monitoring aerial and maritime transportation of illegal drugs into the United States. In the National Defense Authorization Act for 1990 and 1991, Congress directed DOD to conduct training exercises in known drug-interdiction areas to the maximum extent possible. Any vehicle or aircraft used for transporting 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).

3. Military purpose doctrine. Actions 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 PCA—regardless of incidental benefits to civilian law enforcement authorities.

a. Use of information. 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 NCIS field office or other authorized activity for dissemination to appropriate civilian law enforcement officials pursuant to SECNAVINST 5520.3, Subj: CRIMINAL AND SECURITY INVESTIGATIONS AND RELATED ACTIVITIES WITHIN THE DEPARTMENT OF THE NAVY.

b. Training and operations. The planning and execution of compatible military training and operations may consider 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. Missions cannot, however, be planned or created for the primary purpose of aiding civilian law enforcement officials or to routinely collect information about U.S. citizens.

4. 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 paragraph 9e of SECNAVINST 5820.7. Equipment cannot be lent if the loan will adversely affect national security or military preparedness.

a. Operation and maintenance of equipment. Where the training of non-DOD personnel is infeasible or impractical, DON 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 the head of the civilian law enforcement agency, such as the Drug Enforcement Administration (DEA), Customs Service, or Immigration and Naturalization Service (INS).

b. Emergencies. Military forces can be used in emergency situations to prevent loss of life, or wanton destruction of property, and to restore governmental functioning and public order when sudden and unexpected civil disturbances or natural disasters seriously endanger life and property and disrupt normal governmental functions.

5. Training and expert advice. Navy and Marine Corps activities may provide training to federal, state, and local civilian law enforcement officials in the operation and maintenance of equipment made available for their use.

E. 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, our expenses shall be limited to the incremental or marginal costs; however, civilian law enforcement agencies can request a waiver of these costs. Forward waiver requests to CNO (OP-642) or CMC (POS), copy to CNO (OP-92) / NAVCOMPT (NCB). Waiver requests may be granted when: the assistance is incidental to purposeful military activity and the activity provides the Navy with training or operational benefits.

-- Reporting. By the 15th of the month following each quarter, Navy and Marine Corps second echelon commands must submit quarterly reports on requests for assistance. The reports indicate the action taken, the costs involved, and other pertinent information.

APPENDIX A

SAMPLE MEMORANDUM OF UNDERSTANDING (MOU) WITH LOCAL AUTHORITIES

1. **PURPOSE.** The purpose of this Memorandum is to delineate an understanding between the subscribing officials, as representatives of the U.S. Naval Station Ingleside, Texas (NAVSTA Ingleside), the Ingleside Police Department and the San Patricio County Sheriff's Department relating to: (a) the investigation of offenses potentially of mutual interest to NAVSTA Ingleside and civil authorities; (b) the reporting of certain types of offenses and injuries; (c) arrests effected by the Police Department and the Sheriff's Department on board NAVSTA Ingleside; and (d) response to civil disturbances on or adjacent to NAVSTA Ingleside. Nothing herein shall limit the statutory authority or functions of any federal agency acting on board NAVSTA Ingleside.

2. **POLICY.** NAVSTA Ingleside, the Police Department, and the Sheriff's Department recognize that proper administration and discipline of the armed forces require that, ordinarily, offenses committed by military personnel on NAVSTA Ingleside be investigated and prosecuted by the military. However, there may be occasions when such offenses should be investigated by Texas civil authorities. The procedures set forth herein are intended to make the investigation of offenses more expeditious and efficient while giving appropriate consideration to the requirements of the armed forces, the policies of the civil government, and other matters of mutual interest. This MOU does not apply to offenses cognizable only under the Uniform Code of Military Justice (UCMJ) nor does it apply to investigations for administrative or security purposes.

3. **JURISDICTIONAL AREAS.** This MOU shall address responsibilities for the investigation of offenses committed within the geographic area of NAVSTA Ingleside, where it is understood the United States maintains a proprietary interest only.

4. **INVESTIGATIONS.** The following principles shall be applied in determining whether NAVSTA Ingleside, the Police Department, the Sheriff's Department, or the Naval Criminal Investigative Service (NCIS) will conduct a particular investigation. Decisions to assume or decline jurisdiction shall be made promptly so that items of evidentiary value will not be lost or destroyed.

a. Offenses committed on NAVSTA Ingleside

(1) Traffic enforcement. NAVSTA Ingleside shall be primarily responsible for traffic control, enforcement of base traffic regulations, and investigation of motor vehicle accidents.

(2) Other misdemeanor offenses. As used herein, a misdemeanor offense is an offense punishable under the laws of the State of Texas by confinement of one year or less. Investigations of misdemeanor offenses shall be first conducted by the military. If a suspect is not subject to the UCMJ, and if the matter will not be pursued in any federal court, investigative jurisdiction shall be referred to the Police Department or the Sheriff's Department after the military purpose in conducting such investigation has been satisfied.

(3) Felonies. As used herein, a felony is an offense punishable under the laws of the State of Texas by confinement for more than one year. The NCIS is normally responsible for the investigation of felonies aboard NAVSTA Ingleside. NCIS will coordinate with the Police Department or Sheriff's Department whenever investigative matters warrant the attention or assistance of the Police or Sheriff's Departments.

b. Offenses committed outside NAVSTA Ingleside

(1) The Police Department or the Sheriff's Department will normally be responsible for the initial investigation of offenses committed outside the Naval Station. However, when it appears a military member may be subject to prosecution under the UCMJ, the Police Department or the Sheriff's Department shall inform NCIS of the incident and give them the opportunity to participate in the investigation. Thereafter, the investigation shall be conducted as provided in subsection 4.a. above.

(2) Investigations initiated by the military may be pursued by the military to the extent military interests dictate.

(3) It is understood that no state has the right or power to interfere with the Federal Government in the proper performance of its authorized functions. Federal supremacy dictates that, among other matters, the Police Department or the Sheriff's Department may not arrest and detain for trial any member of the armed forces for alleged violation of Texas law done in the lawful performance of official duties or done pursuant to lawful orders.

c. Offenses against the United States. Notwithstanding the provisions of section 4, above, when it appears that an offense involves fraud against the United

States or damage to, or misappropriation or larceny of, U.S. property, or any violation of the criminal laws of the United States, the investigation shall be conducted by NCIS and other appropriate federal authorities.

5. DEMONSTRATIONS. In the event of a demonstration, the following actions will be taken:

a. If the demonstrators are located adjacent to the Naval Station, the Police Department or Sheriff's Department shall normally have cognizance over the arrest of the demonstrators if the need arises and Police or Sheriff Department personnel are present. The commanding officer (CO) of the Naval Station retains the inherent authority to take the necessary steps to protect the security of the installation.

b. If the demonstrators attempt to enter the Naval Station unlawfully, the Naval Station security force shall detain the demonstrators until they can be turned over to Police Department or Sheriff's Department personnel. NAVSTA Ingleside shall request assistance from the Police Department and Sheriff's Department when necessary. When requested, the Police Department and / or Sheriff's Department personnel shall assist in control of demonstrators—including the arrest of demonstrators when necessary.

c. If the demonstrators are physically located on NAVSTA Ingleside, NAVSTA security shall when necessary detain the demonstrators until they can be turned over to Police Department or Sheriff's Department personnel. When necessary, NAVSTA Ingleside will request Police Department and / or Sheriff's Department personnel to come on board NAVSTA Ingleside to assist in control of such demonstrators—including the arrest of such demonstrators when necessary.

6. REPORTING INJURIES

a. Internal Navy regulations require that, when Navy commands are contacted by nonmilitary law enforcement organizations in connection with investigative matters, the matter must be referred to NCIS for coordination. Accordingly, any release of information concerning investigative matters must first be coordinated with NCIS. If NCIS permission is obtained, NAVSTA Ingleside shall immediately report to the Police Department or the Sheriff's Department by telephone—and in writing as soon thereafter as is practicable—the identities of persons involved and circumstances of each occurrence of the following categories of injuries that are treated, or otherwise discovered, by personnel of NAVSTA Ingleside:

(1) Injuries to any person inflicted by means of a knife, gun, pistol, or other deadly weapon, in apparent violation of any law of the State of Texas; and

(2) all suspected cases of child abuse or sexual molestation of minors within the cognizance of the State of Texas. The above information will not be withheld from the Police and Sheriff's Departments unless there is a valid military or investigative reason to do so.

b. The Police Department and the Sheriff's Department shall likewise report to NAVSTA Ingleside the identities of persons involved and circumstances of each occurrence of the following categories of injuries that are discovered by, or become known to, the Police Department or Sheriff's Department:

(1) Serious injuries to military personnel occurring off base; and

(2) serious injuries to dependents of military members assigned to NAVSTA Ingleside which occur off-base. With regard to these categories of injuries, it is understood that the Police Department or the Sheriff's Department cannot order or instruct the local community hospitals, or any physician, to forward injury reports to NAVSTA Ingleside; however, the Police Department and the Sheriff's Department shall, upon request, provide to NAVSTA Ingleside copies of any such injury reports that may be acquired by the Police Department or Sheriff's Department.

7. ARRESTS ON NAVSTA INGLESIDE

a. Entry onto NAVSTA Ingleside by Police Department or Sheriff's Department personnel will be with the prior permission of the CO or designated representative.

b. All arrests will be made pursuant to a valid arrest warrant unless otherwise authorized by the CO, executive officer (XO), or their designated representative.

c. When the delivery of any military member or civilian employee is requested by civil authorities, the person desiring the arrest will bring the arrest warrant to the Security Office. It is understood that the Security Office is required to consult with a judge advocate to determine the validity of the arrest warrant. In the case of a military member, delivery will only be effected upon completion of the agreement contained in Appendix A-6-b of the Manual of the Judge Advocate General, a copy of which is appended to this Agreement for ease of reference. Once the validity of the warrant is established, the warrant will be delivered at a place to be determined by the security officer. Civilians cannot be compelled to report to a designated place for delivery of a warrant.

d. Delivery of a member or civilian employee pursuant to a proper warrant may be refused only in the following limited circumstances:

(1) Where a military accused is pending trial by court-martial; or

(2) when the CO determines that extraordinary circumstances exist which indicate that delivery should be refused.

e. The above procedures do not apply to out-of-state fugitive warrants.

8. **PERIOD OF AGREEMENT.** The undersigned agree to cooperate fully in carrying out the policies and procedures set forth in the foregoing Agreement, which shall remain in force [for a specified period] commencing on the date last subscribed below. This Agreement may be modified by mutual consent or unilaterally by thirty (30) days written notice to the other subscribing officials or their successors. The provisions of this MOU shall be reviewed every two (2) years, with the first to be conducted during November 19__.

[SIGNATURES OF REPRESENTATIVES]

Attachment: Copy of JAGMAN, App. A-6-b

CHAPTER TWENTY-TWO

FREEDOM OF EXPRESSION

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CHAPTER TWENTY-TWO

FREEDOM OF EXPRESSION

2201 RIGHT TO PEACEABLE ASSEMBLY

A. On-base demonstrations. A CO may 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. Prior authorization of an on-base demonstration will not shield participants from prosecution for unlawful conduct.

B. Off-base demonstrations. Commanders may prohibit servicemember participation outright in off-base demonstrations while the members are "on duty" (i.e., during working hours), in a foreign country, when breach of law and order is reasonably anticipated, when violence is likely to result, or when the demonstration involves overtly discriminatory organizations. In addition, the commander can prohibit attendance at an off-base demonstration ***in uniform*** in accordance with DOD Directive 1334.1, under the following circumstances: at any subversive-oriented meeting or demonstration; in connection with political activities; and when wearing the uniform would tend to bring discredit to the armed forces or create the appearance that the service endorses the member's attendance.

C. Off-base gathering places. Under OPNAVINST 1620.2A and MCO 1620.2C, 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 CO 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 service procedures. Servicemembers frequenting an establishment duly declared "off limits" would be subject to prosecution for violation of a lawful order.

D. Membership in organizations. Passive membership in any organization by servicemembers cannot be prohibited. Organizational activities (such as distributing of materials, recruiting new members, or attending an on-base meeting) may, however, be proscribed by a CO when they present a clear danger to installation

security, 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 CO from forming affiliations aboard a naval ship or shore facility and the attendant solicitation of members.

2202 PRINTED MATERIALS

A. Possession of printed material. In accordance with paragraph III.A.2. of DOD Directive 1325.6, "the mere possession of unauthorized printed material may ***not*** be prohibited . . . ." Naturally, this broad statement does not permit the unauthorized possession of classified material. In addition, possession of material for the purpose of making an illegal distribution is prohibited and the material may be impounded if the commander determines that an attempt will be made to distribute it. Such determinations cannot be made arbitrarily, but must be based on probable cause supported by objective facts (e.g., numerous copies of the same publication).

B. Distribution of printed material

1. Official outlets. Article 4314f of the *Navy Exchange Manual* contains very broad guidelines for screening pornographic or other materials inappropriate for sale in the military. Commanders are required to apply a consistent standard to all publications. To avoid ad hoc censorship, however, paragraph III.A.1. of DOD Directive 1325.6 prohibits commanders from denying the sale of a specific issue of a publication which is otherwise authorized for distribution through official outlets.

2. Unofficial outlets. Commanders may require that prior approval be obtained for any distribution on a military installation to determine whether the distribution would present a "clear danger" to the loyalty, discipline, or morale of military personnel or "materially interfere" with the accomplishment of a military mission. Local implementing directives must be couched carefully to avoid an attack that the regulation is overbroad. Distributors should be advised that command approval to distribute is neither an endorsement of the publication nor a shield against subsequent punishment for any unlawful actions in connection with the distribution.

2203 ESTABLISHMENT CLAUSE ISSUES

The three-part test developed in *Lemon v. Kurtzman*, 403 U.S. § 602 (1971), is applied to determine whether governmental action has run afoul of the first amendment guarantee of separation of church and state.

A. Criteria. The government action must:

1. Have a secular legislative purpose;

2. have a principal or primary effect that neither advances nor inhibits religion; and

3. not foster an excessive government entanglement with religion.

B. Application. The common application of this test in recent years is evaluating the constitutionality of nativity scenes. These displays may be held lawful under the *Lemon* test if part of a larger display [*Lynch v. Donnelly*, 465 U.S. § 668 (1984)], as contrasted with placing the display at an inherently governmental location. *American Civil Liberties Union v. City of Birmingham*, 791 F.2d 1561 (6th Cir. 1986) (Nativity scene located alone in front of City Hall violated the establishment clause). For a discussion of religious displays on a military installation, see *Jewish War Veterans v. United States*, 695 F. Supp. 3 (D.D.C. 1988).

2204 RELIGIOUS ACCOMMODATION

A. References

1. 10 U.S.C. §§ 774, 6031

2. *U.S. Navy Regulations, 1990*, Article 0817

3. SECNAVINST 1730.8, Subj: ACCOMMODATION OF RELIGIOUS PRACTICES

4. DOD Directive 1300.17, Subj: ACCOMMODATION OF RELIGIOUS PRACTICES WITHIN THE MILITARY SERVICES

B. General. Notwithstanding the "establishment clause" of the first amendment and the notion of separation of church and state, federal law provides for a Navy Chaplains Corps and requires COs to "cause divine services to be conducted on Sunday." The statute, 10 U.S.C. § 6031, also permits chaplains to conduct divine services according to the manner and form of their faiths.

C. Reasonable accommodation of religious practices. The accommodation of a member's religious practice depends upon military necessity, and that determination of military necessity rests entirely with the CO. SECNAVINST 1730.8 provides guidelines to be used by the naval service, in the exercise of command discretion, concerning the accommodation of religious practices. Commanders may accommodate a variety of religious requests including requests relating to dietary observances, Sabbath observances, and religious clothing. Religious jewelry remains subject to pertinent uniform regulations.

D. Religious apparel. Religious 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. Religious articles which ***are visible*** may be authorized for wear with the uniform if they are neat and discreet and do not interfere with the proper wearing of the uniform or the member's duty performance. Religious items may not be worn with historical or ceremonial uniforms, while participating in ceremonial details, or during basic military skills training.

E. Factors bearing on a request. Commanders may consider:

1. The importance of military requirements, including individual readiness, unit cohesion, health, safety, morale and discipline;

2. the religious importance of the accommodation to the requester;

3. the cumulative impact of repeated accommodations of a similar nature;

4. alternative means available to meet the requested accommodation; and

5. previous treatment of the same or similar requests made for other than religious reasons.

F. Denials. SECNAVINST 1730.8 also provides that any visible item or article of religious apparel may not be worn with the uniform until approved. When a commander denies a religious accommodation request, the member must be advised that he has a right to request a review of the refusal by the Chief of Naval Operations (CNO) or the Commandant of the Marine Corps (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 overseas. If accommodation is not in the best interest of the unit, and continued tension between the unit's requirements and the individual's religious beliefs is apparent, the command may take administrative action, including reassignment, reclassification, or separation.

2205 WRITING OR PUBLISHING MATERIALS

Sections 401.2 and 403.4 of the Navy Public Affairs Policy and Regulations, SECNAVINST 5720.44, provide for prior security and policy review of certain materials prepared by naval personnel. Writers must submit their material for review before the manuscript is given to a prospective publisher. The review seeks to prevent the unauthorized release of classified material and to ensure that, if the author purports to state government policy, the policy is stated correctly. Permission to publish is not a grant of immunity. Publication could violate a number of statutes or regulations, depending on its content. For example, Article 1121.2 of *U.S. Navy Regulations, 1990*, prohibits any public speech or article which is "prejudicial to the interests of the United States." From a standards of conduct perspective, servicemembers may not use government time or resources for personal writing. Conversely, the publication of "underground newspapers" by military personnel off-base, on their own time, and with private resources is not in itself prohibited. *See* "Standards of Conduct" in this Deskbook for a discussion of honoraria in connection with private writings.

2206 POLITICAL ACTIVITIES

A. References

1. DOD Directive 1344.10, Subj: POLITICAL ACTIVITIES BY MEMBERS OF THE ARMED FORCES ON ACTIVE DUTY

2. SECNAVINST 5370.2, Subj: STANDARDS OF CONDUCT AND GOVERNMENT ETHICS

3. MILPERSMAN, art. 6210140.

4. MCO 5370.7

B. Scope. Members on active duty (i.e., full-time duty in the active military service for more than 30 days) are prohibited from engaging in 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. Consult SECNAVINST 5370.2 for a laundry list of political do's and don'ts. Questions recur on the following rules:

1. Members may sign a petition in their private capacity for specific legislative action;

2. a member may write a nonpartisan letter to the editor of a newspaper expressing personal views on public issues;

3. members may display a political sticker on their private automobile, but not a large political sign;

4. a member may ***not*** participate in any organized effort to provide voters with transportation to the polls; and

5. regular, Reserve, or retired members on active duty (more than 180 days), except as otherwise authorized by law, may not hold elective or appointive civil office in the federal or state government (or any political subdivision). This rule in DOD Directive 1344.10 does not prohibit membership in fire departments, rescue squads, or similar organizations.

2207 REDRESS OF GRIEVANCES

A. Unions. Servicemembers are prohibited from joining, organizing, or recognizing military unions under 10 U.S.C. § 976, as implemented by SECNAVINST 1600.1. A military labor organization is any entity that attempts to engage in bargaining on behalf of a servicemember concerning the terms of service, representing servicemembers concerning military grievances, or any demonstration activity to recruit members. Servicemembers may participate in command-authorized councils or any lawful council not constituting a military labor organization.

B. Request mast. Article 0820 of *U.S. Navy Regulations, 1990*, provides that the CO shall: "[A]fford an opportunity, with reasonable restrictions as to time and place, for the personnel under his or her command to make requests, reports or statements to the commanding officer, and shall ensure that they understand the procedures for making such requests, reports or statements. . . ." Article 1151.1 adds: "The right of any person in the naval service to communicate with the commanding officer in a proper time, and at a proper time and place, shall not be denied or restricted." This right does not extend the right to a "personal audience" with officials above the member's CO in the chain of command.

C. Complaint of wrongs

1. Against the CO. Article 138, UCMJ, provides a vehicle for redress of grievances for any member who feels wronged by his CO. Article 138 complaints are discussed in detail in section 2210 below.

2. Against another superior. Article 1150 of *U.S. Navy Regulations, 1990*, provides:

> If any person in the naval service considers him- or herself wronged by an act, omission, decision or order of a person who is superior in rank or command, that person shall not fail in maintaining a respectful bearing toward such superior, but may report the wrong to the proper authority for redress in the manner provided in this article.

The GCMA shall inquire into the matter and take such action as may be warranted. To the extent possible, the GCMA will follow the guidance relating to review of article 138 complaints in chapter III of the *JAG Manual*.

D. Inspector General. Article 0311 of *U.S. Navy Regulations 1990*, 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 (e.g., an investigation into safety conditions at a command). A position of Inspector General exists at Headquarters, U.S. Marine Corps, and at most major commands in the Marine Corps.

E. Right to petition any member of Congress

1. Congressional correspondence. Under 10 U.S.C. § 1034, "[n]o 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 Articles 1154 and 1155 of *U.S. Navy Regulations, 1990*.

2. Group petitions. Local regulations typically require servicemembers to obtain the base commander's approval before circulation on base of petitions addressed to members of Congress. The statutory bar in 10 U.S.C. § 1034 (1976) applies only to an individual servicemember's ability to submit a petition directly to Congress, and not to group petitions.

F. Equal opportunity. The Department of the Navy fully supports equal opportunity. To ensure equal opportunity and to guarantee nondiscriminatory treatment within the naval community, two separate and distinct grievance systems are in place.

1. Federal civilian employees are entitled to an initial investigation and review of complaints, followed by appeal to the Equal Employment Opportunity

Commission (EEOC), and the option to file a civil action in U.S. district court. This process is governed by guidance promulgated by the EEOC and the Office of Personnel Management (OPM), which has been incorporated by reference as Navy policy (SECNAVINST 12720.5). These procedures do not apply to military members.

2. OPNAVINST 5354.1 implements the Navy Equal Opportunity Program for military members. The instruction sets out the rights and responsibilities for all active-duty Navy and Naval Reserve units and personnel. Military members who perceive that they have been discriminated against or harassed should attempt to resolve the complaint at the lowest level possible and use fully the chain of command. To accomplish this goal, the military grievance procedure is divided into two categories, informal and formal.

a. The informal grievance procedure attempts to resolve the complaint with the person or persons involved. Assistance of the immediate supervisor involving the complaint may be requested. Normally, complaints are handled orally at this stage, but the servicemember may elect to pursue the matter in writing. If the immediate supervisor is the object of the complaint, the complaint should be presented to the next senior in the chain of command. If the discrimination complaint cannot be resolved at this level, the servicemember has the right to a request mast to discuss the matter with the CO. If the matter cannot be resolved between the servicemember and the CO, the CO is required to advise the complainant of his / her right to submit a formal complaint and the method for submission.

b. The formal discrimination grievance procedure set out in OPNAVINST 5354.1 incorporates the article 138 / article 1150 Navy regulations complaint procedure in full. If the discrimination complaint is not resolved under the informal grievance procedure, the complaint is handled purely as an article 138 complaint, requiring compliance with the procedures set out in chapter III of the *JAG Manual*.

c. If the servicemember is not satisfied that the complaint has been or will be properly resolved by the chain of command, the member may transmit the complaint via the Inspector General's "Fraud, Waste, and Abuse Hotline." The Hotline may be used to report discriminatory practices, particularly sexual harassment.

G. Other tools to redress grievances. Other mechanisms to redress grievances include Article 138, UCMJ, complaints and petitions to the Board for the Correction of Naval Records or the Naval Discharge Review Board. These more complex topics are discussed below.

2208 THE BOARD FOR THE CORRECTION OF NAVAL RECORDS (BCNR)

A. References

1. 10 U.S.C. § 1552

2. MILPERSMAN, art. 5040200

3. MARCORSEPMAN, fig. 1-2

B. Background. Before 1946, the only method of redress was the private bill in Congress, presenting a problem akin to early federal tort claims. The BCNR was created by the Reorganization Act of 1946. Each service, including the Coast Guard, has its own. BCNR is composed of about 46 civilians; many have a military background, but that experience is not required. Three members constitute a quorum to hear cases to determine the existence of an error or an injustice and make appropriate recommendations to the Secretary of the Navy (SECNAV). Each board has an executive director. The BCNR is divided into sections including a disability section, discharge section, pay section, and performance section.

C. Scope of review. Any member or former member or any other person considered by the board to be competent may make an application. Applications to BCNR are subject to several qualifications. In no event will an application be considered before other administrative remedies have been exhausted. When a "no change" decision has been rendered by the Naval Discharge Review Board (NDRB), and a request for reconsideration by that board has been denied, a petition may then be filed with the BCNR. In addition to its power to consider applications concerning discharges adjudged by GCM's (something the NDRB may not do), BCNR may also review cases involving:

1. Requests for physical disability discharge and, in lieu thereof, retirement for disability;

2. requests to change the character of a discharge or eliminate the discharge and restore to duty;

3. removal of derogatory materials from official records (such as fitness reports, performance evaluations, nonjudicial punishments, failures of selection, and marks of desertion);

4. changing dates of rank, effective dates of promotion or acceptance / commission, and position on the active-duty list for officers;

5. correction of "facts" and "conclusions" in official records (such as lost-time entries or line of duty / misconduct findings);

6. restoration of rank; and

7. pay and allowances items (such as special pays, incentive pay, readjustment pay, severance pay, and basic allowance for quarters).

D. Generic processing. The first step is to get all of the applicant's records. Get a current copy of the Official Military Personnel File, making sure you get ***all*** the fiche. Identify the issue and prepare the DD Form 149.

1. If the issue is pre-1972, list in the service number of the applicant in addition to the social security number. Any block having insufficient space, insert "see attached sheets."

2. If the member agrees, check the block that you or they are willing to appear personally. Recognizing that this is an extremely rare event offered to less than 0.5% of the applicants, it shows BCNR the applicant is willing to go the extra mile to get the relief requested. BCNR allows members to appear when they want to see the applicant, particularly in disability cases. BCNR will write you and invite you to appear. You have 30 days to work out a docket date on which counsel and witnesses can appear with the examiner. After that, BCNR will docket the case and proceed with or without you.

3. In Block 8a, tell BCNR what you want. If you don't ask for it, you won't get it. Make conditional requests as appropriate (e.g., pull my fitness report, expunge my failure of selection, put me in zone as if for the first time). BCNR can do most anything. If you have old references pertinent at the time, include a copy in your application. Don't assume BCNR has it all. They don't. Old regulations are available under a FOIA request to headquarters. Major commands often keep superseded directives for five years for reference purposes. List support, statements, and enclosures in Block 10.

4. The "Date of Discovery" is critical. The more timely the better. BCNR will always consider applications filed within three years of discovery of the error or injustice. If filed later, you have to justify the delay and explain the extraordinary reasons which prevented a timely filing. BCNR is authorized to excuse untimely filings in the interest of justice. The "I didn't know" excuse will rarely prevail; service regulations place the burden of ensuring that records are accurate squarely on the shoulders of the servicemember. The member may obtain review if

they can credibly bring the discovery date within the three-year period (e.g., "I didn't realize this was an error or injustice until my lawyer analyzed it").

5. Put applicant's ***home*** address on the bottom to avoid delay in the event of transfer. Send it off to: The Board for the Correction of Naval Records, Department of the Navy, Washington, DC 20370. The application need not go via chain of command. For Marines contesting performance evaluations, applications are forwarded via HQMC (PE-5 / PERB).

E. Strategies and tactics

1. If challenging the substantive accuracy of a fitness report, you have to back up your claim with statements. You have to find people who can comment on the inaccuracy of the record by virtue of their official position, capacity to observe, judgment, etc.

2. If attacking the procedures, use the regulation. The government is bound to follow its own regulations. If the government fails to follow the regulation to the prejudice of the servicemember, you may be able to get some relief.

3. A common complaint is adverse information in the service record which is not referred to the servicemember for rebuttal. Whether material is "adverse" depends on Navy regulations and service regulations on fitness report preparation. The concept of "adverse" is especially problematic in our inflated system of evaluations. Argue the circumstances. BCNR may remove the report or give you the opportunity ***now*** to write a rebuttal. This latter "relief" is not worth very much. You need to argue that the untimeliness of the rebuttal makes this relief unfair.

F. BCNR action. BCNR sends a letter to notify you of your docket number. Call up and ask, "Who is my examiner?" Examiners are nonlawyers who develop the case and present it to the panel. A lawyer may chop the case, but it's unlikely that a lawyer will present it. Call the examiner to say you are ready, willing, and able to provide any additional assistance the examiner needs to prepare the case for presentation to the BCNR panel.

1. BCNR won't do anything until they retrieve the member's fiche. Having requested them yourself, you will know exactly what they are looking at. In determining whether or not material error or an injustice exists, the board will consider all evidence available including all information contained in the application; briefs submitted by, or on behalf of, the applicant; and all available military records.

2. BCNR may request advisory opinions from BUPERS, CMC, OJAG, or whoever they think they will get the expert advice they need to resolve the request. BCNR will send you a copy of these advisory letters. Ensure you get them

all including all enclosures and references. In fitness report cases, BCNR may go back and ask the reporting senior for comment. This is more common in the Navy than in the Marine Corps. If the reporting senior chooses to comment, you will get a copy. BCNR will give you 30 days to respond to any outside input they receive. Do your best to rebut unfavorable advisory opinions. Don't give up your right to put in the last word.

3. All the opinions go back to the examiner who reviews the entire package. When they understand and have a good handle on the case, they will docket it. The examiner will present the case to a panel of three members of the board. The examiner may or may not offer a personal opinion on the merits of the application. The panel votes. If the vote is not unanimous, a minority opinion will be attached.

G. BCNR decision. SECNAV has delegated to the executive director the authority to take final action in the following ten categories:

1. Leave adjustments;

2. retroactive advancements for enlisted personnel;

3. enlistment / reenlistment 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 member's reenlistment codes.

H. Follow-up. BCNR sends the applicant a letter advising the member of the board's action.

1. If no relief is given, the applicant can later ask BCNR for reconsideration on the basis of new and significant additional information not previously considered and not previously available. The executive director will decide whether to permit reconsideration.

2. If relief is provided, the applicant should request his fiche again in six months to ensure the record has been corrected as directed by BCNR. If the record hasn't been corrected, send a copy of BCNR's final action to the offending agency responsible for maintaining the record; don't just go back to BCNR.

3. Expunged material goes into a confidential file at BCNR. The "hole" will be replaced by a filler letter: "Removed at the direction of the Secretary of the Navy . . . . No adverse inference is permissible."

I. SECNAV action. If favorable action is recommended (and not within the delegation of authority), BCNR will forward this information to the Office of the Assistant Secretary of the Navy for Manpower and Reserve Affairs (M&RA) who has been delegated the authority to act for the Secretary of the Navy in such matters. BCNR's report will be prepared by the examiner, typically in an exceptionally fair manner. The report will discuss the minority opinion in detail. If, and only if, the report of BCNR recommends favorable action (in whole or in part), the report will go to M&RA who will approve, disapprove, or modify. Sometimes M&RA will send it back to BCNR asking for reconsideration on portions of relief denied, thereby signalling that they may be disposed to favorable action. Then it goes back to BCNR with a cover memorandum. If no relief is recommended by BCNR, the report will ***not*** go on to M&RA.

2209 NAVAL DISCHARGE REVIEW BOARD (NDRB)

A. References

1. 10 U.S.C. § 1553

2. SECNAVINST 5420.174, Subj: REVIEW AT THE LEVEL OF THE NAVY DEPARTMENT OF DISCHARGES FROM THE NAVAL SERVICE

3. MILPERSMAN, art. 5040200

4. MARCORSEPMAN, fig. 1-2

B. General. 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, DC, and also travel periodically to other areas within the continental United States. 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. By statute, NDRB 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. 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 before a final discharge has been issued.

D. Action. To change, correct, or otherwise modify a discharge certificate or issue a new certificate, NDRB must be convinced that the original certificate was "improperly or inequitably" given.

1. 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. NDRB may consider any

information disclosed to, or discovered by, the naval service at the time of enlistment or other entry into the service. This evidence may include facts "found" by a fact-finding body (e.g., a court-martial, court of inquiry, etc). Unless the former member can show coercion, the evidence should include charges and specifications to which guilty pleas were appropriately entered in court or which the former member admitted in a request for separation in lieu of trial by court-martial.

2. 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 BCNR, NDRB is ***not*** empowered to change any discharge to one more favorable solely because the applicant has demonstrated exemplary conduct and character since the discharge regardless of the length of time that has elapsed.

E. Secretarial review. Action taken by the NDRB is administratively reviewable only by the SECNAV. If newly discovered evidence is presented, NDRB may recommend to SECNAV reconsideration of a case formerly heard, but may not reconsider a case without prior SECNAV approval.

F. 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.

2210 ARTICLE 138 COMPLAINTS

A. Authority. Article 138, UCMJ, provides:

> 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.

B. Procedures. Implementing instructions are set forth in chapter III of the *JAG Manual*; the appendices include the general court-martial convening authority's (GCMA) letter to SECNAV and the GCMA notice to the complainant of the right to rebut. Two significant changes appear in the 1990 revision. First, legal assistance

attorneys may *not* assist servicemembers in the preparation of article 138 complaints. Second, Marines may *not* use an article 138 as a means to attack adverse fitness reports, given the existing avenues for relief in MCO 1610.7. Proceedings on the complaint held by the GCMA 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. The following checklist may be helpful as a tool for GCMA review of article 138 complaints.

APPENDIX A

CHECKLIST FOR OEGCMJ REVIEW OF ARTICLE 138 COMPLAINTS

___ Original complaint or certified copy received

___ Complaint is complete (*See* Appendix A-3-a(1), *JAG Manual*)

- ___ Includes all documents submitted by complainant and intermediate endorsers
- ___ Signed and sworn by complainant
- ___ Cites Article 138, UCMJ
- ___ Addressed through respondent and appropriate chain of command
- ___ Clearly identifies respondent (and only one respondent) by name and title
- ___ Reflects complainant has made a prior request for redress from respondent which was denied (request and respondent's response should be enclosures to complaint)
- ___ Respondent has Article 15, UCMJ, power over complainant
- ___ Facts and circumstances giving rise to alleged wrong(s) are detailed and available supporting information included
- ___ Personal detriment or harm suffered from alleged wrong(s) detailed
- ___ Specific relief requested
- ___ Requested relief may be granted in command channels

___ Complaint lies within scope of Article 138, UCMJ

___ Complaint is timely, 90 days unless unusual circumstances

___ If complaint is not cognizable under Article 138, UCMJ, OEGCMJ shall return it to complainant advising alternative avenues of redress (e.g., Article 1150, *U.S. Navy Regulations, 1990*, complaint or petition to the Board for Correction of Naval Records). Acts which are not cognizable under article 138 include:

- ___ Acts not initiated or ratified by the respondent
- ___ Acts which are not final
- ___ General policy matters
- ___ Requests for disciplinary action on another
- ___ GCMA action on article 138 complaint (except failure to forward)
- ___ Other DON procedures exist for redress of the specific type of complaint

___ If the complaint is cognizable under article 138, but otherwise defective, OEGCMJ will:

- ___ Return complaint and advise complainant of nature of defect
- ___ Give complainant 30 days to cure defect
- ___ Advise complainant that complaint will be acted on despite defect only if complainant so desires and resubmits his complaint within 30 days.

___ If redress is denied for failure to cure improper joinder (complaints may not be joined with complaints of other individuals) or lack of timeliness, OEGCMJ must report to SECNAV

___ If cognizable complaint, OEGCMJ will conduct inquiry into complaint

___ 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

___ If relief is granted, include documentation of relief granted or that action to effect relief has been directed

___ Advise complainant in writing 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

___ OEGCMJ personally signed report to SECNAV setting forth action on complaint

___ 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

CHAPTER TWENTY-THREE

ETHICS FOR SJAs

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CHAPTER 23

ETHICS FOR SJAs

2301 REFERENCES

A. JAGINST 5803.1, Subj: PROFESSIONAL CONDUCT OF ATTORNEYS PRACTICING UNDER THE SUPERVISION OF THE JUDGE ADVOCATE GENERAL

B. American Bar Association Model Code of Professional Responsibility (1980)

C. American Bar Association Model Rules of Professional Conduct (1984)

D. American Bar Association Standards for Criminal Justice (1986)

E. ABA/BNA Lawyers' Manual of Professional Conduct (1988)

F. The Legislative History of the Model Rules of Professional Conduct, ABA (1987)

G. The Annotated Model Rules of Professional Conduct, ABA (1986)

2302 INTRODUCTION

In August of 1983, the House of Delegates of the American Bar Association (ABA) adopted the ABA Model Rules of Professional Conduct. The ABA hopes these rules will replace the Model Code of Professional Responsibility which had been adopted, with minor revisions, by virtually every state. The legislatures, bar associations, and appellate courts of the states are now in the process of reviewing and evaluating the new Model Rules of Professional Conduct. Although several states have adopted the Model Rules, it appears that every state doing so is making major changes in a variety of areas. Accordingly, we face state ethical codes that differ widely from jurisdiction to jurisdiction. Additionally, the Judge Advocate General of the Navy has adopted a variation of the ABA Model Rules for judge advocates. SJAs must familiarize themselves with the various ethical codes relevant to their practice.

2303 SCOPE

The Rules of Professional Conduct (RPCs), promulgated as enclosure (1) to JAGINST 5803.1, provide a benchmark standard of lawyer conduct for DON attorneys. While the RPCs provide a basis for taking action should a lawyer fail to comply or meet the standards, they do ***not*** provide a basis for a civil cause of action against either DON or the individual judge advocate.

A. Application. The RPCs apply to all:

1. Navy and Marine Corps judge advocates;

2. civilian attorneys who are DON employees and work under the authority of the Judge Advocate General (JAG); and

3. civilian attorneys representing servicemembers in any matter within JAG's cognizance.

B. Other potential sources of ethical rules

1. ABA Standards for Criminal Justice apply to military judges, counsel, and clerical support personnel of DON courts-martial.

2. Ethics code where licensed to practice law. "A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere." (ABA Model Rule 8.5.)

3. Ethics code in the jurisdiction of current practice.

2304 CONFLICT RULES

The practice of judge advocates can present many scenarios in which the attorney faces conflicting professional duties. Consider, for example, a Navy judge advocate joins the Navy after passing the New Jersey bar and is assigned at NLSO Jacksonville for duty as a legal assistance officer. His first client, a dependent spouse, reveals her plans to commit a crime in town: buy drugs. The judge advocate is bound by the New Jersey rules to remain silent, yet bound to disclose under the Florida rules.

A. Resolving conflicts. Where possible, judge advocates should follow the most restrictive standard (i.e., if a course of conduct is permitted under one standard and mandatory under another standard, follow the mandatory standard). The attorney should also consider practical alternatives. In some cases, finding the client

new counsel may eliminate the issue. In other cases, seeking an exception from the state bar may be appropriate.

B. Unresolvable conflicts. Paragraph 8 of JAGINST 5803.1 specifically provides that the Rules of Professional Conduct contained therein take precedence over any such rules promulgated by any other jurisdiction.

1. In *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984), the Supreme Court held that FCC regulations preempted the field of "pay cable" programming regulations indicating that "federal regulations have no less preemptive effect than federal statutes." 467 U.S. at 699. Accordingly, the judge advocate facing conflicting ethical rules can probably most safely elect to follow the federal regulation on point and argue that the federal regulations preempt any conflicting state laws or regulations.

2. Under the comment to ABA Model Rule 8.5, the general authority of states to regulate must be reconciled with the authority of federal tribunals to regulate practice. If conflict is unavoidable, follow the Navy rule. DON has the most significant contacts with the ethical issue. If the state bar brings proceedings, seek removal to federal court. *Kolibash v. Committee on Legal Ethics of the West Virginia Bar*, 872 F.2d 571 (4th Cir. 1989).

2305 DUTIES OF SUPERVISORS AND SUBORDINATES

A. SJAs must ensure subordinates comply. Under RPC 5.1, supervisory judge advocates shall make reasonable efforts to ensure that all judge advocates conform to the RPCs. An SJA having direct supervisory authority over another judge advocate shall make reasonable efforts to ensure that the other judge advocate conforms to the RPCs. This SJA responsibility extends to nonlawyers under supervision (e.g., summer law students on TEMAC / TAD under RPC 5.3). SJAs should provide instruction as necessary to ensure their subordinates understand their professional responsibilities. Similarly, an SJA is responsible for ensuring that subordinate judge advocates are properly trained and competent to perform their assigned duties.

B. Responsibility for acts of a subordinate. An SJA assumes imputed responsibility for acts of subordinates if the SJA, as supervisory judge advocate:

1. Orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

2. has direct supervisory authority over the other judge advocate and knows of the conduct at a time when its consequences can be avoided or mitigated, but fails to take reasonable remedial action.

C. Subordinates are bound by the RPCs. Under RPC 5.2, all judge advocates are bound by the RPCs, even if acting at the direction of another person. A subordinate may rely on ethical judgment of a supervisor if the issue is reasonably subject to question. If the ethical question can be answered only one way, the subordinate must comply with the RPCs even if the supervisor directs a contrary course. When representing individual clients, subordinates are required to exercise unfettered loyalty and professional independence as may be required by that particular assignment. RPC 5.4a.

2306 PROFESSIONAL RESPONSIBILITY COMPLAINTS

A. Professional misconduct. Professional misconduct includes any act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer. Acts of professional misconduct listed under RPC 8.4 include conduct involving deceit, dishonesty, fraud, misrepresentation, or conduct prejudicial to the administration of justice.

B. Reporting requirements. A lawyer with knowledge of a violation of an RPC that raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness, must report the violation. RPC 8.3. This RPC does not require disclosure of information protected under the attorney-client privilege under RPC 1.6.

C. Procedure for resolving complaints against DON judge advocates. The complaint shall be in writing and signed by the complainant. The complaint must specify the nature and grounds for the alleged misconduct or failure to meet ethical standards. The complaint is forwarded to JAG (Code 13), with a copy to the attorney concerned. Enclosure (2) to JAGINST 5803.1 explains the entire complaint processing procedure.

2307 SELECTED ETHICS ISSUES

A. The Department of the Navy as the client. Per paragraph 6.a of JAGINST 5803.1, the DON is the client served by each judge advocate certified by JAG under Article 27(b), UCMJ, unless assigned another client by competent authority.

1. Nature of the privilege. The attorney-client privilege exists between the judge advocate and DON as represented by the commander or head of

the organization (e.g., commanders of corps, fleets, divisions, ships, and other heads of activities).

a. The privilege extends to matters within the scope of the official business of the organization.

b. The head of the organization cannot invoke the attorney-client privilege for his / her own benefit.

2. Client control. If the commander engages in activity or intends to act or refuses to act in some manner that violates his / her legal obligation or the law, the SJA may:

a. Ask the official to reconsider;

b. advise that a separate legal opinion be sought;

c. refer the matter to, or seek guidance from, higher JAG authority;

d. advise the official that his / her personal legal interests are at risk and (s)he should consult counsel as there may exist a conflict of interests for the judge advocate, and the judge advocate's responsibility is to the organization; or

e. if, despite the judge advocate's efforts, the highest authority that can act concerning the matter insists upon action or refuses to act—in clear violation of law—the judge advocate may terminate representation with respect to the matter in question. In no event shall the lawyer participate or assist in the illegal activity.

B. Confidentiality

1. General rule. Under RCP 1.6, a lawyer shall not reveal any information relating to the representation of a client. This applies to information obtained prior to formation of the attorney-client relationship.

2. Exceptions to confidentiality

a. Permissive. A client may consent to disclosure of confidences under RCP 1.6. Judge advocates have implied authority to make disclosures to the extent necessary to represent the client effectively. Disclosure is also permitted to establish a claim or defense in a controversy with a client.

b. Mandatory. Under RCP 1.6b, judge advocates must disclose information they reasonably believe necessary to prevent a client from committing a crime which is likely to result in imminent death or substantial bodily harm. Similarly, the rule requires a judge advocate to disclose information that (s)he reasonably believes is necessary to prevent a client from committing a crime which will cause significant impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapons system.

c. Past and other offenses. No authority exists for revealing information of other potential offenses or past offenses under the RCPs.

C. Client perjury. Under RCP 3.3a(2), a judge advocate may not knowingly fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client. Similarly, a judge advocate may not knowingly offer evidence (s)he knows to be false. RCP 3.3a(4). If a judge advocate has offered material evidence and later learns it to be false, (s)he shall take reasonable remedial measures. A lawyer may also refuse to offer evidence that the lawyer reasonably believes is false (RCP 3.3c).

D. Threatening criminal prosecution. It is unethical for an attorney to threaten criminal prosecution to gain an advantage in a civil matter. A correct statement of fact that includes the possibility of criminal action if a civil obligation is not fulfilled, even if such statement may be construed as a threat, by itself is not an ethical violation. The motivation and intent of the attorney involved will be a factor in determining whether his / her actions were ethically improper. The means employed by the attorney may not have a substantial purpose to embarrass, delay, or burden the recipient of the communication. Legal assistance attorneys must be vigilant to avoid intemperate language in correspondence regarding delinquent support obligations, etc. SJAs should monitor the letters of legal assistance officers on behalf of their clients. They, and other supervisors, have an ethical obligation to see that the RPCs are obeyed.

CHAPTER TWENTY-FOUR

MISCELLANEOUS ISSUES

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CHAPTER TWENTY-FOUR

MISCELLANEOUS ISSUES

2401 HOLD-HARMLESS AGREEMENTS

Agreements purporting to hold a party harmless from liability resulting from negligence causing damage to persons or property are closely scrutinized by the courts. Hold-harmless agreements are frequently held to be of no legal validity, especially as used by the U.S. Government. With the waiver of sovereign immunity contained in the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680, the United States accepted liability for its negligent or wrongful acts just as though it were a private person. Congress expressed the public policy that the government should respond in damages, as a matter of course, for the negligent or wrongful acts of its officers or employees. Nothing in the legislative history suggests that Congress contemplated its remedy should be frustrated by government agencies through the device of demanding exculpation from the members of the public with whom they deal.

A. Judicial review. The actions and attitude of the federal courts in considering the validity of contractual waivers of benefits conferred by the Congress under other statutes indicate that the public-policy implications of the FTCA will not be overlooked should the government attempt to rely upon an exculpatory agreement in its defense of a suit. In general, a right or benefit provided by statute can be waived by a binding contract if no question of public policy is involved. Conversely, however, where the benefit conferred by statute involves a question of public policy, any attempted contractual waiver of that benefit is void.

B. Standard. The test for deciding whether the effect of any specific statute can be avoided by agreement seems to be whether the statute is one enacted for the protection of the public generally or of the rights of individuals. A right conferred as a matter of public policy cannot be limited or waived. However, a person for whose individual benefit a right is given by a statute may contract away that statutory right. Arguably, the rights given under the FTCA are for the individual benefit of persons injured through the negligent or wrongful acts of officers or employees of the government. There seems to be a strong case that FTCA rights are conferred as a matter of public policy and, therefore, cannot be waived.

C. Deterrence. The general legal validity of agreements purporting to relieve the U.S. Government from liability in tort is doubtful at best. In most instances, agreements to exculpate the government will be effective, if at all, only as a possible deterrent to the filing of claims or suits authorized by law. Such a deterrent would be effective only against those persons who, having agreed to exculpation, would feel morally bound not to take advantage of the legal invalidity of the agreement.

D. Insurance statements. Hold-harmless agreements must be distinguished from agreements where the private organization (e.g., a motion picture company filming on an installation) would promise to reimburse the Navy for any damage to government property which was damaged, either wilfully or negligently, by its employees. These agreements are desirable whenever a U.S. agency or department lends, or makes available, its property to any nongovernmental entity, including a commercial enterprise.

E. Sample documents. The sample documents found at appendices A-E may be helpful in preparing tailored agreements for specific circumstances.

2402 PERSONAL LIABILITY

Commanders frequently ask about their risk of personal liability in lawsuits arising from actions they take within the scope of their official duties. These issues are easier to grasp if we break them down into the two general categories of plaintiffs and the two types of torts they are likely to complain about. Following that discussion, this chapter will address environmental law liability and private insurance issues.

A. Two types of torts

1. Common law torts. Common law torts are legal "wrongs" for which the victim may seek money damages in a civil court. These wrongs can be intentional or negligent. Intentional wrongs include injuries from assault, battery, slander, libel, trespass, false imprisonment, and the infliction of emotional distress. An injured person may seek money damages for injuries caused by another person who was negligent (i.e., failing to exercise a reasonable amount of care under the circumstances). Although common law torts are fairly similar, these wrongs are defined by state law and vary slightly from one jurisdiction to the next.

2. Constitutional torts. These wrongs occur when a federal employee violates a person's constitutional rights. Typical complaints allege violation of the individual's first amendment right of free expression, the fourth amendment right to be free of unreasonable searches and seizures, or the fifth amendment right to due

process before being deprived of property or liberty. These suits are of relatively recent origin. The cause of action was first recognized in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In that case, the Supreme Court held that lawsuits seeking money damages could be brought in federal court against federal employees in their individual, as well as official, capacities for alleged violations of constitutional rights.

B. Suits by military personnel

1. Common law torts. Generally, the government is immune from being sued. This doctrine of sovereign immunity was waived to a limited extent by the enactment of the FTCA. This law gave injured people a way to seek relief from the Federal Government. In *Feres v. United States*, 340 U.S. 135 (1950), however, the Supreme Court held that a servicemember could not sue the government or a fellow servicemember for common law torts committed by a servicemember in the course of activity incident to service. These injuries, whether caused by negligent or intentional acts, were deemed exempt from the waiver of sovereign immunity.

a. The *Feres* doctrine has been under attack in recent years. Although numerous bills to abolish the doctrine have been introduced in Congress, none has been successful. Consequently, injured servicemembers cannot sue the United States or their fellow servicemembers for slander, libel, false arrest, assault, or injuries caused by negligent acts which are incident to their service.

b. Injuries will generally be considered "incident to service" unless the servicemember can show they occurred off duty and off base and at a time when the servicemember was neither engaged in any military duty nor directly subject to military orders or discipline. If any one of those factors is not met, the servicemember's injury is likely to be deemed incident to service.

2. Constitutional torts. The *Feres* decision left open the possibility that a servicemember could sue a fellow servicemember for a violation of constitutional rights.

a. In 1983, the Supreme Court heard a suit brought by a group of Navy enlisted men against the commanding officer of their ship. *Chappel v. Wallace*, 462 U.S. 296 (1983). The enlisted men alleged that the commander had violated their rights to be free of racial discrimination under the fourteenth amendment. The Supreme Court ruled that a servicemember could not sue a fellow member of the armed forces for a constitutional wrong. Consequently, wronged servicemembers must rely on administrative means of redressing their grievances such as requesting mast, seeking relief from the Board for the Correction of Naval

Records, filing a complaint against one's CO under Article 138, UCMJ (*JAG Manual*, Chapter 3), or filing a complaint against a superior under Article 1150, *U.S. Navy Regulations*, etc.

b. This approach was reaffirmed in *United States v. Stanley*, 483 U.S. 669 (1987). While in the Army, Stanley volunteered for what was ostensibly a chemical warfare testing program. Without his knowledge, he was administered lysergic diethylamide (LSD) pursuant to an Army plan to test the effects of the drug on human subjects. Stanley suffered severe personality changes that led to his discharge and the dissolution of his marriage. The Supreme Court held that a *Bivens* action should be disallowed whenever the servicemember's injury is incident to service (i.e., when the Feres doctrine would bar a federal tort claim under the circumstances). In so doing, the Court rejected Stanley's argument for a "chain of command" test.

C. Suits by civilian personnel

1. Common law torts. In *Barr v. Matteo*, 360 U.S. 564 (1959), a high-ranking federal officer (non-DOD) was sued by a group of subordinates over a press release he had made which allegedly defamed them. The Supreme Court recognized the potentially devastating effect on the government if such suits were allowed. Consequently, the Court held that, if the individual federal defendant had acted within the "outer perimeter" of their duties, they were absolutely immune from being sued; such complaints were to be dismissed.

a. In 1988, the Court sharply limited the immunity. In *Westfall v. Erwin*, 108 S.Ct. 580, 98 L.Ed.2d 619 (1988), an Army employee, who suffered chemical burns from inhaling soda ash dust improperly stored where he worked, brought suit against his co-workers and supervisors. The Court held that, to qualify for absolute immunity, federal employees had to be performing a "discretionary function" within the scope of their employment. This additional factual determination promised to open the door to extensive litigation against federal employees and servicemembers.

b. To correct that problem, President Reagan signed the Federal Employees Liability Reform and Tort Compensation Act of 1988, 28 U.S.C. § 2879 (the Act). The Act's stated purpose is "to protect Federal employees from personal liability for common law torts within the scope of their employment, while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States." This law makes the United States the ***exclusive*** source of relief for individuals claiming injury or loss as a result of the commission of common law torts by federal civilian or military employees.

c. Therefor, if a civilian sues a CO or any servicemember for a common law wrong (false imprisonment, slander, etc.), the military member will enjoy "absolute immunity" if the act which supposedly injured the civilian was committed in the scope of the servicemember's employment. Commanders sued in their personal capacity can ask for Department of Justice (DOJ) representation. These requests are forwarded to DOJ via the chain of command and OJAG (Code 34). If satisfied that the officer acted within the scope of official duties, DOJ may agree to provide representation when it is in the interests of the government to do so. As a matter of policy, the DOJ will not provide representation in federal criminal proceedings. In some cases, the DOJ may elect to pay for private representation; otherwise, the cost of private counsel is borne by the employee. Representation by the DOJ, or an attorney paid for by the government, does not relieve an employee of the obligation to pay an adverse judgment. *See* 28 C.F.R. Parts 15, 50.15, and 50.16.

d. The prevailing view is that federal defendants will receive more favorable treatment in a federal forum. Under 28 U.S.C. § 1442, federal employees and military personnel acting under color of their office or status may have civil and criminal actions against them in state court removed to federal district court provided there is an averment of a "federal defense." Establishing such a defense may be difficult when the act involved contravenes both state and federal environmental laws. Suits for personal injuries or property damage, however, are automatically removed from state to federal court.

e. If the Attorney General, or DOJ designee, certifies that the servicemember was acting within the scope of his / her office or employment at the time of the incident, the attorneys representing the servicemember will ask the court to substitute the United States in place of the individual named as the defendant. If the court approves this substitution, the defendant is taken out of the litigation and is out of the picture. Unfortunately, some courts have interpreted the Act to permit them to reexamine the scope of employment determination made by the DOJ. In *Arbour v. Jenkins*, 903 F.2d 416 (6th Cir. 1990), the plaintiffs requested the district court to reverse the substitution of the United States as the defendant and reinstate the suit against the individual federal employees for wrongful death. The circuit court ruled that the certification by the U.S. District Attorney was reviewable by the district court in accordance with applicable state law.

f. While the Act for the most part removes the threat to federal employees posed by common law tort suits, it does not cover constitutional torts or actions brought for violation of other U.S. laws (e.g., environmental statutes). It is unlikely that Congress will provide legislative relief in these areas (discussed below). Personnel served with process for official acts should report the matter immediately to their CO, command SJA, the general litigation division of OJAG (Code 34) at (703) 325-9870 or DSN 221-9870, and the Office of General Counsel (OGC) litigation office (703) 602-3176 or DSN 332-3176.

2. Constitutional torts. Some federal employees enjoy absolute immunity against constitutional wrongs in their official capacities (e.g., judges, prosecutors, witnesses, and convening authorities). The typical commander enjoys only "qualified immunity" against suits brought by civilians for constitutional wrongs. To obtain this qualified immunity, the military defendant must show that (s)he did not violate a constitutional right which a reasonable person knew, or should have known, existed. In addition, the Supreme Court recently established a roadblock across a popular avenue of constitutional lawsuits against federal employees. In *Schweiker v. Chilicky*, 487 U.S. 412 (1988), the Court made it clear that civilian employees cannot bring suits alleging constitutional torts as a substitute for existing administrative remedies for resolving civilian personnel disputes. Consequently, the range of likely constitutional torts brought against commanders in their personal capacity was significantly limited.

2403 PRIVATE ORGANIZATION LIABILITY

A. Theory of liability. Claimants have asserted that certain organizations are agencies of the United States and that the organizations' employees or members who caused the injuries were acting within the scope of their federal employment. Under this theory, the injured parties look to the United States, not the individual club members, for compensation. In most cases, we can analyze claimants' assertions by applying a few basic principles.

1. Comparison with other federal activities. The courts examining these cases focus on the concept of nonappropriated fund instrumentalities (NAFIs). Generally speaking, a NAFI is an organization not supported primarily by recurring appropriations from the U.S. Treasury. When these nonappropriated fund activities are essential or integral to the mission of a military service, and the control exerted by the service is more than casual, they are considered federal agencies. Examples of such activities are Navy exchanges, officer and enlisted clubs, open messes ships stores, and swimming pools. When an activity is neither integral to the mission of a service nor subject to direct service control, the activity should not be considered a federal agency.

2. Criteria. The cases of *Woodside v. United States*, 606 F.2d 134 (6th Cir. 1979); *Eckles v. United States*, 471 F. Supp. 108 (M.D. Pa 1979); and *Scott v. United States*, 226 F.Supp 864 (M.D. Ga 1963) give useful examples of criteria courts have used to decide whether an organization is an integral part of the military establishment. These criteria include who chooses the officers or directors of the organization; who promulgates the rules and regulations governing the organization; whether the military service directly supervises the operation of the organization; and whether the organization sponsors activities which develop skills useful to the

service's mission. *Scott* is the only reported case denying liability because the "NAFI" was found not to be an agency of the United States.

B. Regulations. The following service directives address private organizations aboard DOD installations and should be reviewed: DOD Instruction 1000.15 (Sept. 22, 1978); MCO 5760.4B (28 Sept. 1988); and NAVCOMPT Manual (2 Apr. 1970), para. 075261. These directives discuss the concept of the "private organization," a term denoting a self-sustaining, non-federal entity, established and operated on board a federal installation, with written consent of the commander by individuals acting exclusively outside the scope of their official capacity as employees of the United States. These directives establish how and under what conditions a private organization may operate aboard a DOD installation. For example, a written charter and liability insurance are required. Some logistical support from appropriated sources is permitted, but holding of ownership interests in private organization property by appropriated and nonappropriated instrumentalities is prohibited. Further, these directives specifically state that private organizations are neither instrumentalities of the United States nor integral parts of the military organization. In this way, the directives attempt to distinguish private organizations from those NAFIs that courts have determined are an integral part of the military departments and agencies of the United States.

C. SJA action. What appears to be a "private organization" may actually be a nonappropriated activity or organization. You should therefore review the cases and get the facts about a particular organization's establishment and operation, locate its charter and by-laws, and learn how it actually operates. Use the facts you have gathered to make your decision about the character of the organization. You should also consider seeking an opinion about the character of the organization or function from CHNAVPERS or the CMC, as appropriate. If you determine the organization is a federal agency, effective control should be exercised over it and risk management procedures should be implemented to minimize the Navy' s liability. If it is private, the organization and its members should be advised about their liability and insurance requirements.

1. Advising private organizations. Some members or employees of organizations you determine to be "private organizations" rather than nonappropriated activities may disagree with your determination. "Private organizations" occasionally neglect to maintain sufficient liability insurance to cover the negligent acts of their members or employees. In some cases, state law provides individual members are jointly liable for the acts of other members. In this event, be prepared to deal with requests for DOJ representation from members or employees who believe or assert they were acting on behalf of the United States.

2. Claims analysis. Finally, the claim must be examined carefully to determine its perspective: Is the claimant asserting only that the organization is a federal agency and that the member or employee caused injury in the scope of employment? Or, is the claimant also saying the United States failed to supervise properly the activities of an admittedly private organization? In the latter case, analysis will extend beyond the issue of whether the organization is a federal agency.

FAMILY ADVOCACY

2404 REFERENCES

A. DOD Directive 6400.1, Subj: FAMILY ADVOCACY PROGRAM (FAP)

B. SECNAVINST 1752.3, Subj: FAMILY ADVOCACY PROGRAM

C. OPNAVINST 1752.2, Subj: FAMILY ADVOCACY PROGRAM (FAP)

D. MEDCOMINST 6320.22

E. MCO 1752.3

F. COMDINST 1750.7

G. *The Navy Family Advocacy Program: Legal Deskbook*, developed by Robert Horowitz, J.D.

2405 INTRODUCTION

The Family Advocacy Program (FAP) is a line-managed program designed to address the prevention, evaluation, identification, intervention, treatment, follow-up, and reporting of child and spouse maltreatment, sexual assault, and rape. While most often identified with child sexual abuse, the program also deals with such forms of abuse as neglect (deprivation of emotional and physical necessities) and physical abuse—areas in which education and intervention have proven to be a successful means of addressing the problem. DOD has established FAPs DOD-wide. Each service must have its own program and provide Family Service Centers (FSCs) to provide resources such as counseling and referral to deal with complex emotional issues surrounding family dysfunctions. (The Marine Corps specifically includes victims of nonfamilial maltreatment as well.) Since family violence is a complex and multidisciplinary problem, it requires the involvement and

coordination of many agencies and services. In the Navy, FSCs will sponsor the Sexual Assault and Victim Intervention (SAVI) program while all nonsexual assault victims will fall under the Victim and Witness liaison officer who will be appointed by the installation commander and may not be based at the local FSC, pursuant to the Navy's Victim Witness Assistance Program. The Family Advocacy Officer (FAO) is responsible for the coordination of all the nonmedical aspects of the FAP. The Family Advocacy Representative (FAR) is a mental health or social service professional who serves as the point of contact for identification, treatment, and intervention matters pertaining to the FAP. This section of the chapter will merely provide an overview of the program and highlight the substantive issues typically faced by the SJA.

2406 PREVENTION AND DETERRENCE

The FAP seeks to prevent family maltreatment by establishing and maintaining education and awareness programs that contribute to healthy family life and break the cycle of abuse through identification and treatment. The Case Review Subcommittee (CRS) is comprised of the FAR, FSC counselor(s), child protective services (CPS) representative, NCIS, SJA, and a local pediatrician. Other command members who may be involved include the chaplain and a member's command representative. It is recommended that commands work closely with the local CRS / FAR in determining the disposition of cases and in balancing administrative / judicial action with family and treatment considerations.

2407 IDENTIFICATION

All personnel have a duty to report suspected or known cases of abuse and neglect in accordance with DOD mandatory reporting requirements. Military personnel will report such matters to any senior military officer (e.g., the member's CO), who in turn will report the incident to the FAR and the appropriate civilian agencies—usually CPS. In all cases of child sexual abuse, and in cases of child and spouse abuse involving suspected major criminal offenses, local NCIS agents shall be notified. Medical treatment facilities (MTFs) must also report 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 authorities. Memorandums of understanding should be drafted by local SJA's to ensure the sharing of critical case information with local law enforcement and CPS officials in an effort to eventually make joint decisions about prosecutions or therapy. The decision of whether or not family maltreatment occurred is essentially a clinical / professional judgment that the child / spouse has been abused or injured in a nonaccidental fashion. The decision should normally be made by a group consensus of the CRS.

2408 VOLUNTARY SELF-REFERRAL

Any active-duty member of the DOD—or authorized dependent family member—may obtain counseling or treatment services through voluntary self-referral to qualified family advocacy or counseling personnel who are normally available in MTFs and / or FSCs. Qualified personnel for the purpose of reviewing an initial voluntary contact (subject to further referral) include: FAR, medical officer, MTF or FSC counselor, drug and alcohol abuse counselor, any commissioned officer of the member's command, or the senior enlisted member of the command. In those instances where the nature of the problem presented indicates that an administrative discharge is appropriate, processing will be in accordance with the MILPERSMAN. If administrative discharge is predicated solely on information provided by voluntary self-referral, the member will be separated by reason of the offenses committed; however, disclosure of the offenses to designated FAP representatives for the express purpose of obtaining treatment or rehabilitation may not be used against the member in any disciplinary action under the UCMJ or as the basis for characterizing a discharge.

2409 REPORTING

FAP personnel must comply with local laws on the reporting of child or spouse abuse to civilian authorities. 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 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:

A. Procedures. All cases must have a completed DD 2486 (Child / Spouse Abuse Incident Report) forwarded to the CO, 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 NAVMEDCOMINST 6320.22 pertains. Cases with a status determination of "suspected" must be updated within 30 days to either substantiated; unsubstantiated, did not occur; or unsubstantiated, unresolved. The Marine Corps also uses a status of "at risk."

B. Death cases. All child or spouse fatalities where abuse is a suspected factor shall be reported to the FAR and CRS for review to determine if intrafamilial maltreatment was involved. In such cases, the incident report form should be completed, surviving family members (particularly children) must be considered at high risk, and an appropriate service plan should be developed. An ***additional***

report of abuse-related fatalities is required in accordance with enclosure (11) to NAVMEDCOMINST 6320.22.

C. Child care facility cases. Child sexual abuse occurring in a Navy sanctioned out-of-home care setting requires an immediate report. CHNAVPERS (Pers 66 / Pers 65) or HQMC (MHF) must be notified within 24 hours of the actual or alleged occurrence of child sexual abuse in either command-sponsored child development centers, home-based programs, or youth activities of any kind. Enclosure (10) of NAVMEDCOMINST 6320.22 gives message guidance. ***If there are multiple victims or media / community interest, request assistance promptly from Pers 66 / Pers 65.*** A command assistance team comprised of JAGs, physicians, and child psychologists is available for deployment to assist commands in management of complex cases. ***Provide regular SITREPs when there are significant changes in the status of the case.***

2410 INTERVENTION

Intervention mechanisms in cases of family maltreatment take many forms. A military protection order (MPO) may be used as an immediate measure to separate the offending member from the victim(s). Whether in military or civilian housing, the MPO is a written direct order to stay away from designated persons, areas or places, to include: schools and day-care facilities; direction to refrain from contacting, harassing, or touching certain named persons; and direction to refrain from doing certain acts / activities pending easing of the crisis situation. MPOs need not be in writing, but written orders are preferred. MPOs should not usually last longer than 10 days; if a longer duration is required, the member should be given an opportunity to be heard and to respond to the allegations.

-- In overseas commands, provided there is no conflict with the Status of Forces Agreement (SOFA), all cases of alleged child abuse / neglect should be reviewed by the FAR to immediatelv assess the safety of the victim. The FAR will advise the unit commander and recommend appropriate action which may include:

1. Interview of the child by an NCIS agent, physician, and / or mental health professional, with or without parental consent, when such interview is required to protect the health and safety of the child.

2. Temporary removal of the child from the home, by order of the installation commander, when there is substantial reason to believe that unusual, emergency circumstances exist (such as danger to the life or health of the child). Remember that the authority to remove the child is temporary and continues until the immediate threat has passed or other, reasonable actions abate the danger.

3. If a child is in physical danger and the parents are unavailable or uncooperative, the commander of the MTF may admit the child to the MTF to provide required medical care without parental authorization. Involvement of a parent or sponsor in the treatment process should always be sought to increase understanding and reduce resistance to medical care.

4. Transfer from overseas duty of families involved in child abuse cases should be considered under the following circumstances:

a. The family is sufficiently dysfunctional so as to make them unfit for overseas duty or at isolated sites; or

b. there is a substantiated case of abuse, the children are still at risk, there are no protective resources available, and / or the need for foster placement exceeds the availability of involuntary out-of-home placement at local installations.

5. Decisions to transfer families should be made after referral to FAR and review by the local CRS—and only after case assessment and investigation are complete to the fullest extent possible.

2411 ADVERSE PERSONNEL ACTIONS

A. Adverse personnel actions are not a necessary by-product of a member seeking assistance from FAP. For Navy cases of severe physical abuse / neglect, the offender's service record may be flagged at Pers-8 as recommended by the local CRS via BUMED for up to one year to ensure that PCS orders are not issued without clearance from the local FAR. Assignment control flags ensure case disposition prior to issuing orders. Marine cases of abuse or neglect are reported and entered in a central computer for the same purpose.

B. CO's should use discretion in advancing, promoting, or reenlisting FAP-involved members and should consider delaying action until the case is resolved. In appropriate circumstances, such as an offender's noncompliance with treatment, a repeated abusive incident, severe child physical abuse, and severe spouse abuse, COs should—in the case of enlisted personnel—withhold or withdraw the recommendation for advancement and—in the case of officers—delay promotion or remove from promotion lists in accordance with appropriate directives.

C. Child sexual abuse is a felony, and cases always require particular attention. Pers-8 flags each record upon report of an allegation of a Navy case. The Marine central registry is notified of allegations in Marine cases. This flag remains in place until final case disposition (by BUPERS for Navy cases). Enlisted members

are not eligible for reenlistment while the case is being reviewed for disposition. Members will remain unavailable for transfer and, although FAP assignment control flags are not made available to any selection board, advancements and promotions will be held in abeyance pending completion of BUPERS (Navy) action on the case. Child neglect and child / spouse physical abuse cases are managed at the local level, and it is recommended that commands work closely with local CRS / FAR in determining disposition of cases and in balancing administrative / judicial action with treatment and family considerations. Marine cases are controlled slightly more at the local level than in Navy cases (where BUPERS controls flagging and unflagging).

D. Offenders should be held accountable for their actions. The following command actions can be employed in the appropriate case:

1. Mandatory attendance at classes or counseling;

2. for civilian convictions ICO enlisted personnel -- Page 13 entry per MILPERSMAN, art. 5030420 and enlisted performance evaluation BUPERSINST 1616.9A -- ICO officers, FITREP entry per BUPERSINST 1611.17 (Both references make it mandatory that commands document negative performance.);

3. courts-martial / NJP when appropriate; or

4. administrative separation.

E. In cases where members are admitted into the FAP incest treatment option (formal acceptance made only by ACNP, Pers-6) (Navy only), care should be taken to balance accountability with rehabilitation. When treatment is recommended by the FAP, however, commanders are to consider suspending or taking other clemency-oriented action on court-martial sentences after coordinating with the FAR and their SJAs.

2412 REHABILITATION

The Navy and Marine Corps provide for rehabilitation of offenders through education and treatment. Treatment needs are determined via the FAR, CRS, and MTF recommendations. The primary objective is prevention of abuse—or reoccurrence of abuse—through education, quality-of-life programs, and direct services to families and children. Victims of abuse shall be afforded protection and treatment services regardless of the rehabilitation and retention potential of the offender. Normally, the Navy's formal incest offender treatment / counseling is limited to 12 months. Upon successfully completion of treatment, a member's case will be considered closed. For child sexual abuse cases, closed determinations are only made at the BUPERS level at Pers-661D.

2413 MANAGEMENT OF INCEST CASES

Each service has its own concept of treatment. For example, the Navy centrally manages incest cases via BUPERS; the Marine Corps and the Coast Guard leave control of the case with the same authority as other serious offenses.

A. Navy. Incest cases are treated differently than extrafamilial child sexual abuse cases (mandatory processing for sexual perversion in accordance with MILPERSMAN, art. 3610200) because, most often, it is our best Sailor with years of outstanding performance who commits the crime of incest. In order to help victims, families, and our Sailors who are traditionally the most amenable to treatment, the Navy offers an incest treatment option where the member is formally accepted into the FAP either with or without adjudicative sanctions (e.g., suspended sentence hanging over his head) to motivate him into treatment.

1. The criteria for the Navy's incest treatment option are: record of outstanding performance (straight 4.0); acknowledgement of the crime and expression of remorse (does not blame victim); recommendation by the CO for retention and statement that member has worthwhile potential for future naval service; and member is deemed an appropriate treatment candidate by a certified psychologist who specializes in sex offenders (e.g., does not exhibit other sexually deviant behaviors such as cross-dressing or sadistic fantasies).

2. Once admitted into the FAP treatment option, members are not immune from prosecution. While normally it makes no sense to treat an offender and then decide to court-martial, there is no grant of immunity flowing from formal FAP acceptance. Treatment is meant to help the offender, and family and is not meant to be a bar to prosecutorial action. Before commands can administratively separate incest offenders, permission must be obtained from Pers-661D.

B. Marine Corps. The Marine Corps has a similar policy to that of the Navy in incest cases, ***but*** the initial processing determination will be decided at the GCMA level. The same criteria for determining whether to process for separation or retain and treat, however, applies. It is strongly recommended that discipline be suspended pending rehabilitation if rehabilitation is a potential.

C. Coast Guard. Coast Guard policy on processing and retention is similar to the Navy and the Marine Corps. If the CO wants to retain and place the member into long-term treatment, however, the case must be forwarded to Commandant (G-PE) or (G-PO) who will review the matter and consider the recommendations of Commandant (G-PS). The Coast Guard requires this review in ***all*** abuse cases.

2414 STATE CHILD ABUSE REPORTING LAWS

All state child abuse reporting laws require the local CPS agency to receive and investigate reports of suspected child maltreatment and offer rehabilitation services to CPS families. State law specifies who is required to report suspected maltreatment, who is exempt from reporting and / or testifying, and the penalties for not reporting. The military is required to comply with these laws when such abuse is discovered. Reporting shall normally be done via the FAR. Even voluntary self-referrals must be reported by the FAR if the state so requires, creating a situation where, although the military is precluded from prosecuting, the civilian authorities could prosecute.

2415 THE JUDGE ADVOCATE'S ROLE

Successful intervention in cases of family violence requires a multi-disciplinary response involving the collaboration and cooperation of many DON professionals. The SJAs involvement in the FAP is critical. The SJA can expect to play a significant role in a variety of scenarios. SJAs may become involved in setting up the case management system for an installation or command. They may assist in writing MOUs to guide interaction between the installation and state and local child protective services agencies, law enforcement agencies, juvenile courts, and other civilian agencies. This coordination often takes place within the Area FAC, which should include a judge advocate. In addition, SJAs may help develop standard operating procedures (SOPs) for responding to reported cases of family maltreatment in cooperation with the installation CO and the Area FAC. The SJA assists the commander in pursuing courts-martial options to help balance punishment of the perpetrator with the needs of children and families. The SJA must get involved quickly. Most family violence cases rely upon circumstantial evidence, and such evidence may be overlooked, lost, mishandled, or misinterpreted without legal guidance. It is important to note that the determination as to whether or not abuse occurred is largely a clinical vice an evidentiary determination. Too often as lawyers we evaluate the quality of evidence in terms of sufficiency to pursue a criminal or administrative action and we make our decisions whether or not abuse occurred from our own perspective. The SJA can play a fundamental role in guiding the CRS process, but the SJAs role is in deciding what to do with the information once the CRS determination is finalized.

2416 POINTS OF CONTACT

A. Navy. Bureau of Naval Personnel (BUPERS), DSN 224-1006; OJAG DSN 221-9752 or commercial (703) 325-9752; E-mail JAGFAP.

B. Marine Corps. (703) 696-1188

C. Coast Guard. Commandant (G-PS), (202) 267-2237

APPENDIX A

SAMPLE INSURANCE STATEMENT

KNOW ALL MEN BY THESE PRESENTS:

That the undersigned, _____, a corporation organized and existing under the laws of the State of _____, in consideration of permission granted for the use of Department of the Navy property, facilities, equipment, vessels, and aircraft, including, but not limited to, [briefly list such Navy or Marine Corps property, etc., as will be used], in the production of the motion picture now entitled _____, during the period _____ to _____, does hereby expressly agree to maintain, at its sole expense, liability insurance sufficient to cover any and all damage to Department of the Navy property, facilities, equipment, vessels, and aircraft as may result during its use of said Department of the Navy property, facilities, equipment, vessels, and aircraft from the fault or negligence of the undersigned, its agents, employees, or subcontractors.

Authorized representative
Date: _____

Witnessed this day of _____, 19__

(Department of the Navy representative)

APPENDIX B

RELEASE OF LIABILITY AND ASSUMPTION OF RISK

I. The United States of America, hereinafter called the GOVERNMENT, hereby grants permission to _____, hereinafter called the PARTY, to enter upon the military reservation known as _____, for the following period: from the _____ day of _____, 19 ___ to the _____ day of _____, 19 ___ inclusive, for the purpose(s) of: _____

2. The PARTY acknowledges:

a. That the PARTY is fully aware that __insert command name / location__, is a U.S. Military Reservation; and

b. That the presence of the PARTY at and upon any and all areas comprising the said reservation, and the participation of the PARTY in the activities set forth in paragraph 1 above, subjects the PARTY to extraordinary risks of personal injury, disablement, and death by virtue of, but not limited to, the nature of the activities in which the PARTY is participating, the military exercises planned or in the process of execution aboard the reservation, and the quantities of explosive ordnance located at both posted and unposted areas aboard the reservation.

3. In consideration for permission to enter __insert command name / location__, for the purposes set forth in paragraph 1 above, the PARTY agrees for the PARTY and for the heirs, assigns, executors, and administrators of the PARTY:

a. To voluntarily, willingly, and knowingly assume the risks in being present aboard the said military reservation including, but not limited to, those risks set forth in paragraph 2 above; and

b. To release the GOVERNMENT, including all its subdivisions, offices, military personnel, employees and agents from all liability for any damages, injuries, or death that may result to the PARTY while the PARTY is within the military reservation known as _ insert command name / location__, including but not limited to, the PARTY's participation in the activities set forth in paragraph 1 above, whether caused by negligence or otherwise.

4. IT BEING UNDERSTOOD that the PARTY's agreement to release the GOVERNMENT from all liability for any damages, injuries, or death extends to any damages, injuries, or death caused by the negligent or wrongful act or omission of any employee of the GOVERNMENT while acting within the scope of his / her office or employment.

Signed and AGREED to this ___ day of _____, 19 ___

_____ _____

Signature of PARTY Representative of GOVERNMENT

APPENDIX C

SAMPLE MOTORCYCLE SAFETY COURSE WAIVER FORM

This form must be completed, signed, and given to your instructor prior to beginning your on-cycle instruction.

Participants must be a legal resident of the State of _____. Participants under the age of _____ years must have the signed approval of a parent or legal guardian to enroll in this motorcycle safety course.

NAME: (first) _____ (middle) _____ (last) _____

ADDRESS: _____

PHONE: ( ) DATE OF BIRTH: _____

DRIVER'S LICENSE NUMBER: _____ STATE OF: _____

RELEASE, WAIVER, AND INDEMNIFICATION

The undersigned participant and his / her parent or legal guardian (if under the age of 18 years) does hereby execute this release, waiver, and indemnification for himself / herself and his / her heirs, successors, representatives and assigns; and hereby agrees and represents as follows:

To release the [sponsor's name], its members, employees, agents, representatives and those governmental agencies and other organizations affiliated with this course, from any and all liability, loss, damage, costs, claims and / or causes of action, including, but not limited to, all bodily injuries and property damage arising out of participation in the motorcycle training course referred to above; it being specifically understood that said program includes the operation and use by the undersigned participant and others of motorcycles. The undersigned further agrees to indemnify the [sponsor's name], its employees, members, agents, representatives, and those governmental agencies and other organizations affiliated with this program, and hold them harmless for any liability, loss, damage, cost, claim, judgment, or settlement which may be brought or entered against them as a result of the undersigned's participation in said program. This indemnification shall include attorneys' fees incurred in defending against any claim or judgment and incurred in negotiating any settlement. It is understood and agreed that the undersigned shall have the opportunity to consent to any such settlement, provided, however, that such consent shall not be unreasonably withheld.

_____ _____

(Signature of Participant) (Date)

(Signature of parent or legal guardian if participant under the age of 18 years.) (Relationship)

APPENDIX D

SAMPLE LIABILITY RELEASE USED WHEN CIVILIANS ARE PROVIDED WITH MILITARY TRANSPORTATION

In consideration of receiving free transportation from the U.S. Marine Corps by (type of conveyance) from (origin) to (destination), including such other transportation by this and other means that may be reasonably required, commencing on or about (date), and ending on or about (date), I hereby release the U.S. Government, including all its subdivisions, offices, military personnel, employees, and agents from all liability for any injuries or death that may result to me from this transportation, whether caused by negligence or otherwise. I understand that, in transporting me, the U.S. Government is not acting as a common carrier for hire and does not bear the liabilities attaching to that status. I acknowledge that I voluntarily accept such transportation and that I am under no compulsion to do so. I understand that, by accepting such transportation, I incur no obligation to the U.S. Government except as imposed by this release. I agree that this release not only binds me, but also my family, heirs, assigns, administrators, and executors.

_____
Signature and date

_____
Signature of witness / date

_____
Signature of witness / date

APPENDIX E

LETTERHEAD

HOLD-HARMLESS AGREEMENT

In consideration of being accepted as a participant in Recreation Services, MWR, I, the undersigned (or parent / guardian of participant under 18 years of age), do hereby release and discharge the United States of America and officers and employees and other personnel of the U.S. Marine Corps, U.S. Navy, and Marine Corps Base, Camp Pendleton, California, from all claims of damages, demands, and actions whatsoever in any manner arising from or growing out of said participation.

Nothing herein constitutes a waiver of any rights I may have to medical treatment based upon my status as an active duty member, dependent, or retired member of the U.S. armed forces.

I attest and verify that I have full knowledge of the risks and danger involved in this program and hold the government harmless for any harm or injury, including death, sustained while participating in the said recreation program. Should emergency medical treatment be necessary during this instruction, I hereby grant consent to apply the following medical treatment to myself (child in my absence): any examination, anesthetic, medical or surgical diagnosis and / or treatment, and / or hospital care which is advised by and rendered under the general or special supervision of any duly licensed physician or surgeon. This consent is given in advance of any specific diagnosis.

Signed: _____

Date: _____

Printed Name: _____

Address: _____

Telephone Number: _____

Printed Name of Minor Participant: _____

Date of Birth of Participant: _____

Special Medical Considerations: _____

PART V

MILITARY JUSTICE

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PART V - MILITARY JUSTICE

CHAPTER TWENTY-FIVE

GENERAL PRELIMINARY MATTERS

2501 GENERAL MANAGEMENT SUGGESTIONS

A. It is essential to maintain cooperative relationships with the commanding officer (CO) / executive officer (XO), division officers, personnel office, disbursing office, and master-at-arms (MAA). This is not so much camaraderie as a working cooperation for keeping each other informed and ensuring service record entries are made, pay stops and starts as appropriate, division officers have input to the discipline process, witnesses are available as necessary, performance evaluations are prepared on time, an accused has necessary uniforms, and evidence is handled properly.

B. Must be well organized, pay attention to details, maintain good files, and stay current.

C. Need good subordinates (may seek assistance from NLSO / Law Center for training subordinates).

D. Military justice should be firm but fair.

E. Communicate with NLSO / LSSS:

1. Find out time and documentation preferred for *Booker* and ADSEP advice;

2. consult frequently with TC; and

3. maintain contacts with legal assistance office.

F. Library must be ***current***:

1. *Manual for Courts-Martial, 1984*, *JAG Manual*, PAYPERSMAN, MILPERSMAN, applicable instructions, notices, messages;

2. applicable force regulations / instructions (e.g., Sixth Fleet Legal Manual—get it before you deploy to Mediterranean);

3. applicable local instructions (e.g., evidence handling, search authorization, urinalysis, desertion); and

4. make sure admin office has you on routing for all changes and updates.

G. Keep adequate supply of blank forms (e.g., charge sheets, confinement orders, report chits, page 6's, page 7's, consent forms, rights warnings, claims forms)—especially before deployment.

H. CCU / brig list must be current at all times:

1. This can also be used as your reminder for letters to the initial review officer (IRO); and

2. send a weekly list to department heads for CCU / brig visits.

I. Status lists (pending courts-martial, discharges, *JAG Manual* investigations, and claims).

J. Tickler system for periodic reports (e.g., monthly post-trial review status, annual Privacy Act report, triennial FOIA report, disciplinary statistics report).

K. Admiralty claims (*JAG Manual*, ch. XII); shipboard (non-Government employee) civilian injuries must be investigated and reported to OJAG.

L. Overseas:

1. Foreign criminal jurisdiction;

2. foreign claims;

3. liberty ports;

4. liberty risk program; and

5. customs declarations.

M. Indebtedness complaints - MILPERSMAN, art. 6210140; LEGADMINMAN, ch. 7.

N. Nonsupport complaints - MILPERSMAN, art. 6210120; LEGADMINMAN, ch.8.

2502 DESERTION (example of shipboard procedure)

A. 24 hours:

1. Obtain service record; and

2. start page 6.

B. Ten days:

1. Memo reminding division to inventory personal effects and send you a copy of inventory receipted by supply department or memo from division officer specifically stating that the deserter left no personal effects aboard; and

2. letter to next-of-kin.

C. Thirty days:

1. Deserter message;

2. mail DD Form 553;

3. obtain health, dental, and pay records;

4. collect evidence (e.g., witness statements, pending incident complaint report (ICR's) and other documentation of pending disciplinary matters, restriction order, relevant message traffic); and

5. copy anything important (right side of service record, page 6, performance evaluations, last LES, restriction order (certify true), relevant messages).

D. 180 days:

1. Service, health, dental, and pay records to BUPERS;

2. original page 6 OCR, original charge sheet, original restriction order are sent with service record; and

3. retain deserter file onboard.

E. Return of deserter:

1. Return of deserter message (include Finance Center as addressee), with specific request for outstanding pay and leave balances;

2. keep personnel office, disbursing office, and department head informed; and

3. convert deserter file to court-martial case file.

F. Cross-reference outstanding deserter list and alpha roster with Enlisted Distribution Verification Report (EDVR).

2503 MAST / OFFICE HOURS

A. Maintain log book tracking each report chit (i.e., report initiated, sent to division for investigation and completion of rights form—have someone in division initial receipt in log book), return to legal (dismissed, EMI, or XO screening), sent to XO (dismissed, XOI, to CO), return to legal (*Booker* if shore command), mast / office hours (dismissed, NJP).

B. Coordinate with division and with MAA to ensure witnesses and division representative will be present.

C. Have CO record NJP and sign.

D. Post mast / office hours:

1. Post-mast yeoman standing by with appellate rights form;

2. know in advance who may need page 13 warning / counseling; and

3. service record entries should be made without delay.

E. Maintain Unit Punishment Book (UPB)

1. Original report chit with NJP signed by CO;

2. record of mast / office hours proceeding;

3. all documents considered by CO;

4. original—signed and dated—rights warning statements;

5. copies of service record entries; and

6. copies of appeals, endorsements, and responses (originals in NJP appeal correspondence file).

2504 COURTS-MARTIAL

A. Request for services from NLSO.

B. Convening orders, drafting charges, service record review.

C. Status list.

D. Case file:

1. Copy right side of service record and performance evaluations;

2. ICRs, NCIS reports, miscellaneous writings (such as letter from Mom or from accused while UA), relevant messages, memo to division officer, etc.; and

3. chronology recording when events occurred—such as delivery to NLSO, DC called about sanity issue, you called finance center / BUPERS / or civilian police (with whom you spoke and what was said).

E. Work closely with TC:

1. Serve accused when (s)he is aboard;

2. supply sufficient copies of charge sheet, etc.;

3. ensure that service record entries are accurate; and

4. make DC work through TC.

F. Accused works for command, not for DC:

1. Use check-in / check-out chits for visits to DC, and retain them in case file; and

2. conversely, work with division officer and disbursing office to ensure that command fulfills its responsibilities (e.g., accused is paid if so entitled, personal effects returned, brig visits, accused's family has POC).

G. Work with division officer:

1. Advise that accused is in brig (may be going to brig or may be transferred after trial), will need to get sea bag in order (onboard, not off-base), will need transfer performance evaluation reflecting the SPCM conviction (to be completed after trial, of course);

2. keep division informed of changes in trial date and results of trial; and

3. keep witnesses informed of when needed (work with TC).

H. If accused still attached to command when CA's action taken, ensure service record entries are made (including page 13 warning / counseling if appropriate). If not, ensure promulgating order forwarded to accused's new command.

I. Trial team at sea:

1. Message NLSO to get trial teams—follow format in applicable legal manual, especially noting companion cases and prior attorney-client relationships.

2. Make special efforts to accommodate attorneys

a. For each case, prepare case file folders marked TC, DC, or MJ (which include the charge sheet and convening order). For counsel, include lists of witnesses, LPO, LCPO, division officer, and their phone numbers. TC's folder should include all applicable reports with copies (s)he may provide to DC.

b. Provide temporary work space, a private space (stateroom) where DC may interview clients, and a space for courts-martial (wardroom).

3. Coordinate trial team visit with battle group judge advocate if possible.

4. Ask NLSO / LSSS to provide legal assistance, ADSEP advice, *Booker* advice for SCMs.

J. Notes on SCMs

1. Use good officers and prepare SCM package yourself so that busy officers will be more cooperative;

2. provide a copy of the trial guide with plastic covers and a grease pen;

3. maintain separate case files as with other courts-martial;

4. ensure that service record entries are made, including page 13 *Booker* waivers and page 13 counseling / warnings if appropriate; and

5. inform division officer of trial results.

2505 SERVICE RECORD ACCOUNTABILITY

A. There should be a single service record monitor in your office who should be kept informed of all service records entering or leaving the office. (S)he can prepare an update list daily and should inventory the service records in the office regularly.

B. No service record should leave your office without a record transmittal sheet dated and receipted by the transmittee (disbursing, admin, personnel, division, NLSO, registered mail clerk, etc.) and retained by your service record monitor

PRELIMINARY INQUIRIES

2506 PURPOSE OF PRELIMINARY INQUIRIES

R.C.M. 303 requires the commander, upon receipt of charges or information indicating that a member of the command has committed an offense punishable under the UCMJ, to direct a preliminary inquiry into the case sufficient to permit an intelligent disposition of the matter. This may consist only of an

examination of the charges and a summary of the expected evidence which accompanies them while, in other cases, it may involve a more extensive investigation.

2507 USE

The preliminary inquiry report (PIR) is of utmost importance to the proper administration of military justice. The PIR is used initially by the commander in determining the proper disposition of the case. Options include dismissal of the charge(s), imposition of nonpunitive measures, NJP, referral to trial by court-martial, and directing of a formal pretrial investigation. If the commander determines NJP to be appropriate, the PIR will be of assistance in determining whether misconduct occurred and the amount of punishment to be imposed. In the event of an appeal from NJP, the PIR will assist the appellate authority in deciding whether relief is warranted. If the case is referred to trial by court-martial or to a formal pretrial investigation, the PIR will assist the SCM officer, counsel for both sides, or a pretrial investigating officer in preparing to discharge their duties.

2508 ACTION

In many commands, the XO will be the officer who, upon receipt of information indicating an offense has been committed by a member of the command, determines who should investigate the case. The XO is guided by SECNAVINST 5520.3 in making this determination. It may be expedient for more than one case to be assigned to the same person for concurrent investigation where the cases are closely related. Preliminary inquiry officers (PIOs) will proceed per the instructions which follow. In each case, the XO will review the report of the PIO and may remand the report for further investigation where appropriate.

2509 ADDITIONAL INFORMATION

The following pages contain instructions and useful forms to aid PIOs in the performance of their duties: PIO report form; witness statement form; suspect statement form, etc.

NONPUNITIVE MEASURES

2510 INTRODUCTION

The term "nonpunitive measures" is used to refer to various leadership techniques which can be used to develop acceptable behavioral standards in members of a command. Nonpunitive measures generally fall into three areas: nonpunitive censure, extra military instruction (EMI), and administrative withholding of privileges. Commanding officers and officers in charge (OICs) are authorized and expected to use nonpunitive measures to further the efficiency of their commands.

2511 NONPUNITIVE CENSURE

Nonpunitive censure is nothing more than criticism of a subordinate's conduct or performance of duty by a military superior. This form of criticism may be either oral or in writing. When oral, it often is referred to as a "chewing out"; when reduced to writing, the letter is styled a "nonpunitive letter of caution" (NPLOC). A sample NPLOC, per the format in *JAG Manual*, Appendix A-1-a, appears at the end of this chapter. NPLOCs are private in nature. Copies may not be forwarded to BUPERS or CMC. In addition, NPLOCs may not be quoted in or appended to fitness reports or evaluations, included as enclosures to *JAG Manual* or other investigative reports, or otherwise included in the recipient's official departmental records. JAGMAN, § 0105b(2). The deficient performance of duty or other underlying facts ***can*** be mentioned in the recipient's next fitness report or enlisted evaluation, however, so long as no reference is made to the NPLOC. The sole exception to the above limitations is the Secretarial Letter of Censure. (*See* JAGMAN, § 0114b).

2512 EXTRA MILITARY INSTRUCTION (EMI)

The term EMI is used to describe the practice of assigning extra tasks to a servicemember who is exhibiting behavioral or performance deficiencies for the purpose of correcting those deficiencies through the performance of the assigned tasks. Typically, these tasks are performed in addition to normal duties. EMI involves an order from a superior to a subordinate to do the task assigned. To be a lawful order, the EMI must have a legitimate training purpose.

A. Imposing EMI. The initial step in analyzing EMI in a given case is to properly identify the subordinate's deficiency (i.e., shortcomings of character or personality) rather than merely their outward manifestation, which may be overcome with EMI. Once the deficiency has been identified correctly, the superior can assign a ***logically related*** task to correct it. Tasks which are not logically related to the

deficiency will likely be deemed punishment. An order delivered in tempered language will more likely reflect the training goal rather than retaliatory actions associated with punishment.

B. EMI quantity. EMI may still be construed by the courts as punishment if the quantity of instruction is excessive. Per JAGMAN, § 0103, no more than two hours of instruction should be required each day; instruction should not be required on the individual's Sabbath; the duration of EMI should be limited to a period of time required to correct the deficiency; and, after completing each day's instruction, the subordinate should be allowed normal limits of liberty. As valid training, EMI can lawfully interfere with normal liberty hours. One should not confuse this type of training with a denial of privileges (discussed later), which cannot interfere with normal hours of liberty. The commander must also be careful not to assign instruction at unreasonable hours. What "reasonable hours" are will differ with the normal work schedule of the individual involved, but no great interference with normal hours of liberty should be involved.

C. Authority to impose EMI. The authority to assign EMI to be performed ***during*** working hours is not limited to any particular rank or rate, but is an inherent part of the authority vested in officers and petty officers. The authority to assign EMI to be performed ***after*** working hours rests in the CO or OIC, but may be delegated (but generally not below the chief petty officer level). OPNAVINST 3120.32B, para. 142.2.a. For NCOs, see the Marine Corps Manual, para. 1300. Any superior may withdraw subordinate authority to assign EMI during working hours; the commander / OIC may withdraw the authority to assign EMI after working hours. Per JAGMAN, § 0112, reservists on IDT may not be required to perform EMI outside normal periods of IDT.

D. EMI cases

1. *United States v. Trani*, 1 C.M.A. 293, 3 C.M.R. 27 (1952) (order given to a prisoner to perform close-order drill was valid as a corrective measure to cure a want of discipline and self-control where the prisoner had burned certain confinement records).

2. *United States v. Roadcloud*, 6 C.M.R. 384 (A.B.R. 1952) (order to perform close-order drill at 2230 was punishment).

3. *United States v. Raneri*, 22 C.M.R. 694 (N.B.R. 1956) (order to take a parachute and deposit it properly in each area of the hangar, and to announce to those present—each time—that this was the proper way to deposit a parachute, was punitive).

4. *United States v. Robertson*, 17 C.M.R. 684 (A.F.B.R. 1954) (order to draw cleaning gear at 1600 to clean his spaces after normal cleaning hours was punitive).

5. *United States v. Reeves*, 1 C.M.R. 619 (A.F.B.R. 1951) (mowing lawns not logically related to any observed deficiency).

2513 DENIAL OF PRIVILEGES

A third nonpunitive measure which may be employed to correct minor deficiencies is denial of privileges. A "privilege" is a benefit provided for an individual's convenience or enjoyment. JAGMAN, § 0104a. Denial of privileges is a more severe leadership measure than either censure or EMI because denial of privileges does not necessarily involve or require an instructional purpose. Per JAGMAN, § 0104, privileges that may be withheld include such things as special liberty, 72-hour liberty, exchange of duty, special command programs, access to base or ship movies, access to enlisted or officers' clubs, hobby shops, and parking privileges. It may also encompass such things as withholding special pay and commissary and exchange privileges, provided such withholding complies with applicable rules and regulations and is otherwise lawful. Authority to withhold a privilege rests with the person empowered to grant that privilege. Authority to withhold privileges of personnel in a liberty status is vested in the CO or OIC.

2514 USE OF ALTERNATIVE VOLUNTARY RESTRAINTS OR SELF-DENIAL OF PRIVILEGES

A. Self-imposed restriction. The offer to an individual to withhold action, as an alternative to formal punishment or reporting of misconduct, if he will voluntarily restrict himself or accede to an order that is beyond the authority of the superior to give (also known as "putting him in hack") is unenforceable and not sanctioned as a nonpunitive measure.

B. ID cards. The common practice of withholding the ID card as a nonpunitive measure to keep the person around is unauthorized. Per MILPERSMAN, art. 4620150.1 and para. 1004 of MCO P5512.11, ID cards must be carried at all times by all military personnel and are to be surrendered only for identification, investigation, or while in disciplinary confinement. Orders to surrender the ID card to enforce restriction orders are unlawful.

C. Precedent. In three cases, C.M.A. has held that the UCMJ does not authorize deprivation of an individual's liberty except as punishment by court-martial or NJP without a clear necessity for such restraint, either as pretrial restraint or in the interest of health, welfare, discipline, or training.

1. *United States v. Haynes*, 15 C.M.A. 122, 35 C.M.R. 94 (1964) (order restricting the accused for an indefinite period due to prior misconduct, for which the accused had been tried, was held illegal punishment).

2. *United States v. Gentle*, 16 C.M.A. 437, 37 C.M.R. 57 (1966) (order to the accused to sign in hourly to enforce a restriction to the base "so that he would be present for duty during normal working hours" was held to be illegal punishment).

3. *United States v. Wallace*, 2 M.J. 1 (C.M.A. 1976) (order placing accused in company arrest to ensure his presence for duty each day was held illegal; breach of the arrest limits would not support a charge of breaking arrest).

APPENDIX A

INSTRUCTIONS FOR PRELIMINARY INQUIRY OFFICERS (PIOs)

1. The PIO will conduct an investigation by executing the following steps substantially in the order presented below. The report of investigation will consist of the following:

a. NAVPERS 1626/7, Report and Disposition of Offense(s);

b. an Investigator's Report Form (the sample form following these instructions provides a chronological checklist for conducting the preliminary inquiry);

c. statements or summaries of interviews with all witnesses (sworn statements will be obtained if practicable);

d. statements of the accused's supervisor(s) (sworn if practicable);

e. originals or copies of documentary evidence;

f. if the accused waives all rights, a signed sworn statement by the accused—or a summary of interrogation of the accused, signed and sworn to by the accused—or both; and

g. any additional comments by the investigator as desired.

2. Objectives

a. The PIOs primary objective is to collect all available evidence pertaining to the alleged offense(s). As a first step, the PIO should be familiar with those paragraphs in Part IV of the *Manual for Courts-Martial, 1984*, describing the offense(s). Within each paragraph is a section entitled "elements," which lists the elements of proof for that offense. The PIO must be careful to focus on the correct variation. The elements of proof should be copied down to guide the PIO in searching for the relevant evidence. The PIO is to consider everything which tends to prove or disprove an element of proof.

b. The PIOs secondary objective is to collect information about the accused which will aid the commander in making a proper disposition of the case. Items of interest to the commander include: the accused's currently assigned duties, performance evaluation, attitude and ability to get along with others, and particular personal difficulties or hardships which the accused is willing to discuss. Information

of this sort is best reflected in the statements of the accused's supervisors, peers, and of the accused him / herself.

3. Interview the witnesses first. In most cases, a significant amount of information must be obtained from witnesses. The person initiating the report and the persons listed as witnesses are starting points. Other persons having relevant information may be discovered during the course of the investigation.

a. The PIO should not begin by interrogating the accused because, if guilty, the accused is the person with the greatest motive to lie. The interrogator should meet with the accused last, when thoroughly prepared. Even when the accused confesses guilt, the PIO should nevertheless collect independent evidence corroborating the confession.

b. Witnesses who have relevant information to offer should be asked to make a sworn statement. Where a witness is interviewed by telephone and is unavailable to execute a sworn statement, the PIO must summarize the interview and certify it to be true.

c. In interviewing a witness, the PIO should seek to elicit all relevant information. One method is to start with a general survey question, asking for an account of everything known about the subject of inquiry and then following up with specific questions. After conversing with the witness, the PIO should assist in writing out a statement that is thorough, relevant, orderly, and clear. The substance must always be the actual thoughts, knowledge, or beliefs of the witness; the assistance of the PIO must be limited to helping the witness express him / herself accurately and effectively in written form.

4. Collect the documentary evidence. Documentary evidence—such as shore patrol reports, log entries, watchbills, service record entries, local instructions, or organization manuals—should be obtained. The original or a certified copy of relevant documents should be attached to the report. As an appointed investigator, PIOs have the authority to certify copies to be true by subscribing the words "***CERTIFIED TO BE A TRUE COPY***" with their signature.

5. Collect the real evidence. Real evidence is a physical object (such as the knife in an assault case or the stolen camera in a theft case, etc). Before seeking out the real evidence, if any, the PIO must be familiar with the Military Rules of Evidence concerning searches and seizures. If the item is too big to bring to an NJP hearing or into a courtroom, a photograph of the item should be taken. If real evidence is already in the custody of a law enforcement agency, it should be left there unless otherwise directed. The PIO should inspect it personally.

6. Rights advisement

a. Before questioning the accused, the PIO should also have the accused sign the acknowledgement line on the front of the Report and Disposition of Offense (NAVPERS 1626/7) and initial any additional pages of charges that may be attached. The PIO should sign the witness line on the front of NAVPERS 1626/7, next to the accused's acknowledgment.

b. A form follows which may be used to ensure the PIO correctly advises suspects of their rights before asking any questions. Filling in that page must be the first order of business when meeting with the suspect. Only one witness is necessary, and that witness may be the PIO.

7. Interrogate the accused. The accused may be questioned ***only*** after knowingly and intelligently waiving all constitutional and statutory rights. Such waiver, if made, should be recorded on a copy of the suspect's statement form which follows. If the accused asks questions regarding the waiver of these rights, the PIO must decline to answer or give any advice on that question. The decision must be left to the accused. Other than advising the accused of the rights as stated in paragraph 6b above, the PIO should never give any other form of legal advice to the accused. If the accused wants a lawyer, NLSO judge advocates are available.

a. If the accused has waived all rights, the PIO may begin questioning. After the accused has made a statement, the PIO may probe with pointed questions and confront the accused with inconsistencies in the story or contradictions with other evidence. The PIO should, with respect to his own conduct, keep in mind that, if a confession is not "voluntary," it cannot be used as evidence. To be admissible, a confession or admission which was obtained through the use of coercion, unlawful influence, or unlawful inducement is not voluntary. The presence of an impartial witness during the interrogation of the accused is recommended.

b. If the accused is willing to make a written statement, ensure the accused has acknowledged and waived all rights. While the PIO may help the accused draft the statement, the PIO must avoid putting words in the accused's mouth. If the draft is typed, the accused should read it over carefully and be permitted to make any desired changes. All changes should be initialed by the accused and witnessed by the PIO.

c. Oral statements, even though not reduced to writing, are admissible into evidence against a suspect. If the accused does not wish to reduce an oral statement to writing, the PIO must attach a certified summary of the interrogation to the report. Where the accused has made an incomplete written statement, the PIO must add a certified summary of matters omitted from the accused's written statement which (s)he stated orally.

d. If the accused initially waives all rights, but during the interview indicates a desire to consult with counsel or to stop the interview, the PIO will scrupulously adhere to such request and terminate the interview. The interview may not resume unless the accused approaches the PIO and indicates a desire to once again waive all rights and submit to questioning.

APPENDIX B

SAMPLE INVESTIGATOR'S REPORT

INVESTIGATOR'S REPORT IN THE CASE OF _____

1. Read paragraphs in the MCM concerning offenses / charges. _____

2. Witnesses interviewed (not the accused).

NAME	PHONE	Signed statement	Summary of interview

4. Documentary evidence:

Description	Original or copy	Attached or location

INVESTIGATOR'S REPORT IN THE CASE OF _____

5. Real evidence:

Description	Name of Custodian	Custodian's Phone number

6. Permit the accused to inspect report chit. Yes___ No___

7. Accused initialed second page of charges. N/A___ Yes___ No___

8. Accused signed acknowledgement line on NAVPERS 1626/7. Yes___ No___

9. Investigator signed witness line on NAVPERS 1626/7. Yes___ No___

10. Accused waived rights. Yes___ No___

11. Accused made statement (only when #10 is Yes), and

Accused's signed statement attached ___

Summary of interrogation attached ___

APPENDIX C

WITNESS' STATEMENT

Name _____Grade / Rate _____Social Security No._____

Command _____Division _____

TAD from / to _____ until _____

Whereabouts for next 30 days _____ Phone _____

I, _____, hereby make the following statement to _____, who has been identified to me as a preliminary inquiry officer for the _____ _____.

_____
_____
_____
_____
_____
_____
_____
_____
_____
_____

(use additional pages if necessary)

I swear (or affirm) that the information in the statement above (and on the ___ attached page(s), all of which are signed by me) is true to my knowledge or belief.

_____ _____ 19___ _____
(Witness' Signature) (Date) (Time)

Sworn to before me this date.

_____ _____ 19___ _____
(Investigator's Signature) (Date) (Time)

[Obtain SSN's from official records; if member asked to provide SSN, obtain a signed Privacy Act statement.]

APPENDIX D

SUSPECT'S RIGHTS ACKNOWLEDGEMENT / STATEMENT
(see JAGMAN 0170)

FULL NAME (ACCUSED/ SUSPECT)	SSN	RATE/RANK	SERVICE (BRANCH)
ACTIVITY / UNIT			DATE OF BIRTH
NAME (INTERVIEWER)	SSN	RATE/RANK	SERVICE (BRANCH)
ORGANIZATION		BILLET	
LOCATION OF INTERVIEW		TIME	DATE

RIGHTS

I certify and acknowledge by my signature and initials set forth below that, before the interviewer requested a statement from me, he warned me that:

(1) I am suspected of having committed the following offense(s):

_____

_____ . . . . . _____

(2) I have the right to remain silent; . . . . . _____

(3) Any statement I do make may be used as evidence against me . . . . . _____

(4) 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; and . . . . . _____

(5) I have the right to have such retained civilian lawyer and/or appointed military lawyer present during this interview. . . . . _____

WAIVER OF RIGHTS

I further certify and acknowledge that I have read the above statement of my rights and fully understand them, and that, ... _____

(1) I expressly desire to waive my right to remain silent; . . . . . _____

(2) I expressly desire to make a statement; . . . . . _____

(3) 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; . . . . . _____

(4) I expressly do not desire to have such a lawyer present with me during this interview; and . . . . . _____

(5) 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. . . . . _____

SIGNATURE (ACCUSED/SUSPECT)	TIME	DATE
SIGNATURE (INTERVIEWER)	TIME	DATE
SIGNATURE (WITNESS)	TIME	DATE

The statement which appears on this page (and the following _____ page(s), all of which are signed by me), 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.

_____
SIGNATURE (ACCUSED / SUSPECT)

_____

_____

_____

APPENDIX E

REQUEST FOR LEGAL HOLD

From: Commanding Officer,
To: Commanding General, Marine Corps Base, Camp Lejeune
(Attn: SJA)

Subj: REQUEST FOR LEGAL HOLD ICO _____

1. The following personnel have been identified as victims / witnesses in the subject case:

Name	Rank	SSN	Unit	RTD

2. I request that the personnel listed above be placed on legal hold to ensure their presence for trial.

3. The request for legal services in the subject case (was) (will be) forwarded to the Office of the Staff Judge Advocate (on) (not later than) _____, 19__.

SIGNATURE

APPENDIX F

SAMPLE EMI ASSIGNMENT ORDER

(Date)

From: (Rate and full name of person imposing EMI)
To: (Rate and full name of person being assigned EMI)

Subj: ASSIGNMENT OF EXTRA MILITARY INSTRUCTION (EMI)

Ref: (a) JAGMAN, § 0103 [or local instruction]

1. Your performance indicates the following deficiencies: [you failed to make required log entries to record certain events and failed to make proper tours of your watch area.]

2. These performance deficiencies stem from: [your inattention to duty in preparing for your assigned watch.]

3. Per the reference, the following extra military instruction is assigned to assist you in overcoming these deficiencies: [you will study the pertinent orders for watchstanders and develop a checklist for use by personnel standing this watch.]

4. This EMI shall be performed between 1630 and 1800 from Monday 1 June 19CY through Friday 5 June 19CY. On Monday, 8 June 19CY, you will present a 30-minute class on this subject to your division.

_____
(Signature)

_____
(Date)

1. I hereby acknowledge notification of the above EMI. I have read and understand reference (a) and am aware that failure to perform said EMI in the manner set out therein is a violation under Article 92, UCMJ, which is punishable by either nonjudicial punishment or at court-martial.

_____
(Signature)

Copy to:
Members' training record (original)
Command Master Chief
Legal Officer
Division Officer

APPENDIX G

SAMPLE NONPUNITIVE LETTER OF CAUTION

From: Commanding Officer, USS BOHEMIAN (CV 11)
To: CTOCS Michael Stipe, USN, 123-45-6789

Subj: NONPUNITIVE LETTER OF CAUTION

Ref: (a) Report of JAG Investigation of 7 Sep 19CY
(b) JAGMAN, § 0105
(c) R.C.M. 306(c)(2), MCM 1984

1. Reference (a) is the record of investigation convened to inquire into the transmission of a certain message on board USS BOHEMIAN while you were SSES Assistant Division Officer.

2. The investigation disclosed that, as Assistant Division Officer, on 19 July 19CY, you participated in the writing and printing of a fake message. After reviewing the fake message, you noted that there had been an unauthorized modification to the classification line and directed that it be corrected. Unfortunately, you failed to verify that this correction had been made and, when the correction was not made, the next message still had the error in the classification line. When you realized that this message had been transmitted with an error in the classification line, you took steps to retransmit a corrected copy, but you did not notify your superiors.

3. Your performance and judgment during this incident was substandard. As Assistant Division Officer, it was inappropriate for you to participate in the drafting of a fake message. More critical, however, was your failure to notify your superiors that a message with an improper classification line had been transmitted. You are hereby administratively admonished for your actions on 19 July 19CY.

4. This letter, being nonpunitive in nature, is addressed to you as a corrective measure. It does not become a part of your official record. However, you are advised that, as Assistant SSES Division Officer, you are in a position of special trust. In the future, I expect you to exercise greater care in the performance of your duties in order to measure up to the high standards of USS BOHEMIAN. I trust the instructional benefit you receive from this experience will heighten your awareness of the extent of your responsibilities and help you become a more proficient Chief Petty Officer.

E. D. BRICKELL

APPENDIX H

SAMPLE LETTER OF INSTRUCTION

From: Commanding Officer, USS NEVERSAIL (CV 11)
To: LCDR Mike Rowmanage, USN, 987-65-4321/1300
Aviation Fuels Officer, USS NEVERSAIL (CV 11)

Subj: LETTER OF INSTRUCTION

Ref: (a) MILPERSMAN, art. 3410100

1. This Letter of Instruction is issued per the reference to discuss specific measures required to improve the unsatisfactory performance of the Aviation Fuels Division on board NEVERSAIL.

2. Since your assumption of duties as aviation fuels officer on board NEVERSAIL, you have allowed unauthorized procedures to exist in the Aviation Fuels Division that resulted in the structural damage to JP-5 storage tank 8-39-02J during underway replenishment on 18 July 19CY. You failed to familiarize yourself with appropriate aviation fuels directives and thus you were unable to verify the proceedings in your division. You also failed to ensure all directives were maintained up-to-date. Generally, you relied totally upon your assistant aviation fuels officer for the day-to-day operation of your division.

3. To function effectively as the aviation fuels officer, you must become more involved in the day-to-day aspects of your division. You cannot manage from your office, accepting the counsel of your assistants without developing an adequate personal knowledge of specific procedures. You must personally set your division's goals and personally verify they are being met.

a. You must review every aviation fuels directive applicable to USS NEVERSAIL. You will ensure that you are familiar with directed procedures. As a matter of routine, you will personally verify that your division does not deviate from directed procedures unless authorized by higher authority.

b. You will submit quota requests for yourself and CWO2 J. S. Ragmann to attend an aviation fuels officer course upon completion of this deployment.

4. This letter is designed to aid you in correcting deficiencies in your performance as a division officer. The entire chain of command is available to assist you in any way possible. We want and need your success.

D. R. PEPPER

CHAPTER TWENTY-SIX

DISPOSITION OF MINOR OFFENSES

NONJUDICIAL PUNISHMENT (NJP)

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CHAPTER TWENTY-SIX

DISPOSITION OF MINOR OFFENSES

NONJUDICIAL PUNISHMENT (NJP)

2601 USN CHECKLIST FOR REPORT CHIT / NJP PROCESSING

The following process assumes that the command has a local report chit or system for reporting offenses and conducting the preliminary inquiry prior to the preparation of a NAVPERS 1626/7 for use at XOI or CO's mast.

A. Before CO's mast:

1. Log local report into the logbook. (A log should be used for tracking the report through your command.)

2. Send local report and request for preliminary inquiry and recommendation as to disposition to SNM's department head.

3. If returned recommending XOI or mast, check service record out from personnel or PSD.

4. Review service record to ensure all pages are there and to determine if SNM is on any suspended sentence, is in a frocked paygrade, or has been given an administrative separation warning.

5. Prepare NAVPERS 1626/7 and appropriate acknowledgement of rights forms from *JAG Manual*. If a UA case, be sure to have a page 601-6R or page 13.

6. Attach preliminary inquiry report, including statements and other evidence, to report chit.

7. Contact and inform the accused of all rights and let him / her inspect the evidence. (If shore based, set up appointment with DC if accused wants to consult with counsel.)

8. Inform accused, his / her supervisors, and witnesses of time and place of XOI / CO's mast.

B. After CO's mast:

1. Ensure CO has completed section of NAVPERS 1626/7 entitled "Action of the Commanding Officer."

2. Inform accused of right to appeal NJP. Be sure accused signs the appropriate forms (*see JAG Manual*, appendix 1). Ensure NAVPERS 1626/7 is modified to reflect the 5-day time limit vice 15 days which is preprinted on NAVPERS 1626/7.

3. Service record entries required when the ***CO excuses*** or ***dismisses*** the offense(s):

a. When the service record contains an entry concerning UA, an entry must be made to show what action was taken. If the UA is less than 24 hours, a page 13 entry is required.

b. If UA more than 24 hours, completion of a page P601-6R is required.

c. For all other offenses ***excused*** or ***dismissed***, no service record entry is required. If a UA offense is excused or dismissed, page 13 required to reflect disposition.

4. When mast results in a decision to refer charges to trial by summary or special court-martial (SPCM), prepare a charge sheet (DD458). No service record entry is required.

5. When mast results in a decision to direct a pretrial investigation under article 32, no service record entry is required.

6. Required service record entries if punishment imposed does ***not*** include reduction or forfeiture of pay:

a. NAVPERS 1070/613 (page 13);

b. NAVPERS 1070/609 (page 9);

c. NAVPERS 1070/606 (page 6) - Must be completed in UA cases in excess of 24 hours. Since UA of 24 hours or more is lost time, completion of

the page 6 (blocks 1 and 2, 38 through 42, and block 50) must be timely and accurate. Strict adherence to the PAYPERSMAN, § 90435 is mandatory.

7. Required service record entries if punishment imposed ***does*** include reduction or forfeiture of pay:

a. NAVPERS 1070/607 (page 7);

b. NAVPERS 1070/609 (page 9);

c. NAVPERS 1070/604 (page 4) if reduction is awarded;

d. NAVPERS 1070/606 (page 6) to be completed in UA cases in excess of 24 hours as outlined above; and

e. if reduction and forfeitures, ensure forfeitures are based on reduced paygrade (even if reduction suspended).

NOTE: *Manual of Advancement* states that all lost time as a result of UA, misconduct, confinement, etc., is not creditable as time in rate (TIR) for advancement and, accordingly, the TIR shall be adjusted (page 4) ***only*** if there has been ***no reduction in rate***.

8. Punishments involving reduction or forfeiture of pay which are suspended:

a. NAVPERS 1070/613 (page 13) if punishment awarded pertains to reduction in rate (RIR) or forfeiture and fines (FF) and was suspended;

b. NAVPERS 1070/607 (page 7) if one or more types of punishment awarded is suspended, but still includes at least one punishment not suspended that pertains to pay;

c. NAVPERS 1070/609 (page 9) if reduction is awarded; and

d. NAVPERS 1070/604 (page 4) if reduction is awarded.

9. Punishments involving restraint:

a. Correctional custody (CC). If CC is awarded at mast, prepare the confinement order (NAVPERS 1640/4). You will need an original and two copies.

NOTE: The accused will be escorted to the local medical facility for a preconfinement physical. This is a function of your MAA. They are trained to do this. Do not assign the job to one of your YNs.

b. Restriction to limits. If restriction is imposed, restriction papers need to be typed. Usually this is on a local preprinted form, necessitating only the completion of the accused's name, rate, and social security number (SSN). It will show the boundaries of restriction, times, dates and places for muster, and is signed by someone authorized to do so.

c. Extra duty. If extra duty is imposed, virtually the same procedures as in b above will be used. Again, notification is by a preprinted, locally prepared form which defines the extra duty, the time it will be accomplished, to whom the accused reports, and any extra instructions necessary.

d. Confinement on bread and water. Prepare confinement orders for bread and water. The SNM must be given a confinement physical and found to be fit for confinement on bread and water. *See* section on preparation of confinement order.

e. File documents in the Unit Punishment Book (UPB) and, after all action (including any appeal), ensure it is complete.

-- [A "Unit Punishment Book" is nothing more than a binder containing completed NAVPERS 1626/7's of ***all*** cases appearing before the CO at ***mast***, whether dismissed or excused. The UPB is required as a permanent command record of all cases involving ***enlisted*** persons handled at mast and will be maintained on board for two years (MILPERSMAN, art. 5030500 and *JAGMAN*, § 0119 pertain).]

10. Remission, mitigation, or setting aside of NJP:

a. The PAYPERSMAN (Part 9, section 90436) contains block-by-block instructions for preparation of NAVPERS 1070/607 for these actions.

b. Refer to table 9-4-39h for instructions to mitigate, reinstate, or set aside the punishment for members who have previously been reduced in rate.

C. Miscellaneous matters:

1. If the CO's NJP results in a restraint-type punishment, the details must be furnished to the OOD for inclusion in the deck log.

2. Prepare notice for the Plan-of-the Day (POD). If it is the policy of commands to publish the results of CO's NJP in the command POD, strict compliance with JAGMAN, section 0115 is mandatory. The names of offenders will be omitted if the information may be disseminated to civilians. In no instance will the SSN of an individual be used in the publication of NJP results. (*See* SECNAVINST 5211.5 and the Privacy Act in this Deskbook.)

3. If appropriate, prepare page 13—warning member of consequences of future misconduct.

4. If a basis for administrative discharge applies, determine if command wants to process member for discharge. Do not prepare page 13 if command wants to process for discharge.

D. NJP appeals:

1. After receipt of accused's appeal, prepare written endorsement for the CO's signature. Include a copy of NAVPERS 1626/7, copies of all statements or evidence used at mast, and copy of page 9 from accused's service record (with all endorsements). *See* JAGMAN, § 0116 for requirements.

2. Indicate appeal on NAVPERS 1626/7.

3. If no response to appeal is received from appeal authority within five (5) days of accused's appeal, then restraint punishments must be stayed—but only if accused's has requested this.

E. Officer NJP:

1. Before taking an officer to NJP, check with regulations promulgated by the type commander regarding any additional requirements or procedures required by them. (Many want notification prior to the NJP hearing. Prompt verbal reports of all incidents of officer misconduct must be made to CINCPACFLT.)

2. If an officer is awarded NJP, a disciplinary report must be sent to BUPERS 82. (MILPERSMAN, art. 3410100.2b contains the applicable provisions.)

3. If the officer is also being detached for cause, consult MILPERSMAN 3410105 for the provisions for this procedure.

4. *See* "Officer Discipline" in this Deskbook.

OFFICER DISCIPLINE

2602 REFERENCES

A. SECNAVINST 1920.6, Subj: ADMINISTRATIVE SEPARATION OF OFFICERS

B. MILPERSMAN

C. MCO P5800.8 (LEGADMINMAN)

2603 REPORTS OF OFFICER MISCONDUCT

Naval officer misconduct must be reported to BUPERS 82. Marine officer misconduct must be reported to the Commandant of the Marine Corps (CMC) (JAM) in the following instances:

A. The suspect is in the grade of colonel or above;

B. the suspect is a commander with special court-martial convening authority (SPCMCA); or

C. in the judgment of the superior commander:

a. the incident in question may generate significant adverse publicity;

b. formal disciplinary action or a recommendation for administrative separation processing may result; or

c. other special circumstances warrant notifying CMC.

2604 ADMINISTRATIVE SEPARATION

SECNAVINST 1920.6 governs the administrative separation processing of Regular and Reserve officers. The most frequently used bases for administrative separation processing are misconduct (including moral or professional dereliction) and substandard performance of duty. Retirement-eligible officers may also be processed for administrative separation. SECNAVINST 1920.6 provides the mechanism to force the retirement of eligible officers for substandard performance or misconduct, including a board procedure to determine whether retirement should be in the next

inferior grade. These procedures are discussed in greater detail in the administrative separations chapter of this Deskbook.

2605 SEPARATION IN LIEU OF TRIAL

A. 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), MCM, 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.

B. Characterization of service. The characterization of service is normally under other than honorable (OTH) conditions, but a general discharge may be warranted in some cases. 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.

C. Procedures

1. The officer submits a signed, written request for discharge in lieu of trial. The officer shall be afforded an opportunity to consult with qualified counsel. If the member refuses to do so, the CO shall prepare a statement to this effect which shall be attached to the file, and the officer shall acknowledge the waiver of the right to consult with counsel. Unless the officer has waived the right to counsel, the request shall also be signed by counsel.

2. The written request shall indicate the officer understands the following:

a. The elements of the offenses charged;

b. that characterization of service under OTH conditions is authorized; and

c. the adverse nature of such a characterization and possible consequences.

3. The request shall also include:

a. 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

b. 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.

SUMMARY COURTS-MARTIAL

2606 CHECKLIST

A. Pretrial procedures

1. Check the service record out from personnel or PSD.

2. Prepare the DD Form 458 and the convening order for the CO's signature.

3. You will need three (3) copies of the charge sheet and four (4) copies of the convening order. Distribute as follows: one of each for the accused, one of each for the summary courts-martial (SCM) officer, one of each for command files. The fourth convening order should be certified as a true copy and attached to the original charge sheet. The original is retained in the command files for future use.

4. Inform the accused of his / her rights at the SCM, his / her right to refuse SCM, and his / her right to consult with counsel.

5. If accused consults with an attorney, be sure he / she has made an election to accept an SCM. If accused has elected an SCM and desires to waive counsel at the court, have the accused sign a Waiver of Rights to Counsel form. This allows the results to be admissible as a conviction at a later court-martial for purposes of aggravation.

6. Obtain a list of witnesses desired by accused and arrange for their attendance at the trial.

7. Inform the member's division officer that the accused could receive confinement and that a full sea bag is required. This will save time after trial if confinement is in fact adjudged.

8. Contact SCM officer and inform him / her generally of duties. Ensure the SCM officer has a copy of the SCM trial guide in Appendix 9 to the MCM, 1984, and Record of Trial (ROT) by SCM form, DD Form 2329.

B. Post-trial procedures

1. If confinement has been awarded, prepare the confinement orders and alert personnel that TEMADD orders will be needed.

2. If member is to be confined, copy pages 2, 4, 5, 9, 10, and any pages 6, 7, and 13 relating to prior NJP's. Also copy any evaluations or commendations. This information may be needed to prepare the CA's action and the service record is sent to the brig with the prisoner.

3. Ensure that the SCM officer had completed blocks 1-11 of the ROT by SCM (DD Form 2329) and signed block 12.

4. Notify the accused of the right to submit matters to the CA for consideration in taking the action on the record. The accused has seven days from the date sentence is announced to submit any matters to the CA. The accused may waive his right to submit matters to the CA; if this is done, the waiver ***must*** be in writing and should be attached to the ROT.

5. After the seven days have elapsed, consult with your CO to determine what action is to be taken on the ROT; then prepare the CA's action accordingly. This is done by completing block 13 of the ROT by SCM. If the accused has waived the right to submit matters, the CA need not wait seven days prior to taking the action on the record. Although not statutorily required, it is recommended that this waiver be noted in the CA's action.

6. Assemble the ROT. The ROT should include a certified copy of the convening order, the original charge sheet, copies of any documentary evidence used, any summarizations of witness testimony (this is no longer required by the MCM, 1984, but may be desired or required by the SCM procedures established by the general courts-martial convening authority (GCMCA) in your chain of command), and the ROT by SCM (DD Form 2329). (Check also chain of command directives for local requirements for content of the ROT.)

7. Complete the processing times report and attach it to the ROT. [*See* OPNAVINST 5810.4 and JAGINST 5810.1, encl (6).]

8. Make three copies of this package and distribute as follows: one to the accused; one to the accused's service record; and one for the command's files.

9. Forward the original to the appropriate judge advocate (JA) for review (this is probably either your area coordinator or the GCMCA).

10. Ensure that appropriate service record page entries are prepared to record the CA's action. This should include a page 7 (if there is confinement, a reduction, or a forfeiture) and other entries on page 4 and 9 as needed.

11. Upon completion of any adjudged confinement, ensure that a page 7 is prepared to indicate the release and appropriate lost time.

APPENDIX A

SAMPLE NOTIFICATION OF OFFICER NJP

1621
17
Date

From: Commanding General, 1st Marine Aircraft Wing
To: First Lieutenant John J. Jones 123 45 6789/1369 USMC

Subj: NOTIFICATION OF OFFICE HOURS HEARING

Ref: (a) MCM, 1984 Part V
(b) *JAG Manual* 0109
(c) Article 15, UCMJ
(d) SECNAVINST 1920.6A
(e) MCO P1900.16D

1. Per references (a), (b), and (c), I am considering imposing nonjudicial punishment on you.

2. The following advice is provided:

a. You are suspected of the following violation(s) of the Uniform Code of Military Justice:

(1) Article 117, UCMJ: Provoking Speeches and Gestures. In and around the Bachelor Officers Quarters (BOQ), Building 4138 at Plaza Housing, Okinawa, Japan, on or about 15 July 19CY, you wrongfully used provoking words, to wit: "Bitch" and "Go to hell," or words to that effect, and gestures, to wit: balling up your fists, towards Sergeant Green, USMC, a military policeman in the execution of her duties.

(2) Article 134, UCMJ:

(a) Specification 1. Drunk and Disorderly. In and around the BOQ, at Building 4138 at Plaza Housing, Okinawa, Japan, on or about 15 July 19CY, you were drunk and disorderly with military policemen in the execution of their duties, which conduct was of a nature to bring discredit upon the armed forces.

(b) Specification 2. Drunk and Disorderly. In Okinawa City, Okinawa, Japan, on or about 16 July 19CY, you were drunk and disorderly with both Japanese policemen and military policemen in the execution of their duties, which conduct was of a nature to bring discredit upon the armed forces.

b. You will receive a copy of the preliminary inquiry which contains the available documentary information upon which the allegations are based.

c. You do not have to make any statement concerning the allegations.

d. Any statement you do make may be used against you during NJP, in a trial by court-martial, or in an adverse administrative proceeding convened pursuant to references (d) and (e).

e. You may consult with a lawyer, either a civilian lawyer retained by you at no expense to the United States or a judge advocate at no expense to you if one is reasonably available.

f. You will receive a hearing during which you will be accorded the following rights:

(1) To be present before the officer conducting the hearing or, if you waive such personal appearance, to submit written matters for consideration;

(2) to be advised of the offenses of which you are suspected;

(3) to be advised that you cannot be compelled to make any statement regarding the offenses alleged and that any statement you do make can be used against you;

(4) to be present during the presentation of all information against you (copies of any written statements will be furnished to you);

(5) to have available for your inspection all items of information to be considered by the officer conducting the hearing;

(6) to present to the officer conducting the nonjudicial punishment appropriate matters in mitigation, extenuation, or defense of the alleged charge(s) (Matters in mitigation do not constitute a defense, but do reduce the degree of culpability. Such matters might include a fine military record, either before or after the alleged offense. Matters in extenuation are matters which render an offense less aggravated. Such matters do not constitute a defense. Matters in defense are matters which constitute a reason in law or in fact why you should not be found guilty of the allegation);

(7) to present reasonably available witnesses;

(8) to have, during the hearing, a personal representative speak on your behalf (The officer conducting the hearing has no obligation to obtain and arrange for the presence of such representative. It is your obligation to obtain and arrange for the presence of such personal representative. The personal representative need not be a lawyer);

(9) to have the proceedings open to the public unless good cause for closing the proceedings can be shown or the punishment to be imposed will not exceed restriction for 14 days and an oral reprimand; and

(10) to request to confer privately with the officer conducting the hearing.

g. If nonjudicial punishment is imposed, the maximum punishment authorized is:

(1) Letter of admonition or reprimand;

(2) arrest in quarters for not more than 30 consecutive days;

(3) forfeiture of not more that one-half pay per month for two months; and

(4) restriction to specified limits, with or without suspension from duty, for not more than 30 consecutive days.

h. You may refuse to accept office hours and demand trial by court-martial. If you decline to accept office hours, the charges:

(1) May be dismissed;

(2) may be referred to trial by special court-martial;

(3) may be referred to trial by general court-martial; or

(4) may be the basis for adverse administrative action.

3. You are further advised that, if nonjudicial punishment is imposed under reference (c), you have the right to appeal to the Commanding General, III MEF, within five days after announcement of any punishment. The two bases for appeal are either that you consider the punishment unjust or that you consider the punishment to be disproportionate to the offenses for which imposed.

4. You must advise me in writing of your decision regarding your rights concerning nonjudicial punishment not later than five calendar days after receipt of this letter.

Copy to:
CO, [unit]

APPENDIX B

SAMPLE ACKNOWLEDGMENT OF NJP NOTIFICATION

1621
17
Date

From: First Lieutenant John J. Jones 123 45 6789/1369 USMC
To: Commanding General, 1st Marine Aircraft Wing

Subj: NOTIFICATION OF OFFICE HOURS HEARING

Ref: (a) CG, 1stMAW ltr 1621 17 of _____

1. I acknowledge receipt of the reference which gave me notification of the intent to conduct office hours and I understand my rights in that regard.

2. I have received a copy of the information to support the allegations.

3. I have had an opportunity to consult with counsel. I (did / did not) consult with counsel.

4. I (will / will not) accept office hours and (do / do not) demand trial by court-martial. At office hours, I (will / will not) plead guilty to the offenses alleged against me.

5. I (do / do not) request a personal appearance. Written matters (are / are not) attached.

6. I request that the following witnesses, if reasonably available, be present to testify at the hearing:

SIGNATURE

APPENDIX C

SAMPLE RECORD OF OFFICER NJP

LETTERHEAD

1621
17
Date

Subj: RECORD OF HEARING UNDER ARTICLE 15, UCMJ ICO, FIRST LIEUTENANT JOHN J. JONES 123 45 6789/1369 USMC

Ref: (a) Article 15, UCMJ
(b) Part V, MCM, 1984
(c) MCO P5800.8B (LEGADMINMAN)

Encl: (1) CG, 1stMAW ltr 1621 17 of [date]
(2) [SNO's] ltr 1621 17 of [date]
(3) Maj Smith's Report of article 32 investigation of [date] 90 w/ encls

1. First Lieutenant Jones received nonjudicial punishment (NJP) from MajGen Smith, Commanding General of the 1st Marine Aircraft Wing, on [date] for conduct unbecoming an officer. He was awarded a punitive letter of reprimand and forfeiture of $500.00 pay per month for two months.

2. The NJP hearing was conducted in substantial compliance with references (a) and (b). As reflected in enclosures (1) and (2), First Lieutenant Jones was notified of his rights prior to the hearing and elected to accept NJP.

3. This report is prepared by the staff judge advocate, who was present throughout the proceedings, per paragraph 4003 of reference (c).

4. During the hearing, First Lieutenant Jones acknowledged his rights and restated his election to accept NJP. He pled guilty to the charge. Details of the allegations are contained in the article 32 investigation report, attached as enclosure (3).

5. Prior to imposing punishment, the Commanding General deliberated and specifically stated that he considered enclosure (3), including the numerous statements of good character, the Officer Qualification Record, and the oral statements of the witness, First Lieutenant Jones, and the command representative. After the punishment was announced, the Commanding General advised First

Lieutenant Jones of his right to appeal to the Commanding General, III Marine Expeditionary Force.

6. At the hearing, First Lieutenant Jones and a character witness, Major Johnson, made statements substantially as follows:

a. First Lieutenant Jones: Sir, every day, for the last four months, I have regretted this incident. I believe that alcohol affected my judgment that night. It was totally out of character for me. It will never happen again. My statement at the article 32 hearing was to the best of my recollection. I am responsible for my actions and I am willing to face the consequences. I would love to be able to stay a Marine.

b. Major Johnson, Executive Officer, [unit]. I am First Lieutenant Jones' executive officer, but I have known him since August of 1989 (or 19CY-??) when we were both students in the aviation supply school at Athens, Georgia. He did well at school and was well-respected. I believe he just exercised bad judgment on the night in question. It was an isolated incident. While I was at The Basic School, I filled several billets and observed many lieutenants. In my opinion, First Lieutenant Jones rates at the top of the batch. I would not hesitate to have him continue to serve with me.

7. The command representative, Colonel Brown, USMC, CO, [unit], made a statement substantially as follows: After reviewing all the facts in this incident, I do not have confidence in First Lieutenant Jones' judgment or integrity. While the overall incident may have been isolated, he made several separate judgment errors that evening. First Lieutenant Jones does not have the integrity required of Marine Corps officers.

Record Authenticated by:

C. L. VARREC
Lieutenant Colonel, USMC
Staff Judge Advocate

APPENDIX D

SAMPLE OFFICER NJP REPORT

LETTERHEAD

1621
17
Date

FOR OFFICIAL USE ONLY

From: Commanding General, 1st Marine Aircraft Wing
To: Commandant of the Marine Corps (JAM)
Via: (1) Commanding General, III Marine Expeditionary Force
(2) Commanding General, Fleet Marine Force Pacific

Subj: REPORT OF NONJUDICIAL PUNISHMENT ICO FIRST LIEUTENANT JOHN J. JONES 123 45 6789/1369 USMC

Ref: (a) MCO P5800.8B (LEGADMINMAN)
(b) FMFPacO 5810.1L
(c) Art. 15, UCMJ
(d) Part V, MCM, 1984
(e) Ch. 1, Part B, *JAG Manual*
(f) Article 1122, *U.S. Navy Regulations, (1990)*

Encl: (1) Record of hearing under Article 15, UCMJ
(2) Punitive letter of reprimand
(3) First Lieutenant Jones' ltr 1621 17 of [date]
(4) First Lieutenant Jones' statement regarding adverse matter

1. This report is forwarded for inclusion on First Lieutenant Jones' official records per paragraph 4003 of reference (a) via intermediate commanders, as directed by paragraph 3d(2) of reference (b).

2. On [insert date], in accordance with references (c), (d), and (e), nonjudicial punishment (NJP) was imposed on First Lieutenant Jones for conduct unbecoming an officer. As a result, he was awarded a punitive letter of reprimand and a forfeiture of $500.00 pay per month for two months.

3. Details of the hearing and the circumstances of the offenses are set forth in enclosure (1). A copy of the punitive letter of reprimand is attached as enclosure (2).

4. As reflected in enclosure (3), First Lieutenant Jones did not appeal the punishment. Accordingly, the NJP is now final and will be reflected in the fitness report that includes the date it was imposed, [insert date].

5. I recommend that First Lieutenant Jones be retained on active duty until the expiration of his obligated active service.

6. By copy hereof, First Lieutenant Jones is notified of his right, per reference (f), to submit his comments, within 15 days of receipt, concerning this report of NJP and the letter of reprimand which will be included as adverse matter in his official records. His comments, if any, will be attached as enclosure (4).

Copy to:
CO, MAG-32
CO, MALS-32
First Lieutenant Jones

SAMPLE FIRST ENDORSEMENT

LETTERHEAD

FIRST ENDORSEMENT on CG, 1stMAW ltr 1621 17 of [date]

From: Commanding Officer, Marine Wing Aircraft Squadron 1
To: First Lieutenant John J. Jones 123 45 6789/1369 USMC

Subj: PUNITIVE LETTER OF REPRIMAND

1. Delivered.

SIGNATURE
By direction

APPENDIX E

SAMPLE PUNITIVE LETTER OF REPRIMAND

LETTERHEAD

1621
17
Date

From: Commanding General, 1st Marine Aircraft Wing
To: First Lieutenant John J. Jones 123 45 6789/1369 USMC
Via: Commanding Officer, Marine Wing Headquarters Squadron 1

Subj: PUNITIVE LETTER OF REPRIMAND

Ref: (a) UCMJ, Art 15
(b) Part V, MCM, 1984
(c) JAGMAN, § 0114
(d) Record of office hours proceeding

1. On [date], you received nonjudicial punishment (NJP) per references (a), (b), and (c). Prior to the hearing, you were advised of your right to demand trial by court-martial and you elected not to do so. Reference (d) is a summary of the hearing.

2. During July 19CY, you were involved in two separate alcohol-related incidents that resulted in this letter. You were drunk and disorderly on both occasions. On 15 July 19CY, you hosted a party in your BOQ room in Plaza Housing, Okinawa, Japan. At about 0300, a female military policeman asked you to turn down your stereo. In response, you called her a "bitch," told her to "go to hell," threatened her with your fists, and threatened another corporal. At about 0300, 16 July 19CY, you were found asleep in your car near a gangster residence in Okinawa City, Okinawa, Japan. Upon being awakened by Japanese police and asked to leave the area, you got out of your car and became violent, scuffling with the police and Air Force Security Police who were called to the scene, resulting in your being handcuffed and led away.

3. Your misconduct as an officer in dealing with enlisted military police and with Japanese law enforcement personnel brought discredit upon the officer corps. Your conduct reflects adversely on the leadership, judgment, and discipline required of you as an officer of Marines. Accordingly, pursuant to references (a), (b), and (c), you are reprimanded.

4. You are hereby advised of your right to appeal this action within five days of receiving this letter to the next superior authority, the Commanding General, III Marine Expeditionary Force, via the Commanding General, 1st Marine Aircraft Wing, per references (a), (b), and (c).

5. If you do not desire to appeal this action, you are directed to so inform me in writing within five days after receipt of this letter.

6. If you do desire to appeal this action, you are advised that an appeal must be made within a reasonable time and that, in the absence of unusual circumstances, an appeal made more than five days after receipt of this letter may be considered as not having been made within a reasonable time. If, in your opinion, unusual circumstances exist which make it impractical or extremely difficult for you to prepare and submit your appeal within the five days, you shall immediately advise me of such circumstances and request an appropriate extension of time to submit your appeal. Failure to receive a reply to such request will not, however, constitute a grant of such extension of time to submit your appeal. In all communications concerning an appeal of this letter, you are directed to state the date of your receipt of this letter.

7. Unless withdrawn or set aside by higher authority, a copy of this letter will be placed in your official record at Headquarters, U.S. Marine Corps. You may forward within 15 days after receipt of final denial of your appeal or after the date of notification of your decision not to appeal, whichever may be applicable, a statement concerning this letter for inclusion in your record. If you do not desire to submit a statement, you shall so state, in writing, within 5 days. You are advised that the statement submitted shall be couched in temperate language and shall be confined to the pertinent facts. Opinions shall not be expressed nor the motives of others impugned. Your statement may not contain countercharges.

8. Your reporting senior must note this letter in the next fitness report submitted after this letter becomes final, either by decision of higher authority upon appeal or by your decision not to appeal.

9. A copy of reference (d) has been provided to you for your use in deciding whether to appeal the issuance of this letter.

G. LEVY

APPENDIX F

SAMPLE ADVERSE MATTER STATEMENT

From: First Lieutenant John J. Jones 123 45 6789/1369 USMC
To: Commanding General, 1st Marine Aircraft Wing

Subj: STATEMENT REGARDING ADVERSE MATTER IN OFFICIAL RECORDS

Ref: (a) CG, 1stMAW ltr 1621 17 of [date]
(b) Art. 1122, *U.S. Navy Regulations (1990)*

1. I received a copy of reference (a) on [date].

2. I understand my right per reference (b) to make a statement concerning the report of nonjudicial punishment, with enclosures, including the punitive letter of reprimand.

3. I choose to make (no statement) (the following statement).

APPENDIX G

SAMPLE OFFICER NJP APPEAL

From: First Lieutenant John J. Jones 123 45 6789/1369 USMC
To: Commanding General, III Marine Expeditionary Force
Via: Commanding General, 1st Marine Aircraft Wing

Subj: APPEAL OF NONJUDICIAL PUNISHMENT

Ref: (a) CG, 1stMAW ltr of reprimand 1620 17 of [date]
(b) Record of hearing
(c) Article 15, UCMJ
(d) Part V, MCM, 1984

1. I acknowledge receipt of references (a) and (b) on [date].

2. I further acknowledge that I understand my rights under references (c) and (d) to appeal the imposition of nonjudicial punishment, including the punitive letter of reprimand, to the Commanding General, III Marine Expeditionary Force.

3. I desire to appeal on the ground that the punishment was (unjust, disproportionate to the offenses committed) as follows:

APPENDIX H

SAMPLE SCM CONVENING ORDER

DEPARTMENT OF THE NAVY
USS OLDSHIP (DD 111)
FPO AE 09501-5555

27 Oct CY

SUMMARY COURT-MARTIAL CONVENING ORDER 9-CY

Lieutenant Brand S. New, U.S. Navy, is detailed a summary court-martial.

HANG M. HIGH
Commander, U.S. Navy
Commanding Officer
USS OLDSHIP (DD 111)

DOCUMENTING COMPLIANCE WITH "*BOOKER*" AT SCM (SRB page 13/12)

[Date of SCM]: SNM consulted with independent military counsel prior to deciding whether to accept or refuse the summary court-martial held on this date. SNM accepted trial by summary court-martial.

NAME
RANK, SERVICE
POSITION
BY DIRECTION

APPENDIX I

SCM ACKNOWLEDGEMENT OF RIGHTS AND WAIVER

I, (Rate, Name, Branch of Service) assigned to (accused's command or unit) acknowledge the following facts and rights regarding summary courts-martial:

1. I have the right to consult with a lawyer prior to deciding whether to accept or refuse trial by summary court-martial. Should I desire to consult with counsel, I understand that a military lawyer may be made available to advise me, free of charge, or, in the alternative, I may consult with a civilian lawyer at my own expense.

2. I realize that I may refuse trial by summary court-martial, in which event the CO may refer the charge(s) to a special court-martial. My rights at a summary court-martial would include:

a. The right to confront and cross-examine all witnesses against me;

b. the right to plead not guilty and the right to remain silent, thus placing upon the government the burden of proving my guilt beyond a reasonable doubt;

c. the right to have the summary court-martial call, or subpoena, witnesses to testify in my behalf;

d. the right, if found guilty, to present matters which may mitigate the offense or demonstrate extenuating circumstances as to why I committed the offense; and

e. the right to be represented at trial by a civilian lawyer provided by me at my own expense, if such appearance will not unreasonably delay the proceedings and if military exigencies do not preclude it.

3. I understand that the maximum punishment which may be imposed upon me at a summary court-martial is:

<u>On E-4 and below</u>	<u>On E-5 and above</u>
Confinement for one month; or Hard labor without confinement for 45 days; or 60 days restriction; AND	60 days restriction; AND
Forfeiture of 2/3 pay for one month; AND	Forfeiture of 2/3 pay for one month;
Reduction to the lowest enlisted paygrade (E-1).	Reduction to the next inferior paygrade.

4. Should I refuse trial by summary court-martial, the CO may refer the charge(s) to trial by special court-martial. At a special court-martial, in addition to those rights set forth above with respect to a summary court-martial, I would also have the following rights:

a. The right to be represented at trial by a military lawyer, free of charge, including a military lawyer of my own selection if the one I select is reasonably available. I would also have the right to be represented by a civilian lawyer at no expense to the United States.

b. The right to be tried by a special court-martial composed of at least three officers as members or, at my request, at least one-third of the court members would be enlisted personnel. If tried by a court-martial with members, two-thirds of the members, voting by secret written ballot, would have to agree in any finding of guilty, and two-thirds of the members would also have to agree on any sentence to be imposed should I be found guilty.

c. The right to request trial by a military judge alone. If tried by a military judge alone, the military judge alone would determine my guilt or innocence and, if found guilty, the judge alone would determine an appropriate sentence in my case.

5. I understand that the maximum punishment which can be imposed at a special court-martial for the offense(s) presently charged against me is:

> Discharge from the naval service with a bad-conduct discharge [delete if inappropriate]; Confinement for __ months; Forfeiture of 2/3 pay per month for ___ months; and Reduction to the lowest enlisted pay grade (E-1).

Knowing and understanding my rights as set forth above, I (do) (do not) desire to consult with counsel before deciding whether to accept trial by summary court-martial.

Knowing and understanding my rights as set forth above (and having first consulted with counsel), I hereby (consent) (object) to trial by summary court-martial.

Signature of accused and date

Signature of witness and date

APPENDIX J

ADDENDA TO SCM TRIAL GUIDE (MCM, 1984, App. 9)

HANDLING CONFESSIONS AT SCM

NOTE: Before you consider an out-of-court statement of the accused as evidence against him, you must be convinced by a preponderance of the evidence that the statement was made voluntarily and that, if required, the accused was properly advised of his rights. Mil.R.Evid. 304, 305.

A confession or admission is not voluntary if it was obtained through the use of coercion, unlawful influence, or unlawful inducement, including obtaining the statement by questioning an accused without complying with the warning requirements of Article 31(b), UCMJ, ***and*** without first advising the accused of his rights to counsel during a custodial interrogation. You must also keep in mind that an accused cannot be convicted on the basis of his out-of-court self-incriminating statement alone, even if it was voluntary, for such a statement must be corroborated if it is to be used as a basis for conviction. Mil.R.Evid. 304(g).

If a statement was obtained from the accused during a custodial interrogation, it must appear affirmatively on the record that the accused was warned of the nature of the offense of which he was accused or suspected, that he had the right to remain silent, that any statement he made could be used against him, that he had the right to consult lawyer counsel and have lawyer counsel with him during the interrogation, and that lawyer counsel could be civilian counsel provided by him at his own expense or free military counsel appointed for him.

After the above explanation, the accused or suspect should have been asked if he desired counsel. If he answered affirmatively, the record must show that the interrogation ceased until counsel was obtained. If he answered negatively, he should have been asked if he desired to make a statement. If he answered negatively, the record must show that the interrogation ceased. If he affirmatively indicated that he desired to make a statement, the statement is admissible against him. The record must show, however, that the accused did not invoke any of these rights at any stage of the interrogation. In all cases in which you are considering the reception in evidence of a self-incriminating statement of the accused, you should call the person who obtained the statement to testify as a witness and question him substantially as follows:

SCM: (After the routine introductory questions) Did you have occasion to speak to the accused on _____?

WIT: (Yes) (No) _____.

SCM: Where did this conversation take place and at what time did it begin?

WIT: _____.

SCM: Who else, if anyone, was present?

WIT: _____.

SCM: What time did the conversation end?

WIT: _____.

SCM: Was the accused permitted to smoke as he desired during the period of time involved in the conversation?

WIT: _____.

SCM: Was the accused permitted to drink water as he desired during the conversation?

WIT: _____.

SCM: Was the accused permitted to eat meals at the normal meal times as he desired during the conversation?

WIT: _____.

SCM: Prior to the accused making a statement what, if anything, did you advise him concerning the offense of which he was suspected?

WIT: (I advised him that I suspected him of the theft of Seaman Jones' Bulova wristwatch from Jones' locker in Building 15 on [date].)

SCM: What, if anything, did you advise the accused concerning his right to remain silent?

WIT: (I informed the accused that he need not make any statement and that he had the right to remain silent.)

SCM: What, if anything, did you advise the accused of the use that could be made of a statement if he made one?

WIT: (I advised the accused that, if he elected to make a statement, it could be used as evidence against him at a court-martial or other proceeding.)

SCM: Did you ask the accused if he desired to consult with a lawyer or to have a lawyer present?

WIT: (Yes.) (No.)

SCM: (If answer to previous question was affirmative) What was his reply?

WIT: (He stated he did (not) wish to consult with a lawyer (or to have a lawyer present).)

NOTE: If the interrogator was aware that the accused had retained or appointed counsel in connection with the charge(s), then such counsel was required to be given notice of the time and place of the interrogation.

SCM: To your knowledge, did the accused have counsel in connection with the charge(s)?

WIT: (Yes.) (No.)

SCM: (If answer to previous question was affirmative) Did you notify the accused's counsel of the time and place of your interview with the accused?

WIT: (Yes.) (No.)

SCM: What, if anything, did you advise the accused of his rights concerning counsel?

WIT: (I advised the accused that he had the right to consult with a lawyer counsel and have that lawyer present at the interrogation. I also informed him that he could retain a civilian lawyer at his own expense and additionally a military lawyer would be provided for him. I further advised him that any detailed military lawyer, if the accused desired such counsel, would be provided at no expense to him.)

SCM: Did you provide all of this advice prior to the accused making any statement to you?

WIT: (Yes.)

SCM: What, if anything, did the accused say or do to indicate that he understood your advice?

WIT: (After advising him of each of his rights, I asked him if he understood what I had told him and he said he did. (Also, I had him read a printed form containing a statement of these rights and sign the statement acknowledging his understanding of these rights.))

SCM: (If accused has signed a statement of his rights) I show you Prosecution Exhibit #2 for identification, which purports to be a form containing advice of a suspect's rights and ask if you can identify it?

WIT: (Yes. This is the form executed by the accused on _____19___. I recognize it because my signature appears on the bottom as a witness, and I recognize the accused's signature which was placed on the document in my presence.)

SCM: Did the accused subsequently make a statement?

WIT: (Yes.)

SCM: Was the statement reduced to writing?

WIT: (Yes.) (No.)

SCM: Prior to the accused's making the statement, did you, or anyone else to your knowledge, threaten the accused in any way?

WIT: (Yes.) (No.)

SCM: Prior to the accused's making the statement, did you, or anyone else to your knowledge, make any promises of reward, favor, or advantage to the accused in return for his statement?

WIT: (Yes.) (No.)

SCM: Prior to the accused's making the statement, did you, or anyone else to your knowledge, strike or otherwise offer violence to the accused should he not make a statement?

WIT: (Yes.) (No.)

SCM: (If the accused's statement was reduced to writing) Describe in detail the procedure used to reduce the statement in writing.

WIT: _____.

SCM: Did the accused at any time during the interrogation request to exercise any of his rights?

WIT: (Yes.) (No.)

NOTE: If the witness indicates that the accused did invoke any of his rights at any stage of the interrogation, it must be shown that the interrogation ceased at that time and was not continued until such time as there had been compliance with the request of the accused concerning the rights invoked. If the witness testifies that he obtained a written statement from the accused, he should be asked if and how he can identify it as a written statement of the accused. When a number of persons have participated in obtaining a statement, you may find it necessary to call several or all of them as witnesses in order to inquire adequately into the circumstances under which the statement was taken.

SCM: I now show you Prosecution Exhibit 3 for identification, which purports to be a statement of the accused, and ask if you can identify it?

WIT: (Yes. I recognize my signature and handwriting on the witness blank at the bottom of the page. I also recognize the accused's signature on the page.)

SCM: (To accused, after permitting him to examine the statement when it is in writing) The Uniform Code of Military Justice provides that no person subject to the Code may compel you to incriminate yourself or answer any question which may tend to incriminate you. In this regard, no person subject to the Code may interrogate or request any statement from you if you are accused or suspected of an offense without first informing you of the nature of the offense of which you are suspected and advising you that you need not make any statement regarding the offense of which you are accused or suspected; that any statement you do make may be used as evidence against you in a trial by court-martial; that you have the right to consult with lawyer counsel and have lawyer counsel with you during the interrogation; and that lawyer counsel can be civilian counsel provided by you or military counsel appointed for you at no expense to you. Finally, any statement obtained from you through the use of coercion, unlawful influence, or unlawful inducement may not be used in evidence against you in a trial by court-martial. In addition, any statement made by you that was actually the result of any promise of reward or advantage, or that was made by you after you had invoked any of your rights at any time during the interrogation, and your request to exercise those rights was denied, is inadmissible and cannot be used

against you. Before I consider receiving this statement in evidence, you have the right at this time to introduce any evidence you desire concerning the circumstances under which the statement was obtained or concerning whether the statement was in fact made by you. You also have the right to take the stand at this time as a witness for the limited purpose of testifying as to these matters. If you do that, whatever you say will be considered and weighed as evidence by me just as is the testimony of other witnesses on this subject. I will have the right to question you upon your testimony but, if you limit your testimony to the circumstances surrounding the taking of the statement or as to whether the statement was in fact made by you, I may not question you on the subject of your guilt or innocence nor may I ask you whether the statement is true or false. In other words, you can only be questioned upon the issues concerning which you testify and upon your worthiness of belief, but not upon anything else. On the other hand, you need not take the witness stand at all. You have a perfect right to remain silent, and the fact that you do not take the stand yourself will not be considered as an admission by you that the statement was made by you under circumstances which would make it admissible or that it was in fact made by you. You also have the right to cross-examine this witness concerning his testimony, just as you have that right with other witnesses, or, if you prefer, I will cross-examine him for you along any line of inquiry you indicate. Do you understand your rights?

ACC: _____.

SCM: Do you wish to cross-examine this witness?

ACC: _____.

SCM: Do you wish to introduce any evidence concerning the taking of the statement or concerning whether you in fact made the statement?

ACC: _____.

SCM: Do you wish to testify yourself concerning these matters?

ACC: _____.

SCM: Do you have any objection to my receiving Prosecution Exhibits 2 and 3 for identification into evidence?

ACC: (Yes, sir (stating reasons).) (No, sir.)

SCM: (Your objection is sustained.)

--

(Your objection is overruled. These documents are admitted into evidence as Prosecution Exhibits 2 and 3.)

--

(There being no objection, these documents are admitted into evidence as Prosecution Exhibits 2 and 3.)

NOTE: If the accused's statement was given orally, rather than in writing, anyone who heard the statement may testify as to its content if all requirements for admissibility have been met.

APPENDIX K

HANDLING UA GUILTY PLEA AT SCM

SCM OFFICER INQUIRY INTO THE FACTUAL BASIS OF A PLEA OF GUILTY TO THE OFFENSE OF UA

1. Assumption. Assume the accused has entered pleas of guilty to the following charge and specification:

   Charge: Violation of the UCMJ, Article 86

   Specification: In that Seaman Virgil A. Tweedy, U.S. Navy, on active duty, Naval Justice School, Newport, Rhode Island, did, on or about 5 July 19CY, without authority, absent himself from his unit, to wit: Naval Justice School, Newport, Rhode Island, and did remain so absent until on or about 23 July 19CY.

2. Procedure. The SCM officer, after he / she has completed the inquiry indicated in the *Trial Guide* as to the elements of the offense, should question the accused substantially as follows:

   SCM: State your full name and rank.

   ACC: Virgil Armond Tweedy, Seaman.

   SCM: Are you on active duty in the U.S. Navy?

   ACC: Yes, sir.

   SCM: Are you the same Seaman Virgil A. Tweedy who is named in the charge sheet?

   ACC: Yes, sir.

   SCM: Were you on active duty in the U.S. Navy on 5 July 19CY?

   ACC: Yes, sir.

   SCM: What was your unit on that date?

   ACC: The Naval Justice School.

SCM: Is that located in Newport, Rhode Island?

ACC: Yes, sir.

SCM: Tell me in your own words what you did on 5 July that caused this charge to be brought against you.

ACC: I stayed at home.

SCM: Had you been at home on leave or liberty?

ACC: Yes, sir.

SCM: Which one was it?

ACC: I had liberty on the 4th of July.

SCM: When were you required to report back to the Naval Justice School?

ACC: At 0800 on the 5th of July.

SCM: And did you fail to report on 5 July 19CY?

ACC: Yes, sir.

SCM: When did you return to military control?

ACC: On 23 July 19CY.

SCM: How did you return to military control on that date?

ACC: I took a bus to Newport and turned myself in to the duty officer at the Naval Justice School.

SCM: When you failed to report to the Naval Justice School on 5 July, did you feel you had permission from anyone to be absent from your unit?

ACC: No, sir.

SCM: Where were you during this period of absence?

ACC: I was at home, sir.

SCM: Where is your home?

ACC: In Blue Ridge, West Virginia.

SCM: Is that where you were for this entire period?

ACC: Yes, sir.

SCM: During this period, did you have any contact with military authorities? By "military authorities" I mean not only members of your unit, but anyone in the military.

ACC: No, sir.

SCM: During this period, did you go on board any military installations?

ACC: No, sir.

SCM: Were you sick or hurt or in jail, or was there anything which made it physically impossible for you to return?

ACC: No, sir.

SCM: Could you have reported to the Naval Justice School on 5 July 19CY if you had wanted to?

ACC: Yes, sir.

SCM: During this entire period, did you believe you were UA from the Naval Justice School?

ACC: Yes, sir; I knew I was UA.

SCM: Do you know of any reason why you are not guilty of this offense?

ACC: No, sir.

APPENDIX L

SCM PUNISHMENT CHART

PERMISSIBLE PUNISHMENTS	E-4 AND BELOW	E-5 AND ABOVE
CONFINEMENT	30 DAYS	NO
BREAD & WATER / DIMINISHED RATIONS	3 DAYS FOR SHIP-BOARD E-1 TO E-3	NO
RESTRICTION	60 DAYS	60 DAYS
HARD LABOR W/O CONFINEMENT	45 DAYS	NO
FORFEITURE OF 2/3 PAY PER MONTH	30 DAYS; PAYMENT MAY BE EXTENDED OVER 90 DAYS PER JAGMAN, § 0019b	
FINE	YES, BUT FINE AND FORFEITURE TOTAL MAY NOT EXCEED MAX FORFEITURE CEILING	
REDUCTION TO NEXT INFERIOR PAY GRADE	YES	YES
REDUCTION TO LOWEST PAY GRADE	YES	NO
REPRIMAND	YES	YES

CHAPTER TWENTY-SEVEN

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CHAPTER TWENTY-SEVEN

PRETRIAL MATTERS

2701 PREPARATION OF PRETRIAL CONFINEMENT ORDERS

Most brigs have their own instructions regarding any local requirements—such as minimum sea bag needs, visiting hours, and release times. Obtain a copy of the local instruction for further guidance. *See also* the *Navy Corrections Manual*, SECNAVINST 1640.9, and OPNAVINST 1640.6 for all brig procedures.

A. Prepare a confinement order, NAVPERS 1640/4. You will normally need an original and three copies.

B. Check local requirements to determine whether to send dental, medical, and pay records to brig.

C. Have the accused's division officer assist the accused in obtaining the sea bag requirements for the brig.

D. Check local requirements to determine whether brig requires TEMADD orders. Do not use TEMDU orders for pretrial confinees.

E. Have member escorted to the medical department / emergency room for the confinement physical. (***Note***: The doctor must sign the confinement order.)

F. Upon confinement, the accused must be informed of the nature of the offenses for which he / she is being held. This should be acknowledged by the accused on the confinement order. The accused must also be informed of: (1) The right to remain silent; (2) any statement made may be used against him / her; (3) the right to retain civilian counsel at no expense to the United States and the right to request assignment of military counsel; and (4) the procedures by which pretrial confinement will be reviewed. This may be done by brig personnel or the person escorting the member to the brig. Check with the brig to see which method is preferred.

G. After the member is confined, the CO must, within 48 hours, determine that continued confinement of the accused is warranted. He must also forward a pretrial confinement memo to the initial review officer (IRO) by the seventh day of confinement, but should do so as soon as possible. (*See* R.C.M. 305.) (***Note***: This is

a change from the previous 72-hour rule.) *United States v. Holloway*, 38 M.J. 302 (1993), held that R.C.M. 305 does not pass constitutional muster based on *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). Review is now required within 48 hours of confinement.

H. The command should be prepared to send a knowledgeable representative to the hearing held by the IRO. This representative should be cognizant of: (1) The circumstances regarding the charges; (2) the accused's past history for reliability; and (3) unauthorized absences (UAs).

I. After the hearing by the IRO, the command will receive a memo either allowing the confinement to continue or ordering the accused's release. If the member is ordered released, the command must comply. A lesser form of restraint may be imposed, but reconfinement may not occur without further misconduct or new evidence which would impact on the accused's reliability. (*See* R.C.M. 305.)

PRETRIAL AGREEMENTS (PTAs)

2702 GENERAL

The PTA is an agreement between the convening authority (CA) and the accused. Under R.C.M. 705, the accused may "plead guilty to, or enter a confessional stipulation as to one or more charges and specifications, and to fulfill such [permissible] additional terms or conditions which may be included in the agreement . . . ." Only the CA may bind the government. The CA may promise to do one or more of the following: refer the case to a certain type of court-martial; refer a capital offense as noncapital; withdraw any charges or specifications; have the trial counsel present no evidence as to one or more specifications or portions thereof; and take specified action on the sentence adjudged.

2703 NEGOTIATION

R.C.M. 705(d) permits the defense or government to initiate PTA negotiations. Recent decisions have focused on whether particular provisions originated with the defense. *See United States v. Jones*, 23 M.J. 305, 308 (C.M.A. 1987) (Cox, J., concurring). Although Change 5 to the *Manual* permits the government to initiate plea negotiations, it remains a good practice to look at the defense cards before showing the government hand. Moreover, when controversial provisions originate with the defense, "an otherwise valid guilty plea will rarely, if ever, be invalidated . . . ." *United States v. Gibson*, 29 M.J. 379, 382 (C.M.A. 1990). A written defense offer also protects the government against a later claim of lack of

jurisdiction. *See United States v. Wilkins*, 29 M.J. 421 (C.M.A. 1990) (defense plea to receiving stolen property valid, even though not an LIO of larceny, given that defense offered to plead to receiving stolen property in PTA approved by CA).

2704 PERMISSIBLE TERMS AND CONDITIONS

A. Testify against another. The accused may promise to testify as a witness in the trial of another person. *United States v. Phillips*, 24 M.J. 812 (A.F.C.M.R. 1987). The PTA should ***not*** specify the content of the testimony. *United States v. Stoltz*, 14 U.S.C.M.A. 461, 34 C.M.R. 241 (1964). Further, don't structure the benefits to ripen each time the accused testifies against another, a practice found "repugnant to civilized sensibilities" because it offered "an almost irresistible temptation to a confessedly guilty party to testify falsely to escape the adjudged consequences of his own misconduct." *United States v. Scoles*, 14 U.S.C.M.A. 14, 33 C.M.R. 226 (1963); *United States v. Conway*, 20 U.S.C.M.A. 99, 42 C.M.R. 291 (1970). Use this wording in the PTA: "I agree to testify truthfully and fully [if called by the government] [under a grant of testimonial immunity] as a witness in the trial of *United States v. Seaman Apprentice Arnold Schwartz U.S. Navy*."

B. Restitution. The accused may promise to provide restitution. Restitution under R.C.M. 705(c)(2)(C) is not limited to loss or damage directly attributable to the accused's crime. Restitution may cover any loss caused by misconduct related in any way to any offense charged, regardless of the accused's plea thereto. *United States v. Olson*, 25 M.J. 293, 296 (C.M.A. 1987). An agreement to make restitution should state the name of the recipient and an ability and willingness to pay a certain sum of money by a particular date. Sample PTA provision: I agree to make restitution to Colonel John Matrix, USMC, in the amount of $192.00 by [insert specific date] [the date the CA takes action on my case]."

C. Procedural waivers. The accused may promise to waive procedural requirements such as the article 32 investigation. R.C.M. 705(c)(2)(E); *United States v. Schaffer*, 12 M.J. 425 (C.M.A. 1982). *See United States v. Hayes*, 24 M.J. 786 (A.C.M.R. 1987) (Waiver of article 34 advice). Sample PTA provision: "I agree to waive my right to an investigation pursuant to Article 32, UCMJ."

D. Waiver of particular forum. The accused may waive the right to trial by court-martial composed of members or the right to request trial by military judge alone. R.C.M. 705(c)(2)(E). This provision must originate with the defense. *See United States v. Zelenski*, 24 M.J. 1 (C.M.A. 1987); *United States v. Woodward*, 24 M.J. 514 (A.F.C.M.R. 1987). The military judge should inquire to avoid the implication that the provision is a "standard" demand of the government. *United States v. Ralston*, 24 M.J. 709 (A.C.M.R. 1987). Sample PTA provision: "I agree to

request trial by military judge alone. This provision originated with me and my counsel."

E. Motions. Per R.C.M. 705(c)(1)(B), the accused may agree to waive motions based on evidentiary or constitutional grounds, so long as it truly originates with the defense. *United States v. Jones*, 23 M.J. 305 (C.M.A. 1987) (waiving search and seizure, out-of-court identification motions); *United States v. Gibson*, 29 M.J. 379 (C.M.A. 1990) (waiver of hearsay and confrontation objections to pretrial statements made by accused's children); *United States v. Corriere*, 24 M.J. 701 (A.C.M.R. 1987) (unlawful command influence); *United States v. Kitts*, 23 M.J. 105, 108 (C.M.A. 1986) (close scrutiny to ensure waiver of unlawful command influence issue was not caused by the government's "tactical machinations").

F. Stipulations of fact. The accused may promise to enter into a stipulation of fact concerning offenses to which a plea of guilty will be entered. The stipulation should be unequivocal that counsel and the accused agree not only to the truth of the matters stipulated, but that such matters are admissible in evidence against the accused to reflect the full agreement and understanding of the parties. *United States v. Glazier*, 26 M.J. 268 (C.M.A. 1988). Consider the following:

> The government and the defense, with the express consent of the accused, stipulate that the following facts are true, susceptible of proof, and admissible in evidence. These facts may be considered by the military judge, in determining the providence of the accused's pleas, and by the sentencing authority, in determining an appropriate sentence, even if the evidence of such facts is deemed otherwise inadmissible. The accused expressly waives any objection to the admission of these facts into evidence at trial under the Military Rules of Evidence, U.S. Constitution, or applicable case law.

1. Iron out a signed stipulation of fact before sending the PTA to the CA to preserve TC's leverage in dictating the content of the stipulation. *United States v. Vargas*, 29 M.J. 968, 970, 971 (A.C.M.R. 1990) (stipulation carried added weight because it was presented to the CA as part of the proposed plea agreement; defense's later efforts to redact prejudicial portions were unsuccessful). Using the elements as a working framework, the stipulation should establish the factual basis for the offense, including a description of aggravating factors and any other admissible evidence the government could introduce on the merits.

2. The stipulation may include uncharged misconduct. Judges have no sua sponte duty to determine the admissibility of uncharged misconduct in a stipulation. *United States v. Jackson*, 30 M.J. 565 (A.C.M.R. 1990). The stipulation

may also include facts relating to motive, impact on the victim, etc. *United States v. Nellum*, 24 M.J. 693 (A.C.M.R. 1987). Under *Glazier*, the adventurous may also seek to include inadmissible evidence in the stipulation and run the risk of being labeled "overreaching." *United States v. Mullens*, 24 M.J. 745 (A.C.M.R. 1987), *aff'd*, 29 M.J. 398 (C.M.A. 1990).

3. As with any important term, TC should tailor the automatic cancellation paragraph of the PTA to protect the government's interests. Here, the accused should be required to agree that the government will not be bound if the defense withdraws from the stipulation or objects to its contents at trial.

G. Stipulations of testimony. Under R.C.M. 705(c)(2)(E), the accused may agree to waive the opportunity to request the personal appearance of witnesses at sentencing proceedings (i.e., agree to stipulate to their expected testimony). Such a bargain is not contrary to public policy, does not make a plea improvident, and may reflect foresight and calculation on the part of the defense. *United States v. West*, 13 M.J. 800 (A.C.M.R. 1982); *United States v. McDonagh*, 10 M.J. 698, *aff'd*, 14 M.J. 415 (C.M.A. 1981). Conversely, the government can bargain for stipulations of testimony for its aggravation witnesses. *United States v. Harrod*, 20 M.J. 777 (A.C.M.R. 1985).

2705 PROHIBITED TERMS OR CONDITIONS

Involuntary PTA terms are unenforceable. The accused must freely and voluntarily agree to each provision.

A. Unwaivable rights. In addition, the accused cannot be deprived of certain rights. No term will be enforced if it deprives the accused of the right to counsel, the right to due process, the right to challenge the jurisdiction of the court-martial, the right to speedy trial, the right to complete sentencing proceedings, or the complete and effective exercise of post-trial and appellate rights.

B. Capital offenses. An accused may not plead guilty to a capital offense. R.C.M. 910(a)(1); *United States v. Matthews*, 16 M.J. 354 (C.M.A. 1983). Similarly, guilty pleas may not be entered for noncapital offenses which, taken together, constitute a capital offense (e.g., felony-murder). *United States v. Dock*, 28 M.J. 117 (C.M.A. 1989); Art. 118(4), UCMJ. The accused may, however, offer to plead guilty in exchange for a noncapital referral. *United States v. Partin*, 7 M.J. 409 (C.M.A. 1979).

2706 WITHDRAWAL FROM PTAs

Under R.C.M. 705(d)(4)(A), the accused may withdraw from a PTA at any time. Withdrawal from guilty pleas, however, is governed by R.C.M. 910(h). Per R.C.M. 705(d)(4)(B), the CA may withdraw from a PTA at any time before the accused begins performance of promises contained in the agreement, upon the failure by the accused to fulfill any material promise or condition in the agreement, or if findings are set aside because a plea of guilty entered pursuant to the agreement is held improvident on appellate review. *Shepardson v. Roberts*, 14 M.J. 354 (C.M.A. 1983); *United States v. Manley*, 25 M.J. 346 (C.M.A. 1987).

2707 COMMON SENTENCING PROVISIONS

The following list of provisions is to assist you in drafting the sentencing limitations of PTAs. It is not an all-inclusive list; you may be inventive and draft any others which are allowed by the provisions of the *Manual for Courts-Martial* (MCM) and current case law. Plain language is preferred and the terminology should be similar to that used in the CA's action. (*See* App. 16, MCM.)

A. Punitive discharge

1. If awarded, a bad-conduct discharge (dishonorable discharge) (dismissal) will be disapproved.

2. If awarded, a BCD (DD) (dismissal) may be approved; however, it will be suspended for a period of _____ months from the date the sentence is adjudged, at which time, unless sooner vacated, it will be remitted without further action.

3. If awarded, a DD will be changed to a BCD. The sentence as changed may be approved.

B. Confinement or restraint

1. If awarded, confinement may be approved; however, all confinement in excess of ____ months (years) will be suspended for a period of ___ months from the date the sentence is adjudged, at which time, unless sooner vacated, the suspended portion will be remitted without further action. In this regard, this PTA constitutes a request by the accused for and approval by the CA of deferment of the portion of any confinement to be suspended pursuant to the terms of the agreement. The period of deferment will run from the date the accused is released from confinement pursuant to this agreement until the date the CA acts on the sentence.

2. If awarded, confinement for ___ months (years) may be approved; however, all confinement in excess of ____ months (years) shall be suspended for a period of ___ months from the date the sentence is adjudged, at which time, unless sooner vacated, the suspended portion will be remitted without further action.

3. Conditional language

a. If a BCD (DD) (dismissal) is awarded, confinement, if also awarded, may be approved; however, all confinement in excess of ___ months (years) shall be suspended for a period of ___ months from the date sentence is announced, at which time, unless sooner vacated, the suspended portion will be remitted without further action.

b. If no BCD (DD) (dismissal) is awarded, confinement, if awarded, may be approved as adjudged.

Note: Both of these provisions would be present in the agreement. Also, the military judge, when examining the agreement, will seek assurances that such conditional terms originated with the defense offer to enter into the agreement.

4. If awarded, all confinement may be approved as adjudged.

5. Other forms of restraint: All other forms of restraint punishment may be approved as adjudged.

Note: This ensures that all parties agree that restriction or hard labor without confinement may be ordered executed in their entirety, notwithstanding limits on confinement approvable.

C. Forfeitures and fines (FF)

1. If awarded, forfeitures may be approved; however, any forfeitures in excess of $____ pay per month for ____ months will be suspended for a period of ___ months from the date the sentence is adjudged, at which time, unless sooner vacated, the suspended portion will be remitted without further action.

2. If awarded, fines will be changed to forfeitures and subject to the limitations of paragraph B.3.a, above.

3. If awarded, forfeitures and fines may be approved as adjudged.

D. Reduction (rate or grade)

1. If awarded, a reduction to paygrade E-* may be approved; however, any reduction below paygrade E-** will be suspended for a period of ___ months from the date the sentence is adjudged, at which time, unless sooner vacated, the portion of the reduction suspended will be remitted without further action. Any reduction effected under Article 58a, UCMJ, and JAGMAN, § 0152, below paygrade E-** will also be suspended for a period of ___ months from the date the sentence is adjudged, at which time, unless sooner vacated, the portion of the reduction suspended will be remitted without further action.

2. If awarded, any reduction, whether judicially or administratively awarded, may be approved.

E. Other lawful punishments: All other lawful punishments not specifically mentioned in this agreement may be approved.

NOTE: This category should be added. It could include such punishments as loss of numbers, lineal position, seniority, reprimand, or other punishments listed in R.C.M. 1103(b). If any are anticipated, you may make specific mention of them or you can use the general provision above.

IMMUNITY

2708 IMMUNITY GENERALLY

Testimonial immunity, sometimes termed "use" immunity, immunizes a witness against the subsequent use of the testimony and any derivative use. In theory, testimonial immunity allows prosecution of the witness for the pertinent offenses using independent evidence. *United States v. Lucas*, 25 M.J. 9 (C.M.A. 1987). The government, however, has a heavy burden to prove that none of the evidence against the accused was derived directly or indirectly from his immunized testimony. *United States v. Boyd*, 27 M.J. 82 (C.M.A. 1988). Transactional immunity immunizes the witness against prosecution for any offenses concerning which the witness testified. In the military, the minimum form of immunity required by article 31 is use immunity. *United States v. Rivera*, 49 C.M.R. 259 (A.C.M.R. 1974), *rev'd on other grounds*, 1 M.J. 107 (C.M.A. 1975); Mil.R.Evid. 301(c)(1); R.C.M. 704(a) discussion.

2709 AUTHORITY TO GRANT IMMUNITY

Military personnel accused of offenses cognizable by court-martial may be granted immunity by the appropriate GCMCA. *United States v. Kirsch*, 15 C.M.A. 84, 35 C.M.R. 56 (C.M.A. 1964); R.C.M. 704(c). As a general rule, an accused has no standing to contest the propriety of grants of immunity to prosecution witnesses. *United States v. Martinez*, 19 M.J. 744 (A.C.M.R. 1984), *petition denied*, 21 M.J. 27 (C.M.A. 1985). Grants of immunity for military personnel subject to trial by court-martial will also require approval by the Attorney General of the United States if the case could possibly have Department of Justice interest. Concurrent federal civilian and military jurisdiction is possible. R.C.M. 704(c).

A. Procedure. The procedures involved in granting immunity are discussed in JAGMAN, § 0138. In general, a written recommendation for immunity is forwarded to the GCMCA. That officer will act upon the request after referring it to the staff judge advocate (SJA) for advice. In cases involving espionage, subversion, aiding the enemy, sabotage, spying, violation of rules or statutes concerning classified information or the foreign relations of the United States, or other national security matters, the approval of the Attorney General is required. Approval of the Attorney General or his designee may also be required in cases involving any "major federal crimes." See the memorandum of understanding (MOU) between the Department of Defense (DOD) and the Department of Justice (DOJ) in MCM, 1984, app. 3. Persons ***not*** triable by court-martial must be granted immunity by the Attorney General of the United States ***or*** by the GCMCA who has obtained approval from the Attorney General for such a grant. Title II, Organized Crime Control Act of 1970, 18 U.S.C. § 6004 (1970); R.C.M. 704(c)(2); JAGMAN, § 0138c.

B. "Equitable immunity." Under certain circumstances, the actions of a subordinate can effectively bind the GCMCA in granting immunity. *Cooke v. Orser*, 12 M.J. 335 (C.M.A. 1982) (C.M.A. enforced SJA's promises regarding nonprosecution to an Air Force officer charged with failing to report contact with the Soviet Embassy on due process grounds); *United States v. Brown*, 13 M.J. 253 (C.M.A. 1982) (C.M.A. enforced SJA's promise made in exchange for "good information on drug activity"); *United States v. Churnovic*, 22 M.J. 401 (C.M.A. 1986) (C.M.A. enforced the command chief's promise that the accused would not get in trouble if he revealed the location of drugs).

2710 SCOPE OF IMMUNITY OUTSIDE THE MILITARY

A. Domestic prosecutions. Under the single sovereign theory, military grants of immunity are binding on the Department of Justice. Art. 76, UCMJ. Similarly, state prosecutors are prohibited from using any immunized testimony or derivative evidence. *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964).

B. Foreign prosecutions. The application of the fifth amendment right to matters involving possible foreign prosecution was left open by the Supreme Court in *Zicarelli v. Commission of Investigation*, 406 U.S. 472 (1974). At least three circuits have held that the possibility of ***grand jury*** testimony reaching the foreign country is so minimal that the fifth amendment privilege against self-incrimination is not raised. *In re Tierney*, 465 F.2d 806, 811-12 (5th Cir. 1972); *In re Parker*, 411 F.2d 1067, 1069-70 (10th Cir. 1969), *vacated*, 397 U.S. 96 (1970); *In re Weir*, 377 F. Supp. 919 (S.D. Cal.), *aff'd*, 495 F.2d 879 (9th Cir.), *cert. denied*, 419 U.S. 1038 (1974); *In re Cahalane*, 361 F. Supp. 226 (E.D. Pa.), *aff'd*, 485 F.2d 682 (3d Cir. 1973), *cert. denied*, 415 U.S. 989 (1974); *United States v. Yanagita*, 552 F.2d 940 (2d Cir. 1977) (Court found the privilege inapplicable to a witness ***at trial*** who refused to answer for fear of prosecution by Japan); *In re Cardass*, 351 F. Supp. 1080 (D. Conn. 1972).

2711 REFUSAL IN FACE OF THE GRANT

The witness is required to testify—on pain of trial for refusal to testify, and ***possibly*** contempt if the grant was broad enough. *United States v. Croley*, 50 C.M.R. 899 (A.F.C.M.R. 1975). Fear for one's safety is not a defense in a case for refusal to testify. *United States v. Quarles*, No. 74-0537 (N.C.M.R. 28 March 1976) (unpublished).

2712 IMPACT ON CA AND SJA

In some cases, the grant of immunity may preclude these officers from taking post-trial review action if they or their subordinates recommend or grant either immunity or clemency for a witness in a case. *But see United States v. Newman*, 14 M.J. 474 (C.M.A. 1983) (granting use immunity does not equate to expression of CA's views as to credibility of witness; CA was not necessarily disqualified from taking post-trial action on case).

2713 NOTICE TO THE ACCUSED

Mil.R.Evid. 301(c)(2) requires that grants of immunity (or lesser promises of leniency in exchange for testimony) be in writing and served on the accused prior to arraignment (or within a reasonable time before the witness testifies). Otherwise, the witness involved may be disqualified from testifying. *United States v. Webster*, 1 M.J. 216 (C.M.A. 1975); *United States v. Saylor*, 6 M.J. 647 (N.C.M.R. 1978) (MJ has responsibility of fashioning a ruling designed to protect the accused's substantial rights); *United States v. Carrol*, 4 M.J. 674 (N.C.M.R.), *aff'd*, 4 M.J. 89 (C.M.A. 1977) (notice requirement may be waived).

2714 PROSECUTING THE FORMER IMMUNIZED WITNESS

If the government elects to prosecute an accused who had testified earlier pursuant to a grant of use immunity, the government bears a heavy burden of showing in an article 39(a) session that it will be using independent, legitimate evidence against the accused. *United States v. Whitehead*, 5 M.J. 294 (C.M.A. 1978); *United States v. Rivera*, 1 M.J. 107 (C.M.A. 1975); *United States v. Eastman*, 2 M.J. 417 (A.C.M.R. 1975). The government will be required to ***prove***, not merely ***represent***, that no use was made of the immunized testimony. Thus, it may be appropriate, where prosecution of the immunized witness is contemplated, to make a record of evidence available against the witness prior to issuance of the grant. *United States v. Gardner*, 22 M.J. 28 (C.M.A. 1986) (government discharged its burdens of proving that its evidence against the accused was not derived from his immunized testimony in a previous proceeding); R.C.M. 704(a) discussion.

2715 COMPELLING THE GOVERNMENT TO IMMUNIZE DEFENSE WITNESSES

The majority rule of the federal courts of appeal is that a criminal defendant has no constitutional right to have defense witnesses immunized. Under R.C.M. 704(e), the accused can request immunity for a defense witness from the appropriate GCMCA. If the request if denied, the defense may renew the request before the military judge. The military judge must make two findings: (a) That the proffered testimony is of such central importance to the defense case that it is essential to a fair trial; and (b) that the witness intends to invoke the right against self-incrimination to the extent permitted by law if called to testify. If the defense satisfies both requirements, the military judge may grant relief by directing that the proceedings be abated unless an appropriate GCMCA grants immunity; military judges have no power to grant immunity themselves. The burden is on the defense to show the need for immunity. The standard of proof appears to be by a preponderance of the evidence. R.C.M. 905(c)(1); *United States v. Villines*, 13 M.J. 46 (C.M.A. 1982); *United States v. O'Bryan*, 16 M.J. 755 (A.F.C.M.R. 1983), *petition denied*, 18 M.J. 16 (C.M.A. 1984) (no abuse of discretion in refusing to grant immunity to a defense witness whose pretrial admission was not clearly exculpatory); *United States v. James*, 22 M.J. 929 (N.M.C.M.R. 1986) (no need to abate the proceedings where an alleged co-conspirator was not immunized; his expected testimony was only marginally exculpatory, and the government intended to prosecute him).

2716 OTHER QUASI-IMMUNITY SITUATIONS

Statements regarding past drug use or possession, which are made to appropriate persons in the course of voluntary self-referral and are made for treatment or rehabilitation purposes, may not be used for disciplinary purposes or to characterize a discharge. They may be used for impeachment or rebuttal, though, and the members' CO has access to the statements. This limited use immunity does not prohibit disciplinary action or other adverse action based on independently derived evidence. OPNAVINST 5350.4 and MCO P5300.12. Similar protections exist for self-referral in the context of family violence under NAVMEDCOMINST 6320.22 and statements made in epidemiological assessment interviews of members who are identified to be HIV-positive, per SECNAVINST 5300.30.

APPENDIX A

DEPARTMENT OF THE NAVY
USS PUGET SOUND (AD 38)
FPO AE 09501

1640
Ser 00/
3 Jan CY

From: Commanding Officer, USS PUGET SOUND (AD 38)
To: Initial Review Officer, Naval Station, Rota, Spain

Subj: PRETRIAL CONFINEMENT ICO YN3 DAVID L. TYPIST, USN, 222-22-2222

Ref: (a) R.C.M. 305, MCM, 1984
(b) SECNAVINST 1640.10

1. Per references (a) and (b), the following information is provided for the purpose of conducting a hearing into the pretrial confinement of YN3 David L. Typist, USN, 222-22-2222.

a. Hour, date, and place of pretrial confinement:

1400, 2 January 19CY, Navy Brig, Naval Station, Rota

b. Offenses charged:

Violation of UCMJ, Article 86—Unauthorized absence from USS PUGET SOUND (AD 38) from 23 October 19CY(-1) until apprehended on 2 January 19CY.

c. General circumstances:

(1) Petty Officer (PO) Typist's absence began over liberty which expired on board at 0700, 23 October 19CY(-1). The circumstances, as related by Petty Officer Typist to his division officer, are that YN3 Typist was dissatisfied working in the admin office, did not like his immediate supervisor, and felt "picked on." He also relates that, at the time of his absence, he was working "undercover" with the Naval Criminal Investigative Service (NCIS) and the ship's master-at-arms (MAA) force in identifying drug abusers on board the Naval Station. He states that a fellow petty officer (whom he identified as a drug user) found out that YN3 Typist was the one responsible for a "bust" in which this petty officer was involved. This

unidentified petty officer had threatened YN3 Typist with bodily harm. Apparently becoming scared, Petty Officer Typist fled the area.

(2) These statements are unfounded. I have learned, through conversations with NCIS and my chief master-at-arms, that they have never used Petty Officer Typist in their programs, nor have they ever heard of YN3 Typist.

(3) Petty Officer Typist was apprehended by Shore Patrol at 1300, 2 January 19CY, at a local bar in Palma de Mallorca, Spain. I found it appropriate to place YN3 Typist in confinement due to the duration of the absence (approximately 72 days), and considering the absence was terminated by apprehension.

2. Previous disciplinary action:

a. CO's NJP, USS PUGET SOUND (AD 38) on 3 April 19CY(-1). Violation of UCMJ, Article 86—UA from appointed place of duty. Awarded: 10 days extra duties.

b. CO's NJP, USS PUGET SOUND (AD 38) on 10 June 19CY(-1). Violation of UCMJ, Article 86—UA from unit (approximately 3 days). Awarded: Forfeiture of $100.00 pay per month for one month and 30 day's restriction.

c. CO's NJP, USS PUGET SOUND (AD 38) on 12 July 19CY(-1). Violation of UCMJ, Article 86 (6 specifications)—Failure to go to appointed place of duty, to wit: Restricted men's muster. Awarded: 30 days extra duties and forfeiture of $100.00 pay per month for two months.

3. Extenuating or mitigating circumstances: None.

4. Due to the aforementioned information, continued pretrial confinement is appropriate in this case. YN3 Typist has a history of Est, which indicates to me the solution to any of his problems is to absent himself without authority. YN3 Typist has shown that a lesser form of restraint would be inadequate as evidenced by paragraph 2.c. above (failure to go to restricted men's musters). Charges have been preferred for trial by special court-martial. No unusual delays are expected in this case. Given the nature of the offense charged and the sentence which could be imposed by court-martial for this offense, I am confident YN3 Typist would again flee to avoid prosecution.

ROBERT R. ROBERTS

From: Initial Review Officer, Naval Station, Rota, Spain
To: Commanding Officer, USS PUGET SOUND (AD 38)

Subj: PRETRIAL CONFINEMENT ICO YN3 DAVID L. TYPIST, USN, 222-22-2222

Ref: (a) R.C.M. 305, MCM, 1984
(b) SECNAVINST 1640.10
(c) CO, USS PUGET SOUND (AD 38) ltr of 3 Jan CY

1. Per the provisions of references (a) and (b), I conducted a hearing concerning the pretrial confinement of YN3 Typist on 4 January 19CY. All information available at the time of the hearing, in addition to the comments and recommendations set forth in reference (c), have been reviewed.

2. At the hearing, YN3 Typist was afforded all rights set forth in reference (a). YN3 Typist was represented by Lieutenant P. T. Pertee, JAGC, USNR, Naval Legal Service Office Detachment, Rota, Spain, who was detailed pursuant to the confinee's request for military counsel. Lieutenant I. O. Ewe, USN, legal officer, USS PUGET SOUND (AD 38) was present, acting in the capacity of command representative.

3. Having waived his right to remain silent, YN3 Typist was willing to discuss his absence with me. His reasons for going UA, as stated in reference (c), remain basically the same. YN3 Typist stands firm on his story concerning his involvement with the Naval Criminal Investigative Service. However, upon advisement of counsel, YN3 Typist terminated the questioning. Lieutenant Ewe, command representative, had nothing further to offer except to reconfirm the command's position that continued confinement is warranted.

4. I find there is probable cause to believe the confinee committed the offense, and that court-martial jurisdiction does exist over the confinee and the offense charged. I find no cause to extend the time limit for completion of this review.

5. Subject to the foregoing, I find continued pretrial confinement appropriate in this case and that lesser forms of restraint would be inadequate to ensure the presence of YN3 Typist at trial. The confinee should be brought to trial as soon hereafter as practicable, barring any unforeseen delays.

6. Pursuant to paragraphs (i)(7) and (j) of reference (a), reconsideration of this decision may be appropriate at a later date.

I. C. LIGHT
Commander, U.S. Navy

APPENDIX B

SAMPLE RESTRICTION ORDERS

LETTERHEAD

From: Commanding Officer, Naval Air Station
To: (Rate, name, armed force, social security number)

Subj: RESTRICTION ORDERS

1. You are hereby placed on ____ days restriction as awarded you at a [_____ court-martial] [CO's nonjudicial punishment] on _____, 19___.

2. You are hereby notified that the restriction limits and additional requirements are as follows:

a. You are required to remain within the perimeter and gates of the Naval Air Station, Wonderful, Florida.

b. You are not permitted in BEQ 999, 998, 997, or 996; Consolidated Package Store, Mini-Mart, bowling alley, Enlisted Mens' Club Complex, or Navy Exchange Cafeteria, or anywhere else on base that sells alcoholic beverages.

c. While you are on restriction, you may not operate a privately owned vehicle. If you have an automobile and desire to leave your automobile parked in the designated parking area, you must turn all of your ignition keys in to the chief master-at-arms who will provide you with a receipt. The chief master-at-arms will take custody of your keys, but not your automobile. You may arrange to have your automobile stored off the Naval Air Station at your own expense.

d. You are to be inside the Discipline Barracks between the hours of 1900 and 0600 daily.

e. You are hereby ordered to muster at the Discipline Barracks at the following times:

Workdays (including Saturday): 0615, 0745, 1130, 1245, 1600, 1800, 2000, 2145.

Non-workdays (Sundays and holidays): 0715, 1000, 1130, 1400, 1600, 1800, 2000, 2145.

Note: You are also required to come to any additional musters that may be prescribed by the duty desk chief. You will also be present for all bunk checks from taps to reveille.

f. You will surrender all civilian clothes (an inventory will be made and you will be given a receipt for all clothing turned in).

g. You are required to be in the complete uniform of the day at all times between reveille and taps. You are not permitted to be in civilian clothes ***at any time***.

h. You are ordered to keep your face clean-shaven for the duration of your restriction.

i. You are required to march in formation to meals if you desire to eat. The formation will depart for the meal from the muster area immediately preceding the meal. There is no requirement to march back from the meal.

j. You are to ensure that you are berthed in the proper bunk. Failure to do so will result in your being considered an unauthorized absentee.

k. If it is necessary for you to go to the Naval Hospital, Naval Air Station, Wonderful, Florida, you will be transported to and from the hospital by the master-at-arms force. You are forbidden to go or return on your own.

l. You are not to consume, or have in your possession, alcoholic beverages of any kind at any time.

3. You are hereby notified that all the above constitute lawful orders and that failure to comply is a violation of the Uniform Code of Military Justice and will subject you to disciplinary action.

By direction of the
Commanding Officer

I acknowledge this restriction order. I have read and understand its content.

(Signature of restricted person)

APPENDIX C

ADDITIONAL PTA CASES

1. Stipulation as to aggravating circumstances: *United States v. Sharper*, 17 M.J. 803 (A.C.M.R. 1984).

2. Conditions of probation: *United States v. Dawson*, 10 M.J. 142 (C.M.A. 1981); *United States v. Lallande*, 46 C.M.R. 170 (C.M.A. 1973).

3. Waive venue motion: *United States v. Kitts*, 23 M.J. 105 (C.M.A. 1986).

4. Waive search and seizure motions: *United States v. Holland*, 1 M.J. 58 (C.M.A. 1975).

5. Waive objections to evidence: *United States v. Robinson*, 25 M.J. 528 (A.F.C.M.R. 1987).

6. Conditional sentence provisions: *United States v. Hollcraft*, 17 M.J. 1111 (A.C.M.R. 1984); *United States v. Cross*, 21 M.J. 88 (C.M.A. 1988).

7. Proceed to trial by date certain: *United States v. Mitchell*, 15 M.J. 238 (C.M.A. 1983).

8. Agreement to refer case to SPCM: *United States v. Rondash*, 30 M.J. 686 (A.C.M.R. 1990); *United States v. Kelly*, 32 M.J. 835 (N.M.C.M.R. 1991).

9. Forward proposals to CA: *United States v. Upchurch*, 23 M.J. 501 (A.F.C.M.R. 1986).

10. Suspended punishments: *United States v. Albert*, 30 M.J. 331 (C.M.A. 1990); *United States v. Elliot*, 10 M.J. 740 (N.M.C.M.R. 1981); *United States v. Panikowski*, 8 M.J. 781 (A.C.M.R. 1980).

11. Uncovered punishments: *United States v. Edwards*, 20 M.J. 439 (C.M.A. 1985); *United States v. Llewellyn*, 27 M.J. 825 (C.G.C.M.R. 1989).

12. Article 58a automatic reduction: *United States v. Cabral*, 20 M.J. 269 (C.M.A. 1985).

13. Administrative discharge: *United States v. Bedania*, 12 M.J. 373 (C.M.A. 1982).

APPENDIX D

MEMORANDUM FOR PRETRIAL AGREEMENT

UNITED STATES Place_____

v. Date_____

_____ _____ _____
(Name) (Grade) (Serial/Service Number) / (Branch of Service)

I,_____, the accused in a (General/Special) court-martial, do hereby certify;

1. That, for good consideration and after consultation with my counsel, I do agree to enter a voluntary plea of ***guilty*** to the charges and specifications listed below, provided the sentence as approved by the convening authority will not exceed the sentence hereinafter indicated by me;

2. That it is expressly understood that, for purposes of this agreement, the sentence is considered to be in these parts, namely a: a punitive discharge, a period of confinement or restraint, an amount of forfeiture or fine, a reduction in rate or grade, and any other lawful punishment;

3. That should the court award a sentence which is less, or a part thereof is less, than that set forth and approved in this agreement, then the convening authority, according to law, will only approve the lesser sentence;

4. That I am satisfied with my defense counsel in all respects and consider him / her qualified to represent me in this court-martial;

5. That this offer to plead guilty originated with me and my counsel; that no person or persons whomsoever have made any attempt to force or coerce me into making this offer or pleading guilty;

APPELLATE EXHIBIT _____

6. That my counsel has fully advised me of the meaning and effect of my guilty plea and that I fully understand and comprehend the meaning thereof and all of its attendant effects and consequences;

7. That my counsel has advised me that I may be processed for an administrative discharge which may be under other than honorable conditions, and that I may therefore be deprived of virtually all veterans' benefits based upon my current period of active service, and that I may therefore expect to encounter substantial prejudice in civilian life in many situations, even if part or all of the sentence, including a punitive discharge, is suspended or disapproved pursuant to this agreement;

8. That my counsel has advised me of the meaning and effect of Article 58a of the UCMJ and section 0152 of the JAG Manual regarding the possibility of administrative reduction in pay grade as a result of an approved court-martial sentence that includes a punitive discharge or confinement in excess of 90 days (or 3 months), whether that sentence is suspended or not, unless the convening authority has agreed to limit the automatic administrative reduction in the pay grade category of punishment;

9. That my counsel has advised me that I may be placed on appellate leave in a no pay status under the provisions of Article 76a of the UCMJ, notwithstanding any provision regarding forfeitures or fines in the sentencing appendix of this agreement;

10. That I understand that I may withdraw my plea of guilty at any time before my plea is actually accepted by the military judge. I understand further that, once my plea of guilty is accepted by the military judge, I may ask permission to withdraw my plea of guilty at any time before sentence is announced, and that the military judge may, at his discretion, permit me to do so;

11. That I understand this offer and agreement and have been advised that it cannot be used against me in the determination of my guilt on any matters arising from the charges and specifications made against me in this court-martial;

12. That it is expressly understood that the pretrial agreement will become null and void in the event: (1) I fail to plead guilty to each of the charges and specifications as set forth below; (2) the court refuses to accept my plea of guilty to any of the charges and specifications as set forth below; (3) the court accepts each of my pleas but, prior to the time sentence is announced, I ask permission to withdraw

any of my pleas, and the court permits me to do so; and (4) the court initially accepts my plea of guilty to each of the charges and specifications set forth below but, prior to the time the sentence is adjudged, the court sets aside any of my guilty pleas and enters a plea of not guilty on my behalf; or (5) I fail to plead guilty to any of the charges and specifications set forth below at a rehearing, should one occur.

13. This agreement and its appendices constitute all the conditions and understandings of both the government and the accused regarding the pleas in this case.

Charges and Specifications	Pleas

Additional terms:

APPENDIX E

MAXIMUM SENTENCE TO BE APPROVED BY CONVENING AUTHORITY

(See maximum sentence appendix to memorandum of pretrial agreement)

_____
Signature of Accused

Place:_____

Date:_____

Counsel:

_____

Place:_____

Date:_____

The foregoing agreement is (approved) (disapproved).

_____
Signature, Grade, Title of
Convening Authority

APPENDIX F

MAXIMUM SENTENCE APPENDIX TO MEMORANDUM OF PRETRIAL AGREEMENT

UNITED STATES)
)
v.)
)

Date_____

_____ SPECIAL/GENERAL COURT-MARTIAL

_____

_____

Maximum sentence to be approved by convening authority:

1. Punitive discharge (character of and, if suspended, terms thereof)

2. Confinement or restraint (amount and kind)

3. Forfeiture or fine (amount and duration)

APPELLATE EXHIBIT _____

4. Reduction to (rate or grade)

5. Any other Lawful Punishment

This agreement constitutes a request by the accused for, and approval by the convening authority of, deferment of the portion of any confinement to be suspended pursuant to the terms of this agreement. The period of deferment will run from the date the accused is released from confinement pursuant to this agreement until the date the convening authority acts on the sentence.

_____
Signature of Accused

Place:_____

Date:_____

Counsel:

_____

Place:_____

Date:_____

The foregoing agreement is (approved) (disapproved).

_____ _____
Date Signature, Grade, Title of Convening Authority

APPENDIX G

ORDER TO TESTIFY (*See* JAGMAN, § 0129e) [TRANSACTIONAL IMMUNITY]

GRANT OF IMMUNITY

IN THE MATTER OF _____)

_____) GRANT OF IMMUNITY

_____)

_____)

_____

_____

_____

To: (Witness to whom immunity is to be granted)

1. It appears that you are a material witness for the government in the matter of [if charges have been preferred, set forth a full identification of the accused and the substance of all specifications preferred.]

2. In consideration of your testimony as a witness for the government in the foregoing matter, you are hereby granted immunity from prosecution for any offense arising out of the matters therein involved concerning which you may be required to testify under oath.

3. It is understood that this grant of immunity from prosecution is effective only upon the condition that you actually testify as a witness for the government. It is further understood that this grant of immunity from prosecution extends only to the offense or offenses which you were implicated in the matter herein set forth and concerning which you testify under oath.

_____
Signature

_____
Grade, title

APPENDIX H

USE IMMUNITY

GRANT OF IMMUNITY

IN THE MATTER OF _____)

_____) GRANT OF IMMUNITY

_____)

_____)

_____

_____

_____

To: (Witness to whom immunity is to be granted)

1. It appears that you are a material witness for the government in the matter of [if charges have been preferred, set forth a full identification of the accused and the substance of all specifications preferred.]

2. In consideration of your testimony as a witness for the government in the foregoing matter, you are hereby granted immunity from the use of your testimony or other information given by you (or any other information directly or indirectly derived from such testimony or other information) against you in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with an order to testify in this matter.

3. It is understood that this grant of immunity from the use of your testimony or other information given by you (or other information directly or indirectly derived from such testimony or other information) against you in any criminal case is effective only upon the condition that you testify under oath as a witness for the Government.

_____
Signature

_____
Grade, title

ORDER TO TESTIFY
IN THE MATTER OF _____)

_____) ORDER TO TESTIFY

_____)

_____)

_____

_____

_____

To: (Witness to whom immunity is to be granted)

1. As an officer empowered to convene general courts-martial, and pursuant to the provisions of sections 6002 and 6004, title 18, United States Code, I hereby make the following findings:

a. That (name of witness) possesses information relevant to the pending trial by general court-martial of _____, and that the presentation of his testimony at this trial is necessary to the public interest; and

b. That it is likely that (name of witness) would refuse to testify on the basis of his privilege against self-incrimination if subpoenaed to appear as a witness.

2. On the basis of these facts, and pursuant to section 6004, title 18, United States Code, I hereby order (name of witness) to appear and testify before the general court-martial convened for the trial of _____. In accordance with section 6002, title 18, United States Code, no testimony or other information given by (name of witness) (or any information directly or indirectly derived from such testimony or other information) can be used against him in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this order.

3. This order is issued with the approval of the Attorney General of the United States set forth in enclosure 1 annexed hereto.

_____
Signature

_____
Grade, title

CHAPTER TWENTY-EIGHT

CONVENING COURTS-MARTIAL

COURT-MARTIAL JURISDICTION

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CHAPTER TWENTY-EIGHT

CONVENING COURTS-MARTIAL

COURT-MARTIAL JURISDICTION

2801 JURISDICTION OVER THE OFFENSE

Under *Solorio v. United States*, 483 U.S. 435 (1987), jurisdiction of a court-martial over the offense depends solely on the accused's status as a member of the armed forces. If the accused is a reservist, however, active duty status is not necessarily equivalent to subject matter jurisdiction. *United States v. Chodara*, 29 M.J. 943 (A.C.M.R. 1990). In any event, the abandonment of the service-connection test may require increased liaison with civilian prosecutors.

2802 JURISDICTION OVER THE PERSON

Article 2, UCMJ, provides jurisdiction over enlistees, inductees, academy cadets / midshipmen, retirees, etc. Jurisdiction over retirees is constitutional. *United States v. Hooper*, 26 C.M.R. 417 (C.M.A. 1958); *United States v. Overton*, 24 M.J. 309 (C.M.A. 1987); *Pearson v. Bloss*, 28 M.J. 764 (A.F.C.M.R.), *petition denied*, 28 M.J. 376 (C.M.A. 1989). *See also Reid v. Covert*, 354 U.S. 1 (1957) (persons accompanying or serving with the armed forces in the field in time of war); *United States v. Harry*, 25 M.J. 513 (A.F.C.M.R. 1987) (sentenced prisoners).

2803 JURISDICTION OVER RESERVISTS

Under Art. 2(a)(1), (3), UCMJ, and JAGMAN, § 0123, court-martial jurisdiction exists over reservists "while on inactive duty training" without any threshold requirements. Thus, Reserve members are subject to the UCMJ whenever they are in a Title 10 status: Inactive Duty Training (IDT), Active Duty Training (ADT), Annual Training (AT), or Active Duty (AD). *United States v. Cline*, 29 M.J. 83 (C.M.A. 1989).

A. Reservists on active duty. A reservist on active duty can be extended beyond his / her normal release date if he / she has been apprehended, arrested, confined, is under investigation, or charges have been preferred. R.C.M. 202(c);

JAGMAN, § 0123. Proper authority must be obtained to court-martial reservists not on active duty.

B. Reservists on IDT. Jurisdiction is not lost over reservists upon termination of IDT or AT for an offense committed while subject to the UCMJ. Art. 3(d), UCMJ.

1. Recall. Regular component general court-martial convening authorities (GCMCA) can recall reservists to active duty involuntarily for an article 32 investigation, trial by court-martial, or imposition of NJP for offenses committed while on IDT or active duty. Art. 2(d), UCMJ; JAGMAN, § 0123. Only a court-martial convening authority can generate a request to a GCMCA to recall a reservist to active duty.

2. Pretrial confinement. A reservist on IDT can be placed in pretrial confinement in accordance with R.C.M. 304 and 305 with Secretarial approval. JAGMAN, § 0123c.

3. Trial by court-martial. Before arraignment at a general or special court-martial (SPCM), the reservist must be on active duty. R.C.M. 204(b)(1). Coordination between active and Reserve components is required under Art. 2(d), UCMJ. Summary courts-martial (SCM) can be initiated and tried within the Reserve structure and without active duty involvement. RCM 204(b)(2). The SCM officer must be placed on active duty. Art. 25, UCMJ; R.C.M. 1301. If given during IDT, trial and execution of punishments are limited to "normal" training periods. R.C.M. 204(b)(2). Confinement is not an available punishment during IDT. The recall to active duty must be approved by the Secretary of the Navy (SECNAV) before confinement is adjudged. Art. 2(d)(5), UCMJ.

4. Restraints on liberty. Restraints on liberty cannot be extended beyond the normal IDT period, but may be carried over to later drill periods. JAGMAN, §§ 0105a(7), 0112. A reservist on inactive duty cannot be ordered to active duty to serve restraint punishment without SECNAV approval. Similarly, a reservist ordered to active duty for disciplinary purposes cannot be extended on duty to serve restraint punishment, nor can he receive confinement as a sentence, unless the order to active duty was with SECNAV approval.

2804 INCEPTION OF JURISDICTION

A. Article 2, UCMJ. Any member who submitted voluntarily to military authority met the mental competence and minimum age qualifications of 10 U.S.C. §§ 504 and 505 when he / she enlisted, received military pay or allowances, and

performed military duties is subject to the UCMJ effective upon the taking of the oath of enlistment and continuously until terminated as discussed below.

B. Catlow and Russo. The jurisdictional quagmires encountered in *United States v. Catlow*, 23 C.M.A. 142, 48 C.M.R. 758 (1974) (coercion) and *United States v. Russo*, 1 M.J. 134 (C.M.A.1975) (recruiter misconduct plus a regulatory defect) have been rectified by the guidance in *United States v. McDonagh*, 14 M.J. 415 (C.M.A. 1983) and *United States v. Marsh*, 15 M.J. 252 (C.M.A. 1983). *See also United States v. Ghiglieri*, 25 M.J. 687 (A.C.M.R. 1987) (proposed enlistment as alternative to civil prosecution was not coercion); *United States v. Hirsch*, 26 M.J. 800 (A.C.M.R. 1988) (recruiter misconduct or intoxication at the time of the oath can be cured by "constructive enlistment"); *United States v. Ernest*, 32 M.J. 135 (C.M.A. 1991) (constructive enlistment applied to reservist on ADT). The court-martial is competent to examine enlistment misrepresentation claims. *Woodrick v. Divich*, 24 M.J. 147 (C.M.A. 1987). Since habeas corpus is the appropriate remedy, military judges should give careful consideration to appropriate demands of comity if related proceedings are ongoing in federal court.

2805 TERMINATION OF JURISDICTION OVER THE PERSON

A. General rule. Generally, discharge terminates jurisdiction. In *United States v. King*, 27 M.J. 327 (C.M.A. 1989), C.M.A. listed three elements which make a discharge effective in this context: delivery of a valid discharge certificate; a final accounting of pay; and a "clearing" process as required under appropriate service regulations to separate the member from military service. *See also United States v. Scott*, 11 C.M.A. 646, 29 C.M.R. 462 (1960); *United States v. Howard*, 20 M.J. 353 (C.M.A. 1985) (jurisdiction terminates on delivery of discharge and final pay); *United States v. Thompson*, 21 M.J. 854 (A.C.M.R. 1986) (delivery of DD Form 214 to member in entry level status terminates jurisdiction); *United States v. Ray*, 24 M.J. 657 (A.F.C.M.R. 1987) (jurisdiction upheld where accused, on appellate leave awaiting discharge, was not provided discharge due to governmental error).

B. Exceptions. Exceptions to general rule that discharge terminates jurisdiction include:

1. Article 3(a), UCMJ, offenses. Jurisdiction may exist where the accused was subject to the UCMJ at the time of the offense and the person is subject to the UCMJ at the time of trial.

2. Fraudulent discharge. Jurisdiction will not be lost where the discharge is procured by fraud. *Wickham v. Hall*, 12 M.J. 145 (C.M.A. 1981) (administrative discharge for pregnancy), 706 F.2d 713 (5th Cir. 1983) (habeas corpus

relief denied). *United States v. Cole*, 24 M.J. 18 (C.M.A. 1987) (court-martial has jurisdiction to determine if member fraudulently obtained discharge).

3. Article 3(c), UCMJ. Deserter obtaining discharge for subsequent period of service. *United States v. Huff*, 7 C.M.A. 247, 22 C.M.R. 37 (1956).

4. Separation from active to Reserve status. Article 3(d), UCMJ. *Murphy v. Garrett*, 29 M.J. 469 (C.M.A. 1990) (jurisdiction existed over offenses committed on active duty for officer who received an honorable discharge and simultaneously received a commission as a Reserve officer, and who maintained contacts with the military through participation in Reserve drills.)

5. Other

a. Short-term discharge. *United States v. Clardy*, 13 M.J. 308 (C.M.A. 1982) (discharge solely for the purpose of reenlistment does not terminate jurisdiction); *United States v. Kino*, 27 M.J. 327 (C.M.A. 1989) (member who was given a discharge certificate for the purpose of reenlistment and then refused to reenlist is still subject to jurisdiction).

b. Erroneous delivery. Jurisdiction will not be lost by an erroneous delivery. *United States v. Garvin*, 26 M.J. 194 (C.M.A. 1988); *United States v. Brunton*, 24 M.J. 566 (N.M.C.M.R. 1987).

c. Persons in custody of the armed forces serving a sentence imposed by court-martial. Art. 2(a)(7), UCMJ. *United States v. Harry*, 25 M.J. 513 (A.F.C.M.R. 1987) (punishment cannot include another punitive discharge).

C. Continuing jurisdiction beyond end of active obligated service (EAOS). Formerly, jurisdiction was not lost if the member did not object to retention beyond the EAOS date; or, after the EAOS date, the member objected to retention, but the government took official action with a view to trial within a reasonable time; or, before the EAOS date, the government took official action that precisely and authoritatively signaled an intent to prosecute. *United States v. Fitzpatrick*, 14 M.J. 394 (C.M.A. 1983). Now, "jurisdiction to court-martial a servicemember exists despite delay -- even unreasonable delay -- by the Government in discharging that person at the end of an enlistment. . . ." *United States v. Poole*, 30 M.J. 149 (C.M.A. 1990). The member's objection is immaterial; the significant fact is that the member has yet to receive a discharge. Unreasonable delay, however, may provide a defense to "some military offenses."

2806 PROCEDURAL CONSIDERATIONS

For discussion of the requirement to plead jurisdiction, see *United States v. Alef*, 3 M.J. 414 (C.M.A. 1977). Lack of jurisdiction may be raised by a motion to dismiss under R.C.M. 907 at any stage of the proceeding. The government has the burden of persuasion by a preponderance of the evidence. *United States v. Bailey*, 6 M.J. 965 (N.M.C.M.R. 1979); R.C.M. 905(c); *United States v. Marsh*, 15 M.J. 252 (C.M.A. 1983) (for "peculiarly military" offenses like a UA, an accused's military status is an element of the offense which must be proven beyond a reasonable doubt to the fact-finders).

2807 OTHER JURISDICTIONAL MATTERS

The court must be properly composed (i.e., military judge and members must have proper qualifications). The court must be convened by proper authority. A properly constituted court-martial may try any person subject to the UCMJ, even if the accused is not under the command of the CA. *United States v. Murphy*, 30 M.J. 1040 (A.C.M.R. 1990). The charges must be properly referred. A defective referral where charges were referred to a different court-martial convening order than that actually used to try the accused was not jurisdictional error. *United States v. King*, 28 M.J. 397 (C.M.A. 1989). Referral of an offense punishable by death under the UCMJ to SCM or SPCM requires GCMCA approval. R.C.M. 201(f)(2).

2808 CONVENING SPCM CHECKLIST

A. Navy pretrial procedures

1. Check the service record out from personnel or PSD.

2. Copy the enlistment contract; pages 1, 2, 4, 5, 7, 9; all page 13's relating to NJP or disciplinary matters; and enlisted evaluations. These will be needed for preparation of CA's action if accused is convicted.

3. Establish liaison with the local NLSO regarding the pending charges. Follow their desired procedure regarding the forwarding of the charge sheet to their office.

4. Prepare the charge sheet, DD Form 458.

5. Prepare list of possible members from which the CO may choose the panel. If possible, avoid using members you know should be disqualified, such

as accused's division officer or others from his / her same department. Have the CO select the panel and prepare the convening order.

6. After the charges have been preferred by the legal clerk, have the CO sign both the charge sheet and convening order.

7. Make sufficient copies of the charges and convening order. Check with the NLSO, but you will normally need the original and five copies of the charge sheet and six copies of the convening order. They will be distributed as follows: original charge sheet plus one copy to the trial counsel; one to defense counsel; one to the military judge; one to the command files; and one to be served on the accused. Note, the original convening order remains in the command files, therefore the copy for the record of trial (ROT) should be a certified copy.

8. Serve the accused with the charges and note the service on the original charge sheet prior to forwarding the others to the NLSO.

9. Forward appropriate copies of the charge sheet and convening order to the NLSO. Include the service record and copies of the investigation.

10. Make all arrangements necessary for the accused to see his / her lawyer and for the witnesses to be interviewed by counsel.

11. After being notified of the time and date of the trial, inform all witnesses and members (if necessary).

12. Arrange for a bailiff to escort the accused to the trial and to take custody after trial. Bailiff should be indoctrinated by NLSO staff for courtroom duties and by brig staff for any confinement, etc.

13. If confinement is expected, ensure the accused has a full sea bag by the date of the trial. His division officer should do this.

14. If confinement is expected, prepare a confinement order and assemble the pay record, health record, and dental record. Have TEMADD orders prepared prior to trial. If the accused receives more than 30 days effective confinement, or a BCD and any confinement, these must be changed to TEMDU orders later.

B. Marine Corps pretrial procedures

1. Assemble service record book, preliminary inquiry (or NCIS investigation).

2. Audit service record book to assure it is up-to-date and contains no errors.

3. Complete request for legal services. Be sure to list witnesses and any who are pending transfer, discharge, or who will be unavailable within the near future. Also list five (5) approved court-martial officer members by full name, rank, unit, and phone number. Also request telephone notification to the legal officer (LO) when a specific TC is assigned.

4. Make copies of request for legal services and allied papers and forward to Law Center / LSSS. (Be certain to have legal clerk who receives it sign your log as receiving the service record book.)

5. Upon receipt of the convening order and charge sheet upon which charges have been preferred, check to see that first page is completed and signed.

6. Have adjutant / personnel officer receipt for sworn charges and cause unit commander or his / her designee to notify personally the accused of charges and complete the notification block.

7. Have CA sign convening order first, then complete referral block.

8. Return charge sheet and convening order to Law Center / LSSS for service by TC.

9. After reasonable period of time, call TC for a trial date and notify prospective members that, if utilized, they will be needed during a specified time frame.

10. Assign a bailiff (senior to accused) and have them read the bailiff's handbook (NAVMARTRLJUDIC INST 5810.5) to learn their duties. Advise TC who has been selected.

11. Prepare applicable parts of page 13, SRB.

12. If confinement is expected, prepare confinement orders, assemble health and dental records, and secure physical examination immediately before trial (or notify medical people of need).

THE ARTICLE 32 INVESTIGATION

2809 PURPOSE

Article 32, UCMJ states: "No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made."

A. Investigate the charges. The article 32(a) investigation seeks to inquire into the truth of the matter alleged in the charges; consider the form of the charges; and make recommendations as to disposition of the charges. Its purpose is not to perfect a case against the accused, but rather to ascertain and weigh all the evidence in arriving at conclusions and recommendations.

B. Discovery. The investigation also serves as a means of discovery. *United States v. Roberts*, 10 M.J. 308 (C.M.A. 1981). The article 32 also serves to preserve testimony which may be admissible at trial as a prior statement under Mil.R.Evid. 801(d)(1) or as former testimony under Mil.R.Evid. 804(b)(1). *United States v. Conner*, 27 M.J. 378 (C.M.A. 1989); *United States v. Hubbard*, 28 M.J. 27 (C.M.A. 1989); *United States v. Spindle*, 28 M.J. 35 (C.M.A. 1989).

C. Waiver of the investigation. Under R.C.M. 905(e) and R.C.M. 705(c)(2)(E), the investigation may be waived as a condition of a pretrial agreement or for personal reasons. If waived for personal reasons, withdrawal of the waiver need only be permitted upon a showing of good cause. *United States v. Nickerson*, 27 M.J. 30 (C.M.A. 1988). The defense offer to waive is not binding on the government; the investigation may still be held.

D. Scope. The investigation should be limited to issues raised by the charges and necessary to proper disposition of the case. The investigating officer's (IO's) examination may extend beyond the witnesses and evidence mentioned in the accompanying papers. If charges are changed to allege a more serious or essentially different offense, further investigation should be directed with respect to the new or different matter. The IO's recommendations are advisory only. R.C.M. 405(a) discussion.

2810 PLAYERS

A. Appointing authority. Any court-martial convening authority may direct an article 32 investigation when it appears the charges may warrant trial by general court-martial. Typically, the SPCMCA will order the investigation. The appointing authority need not be neutral and detached. *United States v. Wojciechowski*, 19 M.J. 577 (N.M.C.M.R. 1984).

B. Investigating officer. The IO must be a commissioned officer, not a commissioned warrant officer. Preferably, the IO should be a field grade officer or an officer with legal training. The IO is disqualified from later acting in the case in any capacity. Serving in a judicial capacity, the IO must be impartial. Any advice on substantive matters must be from a neutral source. Those performing prosecutorial functions are not neutral. Non-neutral persons may only give advice on patently administrative matters. *United States v. Payne*, 3 M.J. 354 (C.M.A. 1977). Advice must not be given ex parte. Ex parte contacts by the IO regarding substantive matters constitute error which will be tested for prejudice. The TC may rebut the presumption of prejudice. *United States v. Rushatz*, 31 M.J. 450 (C.M.A. 1990); *United States v. Brunson*, 17 M.J. 898 (C.G.C.M.R. 1982), *aff'd*, 17 M.J. 181 (C.M.A. 1983).

2811 PROCEDURAL ISSUES

A. Witnesses. The article 32 IO must produce a witness or other evidence if the defense makes a timely request and the witness or evidence is "reasonably available." In making that determination, the IO must find the witness is within 100 miles and then balance the significance of the witness or evidence against the difficulty, expense, delay, and effect on military operations of obtaining the witness' appearance or obtaining the evidence. R.C.M. 405(g). The immediate commander of the requested witness may determine that the witness is not reasonably available, effectively exercising a veto of the request. If deemed reasonably available, civilian witnesses will be invited to attend; the IO has no subpoena power. Payment of transportation and per diem to civilian witnesses must be approved by the GCMCA. Civilians can later be compelled by subpoena to testify at a deposition. R.C.M. 702.

B. Evidence. The Military Rules of Evidence do not apply, save Mil.R.Evid. 301, 302, 303, 305, and Section V R.C.M. 405(i). The article 32 investigation, while an important pretrial right, is not a crucial trial right for confrontation clause purposes. *United States v. Bramel*, 29 M.J. 958 (A.C.M.R. 1990) (not improper for accused to be separated from child witness by a screen at article 32).

C. Processing. The appointing authority should require expeditious proceeding and set a deadline for receipt of record of investigation in the appointing order. The report of investigation should be forwarded to GCMCA within eight (8) days if the accused is in pretrial confinement. R.C.M. 405(j)(1) discussion.

D. Curing defects. To preserve any objection to the investigation, the defense must move for appropriate relief at trial. Prejudice is presumed if not rebutted. Ordinarily, the remedy is a continuance to reopen the investigation. R.C.M. 906(b)(3) discussion. If the charges have already been referred, re-referral is not required after the investigation is reopened; affirmance of the prior referral, if appropriate, is sufficient. *United States v. Clark*, 11 M.J. 179 (C.M.A. 1981); *United States v. Packer*, 8 M.J. 785 (N.M.C.M.R. 1980).

2812 ARTICLE 32 / 34 CHECKLIST

-- Article 32 investigation. (*See* R.C.M. 405, 406; JAGMAN § 0908; and UCMJ, Arts. 32-34.)

1. Obtain service record from personnel or PSD.

2. Establish liaison with local NLSO regarding pending charges and obtain name of article 32 investigating officer.

3. Draft charges on DD Form 458. Complete charge sheet through block IV only; ***do not*** refer charges.

4. Prepare the appointing order for the article 32 investigating officer.

5. Make sufficient copies of charge sheet and appointing order for distribution to all necessary parties and one copy for the command files. The original appointing order will be attached to the investigation; it is not kept in the command files.

6. Forward the charge sheet, appointing order (and the copies of each), plus the service record and any investigative reports, to the NLSO.

7. After receipt of the completed article 32 investigation and the IO's report, forward to your CO for a determination as to disposition.

8. If a GCM is desired, forward service record, the investigation, and IO's report to the GCM authority requesting the appropriate action.

THE ARTICLE 34 PRETRIAL ADVICE

2813 CONTENTS OF PRETRIAL ADVICE

The pretrial advice letter is a formal document containing the SJA's written advice regarding the charges as required under Article 34, UCMJ, as a prerequisite to trial by GCM.

A. Mandatory contents. Although more may be included, the pretrial advice is streamlined and is only required to include:

1. Conclusions with respect to whether each specification alleges an offense under the code;

2. conclusions with respect to whether the allegation of each offense is warranted by the evidence indicated in the report of investigation (if there is a report);

3. conclusion with respect to whether a court-martial would have jurisdiction over the accused and the offense; and

4. recommendation of the action to be taken by the CA.

B. Legal effect. The three legal conclusions are binding on the CA; the SJA's recommended disposition is not. The SJA need not set forth the underlying analysis or rationale for the conclusions. R.C.M. 406(b) discussion.

C. Optional contents. ". . . [T]he pretrial advice should include when appropriate: a brief summary of the evidence; discussion of significant aggravating, extenuating, or mitigating factors; and any previous recommendations, by commanders or others who have forwarded the charges, for disposition of the case." R.C.M. 406(b) (Discussion). Failure to include optional information is not error.

2814 PREPARATION AND DISTRIBUTION

Trial counsel may draft the pretrial advice for the SJA's consideration. *United States v. Hardin*, 7 M.J. 399 (C.M.A. 1979). The SJA, however, is personally responsible for it and must make an independent and informed appraisal of the charges. The SJA must personally sign it. *United States v. Hayes*, 24 M.J. 786 (A.C.M.R. 1987) (signature of another "For the SJA" was inadequate). A copy of the pretrial advice must be given to the accused if the charges are referred to a GCM.

2815 DEFECTS IN THE PRETRIAL ADVICE

Objections are waived if not raised prior to entry of plea or if the accused pleads guilty. R.C.M. 905(b), (e); *United States v. Packer*, 8 M.J. 785 (N.C.M.R. 1980). Failure to provide written pretrial advice to the CA is error which will be tested for actual prejudice. *United States v. Murray*, 25 M.J. 445 (C.M.A. 1988); *United States v. Nelson*, 28 M.J. 553 (A.C.M.R. 1989). Similarly, streamlining can be carried too far. Information which is so incomplete as to be misleading may result in defective advice and warrant relief. R.C.M. 406(b) discussion. *United States v. Kemp*, 7 M.J. 760 (A.C.M.R. 1979).

2816 CHECKLIST FOR ARTICLE 34 ADVICE / REFERRAL OF CHARGES

A. Upon receipt of a request for a GCM by a summary or SPCMCA, review the service record and investigation.

B. Prepare the advice and recommendation concerning the charges for the flag officer per Article 34, UCMJ, and R.C.M. 406, MCM, 1984.

C. If the flag officer agrees to refer the charge(s) to a GCM, then prepare block V of the charge sheet (DD Form 458).

D. Prepare a list of possible members, so the CA may pick the panel, and prepare the convening order for signature.

E. After referral, serve the accused with a copy of the charges and note this on the charge sheet.

F. Prepare sufficient copies of the charge sheet and convening order for distribution to all parties. Retain the original convening order and send a certified copy with the original charge sheet for inclusion in the record of trial.

G. Copy the enlistment contract and pages 1, 2, 4, 5, 7, 9 (and any page 13's relating to NJP's or disciplinary matters) and enlisted evaluations. These may be needed for preparation of the CA's action if the accused is convicted.

H. Forward the service record, charge sheet, article 34 advice, IO's report with the investigation, and any other investigative reports to the NLSO for action.

I. Contact the accused's command for a bailiff and other requirements for the accused in case he / she is confined (sea bag, pay record, health record, etc.).

J. Prepare a confinement order and TEMADD orders in case the accused is confined.

COURT-MARTIAL PERSONNEL UPDATE

2817 CONVENING AUTHORITY

Under R.C.M. 503(a), the CA shall detail qualified persons as members for courts-martial. SJA's have a duty to ensure that CA's follow the criteria of article 25. Their mistakes may taint the CA's official actions based on erroneous legal guidance. *United States v. Hilow*, 29 M.J. 641 (A.C.M.R. 1989), *rev'd*, 32 M.J. 439 (C.M.A. 1991) (CA believed he was supposed to select nominees who supported a command policy of "hard discipline"; CA said this guidance came from SJA personnel). [Additional panel selection cases are discussed below under "Court Members."] Occasionally, DC will attack the actions of a CA who is the "Acting" commander. If service regulations are followed (i.e., Succession Command; *U.S. Navy Regulations, 1990*, Articles 1070-1088), few problems will arise. Even so, C.M.A. has stated that the concern is for the realities of command, not the intricacies of service regulations. *United States v. Jette*, 25 M.J. 16 (C.M.A. 1987); *United States v. Yates*, 28 M.J. 60 (C.M.A. 1989) (no reversal simply because director of Reserve component support was senior to deputy post commander, where there was no protest to the assumption of command and no objection was raised at trial).

2818 DISQUALIFICATION OF COUNSEL

Generally, one who has acted for the government is disqualified as DC. *United States v. Sparks*, 29 M.J. 52 (C.M.A.1989) (If accused, "after full disclosure and inquiry by military judge, wishes to be represented by defense counsel who previously acted for prosecution, accused has no complaint so long as chosen counsel meets customary standards for professional competence"). Conversely, judge advocates who represent the accused may be disqualified from later representing the government if former representation existed, a substantial relationship between the subject matter exists, and there was a later proceeding. *United States v. Rushatz*, 31 M.J. 450 (C.M.A. 1990) (accused met with legal assistance attorney who later moved to prosecutor's office and disclosed to TC that he had represented accused on unrelated matter; held no attorney-client relationship here concerning the same or related matter).

2819 ACCUSED'S RIGHT TO PROCEED PRO SE UNDER R.C.M. 506(d)

The Supreme Court has held that the defendant's right to counsel includes the right of self-representation. In addition to the proverbial notion about the wisdom of pro se clients, the military right to self-representation is not absolute. *United States v. Freeman*, 28 M.J. 789 (N.M.C.M.R. 1989) (a higher standard for competence must exist in order for an accused to waive counsel and conduct his own defense than would be required to merely assist in his own defense while being represented by counsel); *United States v. Bramel*, 29 M.J. 958 (A.C.M.R. 1990) (request for self-representation, like IMC request, should be made in good faith and not solely to vex the prosecution or the court). *See also United States v. Bowie*, 21 M.J. 453 (C.M.A. 1986); *United States v. Tanner*, 16 M.J. 930 (N.M.C.M.R. 1983).

2820 PROFESSIONAL STANDARDS OF COUNSEL

The notion of ineffective assistance of counsel typically conjures up an image of an error in the midst of a contested court-martial. Recent cases indicate that appellate courts will scrutinize pretrial activities carefully as well. *United States v. King*, 30 M.J. 59 (C.M.A. 1990) (accused was denied effective assistance by his counsel's superficial representation designed to avoid an attorney-client relationship); *United States v. Polk*, 32 M.J. 150 (C.M.A. 1991) (counsel deemed ineffective for failing to explore the possibility of co-actor's testimony or to obtain a substitute for the testimony if co-actor refused to testify). In addition, courts have examined DC's discharge of post-trial responsibilities. *United States v. Harris*, 30 M.J. 580 (A.C.M.R. 1990) (DC's responsibilities do not end at close of trial; DC must review case and bring forth all legal issues and clemency matters which might assist the accused); *United States v. Dorsey*, 30 M.J. 1156 (A.C.M.R. 1990) (civilian DC did not prepare or present any meaningful presentencing evidence; did not submit clemency matters because he felt it was "useless to petition the convening authority"); *United States v. Martinez*, 31 M.J. 524 (A.C.M.R. 1990) (DC's ineffective assistance illustrated by accused's untimely, hand-written clemency request to the CA). Counsel for the government and the defense must conduct themselves appropriately. *United States v. Hebert*, 32 M.J. 707 (A.C.M.R. 1991), *aff'd*, 35 M.J. 266 (C.M.A. 1992) (during a recess and in presence of some of the members, TC said the accused was a "guilty son-of-a-bitch" who "was going to jail"; no impact on deliberations).

2821 COURT MEMBERS

Per Article 25, UCMJ, members are to be selected on the basis of their age, experience, education, training, length of service, and judicial temperament. When it can be avoided, court members should not be junior in rank to the accused. *United States v. McGee*, 15 M.J. 1004 (N.M.C.M.R. 1983) (failure to object results in

waiver). The CA cannot exclude any group or class on irrelevant, irrational, or prohibited grounds. *United States v. Nixon*, 30 M.J. 1210 (A.C.M.R. 1990) (en banc) (although the CA selected senior NCO's (E-9's and E-8's), he did not categorically exclude the lower grades from consideration; no illegal or improper motive shown). On the other hand, deliberate inclusion may serve the interests of justice. *United States v. Smith*, 27 M.J. 242 (C.M.A. 1988) (CA may take gender into account in selecting court members if seeking in good faith to ensure that a court-martial panel is representative of the military population). *See also United States v. McClain*, 22 M.J. 124 (C.M.A. 1986); *United States v. McLaughlin*, 27 M.J. 685 (A.C.M.R. 1988), *petition denied*, 28 M.J. 354 (C.M.A. 1989); *United States v. Hodge*, 26 M.J. 596 (A.C.M.R. 1988), *aff'd*, 29 M.J. 304 (C.M.A. 1989).

2822 MILITARY JUDGE

Recent case law confirms the expanding power of military judges to call the court into session at any time after referral [*United States v. Scaff*, 29 M.J. 60 (C.M.A. 1989)], and post-trial prior to authentication. *United States v. Griffith*, 27 M.J. 42 (C.M.A. 1988). *See also United States v. Beckermann*, 27 M.J. 334 (C.M.A. 1989); *United States v. Stiner*, 30 M.J. 860 (N.M.C.M.R. 1990).

APPENDIX A

SAMPLE CONVENING ORDER

LETTERHEAD

16 Jan CY

SPECIAL COURT-MARTIAL CONVENING ORDER 2-CY

A special court-martial is hereby convened. It may try such persons as may properly be brought before it. The court will be constituted as follows:

Lieutenant Commander Steven A. Miller, Jr., U.S. Navy;
Lieutenant Matthew J. Ferguson, SC, U.S. Naval Reserve;
Lieutenant Carol L. Parmley, U.S. Navy;
Lieutenant Junior Grade Peter C. Gaines, U.S. Navy; and
Ensign Roberto I. Jiminez, U.S. Naval Reserve.

JAMES D. WATKINS III
Captain, U.S. Navy
Commanding Officer
Naval Air Station Oceana
Virginia Beach, Virginia

****

SAMPLE MODIFICATION

LETTERHEAD

5 Feb CY

GENERAL COURT-MARTIAL AMENDING ORDER 1A-CY

Chief Operations Specialist CWO3 Jeffrey T. Campbell, U.S. Navy, is detailed as a member of the general court-martial convened by order number 1-CY, this command, dated 29 January 19CY, vice Lieutenant Anthony R. Patrilli, U.S. Navy, relieved.

RICHARD J. ANDERSON
Rear Admiral, U.S. Navy
Commander, Naval Surface Group
Middle Pacific

APPENDIX B

SAMPLE APPOINTING ORDER FOR ARTICLE 32 PRETRIAL INVESTIGATION

DEPARTMENT OF THE NAVY
Naval Justice School
360 Elliot St.
Newport, Rhode Island 02841-1523

22 Aug 19CY

In accordance with R.C.M. 405, MCM, 1984, Lieutenant Commander Pretrial I. Officer, JAGC, U.S. Navy, is hereby appointed to investigate the attached charges preferred against Seaman Watt A. Accused, U.S. Navy. The charge sheet and allied papers are appended hereto. The investigating officer will be guided by the provisions of R.C.M. 405, MCM, 1984, and current case law relating to the conduct of pretrial investigations. In addition to the investigating officer hereby appointed, the following personnel are detailed to the investigation for the purposes indicated:

COUNSEL FOR THE GOVERNMENT

Lieutenant I. Will Convictim, JAGC, U.S. Navy, certified in accordance with Article 27(b), Uniform Code of Military Justice;

DEFENSE COUNSEL

Lieutenant I. Gettum Off, JAGC, U.S. Naval Reserve, certified in accordance with Article 27(b), Uniform Code of Military Justice.

CONVENING T. AUTHORITY
Captain, JAGC, U.S. Navy
Commanding Officer
Naval Justice School
Newport, Rhode Island

DEPARTMENT OF THE NAVY
Naval Justice School
360 Elliot St
Newport, Rhode Island 02841-1523

2 Sep 19CY

FIRST ENDORSEMENT on LCDR Pretrial I. Officer, JAGC, USN, Investigating Officer's Report of 30 Aug CY

From: Commanding Officer, Naval Justice School
To: Commander, Naval Education and Training Center, Newport

Subj: ARTICLE 32 INVESTIGATION ICO SEAMAN WATT A. ACCUSED, U.S. NAVY, 123-45-6789

1. Forwarded.

2. Recommend trial by general court-martial.

CONVENING T. AUTHORITY

APPENDIX C

SAMPLE ARTICLE 34 LETTER

MEMORANDUM

From: Staff Judge Advocate
To: Commander, Naval Education and Training Center, Newport

Subj: ADVICE AND RECOMMENDATIONS CONCERNING THE CHARGES AGAINST SEAMAN WATT A. ACCUSED, U.S. NAVY, 123-45-6789

Ref: (a) Article 32, UCMJ
(b) R.C.M. 406, MCM, 1984

Encl: (1) Charge sheet
(2) Article 32 investigation w/ fwd ltr CO, NAVJUSTSCOL

1. Per reference (a), an investigation has been conducted into the following charge and specification against Seaman Watt A. Accused, U.S. Navy, 123-45-6789.

Charge and Specification: See enclosure (1).

2. The charge and specification have been forwarded with a recommendation for trial by general court-martial by Commanding Officer, Naval Justice School, Newport, Rhode Island. The investigating officer, Lieutenant Commander Pretrial I. Officer, JAGC, U.S. Navy, recommended trial by general court-martial of the charge and specification. The investigation was conducted on 30 August 19CY. The pretrial investigation report and forwarding letter, dated 2 September 19CY, are attached [enclosure (2)].

3. Per reference (b), the following advice concerning the charge and specification is furnished:

a. The investigation was conducted in substantial compliance with reference (a). The evidence consisted of one government exhibit received into evidence.

b. The specification alleges an offense under the UCMJ.

c. The allegations in the specification are warranted by the evidence adduced at the investigation.

d. Court-martial jurisdiction has been established over the accused and the offense.

4. Discussion of the charge and specification:

a. Elements:

(1) That the accused, on or about 1 June 19CY, absented himself from his organization, that is, Naval Justice School, Newport, Rhode Island;

(2) that he remained so absent until 18 August 19CY;

(3) that the absence was without authority from anyone competent to give him leave;

(4) that the accused intended at the time of absenting himself, or at some time during his absence, to remain away permanently from his organization; and

(5) that the accused's absence was terminated by apprehension.

b. Discussion of proof:

(1) IO Exhibit (2), a true copy of a NAVPERS 1070/606 (Record of Unauthorized Absence) from the service record of the accused, provides evidence which establishes probable cause to believe that, on or about 1 June 19CY, the accused absented himself from his organization, to wit: Naval Justice School, Newport, Rhode Island; that he remained so absent until 18 August 19CY; that the absence was without authority from anyone competent to give him leave; and that the absence was terminated by apprehension. The intent of the accused to remain away permanently can be inferred from the length of the absence (78 days), and the accused's apprehension in Tucson, Arizona, some distance from Newport, Rhode Island.

(2) If the intent of the accused to remain away permanently is not proved beyond a reasonable doubt, the accused may be found guilty of a lesser included offense of unauthorized absence in violation of Article 86, UCMJ.

(3) The statute of limitations, for both article 85 and article 86, is five years. The receipt of the preferred charges by Commanding Officer, Naval Justice School, Newport, Rhode Island, on 20 August 19CY, has tolled the running of the statute of limitations and this issue is moot.

5. Maximum authorized punishment:

a. Dishonorable Discharge, confinement for 3 years, forfeiture of all pay and allowances, and reduction to E-1, in the event the accused is convicted of a violation of Article 85, UCMJ.

b. Dishonorable Discharge, confinement for 1 year 6 months, forfeiture of all pay and allowances, and reduction to E-1, in the event the accused is convicted of a violation of Article 86, UCMJ.

6. Additional information relative to case:

a. A review of the accused's service record reflects the following misconduct resulting in disciplinary action:

CO's NJP - 14 Jan CY - Violation of Article 86, UCMJ, UA from 15 Oct CY(-1) to 23 Dec CY(-1).

AWARDED: 15 days restriction, 15 days extra duty, and forfeiture of $50.00 pay per month for one month.

b. The accused is 24 years of age, single, and enlisted in the U.S. Navy on 1 January 19CY(-1), for a period of 4 years. His GCT is 45, his ARI is 53, and he completed the 12th grade of school. His average performance marks are 3.4. He is entitled to no awards, medals, or decorations.

7. In summary, my advice is that there has been substantial compliance with reference (a), the specification alleges an offense under the Code and the allegations in the offense are warranted by the evidence contained in the investigation. I recommend the charge and specification be referred to trial by general court-martial.

8. You may indicate your agreement or disagreement with the foregoing in the place provided below. If you agree with the advice and recommendation herein, you should sign the referral to trial on page two of the Charge Sheet (DD Form 458) [enclosure (1)].

R. U. GUILTY

APPROVED / DISAPPROVED

CHAPTER TWENTY-NINE

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UNLAWFUL COMMAND INFLUENCE

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CHAPTER TWENTY-NINE

RECURRING PROCEDURAL ISSUES AND MOTIONS

UNLAWFUL COMMAND INFLUENCE

2901 INDEPENDENT DISPOSITION AUTHORITY

Each commander at every level is vested with independent discretion which, by law, may not be impinged upon. Senior commanders may not dictate dispositions to a lower-level commander.

A. Permissible actions. The commander *may*, however, personally dispose of a case at the level authorized for that offense and for that commander or at any lower level. Senior commanders may withdraw subordinate authority on particular types of cases and take cognizance over major offenses disposed of at NJP by a subordinate commander. Per *United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989), the CA must give the accused credit for article 15 punishment previously received for an offense later punished by court-martial. *United States v. Burum*, 30 M.J. 1075 (A.C.M.R. 1990). Commanders can always send a case back to a lower commander for that lower commander's independent action. Conversely, the commander may forward a case to a higher commander with a recommendation for disposition. R.C.M. 601(f); *United States v. Blaylock*, 15 M.J. 190 (C.M.A. 1983).

B. Guidance. Commanders may express opinions and provide guidance, provided the subordinate has a free choice to accept or reject the superior's views. Guidelines on appropriate levels of disposition and punishment are inappropriate. An accused is entitled to have the immediate commander exercise independent discretion in the disposition of charges. *United States v. Hawthorne*, 22 C.M.R. 83 (C.M.A. 1956) (directive which required that accused members having two prior convictions be tried by GCM was an unlawful interference with the subordinate's independent discretion).

2902 FLEXIBILITY

A. Disposition. The commander must not have an inflexible policy on disposition or punishment. As a judicial authority, the CA must consider each case individually on its own merits.

B. Clemency. The CA may approve or disapprove findings and suspend and reduce sentences. As a judicial appellate authority, the CA has a duty to review military justice actions impartially. An inflexible attitude towards clemency dictates a loss of judicial authority. *United States v. Howard*, 48 C.M.R. 939 (C.M.A. 1974) (CA showed inflexibility by stating "all convicted drug dealers say the same things. . . . [M]y answer to [their] appeals is 'No'"); *United States v. Glidewell*, 19 M.J. 797 (A.C.M.R. 1985) (CG showed inflexibility by stating he could not understand how a battalion commander could allow a soldier to be court-martialed and then testify at trial about the soldier's good character); *United States v. Fernandez*, 24 M.J. 77 (C.M.A. 1987) (CA's letter urging commanders to be aggressive in the detection and prosecution of drug dealers did ***not*** indicate inflexibility).

2903 ACCUSERS

An accuser, actual or nominal, may not dispose of the case. As a judicial authority, the CA who possesses more than an official interest in a case cannot act fairly in the matter. The appearance of impropriety must be avoided. The accuser concept does not apply to enforcement of general regulations, punishments at NJP, or trial by SCM.

2904 COURT-MARTIAL MEMBERS

A. Selection. Court members may not be selected, removed, or replaced to obtain a particular result. The CA chooses court members using the criteria of Article 25, UCMJ: age, education, training and experience, length of service, and judicial temperament. The same criteria apply to modifications.

B. Influence. No outside pressures may be placed on the judge or court members to arrive at a particular decision. Instructing members on their immediate responsibilities in court-martial proceedings is the sole province of the military judge. The members may not be influenced by command policies. *United States v. Brice*, 19 M.J. 170 (C.M.A. 1985) (CG's speech on drugs during recess of a drug trial resulted in mistrial); *United States v. Walk*, 26 M.J. 665 (A.F.C.M.R. 1987) (judge's sentencing instruction conveying command policy of generally not retaining those involved in drugs was plain error).

2905 WITNESSES

Witnesses may not be intimidated or discouraged from testifying, directly or indirectly. *United States v. Charles*, 15 M.J. 509 (A.F.C.M.R. 1982) (commander's advice to a witness for the accused to modify his comments, if possible, was "inexcusable"); *United States v. Saunders*, 19 M.J. 763 (A.C.M.R. 1984) (commander told defense witnesses in the waiting room on the day of trial he wanted the accused to get the maximum punishment); *United States v. Levite*, 25 M.J. 334 (C.M.A. 1987) (conviction set aside where members of the command were briefed before trial on the accused's "bad character" and NCO's who testified for the accused were told "that they had embarrassed" the unit); *United States v. Kitts*, 23 M.J. 105 (C.M.A. 1986) (SJA briefed crew on pending courts-martial; despite good intentions, had potential for unlawfully influencing the outcome of trials); *United States v. Lowery*, 18 M.J. 695 (A.F.C.M.R. 1984) (chilling effect of the commander's lecturing a defense witness after they have testified); *United States v. Jones*, 30 M.J. 849 (N.M.C.M.R. 1990) (chilling effect of relieving two drill instructors immediately after they testified for the accused).

2906 INFLUENCING THE MILITARY JUDGE

No person may invade the independent discretion of the military judge. Art. 37, UCMJ. Command and SJA inquiries which question or seek justification for a judge's decision are prohibited unless made in connection with an independent judicial commission per the guidelines of section 9.1(a), ABA Standards, The Function of the Trial Judge. *United States v. Ledbetter*, 2 M.J. 37 (C.M.A. 1976). Nor can the command attempt to influence the neutral and detached decisions of the IRO. *United States v. Rice*, 16 M.J. 770 (A.C.M.R. 1983) (deputy SJA asked the senior judge to call the IRO to explain the seriousness of a certain pretrial confinement issue). Even judges must avoid actions which create the appearance of attempting to influence subordinate judges. *United States v. Mabe*, 28 M.J. 326 (C.M.A. 1989), *on remand*, 30 M.J. 1254 (N.M.C.M.R. 1990) (letter from the Chief Trial Judge of the Navy to the Chief Judge of the Transatlantic Judicial Circuit appeared to relay complaints concerning inordinately lenient judge-alone sentences).

2907 CORRECTING MISTAKES

A. Command action. Remedial actions may be taken at various stages of the proceeding, tailored to the nature of the potential harm. The offending party can rectify an ambiguous remark with a clarifying policy pronouncement. *United States v. Sullivan*, 26 M.J. 442 (C.M.A. 1988) (command told all personnel that testifying was their duty; offender transferred to remove his input in the evaluation process).

B. Trial judge action. The judge can take remedial action when unlawful command influence is discovered at the trial level. *United States v. Southers*, 18 M.J. 795 (A.C.M.R. 1984) (granting liberal challenges for cause against members who heard unlawful comments); *United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986) (no unfavorable character evidence permitted against the accused; commander disqualified as reviewing authority); *United States v. Sullivan*, 26 M.J. 442 (C.M.A. 1988) (government given blanket order to produce all requested defense witnesses; each advised of duty to testify truthfully and that no adverse retaliatory would be taken). Judges may grant liberal continuances to allow cleansing actions to take effect.

C. Appellate action. Appellate courts may take any remedial action necessary from ordering a new recommendation and action [*United States v. Howard*, 48 C.M.R. 943 (C.M.A. 1974)], to overturning the findings and sentence [*United States v. Levite*, 25 M.J. 334 (C.M.A. 1987)]. Once unlawful command influence is raised, C.M.A. will not affirm unless convinced beyond a reasonable doubt that the findings and sentence were not affected. *United States v. Thomas, et al.*, 22 M.J. 388 (C.M.A. 1986), *cert. denied*, 107 S.Ct. 1289 (1987).

2908 ADDITIONAL UNLAWFUL COMMAND INFLUENCE

A. Policy directives. *United States v. Eland*, 17 M.J. 596 (N.M.C.M.R. 1983); *United States v. Grady*, 15 M.J. 275 (C.M.A. 1983).

B. Contact with members. *United States v. Cole*, 38 C.M.R. 94 (C.M.A. 1967); *United States v. Hollcraft*, 17 M.J. 1111 (A.C.M.R. 1984).

C. Contact with witnesses. *United States v. Treakle*, 18 M.J. 646 (A.C.M.R. 1984), *aff'd*, 23 M.J. 151 (C.M.A. 1986); *United States v. Jameson*, 33 M.J. 669 (N.M.C.M.R. 1991).

D. Command control. *United States v. Smith*, 27 M.J. 242 (C.M.A. 1988); *United States v. Hedges*, 29 C.M.R. 458 (C.M.A. 1960); *United States v. McClain*, 22 M.J. 124 (C.M.A. 1986); *Petty v. Moriarty*, 43 C.M.R. 278 (C.M.A. 1971).

E. Burdens. *United States v. Anderson*, 26 M.J. 555 (A.C.M.R. 1988); *United States v. Allen*, 31 M.J. 572 (N.M.C.M.R. 1990), *aff'd*, 33 M.J. 209 (C.M.A. 1991).

F. Appearance doctrine. *United States v. Rosser*, 6 M.J. 267 (C.M.A. 1979); *United States v. Cruz*, 20 M.J. 873 (A.C.M.R. 1985), *rev'd in part*, 25 M.J. 326 (C.M.A. 1987); *United States v. Allen*, 31 M.J. 572 (N.M.C.M.R. 1990), *aff'd*, 33 M.J. 209 (C.M.A. 1991).

FOURTH AMENDMENT MATERIALS

2909 PROBABLE CAUSE CHECKLIST

The following checklist may be helpful in advising commanders presented with a request by an investigator to authorize a search.

A. Find out the name and duty station of the applicant requesting the search authorization.

B. Administer an oath to the person requesting authorization: "Do you solemnly swear that the information you are about to provide is true to the best of your knowledge and belief, so help you God?"

C. What is the location and description of the premises, object, or person to be searched? ***Ask yourself***:

1. Is the person or area one over which I have jurisdiction?

2. Is the person or place described with particularity?

D. What facts indicate that the property to be seized is actually located in the place to be searched?

E. Who is the source of this information? If the source is any person other than the applicant who is before you, consult the checklist for informants.

F. What training have you had in investigating offenses of this type or in identifying this type of contraband?

G. Is there any further information you believe will provide grounds for the search for, and seizure of, this property?

H. Are you withholding any information you possess on this case which may affect my decision on this request to authorize the search?

I. If you are satisfied as to the reliability of the information and that of the person from whom you receive it, and you then entertain a reasonable belief that the items are where they are said to be, you may authorize the search and seizure. It should be done along these lines: "[***Applicant's name***], I find that probable cause exists to issue an authorization to search [***location or person***] for the following items: [***description of items sought***]."

2910 INFORMANT CHECKLIST

A. The basis of the informant's knowledge. The commander must find what ***facts***, not conclusions, were given by the informant to indicate that the items sought will be in the place described.

B. The commander must then find that ***either*** the informant is reliable or his / her information is reliable. To gauge the informant's reliability, ask:

1. How long has the applicant known the informant?

2. Has this informant provided information before?

3. Has the past information always proven correct? Almost always? Never?

4. Has the informant ever provided any false or misleading information?

5. (If drug case) Has the informant ever identified drugs in the presence of the applicant?

6. Has any prior information resulted in conviction? Acquittal? Are there any cases still awaiting trial?

7. What other situational background information was provided by the informant that substantiates believability (e.g., accurate description of interior of locker room, etc.)?

C. Questions to determine that the information provided is reliable:

1. Does the applicant possess other information from known reliable sources which indicates what the informant says is true?

2. Do you possess information (e.g., personal knowledge) which indicates what the informant says is true?

2911 SPECIFICITY CHECKLIST

No search authorization will be valid unless the place to be searched and the items sought are particularly described.

A. Description of the place or the person to be searched

1. Persons. Always include all known facts about the individual (such as name, rank, SSN, and unit). If the suspect's name is unknown, include a personal description, places frequented, known associates, make of auto driven, usual attire, etc.

2. Places. Be as specific as possible, with great effort to prevent the area which you are authorizing to be searched from being broadened, giving rise to a possible claim of the search being a "fishing expedition."

B. What can be seized. Go from the general to the specific.

1. Contraband. Contraband is anything which is illegal to possess (e.g., narcotics including, but not limited to, heroin, paraphernalia for the use, packaging, and sale of said contraband, including, but not limited to, syringes, needles, lactose, and rubber tubing).

2. Unlawful weapons. Unlawful weapons are made illegal by some law or regulation (e.g., firearms and explosives including, but not limited to, one M-60 machine gun, M-16 rifles, and fragmentation grenades, together with any parts thereof).

3. Evidence of crimes

a. Fruits of a crime (e.g., household property including, but not limited to, one G.E. clock, light-blue in color, and one Sony 15-inch portable color TV, tan in color, with black knobs).

b. Tools or instrumentalities of crime. Property used to commit crimes (e.g., items used in measuring and packaging of marijuana for distribution including, but not limited to, cigarette rolling machines, rolling papers, scales, and plastic baggies).

c. Evidence which may aid in solving a particular crime (e.g., papers, documents, and effects which show dominion and control of said area including, but not limited to, canceled mail, stenciled clothing, wallets, receipts).

2912 RECENT SEARCH AND SEIZURE CASES

A. Seizure. *United States v. Phillips*, 30 M.J. 1 (C.M.A. 1990) (accused was "seized" within the meaning of the fourth amendment when, after MPI agent displayed his credentials, stopped taxi from leaving, asked accused to get out of the taxi, and demanded accused's ID card, the agent failed to tell the accused he could leave and failed to return the ID card, which was indispensable for the soldier's movement in Korea).

B. NEX detectives. *United States v. Baker*, 30 M.J. 262 (C.M.A. 1990) [although they may not be "investigative or law enforcement officers" for Federal Tort Claims Act purposes, NEX detectives are governmental officials for purposes of fourth amendment analysis (i.e., required to read article 31 warnings to servicemembers suspected of a crime)]. *United States v. Quillen*, 27 M.J. 312 (C.M.A. 1988).

C. Plain view doctrine. *United States v. Jacobs*, 31 M.J. 138 (C.M.A. 1990) (security policeman's act of observing and recording serial numbers on suspected stolen items, which were in plain view and which were not moved, was not a search).

D. Consent to search. *United States v. Goudy*, 32 M.J. 88 (C.M.A. 1991) (accused's consent to search his room was voluntarily given to his commander based on the totality of the circumstances. Factors: (1) article 31 warnings were read; (2) commander never ordered accused to consent; (3) agent gave oral and written advice that accused did not have to consent; (4) commander told accused he needed consent; (5) accused was intelligent, experienced, and articulate, not submissive; and (6) no threats were made. Article 31 warnings are not required prior to requesting consent to search, but are a factor showing voluntariness.)

E. Barracks. *United States v. McCarthy*, 34 M.J. 768 (A.C.M.R. 1992) (a minimal intrusion results from entry into barracks room for the purpose of making an apprehension as opposed to the greater intrusion necessary for a search; therefore, a warrantless apprehension in a barracks room did not violate the fourth amendment).

F. Good-faith exception. *United States v. Lopez*, 35 M.J. 35 (C.M.A. 1992) (good-faith exception to the exclusionary rule applies to the military).

G. Inevitable discovery. *United States v. Allen*, 34 M.J. 228 (C.M.A. 1992).

See the urinalysis section in chapter 30 of this Deskbook for additional search and seizure cases in that context.

FIFTH AND SIXTH AMENDMENT UPDATE

2913 SOURCES OF THE RIGHTS

A. The fifth amendment. "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

B. Article 31(a), UCMJ. "No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him."

C. Article 31(b). "No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him . . . ."

D. The sixth amendment. "In all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defence."

2914 ARTICLE 31 WARNINGS

A. Who must warn? Article 31 warnings must be given if a questioner subject to the Code was acting in an official capacity in his / her inquiry (i.e., not only a personal motivation) and the person questioned perceived that the inquiry involved more than a casual conversation. *United States v. Duga*, 10 M.J. 206 (C.M.A. 1981) (Everett: Article 31(b) applies "only to situations in which, because of military rank, duty, or other similar relationship, there might be subtle pressure on a suspect to respond to an inquiry").

B. *Duga* progeny. *United States v. Good*, 32 M.J. 105 (C.M.A. 1991) (a supervisor questioning an accused is presumed to be acting in a law enforcement / disciplinary capacity unless the government can prove that he had another, nondisciplinary purpose); *United States v. Loukas*, 29 M.J. 385 (C.M.A. 1990) (article 31 warnings were not required prior to aircraft crew chief's questioning of crewmember about drug use where questions were limited to those needed to "fulfill operational responsibilities, and there was no evidence suggesting his inquiries were designed to evade constitutional or codal rights"; article 31 "requires warnings only when questioning is done during an official law-enforcement investigation or disciplinary inquiry"); *United States v. Parrillo*, 31 M.J. 886 (A.F.C.M.R. 1990) (Air Force sergeant acting as agent of OSI was not required to read article 31 warnings before questioning a lieutenant about drugs. Although questioning was official, the lieutenant perceived it as casual conversation because of prior sexual relationship with the sergeant.); *United States v. Quillen*, 27 M.J. 312 (C.M.A. 1988) (Civilian PX

detective was required to advise a soldier suspected of shoplifting of his article 31 rights before questioning him. The detective was an "instrument of the military" whose conduct in questioning the suspect was "at the behest of military authorities and in furtherance of their duty to investigate crime"; the suspect perceived the detective's questioning to be more than casual conversation.); *United States v. Moore*, 32 M.J. 56 (C.M.A. 1991). (Psychiatric nurse was not required to read rights warnings prior to questioning accused about child sexual abuse when questioning was done only for legitimate medical purpose of gauging the depth of the accused's depression. *Quillen*-type argument that psychiatric nurse was an agent of law enforcement and required to read article 31 warnings rejected because current AR 608-18 was not in effect.)

C. When must warnings be given? Warnings must be given prior to any interrogation, questioning, or other request for a statement from a person subject to the UCMJ who is suspected of an offense.

1. Interrogation defined. Interrogation under Mil.R.Evid. 305(b)(2) "includes any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning."

2. Cases. *United States v. Steward*, 31 M.J. 259 (C.M.A. 1990) (OSI agent impermissibly interrogated suspect prior to rights warnings by saying: "Wayne, from this point on, you are grounded. You can either cooperate with us and try to get your wings back or lose your wings forever." A.F.C.M.R. erred by relying on "presumptive taint" to suppress the confession because of this "technical violation of article 31(b)."); *United States v. Kramer*, 30 M.J. 805 (A.F.C.M.R. 1990) (OSI agent's false statements about evidence against ATM card thief followed by question, "We are not going to see your face on the tape are we?" was "functional equivalent of interrogation"; despite subtlety of the approach, it was designed to obtain an incriminating response and should have been preceded by warnings); *United States v. Schake*, 30 M.J. 314 (C.M.A. 1990) (behavioral analysis interview is a "form of police interrogation, especially when it entails direct questioning about an interviewee's involvement in a crime"; technique is designed to use noninvestigative questions to evoke verbal and nonverbal responses that are useful to police).

2915 THE RIGHT TO COUNSEL AND COUNSEL WARNINGS

A. Source. *Miranda v. Arizona*, 384 U.S. 436 (1966) ("[P]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed"); *United States v. Tempia*, 16 C.M.A. 629, 37 C.M.R. 249 (1967); Mil.R.Evid. 305(d).

B. Exercise of rights. Under Mil.R.Evid. 305(f), "[i]f a person chooses to exercise the privilege against self-incrimination or the right to counsel . . . questioning must cease immediately." The rule does not address whether or when questioning may be resumed.

1. The right to counsel. *Edwards v. Arizona*, 451 U.S. 477 (1981) ("[W]hen an accused has invoked his right to . . . counsel, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. . . . [A]n accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation . . . until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."); *Minnick v. Mississippi*, 111 S.Ct. 486 (1990) ("[W]e now hold that when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney."); *Arizona v. Roberson*, 486 U.S. 675 (1988) (There is no exception to *Edwards* for post-request, police-initiated, custodial interrogation relating to a separate investigation: "As a matter of law, the presumption raised by a suspect's request for counsel—that he considers himself unable to deal with the pressures of custodial interrogation without legal assistance—does not disappear simply because the police have approached the suspect, still in custody, still without counsel, about a separate investigation." The fact that the officer who conducted the second interrogation did not know of the request for counsel is of "no significance."); *United States v. Fassler*, 29 M.J. 193 (C.M.A. 1989) (applied *Roberson* to military).

2. Exceptions to the *Edwards* per se rule

a. Counsel "made available." *United States v. King*, 30 M.J. 59 (C.M.A. 1990) ("[W]e are not precisely clear as to whether counsel secured under the Fifth Amendment must invariably be present at any reinitiation of contact or whether, once substantial legal services have been provided, there are any exceptions to the presence requirement. . . . The brief visitation of counsel here was insufficient to permit receipt in evidence of any confession secured by investigators upon their own initiation of contact."); *United States v. Fassler*, *supra* (10-minute long-distance telephone consultation with defense counsel was not "constructive presence" of an attorney that might satisfy *Miranda*); *United States v. Schake*, 30 M.J. 314 (C.M.A. 1990) (accused who requested counsel during police interrogation could be reinterrogated following a 6-day break in continuous custody and a complete rights advisement where accused had a "real opportunity to seek legal advice" during his release); *Minnick v. Mississippi*, 111 S.Ct. 486 (1990) ("In context, the requirement that counsel be "made available" means more than an opportunity to consult with an attorney outside the interrogation . . . [W]hen counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney.").

b. Initiation and waiver by the accused. *Minnick v. Mississippi, supra* ("*Edwards* does not foreclose finding a waiver of Fifth Amendment protections after counsel has been requested, provided the accused has initiated the conversation or discussions with the authorities.").

2916 CONFESSIONS AFTER IMPROPER POLICE CONDUCT

A. After an illegal arrest or search. *New York v. Harris*, 110 S.Ct. 1640 (1990) (Where police have probable cause to arrest a suspect, the exclusionary rule does not bar the use of the suspect's statement made outside his home, even though the statement is taken after a warrantless and nonconsensual arrest made in violation of *Payton v. New York*, 445 U.S. 573 (1980); warrant requirement is designed to protect the home, so any evidence seized there, including the suspect's first statement, was properly excluded. Attenuation analysis of *Brown* and *Dunaway* is not required for subsequent station-house confession because, unlike those cases, police here had probable cause to make the arrest and, therefore, the challenged evidence was not the product of illegal governmental activity.); *United States v. Mitchell*, 31 M.J. 914 (A.F.C.M.R. 1990) (*Harris* applied; statement made to police who entered accused's motel room based on probable cause, but without a warrant or his consent, should have been suppressed; written statement given three days later was admissible); *Minnesota v. Olson*, 110 S.Ct. 1684 (1990) (statement given in police station following warrantless, nonconsensual arrest in home of another, where suspect was a guest and had legitimate expectation of privacy, excluded as fruit of illegal arrest; although police had probable cause to arrest the suspect, the "State expressly disavowed any claim that the statement was not a fruit of the arrest"; court declined to apply *New York v. Harris* sua sponte).

B. After an inadmissible confession. *United States v. Schake*, 30 M.J. 314 (C.M.A. 1990). ("[T]he doctrine of presumptive taint for Article 31 violations espoused by Chief Judge Everett in *United States v. Ravenel* has not gained the support of a majority of this Court." Even assuming taint, it was rebutted where (1) no admissions were made during the first interrogation; (2) rights warnings were given prior to second statement; (3) different investigator conducted second interview; and (4) most importantly, six days passed between the unwarned and warned interviews); *United States v. Steward*, 31 M.J. 259 (C.M.A. 1990) (mere "technical violations of Article 31(b)" do not presumptively taint subsequent warned statements; although the "presumptive taint doctrine" permits rebuttal of such taint, that attenuation approach is inappropriate when there is no initial tainting statement and proper advice is provided before the confession; the appropriate legal inquiry in these types of cases is whether his subsequent confession was voluntary considering all the facts and circumstances of the case, including the earlier technical violation of article 31(b)); *United States v. Phillips*, 32 M.J. 76 (C.M.A. 1991) (an unwarned statement obtained without actual coercion does not presumptively taint a subsequent, warned

statement; government must prove by a preponderance of the evidence, however, that the warned statement was voluntary and was not obtained by using the earlier statement; if the initial statement is the product of actual coercion, duress, or inducement, it does presumptively taint subsequent warned statements; cleansing warnings, although not legally required, will help show voluntariness.)

2917 RECENT FIFTH AND SIXTH AMENDMENT CASES

A. Warning by informant not required. *United States v. Harvey*, 33 M.J. 822 (A.F.C.M.R. 1991). (Accused, after invoking his rights and consulting with counsel, arranged three meetings with co-accused to discuss pending government investigation. The meetings were taped by the co-accused with OSI assistance. Article 31 rights were not required since the accused perceived the meetings as nothing more than casual conversation.)

B. Not likely to elicit an incriminating response. *United States v. Tubbs*, 34 M.J. 654 (A.C.M.R. 1992). (Accused was placed handcuffed on a bench near an open door, while cold and wearing wet clothing, in MP station for two hours awaiting CID agent interview. Accused was questioned about his identity and overheard MPs in the area talking about the alleged assault and related search. Accused made several incriminating statements. A.C.M.R. found no "design or attempt, direct or disguised to elicit incriminating responses which . . . rise to the level of the functional equivalent of interrogation.")

C. Consent to search. *United States v. Burns*, 33 M.J. 316 (C.M.A. 1991) (requesting consent to search and also conduct a urine test which did not violate a fifth amendment right even though accused previously requested counsel).

D. Use of deception. *United States v. Jones*, 34 M.J. 899 (N.M.C.M.R. 1992). (NCIS agent falsely stated that co-accused had fingered the accused as the sole perpetrator. This misrepresentation, though relevant to the determination of voluntariness, does not render an otherwise voluntary statement involuntary.)

E. R.C.M. 305(i) hearing. *United States v. Hanes*, C.M. 91-1549 (N.M.C.M.R. 24 April 1992) (representation at 305(i) hearing not a fifth amendment election of right to counsel).

F. Joint investigations. *United States v. Oakley*, 33 M.J. 27 (C.M.A. 1991) (civilian investigation did not become joined with the military due to the presence of a liaison officer).

2918 CORROBORATION

United States v. Rounds, 30 M.J. 76 (C.M.A. 1990), *cert. denied*, 111 S.Ct. 130 (1990). ("Independent evidence of each and every element of the confessed offense is not required as a matter of military law. All that is required is that the independent evidence raise an inference of truth as to the essential facts stated in the confession. Generally speaking, it must establish the trustworthiness of the confession." Confession was sufficiently corroborated without independent evidence of ingestion of drugs when independent evidence showed accused had access and opportunity to ingest drugs at time and place where he confessed to using drugs.)

2919 SPEEDY TRIAL

The following sections discuss an accused's constitutional and statutory right to a speedy trial. Section 2920 discusses the past and present treatment of the statutory right to a speedy trial as provided by R.C.M. 707, MCM, 1984 [hereinafter R.C.M. 707], as amended by Change 5, MCM, 1984. Subsequent sections address the development of the right to speedy trial through case law. There exist several avenues, the products of both statute and case law, through which an accused may seek judicial enforcement of his right to speedy trial. These sections will highlight, under the preexisting and current R.C.M. 707, when this right applies to an individual accused, what constitutes a violation of that right by the government, and the legal ramifications of a violation of that right.

A. The right to a speedy trial is derived from the Magna Carta and the English common law. *United States v. Wilson*, 10 C.M.A. 398, 27 C.M.R. 472 (1959). It is specifically guaranteed by the sixth amendment and Article 10, UCMJ:

> When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.

Article 10, UCMJ, provides broader protection for the accused than the sixth amendment. *United States v. Powell*, 2 M.J. 6 (C.M.A. 1976). In addition to Article 10, Article 30(b), UCMJ, provides:

> Upon the preferring of charges, the proper authority shall take immediate steps to determine what disposition should be made thereof in the interest of justice and discipline, and the person accused shall be informed of the charges against him as soon as practicable.

Finally, Article 33, UCMJ, is designed to implement a speedy trial by general court-martial:

> When a person is held for trial by general court-martial the commanding officer shall, within eight days after the accused is ordered into arrest or confinement, if practicable, forward the charges, together with the investigation and allied papers, to the officer exercising general court-martial jurisdiction. If that is not practicable, he shall report in writing to that officer the reasons for delay.

B. The term "arrest or confinement" as it appears in Article 10, UCMJ, has been interpreted by the C.M.A. to mean pretrial restraint, including restriction. *United States v. Weisenmuller*, 17 C.M.A. 636, 38 C.M.R. 434 (1968) (pretrial restriction which did not differ from restriction normally imposed as NJP was sufficient to raise the right to a speedy trial); *United States v. Williams*, 16 C.M.A. 589, 37 C.M.R. 209 (1967) (restriction to company area equivalent to arrest for speedy trial purposes). The 90-day speedy trial requirement adopted by the C.M.A. in *United States v. Burton*, 21 C.M.A. 112, 44 C.M.R. 166 (1971), discussed *infra*, however, applies only when an accused is in pretrial confinement and not when merely under restriction or arrest. *See also United States v. Nelson*, 5 M.J. 189 (C.M.A. 1978).

C. The remedy for denial of the right to a speedy trial is dismissal of the charges. R.C.M. 707(d) provides for dismissal with or without prejudice. The charge must be dismissed with prejudice if an accused's constitutional right to a speedy trial has been violated.

D. Congress attempted to reinforce the accused's right to a speedy trial by the enactment of Article 98, UCMJ, which makes it an offense to delay unnecessarily the disposition of any case of a person charged with an offense.

2920 THE SPEEDY TRIAL RULE IN THE *MANUAL FOR COURTS-MARTIAL*

R.C.M. 707 was drastically revised in 1991. The amended rule applies to all cases in which arraignment occurs on or after 6 July 1991. The rule is based on ABA Standards For Criminal Justice, Speedy Trial (1986) and The Federal Speedy Trial Act, 18 U.S.C. § 3161. The amendments have not yet undergone significant challenge in the military court system.

A. Starting the clock. R.C.M. 707(a) provides that the accused shall be brought to trial within 120 days after the earlier of:

1. Preferral of charges;

2. the imposition of restraint under R.C.M. 304(a) (2)-(4); or

3. entry on active duty under R.C.M. 204.

These three constitute the "triggering events" that start the 120-day clock. Note that conditions on liberty do not "trigger" the speedy trial clock, nor does imposition of liberty risk unless used as a subterfuge for pretrial restriction. *United States v. Bradford*, 25 M.J. 181 (C.M.A. 1987). In contrast to the old rule, notice of preferral is irrelevant. Actual preferral, when the accuser signs the charges and specifications under oath before a commissioned officer, is the "trigger." R.C.M. 307(b). In addition, the new rule apparently eliminates the application of a 90-day clock when the accused is in pretrial confinement. However, *United States v. Burton, supra*, which presumes a speedy trial violation for an accused in pretrial confinement over 90 days, is still good law. *See* Analysis to R.C.M. 707, as amended by Change 5, MCM, 1984. *Burton* and the 90-day rule are discussed in detail in section 2921.

B. Accountability. R.C.M. 707(b)(1). The date of preferral of charges or the date on which pretrial restraint is imposed does not count for purposes of computing the 120-day period, but the date on which the accused is brought to trial does count. *United States v. Tebsherany*, 30 M.J. 608 (N.M.C.M.R. 1990), *aff'd*, 32 M.J. 351 (C.M.A. 1991). An accused is "brought to trial" under this rule at the time of arraignment under R.C.M. 904. This is a major change from the old rule which defined "brought to trial" as the time the government presents evidence.

C. Multiple clocks. When charges are preferred at different times, accountability for each charge is determined from the date on which the charge was preferred or on which pretrial restraint was imposed on the basis of that offense. R.C.M. 707(b)(2). Even when charges are preferred at the same time, earlier imposition of pretrial restraint will only start the clock for the charged offenses that were the bases for imposing pretrial restraint. *United States v. Robinson*, 28 M.J. 481 (C.M.A. 1989).

D. Events which affect time periods. R.C.M. 707(b)(3) addresses four events which may affect time periods of the speedy trial clock.

1. Dismissal or mistrial. When charges are dismissed, or if a mistrial is granted, a new 120-day clock begins to run only from the date on which charges are preferred or restraint is reimposed. R.C.M. 707(b)(3)(A). Withdrawal of charges from court-martial is not tantamount to a "dismissal" within the meaning

of the rule. *United States v. Mucthison*, 28 M.J. 1113 (N.M.C.M.R. 1989). The true intent behind the convening authority's actions determines whether the dismissal was genuine. In *United State v. Britton*, 26 M.J. 24 (C.M.A. 1988), the Court of Military Appeals defines an intent to dismiss:

> Dismissal, mistrial, and a break in pretrial restraint all contemplate that the accused no longer faces charges, that conditions on liberty and pretrial restraint are lifted, and that he is returned to full-time duty with full rights as accorded to all other servicemembers. Reinstitution of charges requires the command to start over. The charges must be re-preferred, investigated, and referred in accordance with the Rules for Courts Martial, as though there were no previous charges or proceedings.

Id. at 26.

Furthermore, a convening authority cannot attempt to "withdraw" charges in an attempt to create a limbo status for the charges until such time as the prosecution is prepared to present its case. *United States v. Mucthison*, 28 M.J. at 1115. However, in *United States v. Bolado*, 34 M.J. 732 (N.M.C.M.R. 1991), the Navy-Marine Corps Court of Military Review concluded that charges can only be withdrawn when they have been referred, otherwise they have been dismissed. Therefore, even if a convening authority may intend to reinstate charges in the future, an otherwise clear dismissal will not be treated as a withdrawal.

2. Release from pretrial restraint. Release from pretrial restraint for a significant period of time stops the clock when the pretrial restraint is the only event to trigger the speedy trial clock. A "significant period" of time is not specifically defined, but has been found to be as short as five days. *United States v. Hulsey*, 21 M.J. 717 (A.F.C.M.R. 1985). Once again, the clock will restart on the date of preferral of charges or the date that restraint is reimposed. *United States v. Facey*, 26 M.J. 421 (C.M.A. 1988).

3. Government appeals. R.C.M. 707(b)(3)(C) grants the government a new 120-day clock upon proper government appeal. Once the parties are given notice of either the government's decision not to appeal under R.C.M. 908(b)(8), or the decision of the Court of Military Review under R.C.M. 908(c)(3), a new 120-day period begins. The new clock applies to all charges being tried together, whether or not the subject of the appeal. *See United States v. Ramsey*, 28 M.J. 370 (C.M.A. 1989).

4. Rehearings. "If a rehearing is ordered or authorized by an appellate court, a new 120-day time period under this rule shall begin on the date

that the responsible convening authority receives the record of trial and the opinion authorizing or directing a rehearing." R.C.M. 707(b)(3)(D). This section was added to the amended rule and codifies the decision in *United States v. Moreno*, 24 M.J. 752 (A.C.M.R. 1987).

E. Excludable delay. Any pretrial delay approved by the convening authority or by the military judge shall be excluded when determining whether the speedy trial clock has run. R.C.M. 707(c). Requests for delay before referral will be submitted to the convening authority and requests after referral will be submitted to the military judge. R.C.M. 707(c)(1). In addition, all periods of time covered by stays issued by appellate courts shall be excluded. R.C.M. 707(c).

1. Old exclusions. R.C.M. 707(c) has undergone major revision under the Change 5 amendments. The old rule set forth a list of specific circumstances in which pretrial delays were excluded from computation. Extensive case law was developed to interpret each specific circumstance set out in the rule. The frustration of the Court of Military Appeals in making after-the-fact determinations of accountability became evident in *United States v. Carlisle*, 25 M.J. 426 (C.M.A. 1988). In *Carlisle*, C.M.A. stated emphatically, "*ON DAY NUMBER 1, EVERYONE ASSOCIATED WITH A CASE SHOULD KNOW WHAT DAY WILL BE NUMBER 120.*" The court also held that ". . . each day that an accused is available for trial is chargeable to the Government, unless a delay has been approved by either the convening authority or the military judge, in writing or on the record." *Id.* at 428. While *Carlisle* was decided under the old rule, the case underscores the critical importance C.M.A. assigns to determinations of accountability for trial delay and should still be regarded as mandatory reading by both trial and defense counsel.

2. Amendments. The old list of specific circumstances are now listed in the discussion following R.C.M. 707(c)(1) as possible reasons for a convening authority or military judge to grant a reasonable delay. They include:

> [T]ime to enable counsel to prepare for trial in complex cases; time to allow examination into the mental capacity of the accused; time to process a member of the reserve component to active duty for disciplinary action; time to complete other proceedings related to the case; time requested by the defense; time to secure the availability of the accused, substantial witnesses, or other evidence; time to obtain appropriate security clearances for access to classified information or time to declassify evidence; or additional time for other good cause.

Id.

The purpose of the new rule is to provide guidance for granting pretrial delays and to eliminate after-the-fact determinations as to whether certain periods of delay are excludable. Analysis to R.C.M. 707. The amendments conform to the principle that the government is accountable for all time prior to trial unless a competent authority grants a delay. *United States v. Longhofer*, 29 M.J. 22 (C.M.A. 1989). Under the new rule, decisions granting or denying pretrial delays will be subject to review for both abuse of discretion and the reasonableness of the period of delay granted. *United States v. Maresca*, 28 M.J. 328 (C.M.A. 1989).

3. Motions. The accused must make a timely motion to the military judge under R.C.M. 905 for speedy trial relief. Counsel should provide the court with a chronology detailing the processing of the case to be made a part of the appellate record. R.C.M. 707(c)(2). Once the issue of speedy trial has been raised by the defense, the burden is upon the government to show by a preponderance of the evidence that the accused was brought to trial within 120 days. R.C.M. 905(c)(2)(B).

F. Remedy. A failure to comply with the right to a speedy trial will result in dismissal of the affected charges. The dismissal may be with or without prejudice to the government's right to reinstitute charges for the same offense at a later date. The charges must be dismissed with prejudice where the accused has been deprived of his / her constitutional right to a speedy trial. R.C.M. 707(d). The military judge's discretion to dismiss without prejudice is a significant change from the old rule which contained no such option. The new rule provides four factors for the court to consider in determining whether to dismiss with or without prejudice: the seriousness of the offense; the facts and circumstances of the case that lead to dismissal; the impact of a reprosecution on the administration of justice; and any prejudice to the accused resulting from the denial of a speedy trial. R.C.M. 707(d).

G. Waiver. Under the amended R.C.M. 707(e), a plea of guilty which results in a finding of guilty generally waives any speedy trial issue as to that offense. The issue is preserved if the accused is allowed to enter a conditional plea under R.C.M. 910(a)(2). This change apparently reverses case law that preserved speedy trial issues for appeal despite a guilty plea. *See United States v. Angel*, 28 M.J. 600 (N.M.C.M.R. 1989).

2921 THE RIGHT TO SPEEDY TRIAL IN PRETRIAL CONFINEMENT CASES

Under Change 5 to the *Manual*, the 90-day rule established by R.C.M. 707(d) was eliminated. Change 5 specifically provided that there was a single 120-day speedy trial clock. This clock could be triggered by several events: (1) the imposition of pretrial restraint, excluding conditions on liberty; (2) preferral of charges; (3) entry on active duty pursuant to R.C.M. 204; (4) notice of government

appeal; or (5) the responsible CA's receipt of record of trial and appellate notice directing rehearing. Periods of delay were granted by the military judge and were excluded from this clock without a determination of accountability as to the government or the defense. The intent of Change 5 was to simplify speedy trial issues.

Despite this attempt at simplification, one issue remained: Was the 90-day speedy trial clock triggered by the imposition of pretrial confinement dead? The change on its face appeared to eliminate this separate 90-day clock in favor of a single 120-day clock. The analysis to R.C.M. 707(a), as amended by Change 5, provided that the change was not intended to overrule the case of *United States v. Burton*, 44 C.M.R. 166 (C.M.A. 1971). *Burton* provided for the 90-day speedy trial clock that was applicable in cases involving pretrial confinement.

The Navy-Marine Corps Court of Military Review had an opportunity to interpret the change in *United States v. Kossman*, 37 M.J. 639 (N.M.C.M.R. 1993). N.M.C.M.R. held that the 90-day clock was still applicable in those cases involving pretrial confinement. The government appealed this decision to the U.S. Court of Military Appeals, arguing that the change effected a single 120-day speedy trial clock.

C.M.A., however, rejected the government's position and overruled N.M.C.M.R.'s decision. *See United States v. Kossman*, No. 93-6002 (N.M.C.M.R. 29 Sept. 1993). C.M.A. threw out the concept of a set speedy trial clock, whether it be 120 or 90 days, and employed the Article 10, UCMJ, standard of reasonable diligence. Failure by the government to exercise due diligence in bringing a case to trial in a timely fashion would serve as the basis for denial of the accused's right to a speedy trial, with dismissal with prejudice being the only available remedy. This now means that government prosecutors could be faced with defense motions to dismiss in cases well under the old 120-day rule based upon allegations of failure to exercise reasonable diligence in bringing the case to trial in a timely fashion. Conversely, prosecutors may now successfully defend against such motions to dismiss in cases well over the old 120-day or 90-day rules if they can show that they were in fact exercising such reasonable diligence.

The following discussion of law that developed around *Burton* is provided as a historical analysis. Its future application is wholly dependent upon a subsequent re-examination of the *Kossman* decision.

A. Presumption of prejudice from pretrial confinement

1. In *United States v. Burton*, 21 C.M.A. 112, 44 C.M.R. 166 (1971), the C.M.A. issued a rule regarding the right to speedy trial when the accused is placed in pretrial confinement. For offenses occurring after 17 December 1971, in the

absence of a defense request for a continuance, a presumption will exist that the accused has been denied a speedy trial in violation of article 10 when his pretrial confinement exceeds three months. "In such cases, this presumption will place a heavy burden on the Government to show diligence, and in the absence of such a showing the charges should be dismissed." *Id.* at 118, 44 C.M.R. at 172. It is stressed that the *Burton* presumption applies only to cases of pretrial confinement including any form of restraint that is tantamount to confinement because of the conditions of restraint.

2. In *United States v. Marshall*, 22 C.M.A. 431, 47 C.M.R. 409 (1973), C.M.A. explained what *Burton* really stood for. It held that:

> mere diligence would not be sufficient to overcome the *Burton* presumption. Really extraordinary circumstances, beyond such normal problems such as mistakes in drafting, manpower shortages, illnesses and leave, would be required. The government may still show diligence . . . in such cases as those involving problems found in a war zone or in a foreign country . . . , or those involving serious or complex offenses in which due care requires more than a normal time . . . or . . . for reasons beyond the control of the prosecution. . . .

Id. at 434.

B. Counting under *Burton*

1. "90 days." In *United States v. Driver*, 23 C.M.A. 243, 49 C.M.R. 376 (1974), C.M.A. modified *Burton*'s three-month rule. In the interest of establishing a single standard for all cases, the court revised the period of pretrial confinement to "90 days" instead of "three months."

2. How to count. Do not count the first day of pretrial confinement; do count the day of trial. *Cf. United States v. Manalo*, 1 M.J. 452 (1976). Therefore, if the accused enters pretrial confinement on 1 January and goes to trial on 1 April (in a non-leap year), he has been in pretrial confinement 90 days (30 + 28 + 31 + 1).

3. What to count. Pretrial confinement has been the only form of pretrial restraint that will "trigger" the *Burton* presumption. But, if the terms of pretrial arrest or restriction are severe enough, they may be considered to be pretrial "confinement" for purposes of *Burton*. *See United States v. Burrell*, 13 M.J. 437 (C.M.A. 1982); *United States v. Schilf*, 1 M.J. 251 at 252 n.2 (C.M.A. 1976). In *United States v. Cahandig*, 47 C.M.R. 933 (N.C.M.R. 1973), the court counted eight days of

restriction as pretrial confinement, but gave no explanation of its decision. If the accused is an adjudged prisoner serving the sentence of another court-martial, he is not considered to be in pretrial confinement. *United States v. Gettz*, 49 C.M.R. 79 (N.C.M.R. 1974). If the accused is serving correctional custody previously imposed under article 15 for a separate offense, he is not considered to be in pretrial confinement for *Burton* purposes. *United States v. Miller*, 2 M.J. 77 (C.M.A. 1976). If the correctional custody is imposed as a subterfuge to avoid responsibility for pretrial confinement, it will be counted. *United States v. Miller, supra*; *United States v. Schilf, supra*.

4. Additional charges. When an accused is charged with offenses in addition to those for which he was confined, those offenses may have different inception dates for *Burton* purposes. *E.g.*, *United States v. Talavera*, 8 M.J. 14 (C.M.A. 1979); *United States v. Johnson*, 1 M.J. 101 (C.M.A. 1975); *United States v. Johnson*, 23 C.M.A. 91, 48 C.M.R. 599 (1974); *United States v. Mohr*, 21 C.M.A. 360, 45 C.M.R. 134 (1972); *United States v. Craft*, 50 C.M.R. 334 (A.C.M.R. 1975). Government accountability for these additional offenses begins when the government has in its possession substantial information on which to base preferral of charges. *United States v. Johnson*, 23 C.M.A. 91, 48 C.M.R. 599 at 601; *United States v. Shavers*, 50 C.M.R. 298 (A.C.M.R. 1975). Therefore, if an accused goes into pretrial confinement on 1 January on Charge I, on 15 January the government learns he has committed an additional offense, and on 25 January prefers this as Charge II, the inception date for *Burton* purposes for Charge II is 15 January—not 25 January when the charge was preferred.

In determining when the government has such substantial knowledge, the court has not considered the government to be a single entity. *United States v. O'Brien*, 22 C.M.A. 557, 48 C.M.R. 42 (1973). If, therefore, the accused is confined on 1 January by authorities at point A for Charge I, and authorities at point B learn of a Charge II on 1 January, the inception date for *Burton* purposes for Charge II will not begin on 1 January. The authorities at point B will have a "reasonable time" to inform point A of Charge II. *United States v. O'Brien, supra*. In *O'Brien*, a delay of 56 days was not considered "reasonable" by the court.

5. Rehearings. "[R]ehearings fall within the *Burton* mandate, and such rehearings must be held within 90 days of the date the convening authority is notified of the final decision authorizing a rehearing." *United States v. Flint*, 1 M.J. 428, 429 (C.M.A. 1976). *Dubay*-type proceedings [*United States v. Dubay*, 17 C.M.A. 147, 37 C.M.R. 411 (1967)] are not included within the *Burton* mandate. *United States v. Flint, supra*, affirming 50 C.M.R. 865 (A.C.M.R. 1975). (A *Dubay* hearing typically involves a post-trial hearing before a military judge alone on an issue not resolved at trial to the satisfaction of the reviewing authority ordering the hearing. The judge will hear evidence and make findings.

6. Accused in the hands of civilian authorities. If the accused is confined by civilian authorities pending delivery to military authorities, the government has a reasonable time to arrange for his transportation and arrival at his ultimate destination before the *Burton* period begins to run. *United States v. Smith*, 50 C.M.R. 237 (A.C.M.R. 1975); *United States v. Halderman*, 47 C.M.R. 871 (N.C.M.R. 1973). *See also United States v. Harris*, 50 C.M.R. 225 (A.C.M.R. 1975). *But see United States v. O'Brien, supra*, in which C.M.A. seems to assume that the inception date of one period of pretrial confinement was the date the accused was confined by civilian authorities even though that confinement occurred at a place over 2,000 miles from the site of the trial. *See United States v. Hubbard*, 21 C.M.A. 131, 44 C.M.R. 185 (C.M.A. 1971).

The rationale of the Courts of Military Review cases in this area is that the prosecution is responsible for only those delays over which it has control. But, transportation delays arising from confinement at a military post distant from the location of the trial have been held chargeable to the government. *United States v. Howell*, 49 C.M.R. 394 (A.C.M.R. 1974).

If the accused is confined for civilian offenses prior to his being released to military control, that delay will not be chargeable to the government. *United States v. Reed*, 2 M.J. 64 (C.M.A. 1976); *United States v. Williams*, 12 C.M.A. 81, 30 C.M.R. 81 (1961). *See also United States v. Asbury*, 28 M.J. 595 (N.M.C.M.R. 1989). Likewise, if the accused is apprehended by military authorities and released to civilian authorities or a foreign government [*United States v. Stubbs*, 3 M.J. 630 (N.C.M.R. 1977)] for prosecution, the military is not accountable for such periods of confinement. *United States v. Reed, supra*. The court's statements in *Reed* are broader than is necessary to support the holding, however, and in appropriate circumstances it may be possible to apply the balancing test of *United States v. Sewell*, 1 M.J. 630 (A.C.M.R. 1975).

7. Release from confinement. Confinement does not have to be for 90 consecutive days for *Burton* to apply. *United States v. Brooks*, 23 C.M.A. 1, 48 C.M.R. 257 (1974). Therefore, if the accused is confined on 1 January, released on 1 February, reconfined on 1 March, and tried on 15 May, the *Burton* presumption will apply. Although a post-trial confinement case, *United States v. Ledbetter*, 2 M.J. 37 (C.M.A. 1976), is authority for a convening authority to release an accused on the 89th day of pretrial confinement solely to avoid the *Burton* presumption.

8. The accused who goes UA. An accused who absents himself without authority upon his release will thereby lose *Burton* credit for the previous pretrial confinement served. *United States v. McAnally*, NCM 79-1819, 30 May 1980, *cert. by JAG on other grounds*, 10 M.J. 270 (C.M.A. 1981) (court declined to answer the certified issue (not relevant here) because it would not materially alter the

situation for the accused or the government). *United States v. O'Brien, supra; United States v. Bush*, 49 C.M.R. 97 (N.C.M.R. 1974).

C. Extraordinary circumstances. In *United States v. Marshall*, 22 C.M.A. 431, 47 C.M.R. 409 (1973), C.M.A. elaborated on the "heavy burden" it imposed on the government in *Burton* to justify delays beyond the 90th day. The court stated that such delays would have to be justified by "extraordinary reasons." The court stated:

> Under Burton, the Government may still show diligence, despite pretrial confinement of more than 3 months, in such cases as those involving problems found in a war zone or in a foreign country, . . . [citations omitted] or those involving serious or complex offenses in which due care requires more than a normal time in marshaling the evidence, or those in which for reasons beyond the control of the prosecution the processing was necessarily delayed.

Id. at 433-34, 47 C.M.R. at 412-13.

It added that "[o]perational demands, a combat environment, or a convoluted offense are examples that might justify a departure from the norm." *Id.* at 435, 47 C.M.R. at 413. It then drew a distinct line between these types of delays and those such as "mistakes in drafting, manpower shortages, illnesses, and leave" which would not justify additional delay. Conditions such as these were already considered by C.M.A. in establishing the 90-day standard. Since the dismissal in *Marshall*, the courts have made a large number of similar rulings due to a lack of extraordinary circumstances, making the "heavy burden" a practical as well as a literal one. The court has thereby enforced the duty of the government to provide adequate administrative support to the judicial system. *E.g.*, *United States v. Wolzok*, 1 M.J. 125 (C.M.A. 1975) (docketing delays); *United States v. McClain*, 1 M.J. 60 (C.M.A. 1975) (military judge not available); *United States v. Toliver*, 23 C.M.A. 197, 48 C.M.R. 949 (1974) (trial counsel sent to USS KITTY HAWK and could not work on case of accused); *United States v. Reitz*, 22 C.M.A. 584, 48 C.M.R. 178 (1974) (delay to complete CID investigation); *United States v. Durr*, 22 C.M.A. 562, 48 C.M.R. 47 (1973), *rev'd*, 47 C.M.R. 622 (A.C.M.R. 1973) (delays in completing and transcribing article 32 investigation); *United States v. Johnson*, 22 C.M.A. 524, 48 C.M.R. 9 (1973) (inadequate number of personnel available); *United States v. Kaffenberger*, 22 C.M.A. 478, 47 C.M.R. 646 (1973) (delays in article 32 investigation and referring case to trial). *Cf. United States v. Johnson*, 3 M.J. 143 (C.M.A. 1977), where the court approved the government's decision to try a companion case first in order to have that person's testimony for use against the accused, even though pretrial confinement extended to 150 days. In a footnote, the court commended the trial counsel for explaining the reasons for the delay on the record to the military judge in the form of a motion for a continuance, thus involving judicial discretion

early in the proceedings. Other examples of extraordinary circumstances are contained in *United States v. Groshong*, 14 M.J. 186 (C.M.A. 1982) (pretrial confinement of 104 days chargeable to the government, but government showed reasonable diligence in bringing accused to trial in light of additional serious charges preferred after original confinement); *United States v. Miller*, 12 M.J. 836 (A.C.M.R. 1982) (*Burton* presumption applied to pretrial confinement over 90 days chargeable to government, but extraordinary circumstances existed).

1. Seriousness of the offense. In *United States v. Henderson*, 1 M.J. 421 (C.M.A. 1976), the C.M.A. stated that, just because an offense is serious (here murder), that factor may not itself constitute an "extraordinary circumstance." The court reasoned that, although charges may be serious, they may still be relatively easy to prove.

2. Complex offenses. The court in *Henderson* did state that a complex offense may justify additional time to gather evidence. The difficulties that the government encounters in meeting this burden of proof are illustrated by the facts in *Henderson*. Pretrial confinement was 132 days, 113 of which were attributed to the government. The charges were conspiracy to murder and premeditated murder. The article 32 investigation contained 140 pages of verbatim testimony and 89 pages of verbatim deposition. Two of the conspirators were civilians, and nearly half of the 36 witnesses called by the prosecution were Okinawan civilians. Many of those did not speak English. Some of the witnesses were in custody, and obtaining their presence required coordination efforts with Okinawan authorities. Despite these factors, the court held that extraordinary circumstances were not present and dismissed the charges. *Accord United States v. Toliver*, 23 C.M.A. 197, 48 C.M.R. 949 (1974); *United States v. Holmes and Huff*, 23 C.M.A. 24, 48 C.M.R. 316 (1974); *United States v. Brooks*, 23 C.M.A. 1, 48 C.M.R. 257 (1974); *United States v. Gettz*, 49 C.M.R. 79 (N.C.M.R. 1974); *United States v. Presley*, 48 C.M.R. 464 (N.C.M.R. 1974). Contrary to the general tendency of courts to hold that the complexity of the offense is not an extraordinary circumstance are *United States v. Hensley*, 50 C.M.R. 677 (A.C.M.R. 1975); *United States v. Lovins*, 48 C.M.R. 160 (A.C.M.R. 1973); and *United States v. Cole*, 3 M.J. 220 (C.M.A. 1972).

3. Foreign situs. Complications arising from prosecution in a foreign country may justify delays greater than 90 days. *United States v. Marshall, supra.* Again, however, C.M.A. has been reluctant to accept this as a rationale. *See United States v. Henderson, supra*, in which the court rejected it; *United States v. Young*, 1 M.J. 71 (C.M.A. 1975); *United States v. Stevenson*, 22 C.M.A. 454, 47 C.M.R. 495 (1973). *See also United States v. Miller*, 12 M.J. 836 (A.C.M.R. 1982). In *United States v. Rowel*, 50 C.M.R. 752 (A.C.M.R. 1975), the Army court did excuse some delay due to the foreign situs. But, *Rowel* appears to be clearly outside the *Henderson* line of cases since the government did not connect the delay with the foreign situs. The government must demonstrate that the extraordinary

circumstance (i.e., foreign situs) did in fact cause the delay. *United States v. Henderson, supra.* For example, in *United States v. Shavers*, 50 C.M.R. 288 (A.C.M.R. 1975), the court did not allow the foreign situs to be considered as an extraordinary circumstance where it could not find that this factor contributed to the delay. *Accord United States v. Eaton*, 49 C.M.R. 426 (A.C.M.R. 1974). *See also United States v. Hensley*, 50 C.M.R. 677 (A.C.M.R. 1975).

4. Additional charges. "[T]he commission of additional misconduct may, in an appropriate case, amount to extraordinary circumstances within the meaning of *Marshall* sufficient to overcome the *Burton* presumption . . . ." *United States v. Johnson*, 1 M.J. 101, 102 (C.M.A 1975). But, while making this admission, the court refused to accept the commission of an assault while the accused was in the stockade as an extraordinary circumstance. It specifically placed the right of an accused to a speedy trial under the UCMJ above the MCM's policy that all known charges against an accused be handled at a single trial. Para. 33h, MCM, 1969 (Rev.); R.C.M. 401(c), discussion. *See also United States v. McAnally, supra* (UA begins the pretrial confinement clock anew). *But see United States v. Groshong*, 14 M.J. 186 (C.M.A. 1982), a case in which the court ruled that paragraphs 30g, 32c, and 33h, MCM, 1969 (Rev.), imposed a responsibility on the command to consolidate all offenses at a single trial. In view of this responsibility and repeated misconduct by the accused, the court held that reasons beyond the control of the prosecution delayed the court-martial and pretrial confinement extended to 104 days. The court reviewed the unusual circumstances of the case and determined a dismissal would not lie because the government showed reasonable diligence in bringing the accused to trial. In a footnote, the court cited *United States v. O'Brien*, 22 C.M.A. 557, 48 C.M.R. 42 (1973) as a case where it had held that additional charges justified delay. The additional charge in *O'Brien* was unauthorized absence which, of necessity, would stop the processing of the case for trial. In *United States v. Huddleston*, 50 C.M.R. 99 (A.C.M.R 1975) and *United States v. O'Neal*, 48 C.M.R. 89 (C.M.R. 1973), the Army Court of Military Review did allow the government to justify delay because of additional charges. But, in *Huddleston*, the court's analysis gave more weight to the policy in favor of trying all known offenses than it did to the right of the accused to a speedy trial. *See also United States v. Gettz*, 49 C.M.R. 79 (N.C.M.R. 1974). The Army court rejected an "additional charge" rationale in *United States v. First*, 2 M.J. 1266 (A.C.M.R. 1976). In this area as well as others, the tendency of the courts has been against finding that extraordinary circumstances exist where additional charges are brought against the accused. *See United States v. Ward*, 1 M.J. 21 (C.M.A. 1975); *United States v. Smith*, 2 M.J. 394 (A.C.M.R. 1975); *United States v. Shavers*, 50 C.M.R. 298 (A.C.M.R. 1975). *Contra United States v. Groshong*, 14 M.J. 186 (C.M.A. 1982).

5. Unavailability of witnesses. In *United States v. Dinkins*, 1 M.J. 185 (C.M.A. 1975), a prosecution witness was not available at trial in Germany because a passport had not been secured in advance of the scheduled trial date. The

court held: "Assuring the presence of witnesses for trial is one of the routine responsibilities of the prosecution for which ample allowance was made in establishing the 90-day standard." *Id.* at 186. It ordered the charges dismissed. This rationale had been used earlier in *United States v. Jordon*, 48 C.M.R. 841 (N.C.M.R. 1974), where several witnesses had been transferred to new duty stations. In *United States v. Johnson*, 23 C.M.A. 91, 48 C.M.R. 599 (1974), trial was delayed in part because an essential government witness was in an unauthorized absence status. The court accepted this as an extraordinary circumstance, but it did not have to deal with the problem of how long the government can reasonably wait for the witness' return. *Accord United States v. Gettz*, 49 C.M.R. 79 (N.C.M.R. 1974).

6. War zone, operational demands, or a combat environment. In *United States v. Cahandig*, 47 C.M.R. 933 (N.C.M.R. 1973), the Navy court concluded that operational demands of the submarine USS SALMON, in the western Pacific in connection with the Vietnam conflict, justified delay beyond 90 days. Key witnesses in the trial were also key crew members of the submarine, and the time in question was near the time of the mining of Haiphong harbor. And, in *United States v. Rowel*, 50 C.M.R. 752 (A.C.M.R. 1975), the Army court excused eight days of government delay due to battalion field training in Germany. The court noted "that the state of readiness and training in Europe demands frequent and full unit participation." *Id.* at 753.

7. Investigation delays. As a general rule, delays due to the criminal investigatory process (such as investigative agency reports or laboratory reports) have ***not*** been considered extraordinary circumstances. In *United States v. Reitz*, 22 C.M.A. 584, 48 C.M.R. 178 (1974), the court held that the need to complete a criminal investigation report was ***not*** an excuse for pretrial delay. *Accord United States v. Pyburn*, 23 C.M.A. 179, 48 C.M.R. 795 (1974) (laboratory report); *United States v. Presley*, 48 C.M.R. 464 (N.C.M.R. 1974) (*JAG Manual* investigation); *United States v. Perry*, 2 M.J. 113 (C.M.A. 1977) (no excuse for a delay of 55 days in conducting an article 32 investigation simply because the accused raised the issue of self-defense). But, there can be circumstances where the court will accept investigative delays if the facts are striking enough. In *United States v. Johnson*, 23 C.M.A. 91, 48 C.M.R. 599 (1974), the agent investigating the offense committed by the accused and as many as four out of the eight other agents otherwise available were diverted to investigate a series of fires aboard USS FORRESTAL. The court pointed out that this resulting delay was due to "an incident of apparent sabotage of an important operational unit of the Fleet"; but it did not indicate what other priorities would justify investigatory diversion. Finally, in *United States v. Gettz, supra*, the court held, without citing *Reitz*, that delays caused by sending drugs from Thailand to Japan for analysis were, along with other factors, extraordinary circumstances.

D. The second prong of *Burton*. A second aspect of the *Burton* opinion, "often forgotten or ignored" [*United States v. Johnson*, 1 M.J. 101, 105 (C.M.A. 1975)], arises from this language: "When the defense alertly avoids what could otherwise be a waiver of the speedy trial issue by urging prompt trial, the government is on notice that delays from that point forward are subject to close scrutiny and must be abundantly justified." *United States v. Burton, supra*, at 117, 44 C.M.R. at 171. "The Government must respond to the request and either proceed immediately or show adequate cause for any further delay. A failure to respond to a request for a prompt trial or to order such a trial may justify extraordinary relief." *Id.* at 118, 44 C.M.R. at 172.

While pretrial confinement is necessary to cause the court to examine subsequent government actions, the confinement does not have to amount to 90 days. In *United States v. Johnson*, 1 M.J. 101 (C.M.A. 1975), the Court of Military Appeals used this aspect of *Burton* to affirm an A.C.M.R. decision (49 C.M.R. 13) that ordered charges against the accused dismissed when the accused had been in pretrial confinement for 82 days. *Johnson* makes it clear that the N.C.M.R. was incorrect in its prior decision in *United States v. Barnes*, 50 C.M.R. 625 (N.C.M.R 1975), when it declared that the request for a speedy trial, standing alone, did not place an added burden on the government. *United States v. Zammit*, 14 M.J. 554 (N.M.C.M.R. 1982), *rev'd on other grounds*, 16 M.J. 330 (C.M.A. 1983); *United States v. Williams*, 14 M.J. 994 (N.M.C.M.R. 1982).

The so-called "demand" or "second" prong of *Burton* was prospectively overruled in *United States v. McCallister*, 27 M.J. 138 (C.M.A. 1988). The court found that an accused's right to a speedy trial was fully protected by the 90-day *Burton* rule in pretrial confinement cases, R.C.M. 707(a) in all other cases, and the four-part analysis in *Barker v. Wingo*, 92 S. Ct. 2182 (1972). It should be noted that one element of such analysis is the accused's demand for a speedy trial. (The other three elements are length of delay, reason for delay, and prejudice to the accused.) It is unlikely the defense can successfully rely on Barker, since it is less restrictive than *Burton* or R.C.M. 707. After *McCallister*, if the defense requests a speedy trial, the government no longer must either respond to the request and proceed to trial immediately nor show adequate cause for further delay.

2922 WAIVER OF THE SPEEDY TRIAL ISSUE

The general rule is that the issue is waived if not raised at trial. R.C.M. 907(b)(2)(A). There may be an exception, however, where the denial of speedy trial amounts to a denial of due process.

A. In *United States v. Schalck*, 14 C.M.A. 371, 34 C.M.R. 151 (1964), the accused pleaded guilty to UA and willful disobedience at a general court-martial and

was sentenced to a BCD. At the Board of Review, the accused asserted the defense of lack of a speedy trial for the first time in that he was confined for a period of 96 days to trial without charges being preferred against him. The Board of Review agreed with the accused and dismissed the charges against him. The C.M.A. indicated that the issues of speedy trial and denial of due process are "frequently inextricably bound together and the line of demarcation not always clear." *Id.* at 372, 34 C.M.R. at 153. The government argued that the accused had been, in fact, advised of the charges against him and used a chronology sheet in argument before the C.M.A. The court recognized the well-established rule that the right to a speedy trial is "personal and can be waived if not promptly asserted by timely demand," but held that "in the posture of the record" the delay in preferring charges against the accused was not waived by his failure to raise the issue at trial and by his plea of guilty. *Id.* at 373, 34 C.M.R. at 153. Since the record was devoid of evidence on the point, the C.M.A. disagreed with the Board of Review to the extent that it felt the case should be reheard and the issue litigated. ***But see United States v. Tibbs***, 15 C.M.A. 350, 35 C.M.R. 322 (1965).

B. Status of the law

If the accused fails to object at the trial level to a lack of a speedy trial, he will be precluded from raising the issue at the appellate level in the absence of evidence indicating a denial of military due process or manifest injustice. *United States v. Sloan*, 22 C.M.A. 587, 48 C.M.R. 211 (1974). However, failure to raise issue at trial does not preclude the appellate courts from considering issue. In *United States v. Britton*, 26 M.J. 24 (C.M.A. 1988), the defense did not raise speedy trial at the trial level. A.F.C.M.R. dismissed the charges for denial of speedy trial. C.M.A. held that failure to raise the issue does not preclude C.M.R. in the exercise of its powers from granting relief.

APPENDIX A

REQUEST FOR SEARCH AUTHORIZATION

WITH THE UNITED STATES ARMED FORCES AT Newport County, Newport, Rhode Island, Continental USA

1. I, Robert T. Jacobs, Naval Criminal Investigative Service Resident Agency, Newport, RI, having first been duly sworn, state that larceny of a Panasonic AM / FM radio, Model RF-593, SN 00610, with a broken antenna, from YN2 Douglas Wright, USN, on 10 January 19CY, has been committed.

2. I further state that BM1 Jonathan P. Rhodes was visiting YN2 Richard R. Blue in Bldg. 346, Rm 13B, NETC, Newport, RI, on 15 Jan CY. BM1 Rhodes saw a Panasonic AM / FM radio with a broken antenna which fit the description of a radio stolen from YN2 Douglas Wright. BM1 Rhodes informed me via phone conversation what he had witnessed. I talked with BM1 Rhodes on 15 Jan CY in my office, and he again went over the facts in more detail. BM1 Rhodes' CO informed me that BM1 Rhodes is a very trustworthy individual.

3. In view of the foregoing, the undersigned requests that permission be granted for the search of YN1 John T. Green's living area and wall locker, Bldg. 346, Rm 13B, NETC, Newport, Rhode Island, and seizure of a Panasonic AM / FM radio, Model RF-593, SN 00610.

_____
Signature

_____
Typed name and organization

I, SA James Q. Summerville, do hereby certify that the foregoing request for authorization to conduct search and seizure was subscribed and sworn to before me this 16th day of January, 19CY, by SA Robert T. Jacobs, who is known to me to be a Special Agent with the U.S. Armed Forces. And I do further certify that I am on this date empowered to administer oaths by authority of Article 136, UCMJ.

_____
Signature

_____
Typed name, grade, and branch of service

_____
Command or Organization

APPENDIX B

AFFIDAVIT FOR SEARCH AUTHORIZATION

Before the Commander, Naval Education and Training Center, Newport, Rhode Island, the undersigned, being duly sworn, requests authority to search:

Living area and wall locker of YN1 John T. Green, Building 346, Room 13B, Naval Education and Training Center, Newport, Rhode Island.

Believing that there is now being concealed certain property, namely:

Panasonic AM / FM Radio, Model RF-593, SN 00610, with a broken antenna.

The request for authorization to search and seize is made in connection with an investigation into the offense(s) of:

Article 121: Larceny.

The facts and circumstances known to me tending to establish the foregoing grounds for authorization to search and seize, including comments demonstrating the reliability of the information, and / or informant, are as follows:

SA Robert T. Jacobs was informed by BM1 Jonathan Rhodes that BM1 Rhodes had been visiting YN2 Richard R. Blue on 15 Jan CY. YN2 Blue shares Rm. 13B, Bldg. 346, NETC, Newport, RI, with YN1 John T. Green. BM1 Rhodes saw a Panasonic AM / FM radio of the same description which YN2 Douglas Wright had reported stolen. BM1 Rhodes immediately notified SA Jacobs. BM1 Rhodes' CO states BM1 Rhodes is a very trustworthy individual.

_____

Signature of affiant

Sworn to before me, and subscribed in my presence this 16th day of January 19CY.

_____

Signature of person administering oath

_____

Rank, Service, Title

APPENDIX C

RECORD OF AUTHORIZATION FOR SEARCH (see JAGMAN 0170)

1. At (time) on (date), I was approached by (name) in his / her capacity as (duty), who, having been first duly sworn, advised me that he / she suspected (name) of (offense) and requested permission to search his / her (object or place) for (particular items).

2. The reasons given to me for suspecting the above-named person were:

_____

_____

_____

_____

_____

_____

_____

3. After carefully weighing the foregoing information, I was of the belief that the crime of _____ [had been] [was being] [was about to be] committed, that _____ was the likely perpetrator thereof, that a search of the object or area stated above would probably produce the items stated, and that such items were [the fruits of crime] [the instrumentalities of a crime] [contraband] [evidence].

4. I have therefore authorized _____ to search the place named for the property specified and, if the property is found there, to seize it.

_____

Grade Signature Title

_____

Date and Time

RECORD OF AUTHORIZATION FOR SEARCH

1. At 1340 hours on 16 January 19CY, I was approached by Robert T. Jacobs in his capacity as Special Agent, Naval Criminal Investigative Service, who, having been first duly sworn, advised me that he suspected YN1 John T. Green, USN, of Article 121, UCMJ, larceny and requested permission to search his wall locker and living area in Bldg. 346, Rm 13B, NETC, for one Panasonic AM / FM Radio, Model RF-593, SN 00610.

2. The reasons given to me for suspecting the above-named person were:

> On 15 Jan CY, BM1 Jonathan P. Rhodes, USN, was visiting YN2 Richard R. Blue, USN. YN2 Blue lives in Rm 13B, Bldg 346, NETC, Newport, RI. His roommate is YN1 John T. Green. While in Rm 13B, Bldg 346, BM1 Rhodes observed a radio in YN1 John T. Green's area. It was a small Panasonic radio with a broken antenna. BM1 Rhodes was aware, through a conversation with YN2 Douglas Wright, that YN2 Wright's radio had been stolen early in January 19CY. YN2 Wright had described his radio to BM1 Rhodes as a Panasonic with a broken antenna.

3. After carefully weighing the foregoing information, I was of the belief that the crime of larceny [had been] committed, that a search of the object or area stated above would probably produce the items stated, and that such items were [the fruits of crime].

4. I have therefore authorized Special Agent Robert T. Jacobs, NCIS, to search the place named for the property specified and, if the property is found there, to seize it.

Captain _____, Commander, Naval Education and Training Center, Newport, Rhode Island, 16 January 19CY, 1440.

APPENDIX D

COMMAND AUTHORIZATION FOR SEARCH AND SEIZURE

To Special Agent Robert T. Jacobs:

Affidavit(s) having been made before me by Special Agent Robert T. Jacobs

That there is reason to believe that, on the person of and / or on the premises known as:

Living area and wall locker of YN1 John T. Green, USN, Bldg 346, Room 13B, Naval Education and Training Center, Newport, Rhode Island, which is my jurisdiction;

There is now being concealed certain property, namely:

Panasonic AM / FM Radio, Model RF-593, SN 00610, with a broken antenna.

I am satisfied that there is probable cause to believe that the property so described is being concealed on the person and / or premises above described and that the grounds for application for issuance of a command-authorized search exist as stated in the supporting affidavit(s).

YOU ARE HEREBY AUTHORIZED TO SEARCH the person and / or place named for the property specified and if the property is found there to seize it, leaving a copy of this authorization and receipt for the property taken. You will provide a signed receipt to this command, containing a full description of every item seized.

Any assistance desired in conducting this search will be furnished by this command.

Dated this 16th day of January 19CY.

_____
Signature of Commander

_____
Rank, Service, Title

_____
Command

APPENDIX E

CONSENT TO SEARCH (*see* JAGMAN 0170)

I, _____, have been advised that inquiry is being made in connection with _____. I have been advised of my right not to consent to a search of [my person] [the premises mentioned below]. I hereby authorize _____ [and] _____ _____, who [has] [have] been identified to me as _____(position(s))_____, to conduct a complete search of my [person] [residence] [automobile] [wall locker] [_____] [_____] located at _____. I authorize the above-listed personnel to take from the area searched any letters, papers, materials, or other property which they may desire. This search may be conducted on _____. This written permission is being given by me to the above-named personnel voluntarily and without threats or promises of any kind.

_____
Signature

WITNESSES

_____

_____

SAMPLE

CONSENT TO SEARCH

I, YN1 John T. Green, USN, have been advised that inquiry is being made in connection with larceny of a Panasonic AM / FM Radio from YN2 Douglas Wright, USN, on 10 January 19CY.

I have been advised of my right not to consent to a search of [my person] [the premises mentioned below].

I hereby authorize SA Robert T. Jacobs, who has been identified to me as a Special Agent, GS-6, with Naval Criminal Investigative Service Resident Agency, Newport, RI, to conduct a complete search of my residence wall locker located at Building 346, Room 13B, Naval Education and Training Center, Newport, Rhode Island.

I authorize the above-listed personnel to take from the area searched any letters, papers, materials, or other property which they may desire. This search may be conducted on 16 January 19CY.

This written permission is being given by me to the above-named personnel voluntarily and without threats or promises of any kind.

_____

Signature

Witnesses

_____

_____

APPENDIX F

SEARCH AND SEIZURE INSTRUCTION

INSTRUCTION 5510.3A

Subj: SEARCHES AND SEIZURES

Ref: (a) Mil.R.Evid. 315

1. Purpose. To establish the authority of various members of the U.S. Naval Ballistics Command to order searches of persons and property, and to promulgate regulations and guidelines governing such searches.

2. Cancellation. NAVBALCOM Instruction 5510.3 is hereby cancelled.

3. Objective. To ensure that every search conducted by members of this command is performed in accordance with the law. For purposes of this instruction, "search" is defined as a quest for incriminating evidence.

4. Authority

a. Reference (a), as modified by court decisions, authorizes a commanding officer to order searches of:

(1) Persons subject to military law and to his / her authority;

(2) persons, including civilians, situated on or in a military installation, encampment, vessel, aircraft, vehicle, or any other location under his / her control;

(3) privately owned property situated on or in a military installation, encampment, vessel, aircraft, vehicle, or any other location under his / her control;

(4) U.S. Government–owned or –controlled property under his / her jurisdiction which has been issued to an individual or group of individuals for their private use;

(5) all other U.S. Government–owned or –controlled property under his / her jurisdiction; and

(6) in foreign countries, persons subject to military law and to his / her authority, and any property of such persons located anywhere in the foreign country.

b. As to property described in paragraph 4(a)(5) above, a search may be conducted at any time, by anyone in military authority on the scene, for any reason, or for no reason at all. Any property seized as a result of such a search will be handled per paragraph 7 below.

c. Items or other evidence seized as a result of a search of persons or property falling within paragraphs 4a(1), (2), (3), or (4) above, will be admissible in a subsequent court proceeding only if the search was based on probable cause. This means that, before the search is ordered, the person ordering the search is in possession of facts and information, more than mere suspicion or conclusions provided to him / her by others, which would lead a reasonable person to believe that: (a) an offense has been committed; and (b) the proposed search will disclose an unlawful weapon, contraband, evidence of the offense or of the identity of the offender, or anything that might be used to resist apprehension or to escape.

d. Before deciding whether to order any search of persons or property described in paragraphs 4(a)(1), (2), (3), or (4) above, the officer responsible is required to take all reasonable steps, consistent with the circumstances, to ensure that his / her source of information is reliable and that the information available to him / her is complete and correct. (S)he must then decide whether such information constitutes probable cause as defined above. In making this determination, the responsible officer is exercising a judicial, as opposed to a disciplinary, function.

e. Ordinarily, the Commanding Officer, U.S. Naval Ballistics Command, will be the officer responsible for authorizing searches of persons or property described in paragraphs 4a(1), (2), (3), or (4) above in this command. If the commanding officer is unavailable and full command responsibilities have devolved to another (normally the executive officer), that person then exercising full command responsibilities is permitted to authorize searches and seizures.

5. Criteria

a. When so acting, the individual empowered to authorize searches will exercise discretion in deciding whether to order a search in accordance with the general criteria set forth above. No search will be ordered without a thorough review of the information to determine that probable cause, where required, exists. Due consideration will be given to the advisability of posting a guard or securing a space to prevent the tampering with, or alteration of, spaces while a further inquiry is

conducted to effect a more complete development of the facts and circumstances giving rise to the request for a search.

b. The following examples are intended to assist the responsible officer in placing the persons or property to be searched within the proper category (set forth in paragraph 4a, above):

(1) Members of the armed forces and civilians accompanying armed forces in a combat zone in time of war;

(2) all persons, servicemembers and civilians, situated on or in a military installation, encampment, vessel, aircraft, or vehicle;

(3) automobiles, suitcases, civilian clothing, privately owned parcels, etc., physically located on or in a military installation, encampment, etc., and owned or used by a servicemember or a civilian;

(4) lockers issued for the stowage of personal effects, government quarters, or other spaces or containers issued to an individual for his / her private use;

(5) the working spaces of this command, including restricted-access spaces, in the custody of one or a group of individuals where no private use has been authorized (e.g., a wall safe, gear lockers, government vehicles, government briefcases, and government desks); or

(6) persons under the authority of this command and their personal property, including vehicles located on or off base, when located in a foreign country.

6. Exception. In circumstances involving vehicles, the interests of the safety or security of a command, or the necessity for immediate action to prevent the removal or disposal of stolen property, may leave insufficient time to obtain prior authorization to conduct a search. Under such circumstances, any officer of this command, on the scene in the execution of his / her military duties, is authorized to conduct a search without prior authorization from the commanding officer. When so acting, such officer is limited by all the requirements set forth above. (S)he must determine that the person or property to be searched falls within one of the categories set forth, that his / her information is reliable to the extent permitted by the circumstances, and that probable cause, if required, is present. (S)he shall inform the command duty officer of all the facts and circumstances surrounding his / her actions at the earliest practicable time.

7. Instructions

a. If circumstances permit, place the person requesting the authorization to search under oath or affirmation prior to giving such authorization. This oath or affirmation should be substantially in accordance with the one suggested in JAGMAN, app. A-1-n(2), para. 2.

b. Any person authorizing a search pursuant to this instruction may do so orally or in writing but, in every case, the order shall be ***specific*** as to who is to conduct the search, what person(s) or property are to be searched, and what item(s) or information are expected to be found on such person(s) or property. At the time the search is ordered, or as soon thereafter as practicable, the individual authorizing the search will set forth the time of authorization, the particular persons or property to be searched, the identity of the persons authorized to conduct the search, the items or information which was expected to be found, a ***complete*** discussion of the facts and information (s)he considered in determining whether or not to order the search, and what effort, if any, was made to confirm or corroborate these facts and information. This report will be forwarded to the commanding officer and will be supplemented at the earliest practicable time by a written report, setting forth any items seized as a result of the search, together with complete details, including location of their seizure and location of their stowage after seizure.

c. Where possible, searches authorized by this instruction will be conducted by at least two persons not personally interested in the case, at least one of whom will be a commissioned officer, noncommissioned officer, or petty officer.

d. Once a search is properly ordered pursuant to this instruction, it is not necessary to obtain the consent of any individual affected by the search; however, such consent may be requested.

e. Frequently, it will appear desirable to interrogate suspects in connection with an apparent offense. It is essential that the function of interrogation be kept strictly separate and apart from the function of conducting a search pursuant to this instruction. This instruction does not purport to establish any regulations or guidelines for the conduct of an interrogation.

f. Personnel conducting a search properly authorized by this instruction will search only those persons or spaces ordered. If, in the course of the search, they encounter facts or circumstances which make it seem desirable to extend the scope of the search beyond their original authority, they shall immediately inform the person authorizing the search of such facts or circumstances and await further instructions.

g. Personnel conducting a search properly authorized by this instruction will seize ***all*** unlawful items which come to their notice in the course of the search, even if their existence was not known or anticipated before the search began. These unlawful items fall within the following categories:

(1) Unlawful weapons (i.e., any weapon the mere possession of which is prohibited by law or lawful regulation);

(2) contraband (i.e., any property the mere possession of which is prohibited by law or lawful regulation);

(3) any evidence of a crime (e.g., the fruits or products of any offense under the Uniform Code of Military Justice, or instrumentalities by means of which any such offense was committed); and

(4) any object or instrumentality which might be used to resist apprehension or to escape.

h. Any property seized as a result of a search shall be securely tagged or marked with the following information:

(1) Date and time of the search;

(2) identification of the person or property being searched;

(3) location of the seized article when discovered;

(4) name of person ordering the search; and

(5) signature(s) of the person(s) conducting the search.

i. No person conducting a search shall tamper with any items seized in any way, but shall ***personally*** deliver such items to the senior member of the search team. In the event that size or other considerations preclude the movement of any seized items, one of the persons conducting the search shall personally stand guard over them until notification is made to the person authorizing the search and receipt of further instructions.

j. No person acting to authorize a search under the provisions of this order shall personally conduct the search. Such persons should also avoid, where possible and practical, being present during its conduct.

k. Any person authorizing a search based upon this instruction should be careful to avoid any action which would involve him / her in the evidence-gathering process of the search.

l. The person conducting a search should, when possible, notify the person whose property is to be searched. Such notice may be before or during the search. Any property seized shall be inventoried then or as soon as practicable. A copy of the inventory shall be given to a person from whose possession or premises the property was taken.

m. Nothing in this instruction shall be construed as limiting or affecting in any way the authority to conduct searches pursuant to a lawful search warrant issued by a court of competent jurisdiction, or pursuant to the freely given consent of one in the possession of property, or incident to the lawful apprehension of an individual. The *JAG Manual* contains suggested forms for recording information pertaining to the authorization for searches and the granting of consent to search. Use these forms whenever practicable.

/s/
COMMANDING OFFICER

APPENDIX G

SUSPECT'S RIGHTS ACKNOWLEDGEMENT / STATEMENT

(*See* JAGMAN 0170)

FULL NAME (ACCUSED/SUSPECT)	SSN	RATE/RANK	SERVICE (BRANCH)
John P. Williams	**434-52-9113**	**RMSN**	**USN**
ACTIVITY/UNIT			DATE OF BIRTH
USS BENSON (DD 895)			**22 May 19xx**
NAME (INTERVIEWER)	SSN	RATE/RANK	SERVICE (BRANCH)
D. S. Willis	**000-00-0000**	**ENS**	**USNR**
ORGANIZATION		BILLET	
USS BENSON (DD 895)		**PIO**	
LOCATION OF INTERVIEW		TIME	DATE
USS BENSON (DD 895)		**1000**	**19 Jun 19cy**

RIGHTS

I certify and acknowledge by my signature and initials set forth below that, before the interviewer requested a statement from me, he warned me that:

(1) I am suspected of having committed the following offense(s): **Unlawfully carrying a concealed weapon, to wit: a switch blade knife** ..... ***JPW***

(2) I have the right to remain silent; ..... ***JPW***

(3) Any statement I do make may be used as evidence against me in trial by court-martial; ..... ***JPW***

(4) 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; and ..... ***JPW***

(5) I have the right to have such retained civilian lawyer and / or appointed military lawyer present during this interview. ..... ***JPW***

WAIVER OF RIGHTS

I further certify and acknowledge that I have read the above statement of my rights and fully understand them, and that, ... *JPW*

(1) I expressly desire to waive my right to remain silent; ..... *JPW*

(2) I expressly desire to make a statement; ..... *JPW*

(3) 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; ..... *JPW*

(4) I expressly do not desire to have such a lawyer present with me during this interview; and ..... *JPW*

(5) 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. ..... *JPW*

SIGNATURE (ACCUSED / SUSPECT	TIME	DATE
/s/ *John P. Williams*	1015	19 Jun cy
SIGNATURE (INTERVIEWER)	TIME	DATE
/s/ *David S. Willis*	1015	19 Jun cy
SIGNATURE (WITNESS)	TIME	DATE

CHAPTER THIRTY

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CHAPTER THIRTY

RECURRING TRIAL ISSUES

CHILD ABUSE CASES

3001 INTRODUCTION TO CHILD ABUSE CASES

Our military justice system is not geared to accommodate court proceedings involving child victims. Children are not little "big people." They are unique in their response to trauma, fright, guilt, shame, and the accompanying range of emotions. These cases present challenging issues for the judge advocate (JA). Can the child be protected without compromising the rights of the alleged perpetrator? Is a child witness credible? Competent? Should a child victim's hearsay statement be admitted under the residual hearsay exception. Effective prosecution and defense of child sexual abuse cases requires specialized knowledge and training. This unique area requires an understanding of medicine, psychology, investigatory techniques, and a firm grasp of the rules of evidence. A multidisciplinary approach to these cases is a must. Education and training are prerequisites to proper sensitization and resolution of these complex issues. This section highlights some of the recent decisions and legislation which will affect practitioners.

3002 COMPETENCE OF THE CHILD WITNESS TO TESTIFY

See NJS *Evidentiary Foundations* for guidance on laying a proper foundation. *United States v. Morgan*, 31 M.J. 43 (C.M.A. 1990) (nonverbal responses by a 4-year-old witness to TC's traditional truthfulness inquiry established that the witness knew the difference between truth and falsehood and intended to tell the truth). Ensure the court reporter reflects the gestures in the record.

3003 CONFRONTATION

A. At the article 32 investigation. In *United States v. Bramel*, 29 M. J. 958 (A.C.M.R.), *aff'd*, 32 M.J. 3 (C.M.A. 1990), the child victim testified behind a partition at the article 32 investigation, unaware that the accused was present. The accused could hear but not see the victim; DC cross-examined. The child testified at the

court-martial without the partition. The court held the right to face-to-face confrontation is a ***trial*** right; Article 32(b), UCMJ, only provides for the right of cross-examination, not confrontation. The article 32 investigation is not a critical stage of the trial; rather, its primary function is for discovery and to provide an impartial recommendation.

B. At trial

1. Supreme Court. In *Maryland v. Craig*, 110 S. Ct. 3157 (1990), a child victim testified by one-way closed-circuit television with DC and prosecutor present. The testimony was seen in the courtroom by the accused, jury, judge, and other counsel. The Supreme Court concluded "that a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court." *Id.* at 3167. The Court opined that face-to-face confrontation with an available witness was required unless the state can make a case-specific showing of necessity because the child will suffer emotional distress if forced to testify in the presence of the accused, and the witness' ability to communicate will be impaired. If the specific showing is made, then the accused's sixth amendment confrontation rights are protected by cross-examination under oath observed by judge, jury, and the accused.

2. Court of Military Appeals. *United States v. Thompson*, 31 M.J. 168 (C.M.A. 1990) (accused's due process rights were not violated when the two sons he was accused of abusing testified in the courtroom with their backs to the accused father). Per *Thompson*, the military judge must establish by a specific inquiry and case specific findings that ***literal confrontation*** will cause such emotional trauma that the child cannot reasonably communicate information to the trier of fact. Judge Everett, in a concurring opinion, emphasized that the procedure used in this ***judge alone*** case created no adverse inference to the presumption of innocence and was so stated on the record. In a footnote, Judge Everett warned that, in a members trial, it will be important for an MJ to consider the risk that the members may infer guilt because of the location of the child witness during their testimony. The MJ should be careful to preclude such an inference by giving appropriate instructions. *United States v. Batten*, 31 M.J. 205 (C.M.A. 1990) (conviction upheld where victim, age 3, was separated from accused by a partition; accused observed testimony by video camera); *United States v. Romey*, 32 M.J. 180 (C.M.A. 1991) (confrontation requirement satisfied where child victim whispered testimony to her mother who then repeated it to the court under oath as an interpreter).

3004 UNAVAILABLE CHILDREN

In many child abuse cases, a child makes a statement or testifies at a pretrial hearing but is unavailable at trial, thereby presenting the question of whether the child is "unavailable" under the confrontation clause of the sixth amendment. C.M.A. has opined that the sixth amendment requirement "for establishing 'unavailability' may be even more stringent than that imposed by M.R.E. 804." *United States v. Burns*, 27 M.J. 92, 96 (C.M.A. 1988) (no attempt to personally deliver a subpoena to the critical, but incredible, victim). Per R.C.M. 703, formal service is "advisable" when the witness' voluntary attendance is unlikely. "A military judge is hardly bound to accept a mother's unprofessional, lay opinion that requiring a child to testify at trial would so traumatize the child as to outweigh an accused's right to confrontation under the Sixth Amendment." *United States v. Ferdinand*, 29 M.J. 164, 168 (C.M.A. 1989), *cert. denied*, 110 S.Ct. 840 (1990). Consider Articles 47 and 48, UCMJ, enforcement and contempt proceedings, and do not presume efforts would be futile merely because a witness threatens to disobey a subpoena. The government's diligence in attempting to secure the witness' presence goes a long way toward a showing of unavailability. *United States v. Evans*, 31 M.J. 927 (A.C.M.R. 1990) (civilian witness living in the United States, court-martial in Germany; witness not subject to subpoena; the SJA representative in Germany spoke with witness who said he would decline invitational travel orders (ITO) even if expenses paid; witness told wife the same; and witness refused to accept ITO from SJA representative in the United States). In *White v. Illinois*, 112 S. Ct. 736 (1992), the Court ruled that a 4 year-old victim of sexual abuse did not have to be declared to be "unavailable" for out-of-court statements to be admitted as hearsay exceptions without violating the confrontation clause. The Court held that the confrontation clause did not require either the prosecutor to produce the declarant at trial or for the trial court to declare the declarant unavailable prior to admission of testimony under the spontaneous declaration and medical examination exceptions to the hearsay rule.

3005 INDICIA OF RELIABILITY

Even if a child witness is deemed unavailable, the out-of-court statement is inadmissible unless there are sufficient "indicia of reliability."

A. Supreme Court. In *Idaho v. Wright*, 110 S. Ct. 3139 (1990), a statement by a 2 1/2 year-old girl to a pediatrician was admitted under the residual hearsay exception. While the unavailability of the witness was not at issue, the Court held her out-of-court statement lacked sufficient indicia of reliability. The Court articulated factors to consider in determining whether a hearsay statement made by a child witness in a child sexual abuse case has sufficient indicia of reliability to satisfy the confrontation clause: spontaneity and consistent repetition; mental state of the declarant; use of terminology unexpected of a child of similar age; and lack of

motive to fabricate. The Court rejected boot-strapping by using corroborating factors like physical evidence, consistency among witnesses' statements, and consistency with the accused's confession. Look at the factors which relate to whether the witness was likely to be telling the truth at the time the statement was made (i.e., the totality of the circumstances surrounding the making of the statement).

B. Military precedent. *United States v. Moreno*, 31 M.J. 935 (A.C.M.R. 1990). Child victim made an accusatory videotaped statement to a social worker and a statement recanting the accusations at a deposition. Defense was present, but did not cross-examine the child at the deposition. The Army Court of Military Review stated that *Wright* was controlling. The court further held that the accused waived his right to confrontation at the deposition and the statements were sufficiently reliable to be admissible.

3006 INCREDIBLE CHILD WITNESS

United States v. Smith, 31 M.J. 823, 825 (A.C.M.R. 1990) ("In view of evidence of coaching, the history of physical abuse by the mother, the absence of any corroboration as to the cause of the fracture, the testimony of an orthopedic expert that the fracture could have been caused by a fall, and the unreliability of the victim's memory of the alleged assault, we find the evidence insufficient to support the finding of guilty").

3007 HEARSAY RULE AND THE MEDICAL TREATMENT EXCEPTION

United States v. Edens, 31 M.J. 267 (C.M.A. 1990) (proponent of statements under Mil.R.Evid. 803(4), must show the statements were offered for diagnosis or treatment and the patient realized the benefit); *United States v. Avila*, 27 M.J. 62 (C.M.A. 1988) (though very young children will not have the same understanding or incentive as adults when making statements to health care providers, the child must know that the person is rendering care and needs the information to help for the statements to be admissible).

3008 UNCHARGED MISCONDUCT

Evidence of uncharged misconduct is admissible in child sexual abuse cases, but seemingly not to the same extent as would be permitted under Mil.R.Evid. 404(b) in other cases. In *United States v. Munoz*, 32 M.J. 359 (C.M.A. 1991), C.M.A. opined that this evidence is admissible to prove modus operandi when the accused acknowledges the acts occurred, but not by him. Similarly, uncharged misconduct would be admissible to show intent or rebut mistake of fact when the accused

acknowledges acts occurred, but relies on such a theory of defense. *United States v. Orsburn*, 31 M.J. 182 (C.M.A. 1990) (explicit books dealing with sex with children were admissible when found in accused's home in proximity to alleged sexual offenses committed by accused with his daughter, and offered to show that the accused had the requisite sexual desire relevant to the LIO's of indecent assault and indecent acts on a child). When the accused flatly denies anything occurred, the evidence simply shows the accused acted in conformity with an earlier occasion and is inadmissible under Mil.R.Evid. 404. The TC in *Munoz* won the motion in limine regarding introduction of uncharged misconduct, but exceeded the scope of that victory. Interestingly, the court there upheld the introduction of uncharged misconduct which occurred 15 ***years*** earlier, reasoning that the similarity was demonstrated by the age of the victims, not the time elapsed.

3009 EXPERT TESTIMONY

An expert may testify to help the trier of fact understand the evidence to determine a fact in issue. Qualified experts may also identify symptoms found among children who have suffered sexual abuse and state whether the child-victim has exhibited these symptoms. Further, an expert may discuss various patterns of consistency in the stories of child sexual abuse victims and evaluate patterns in the victim's story. *United States v. Holt*, 31 M.J. 758 (A.C.M.R. 1990) (upheld admissibility of board-certified pediatrician's opinion that the victim had been sodomized and social worker's opinion that the victim demonstrated damaged goods syndrome). The expert may not, however, invade the province of the fact-finders to weigh the evidence and determine credibility (i.e., put the expert's stamp of truthfulness on the witness's story). *United States v. Harrison*, 31 M.J. 330 (C.M.A. 1990) (conviction overturned where clinical psychologist testified that the accused's stepdaughter was a credible and reliable witness and that she had been sexually abused). *See also* the article written by Professor John E.B. Meyers, Asst. Professor of Law, Univ. of Pacific, McGeorge School of Law in *Off the Record*, Number 116.

3010 AGGRAVATION

United States v. Button, 31 M.J. 897 (A.F.C.M.R. 1990) (accused's continual flouting of his commander's order not to go to his family's on-base quarters where alleged victim of sexual abuse resided was proper evidence in aggravation under R.C.M. 1001(b)(4)).

3011 VICTIMS OF CHILD ABUSE ACT OF 1990

Legislative developments in the area of child abuse recently culminated in the enactment of the "Child Victims' Rights Act." The Act, passed as part of Title II of the 1990 Omnibus Crime Control Act, Pub. L. No. 101-647, reflects growing national awareness of and concern about child abuse. The Act contains sweeping changes to the federal criminal code provisions dealing with offenses against children, including a liberalization of the rules regarding the use of videotaped testimony, tightening of reporting requirements onboard federal lands and facilities, and increased penalties provisions. While many of the provisions deal with the particulars of prosecuting federal offenses, a number of the provisions directly affect the way the Navy conducts business onboard its installations.

A. Of particular interest are the child abuse reporting provisions. Under the Act, health care providers, social workers, teachers, law enforcement personnel, day care providers, and commercial film processors engaged in their official duties on federal land or a federally owned (or contracted) facility are required to report immediately all incidents of suspected child abuse to a special agency to be designated by the Attorney General. To promote compliance with this provision, the Act provides immunity for good-faith reporting and a criminal penalty for failure to report. The statute also mandates periodic training for covered individuals to promote awareness of the reporting requirement and to identify abused and neglected children. Additionally, background checks prior to hiring individuals involved with the provision of child care services in a federally operated facility are required. (This includes facilities operated under contract.)

B. The Act highlights legislative efforts to protect children. Specific provisions include the taking of child victims' testimony by two-way, closed-circuit television; the expanded statute of limitations for the prosecution of offenses against children; and the new provisions for increased penalties for crimes involving sexual abuse, kidnapping, and the distribution of material involving children engaged in sexually explicit conduct. The Act will doubtless shape the development of military jurisprudence in this area.

FRATERNIZATION

3012 FRATERNIZATION REFERENCES

A. Article 1165, *U.S. Navy Regulations, 1990*

B. Article 1165, *U.S. Navy Regulations, 1993* (*See* ALNAV 13193, 25 January 93)

C. Part IV, para. 83, MCM, 1984

D. OPNAVINST 5370.2, Subj: NAVY FRATERNIZATION POLICY

E. *Marine Corps Manual*, para. 1100.4

3013 INTRODUCTION

Fraternization is a viable offense under the Uniform Code of Military Justice. There are an increasing number of fraternization cases arising throughout the fleet. These violations have been charged as offenses under articles 92 (when an order exists), 133, and 134. Rules against fraternization exist because this conduct compromises the chain of command, undermines a leader's integrity and, at the very least, creates an appearance of partiality and favoritism. Whether charged as a violation of article 92 or article 134, the maximum punishment is two years' confinement, total forfeitures, and a dishonorable discharge (DD) / dismissal.

3014 DESCRIPTION

Because fraternization has traditionally been a breach of custom, it is more describable than definable. Frequently, it is not the acts alone which are wrongful per se, but rather the circumstances under which they are performed.

A. *U.S. Navy Regulations, 1993.* Article 1165 focuses upon the individual parties in order to determine what is prohibited fraternization.

1. Between officer and enlisted members - Prohibited fraternization is a personal relationship which is unduly familiar and does not respect the differences in grade or rank.

2. Between officer and enlisted members - Prohibited fraternization is a personal relationship which is unduly familiar, does not respect the differences in grade or rank, and is prejudicial to good order and discipline or service-discrediting.

B. CNO policy. OPNAVINST 5370.2 defines fraternization as: "Personal relationships which contravene the customary bounds of acceptable senior-subordinate relationships. Although it has most commonly been applied to officer-enlisted relationships, fraternization also includes improper relationships between officer members and between enlisted personnel."

C. Marine Corps policy

1. Paragraph 1100.4 of the *Marine Corps Manual* provides as follows:

> Relations Between Officers and Enlisted Marines. Duty relationships and social and business contacts among Marines of different grades will be consistent with traditional standards of good order and discipline and the mutual respect that has always existed between Marines of senior grade and those of lesser grade. Situations that invite or give the appearance of familiarity or undue informality among Marines of different grades will be avoided or, if found to exist, corrected. . . . [These provisions] apply generally to the relationships of noncommissioned officers with their subordinates and apply specifically to noncommissioned officers who may be exercising command authority.

D. *Manual for Courts-Martial*. Part IV, para. 83(c), emphasizes that this offense is rooted in military custom. Accordingly, the *Manual* states that whether conduct amounts to an offense rests upon the surrounding circumstances. The explanation states:

> [t]he acts and circumstances must be such as to lead a reasonable person experienced in the problems of military leadership to conclude that the good order and discipline of the armed forces has been prejudiced by their tendency to compromise the respect of enlisted persons for the professionalism, integrity, and obligations of an officer.

E. Judicial attempts

1. In *Free* at 470 [full citations appear at the end of this section] the Navy Board first enunciated the difficulty in defining fraternization:

> Because of the many situations which might arise, it would be a practical impossibility to lay down a measuring rod of particularities to determine in advance what acts are prejudicial to good order and discipline and what are not. [T]he surrounding circumstances have more to do with making the act prejudicial than the act itself in many cases. [E]ach case must be determined on its own merits. Where it is shown that the acts and circumstances are such as to lead a reasonably prudent person experienced in

> the problems of military leadership to conclude that the good order and discipline of the armed forces has been prejudiced by the compromising of an enlisted person's respect for the integrity and gentlemanly obligations of an officer, there has been an offense under Article 134.

2. *Baker* describes fraternization as "untoward association that demeans the officer, detracts from the respect and regard for authority in the military relationship between officers and enlisted and seriously compromises the officer's standing as such." *Baker* cites with approval *Tedder* and the *Marine Corps Manual*, para. 1100.4, explanations of fraternization.

3. *Van Steenwyk* contains an excellent historical analysis of the concept of fraternization. In discussing whether an officer's sharing of marijuana with enlisted personnel and having sexual relations with female members of his staff constituted wrongful fraternization, the Navy court says in footnote 12: "Fraternization . . . in civilian usage means associating in a brotherly manner; being on friendly terms. The military usage of the term is very similar. [F]raternization refers to a military superior-subordinate relationship in which mutual respect of grade is ignored."

4. In *Mayfield*, the C.M.A. defined fraternization as "any nonprofessional, social relationship of a personal nature between two or more persons." Included in this definition are relationships between permanent personnel and trainees, NCO's (E-5 and above) and junior enlisted personnel, or officer and enlisted personnel of all grades. Suggestive, but not exhaustive, of the types of conduct addressed by the term fraternization are drinking alcoholic beverages together, playing cards or gambling together, going to private homes or clubs together, and dating or engaging in sexual activities.

F. Defining by example. Therefore, it is not every interaction between officers and enlisted that is wrongful. *Tedder* (officer having a drink with enlisted woman not fraternization); *Johanns; Wales; Arthen; Cottrell* (private, nondeviate, voluntary sexual relations between Air Force officer and enlisted member not fraternization where there is no command or supervisory relationship and no discernible custom against fraternization); *Moultak* (officer-enlisted sexual relations and financial dealings are conduct unbecoming an officer under article 133); *Mayfield* (asking enlisted woman on a date and fondling an enlisted woman is fraternization); *Parrillo* (supervisor who fraternizes sexually with someone under his command violates article 133). The key issue is whether the interaction or relationship has become "over-familiar" or created the ***appearance*** of favoritism or partiality.

3015 THEORIES OF PROSECUTION

There are a series of ways to prosecute a fraternization offense. However, because the newer regulations have been untested, it is not clear which approach is the most appropriate.

A. Violation of article 92(1). Now that Article 1165, *U.S. Navy Regulations*, prohibits fraternization, fraternization offenses could be prosecuted under article 92. Article 1165, *U.S. Navy Regulations, 1990*, was clearly a punitive article. The article specifically stated that violations of this rule "may result in administrative or punitive action." The 1993 changes to article 1165 eliminate this clear language. Instead, the only indication that the regulation carries, which makes it appear to be punitive, is the use of the words "Fraternization Prohibited." As such, it is less likely that the new regulation will be seen as a punitive regulation.

B. Violation of article 92(2). The conduct may be violative of a local order or regulation. Additionally, since fraternization has a detrimental effect on morale and discipline, the participants may be subject to a lawful written or verbal order to cease and desist. *Carter* (enlisted–enlisted fraternization in the chain of command violated the ship's order); *Calloway* (officer–officer fraternization in the chain of command is an offense). Failure to terminate a relationship after such an order may also subject one to a willful disobedience violation under Articles 90 or 91, UCMJ.

C. Violation of article 133. In some circumstances, the conduct may rise to the level of being unbecoming an officer and gentlemen, and thus be charged as a violation of article 133. *See* Part IV, para. 59, MCM, 1984. *See also Graham; Parini; Baker; Johanns; Shober.*

D. Violation of article 134. Fraternization is now a listed offense under article 134. The fraternization provision can be found at Part IV, para. 83, MCM, 1984. Although this provision is generally used when there is no other means upon which to charge an offense, it may be wise to additionally charge all fraternization offenses as violations of Article 134.

E. Violations of the UCMJ due to the underlying offense. A fraternization allegation usually is evidenced by some underlying conduct. This conduct generally is criminal in nature (i.e., adultery, sodomy, drug abuse). As such, it will become possible to charge this underlying conduct separately.

3016 ELEMENTS UNDER ARTICLE 134, UCMJ

Part IV, para. 83b, MCM, 1984, lists five elements under fraternization: (1) The accused was a commissioned or warrant officer; (2) the accused fraternized on terms of military equality with one or more enlisted members in a certain manner; (3) the accused then knew the person to be an enlisted member; (4) such fraternization violated the custom of the ***accused's*** service that officers shall not fraternize with enlisted members on terms of military equality; and (5) under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

A. Officer and enlisted offenders. Historically, the prohibition against fraternization applied only to relations between officers and enlisted and was based on social distinctions. *Stocken*. While not specifically provided for in paragraph 83, the analysis of that paragraph indicates that this article 134 offense does not preempt the creation of an order or a novel 134 specification to punish the enlisted participant. *Carter; March*. Warrant officers (WO-1) are included as accused despite the fact that, elsewhere in the UCMJ, they are treated as enlisted members. Part IV, para. 15a, MCM, 1984. A midshipman might best be charged under article 133 since this first element seems to exclude them. Part IV, para. 59c(1), MCM, 1984.

B. Fraternized on terms of military equality

1. This element suggests that not every meeting between officers and enlisted is wrongful. *Tedder; Smith; Johanns*. However, this article does ***not*** require that a command or supervisory relationship exist between the officer and enlisted person. The Navy court, in *Van Steenwyk*, said that the damage done by fraternization does not depend on the chain of command, but on the compromise of position: "today's lovers of different commands are tomorrow's senior and subordinate."

2. The conduct prohibited need not be sexual in nature, although it often is. *Livingston* (drinking liquor with enlisted men and sodomy); *Lovejoy* (sodomy); *Hoard* (socializing, drinking, and sexual intercourse); *Nelson* (soliciting a male soldier to arrange social engagements with enlisted women); *Adames* (attending private enlisted party); *Mayfield* (asking enlisted woman for dates); *Van Steenwyk* (using marijuana with enlisted personnel).

C. Knowledge. It would appear to be a general defense that the accused honestly did not know the person's enlisted status. The government must show ***actual*** knowledge beyond a reasonable doubt.

D. Custom of the accused's service

1. The existence of a custom proscribing the alleged conduct also provides the notice of criminal sanction required by due process. *Johanns; Moultak; Van Steenwyk; Wales; Arthen; Cottrell.* Recent N.M.C.M.R. cases have uniformly held that any reasonable officer of even minimal intelligence is deemed to be on notice that officers cannot associate with enlisted personnel on terms of military equality in the naval service. In *Van Steenwyk*, N.M.C.M.R. described a "judicially recognizable custom" against sexual relations with enlisted personnel.

2. The prosecution, however, must ***prove*** the existence of a service custom which makes the alleged conduct wrongful. *Fox.* "Custom" is defined at Part IV, para. 60c(2)(b), MCM, 1984. It is the existence of a custom that makes certain conduct between officers and enlisted wrongful. Absent the existence of the servicewide custom, the conduct is not unlawful. *Wilson; Means; Johanns; Wales; Arthen; Cottrell.* The government may rely on written documents such as the *Marine Corps Manual*, para. 1100.4; NAVMC 2767 of 12 March 1984 *User's Guide to Marine Corps Leadership Training*; OPNAVINST 5370.2; or *U.S. Navy Regulations, 1993* (article 1165) to prove a custom. Where there is no written policy available, custom may be proven through testimony. *Free* (officer with 31 years of service testified as to the custom against officer-enlisted sexual relations). The courts, however, have repeatedly warned that customs should be reduced to writing or they may be unable to discern the custom and may not uphold alleged violations. *Pitasi* at 38. "A custom which has not been adopted by existing statute or regulation ceases to exist when its observance has been long abandoned." *Johanns* at 159; *Wales.*

3. The existence of such an order or regulation would eliminate the need to prove custom was violated and allow the offense to be charged under article 92. *Hoard; Carter; Adams* (Army regulation precludes student-instructor fraternization). Such codifications of custom in the form of regulations is also encouraged by the MCM. Part IV, para. 83c(2), MCM, 1984, specifically suggests that officer-enlisted relations may be governed by orders. There would be no preemption issue raised with a fraternization prosecution under article 92. Multiplicity would still have to be considered. *Cantu.* Navy custom is now codified in Article 1165, *U.S. Navy Regulations, 1993* and OPNAVINST 5370.2.

4. In *Lowery*, the Army court opined that the custom against fraternization was created for all of the services on August 1, 1984, when the President signed the Executive order that effectuated the MCM. If this dicta is correct, the prosecution would still have to prove beyond a reasonable doubt that the alleged misconduct violated the custom. *Serino.* In *Clarke*, the Army court reemphasized this theory and stated categorically that there is also such a custom precluding certain relationships between NCO's and ***their*** subordinates. The C.M.A.,

however, has refused to adopt the Army court's interpretation of paragraph 83. *Wales*.

E. Conduct prejudicial or service-discrediting. The harm must be direct and palpable. *Tedder*. There is no conduct known as "simple fraternization" which does not prejudice good order and discipline. *Adames*.

3017 CONSTITUTIONALITY

Since the Supreme Court's decision in *Parker v. Levy* in 1974, constitutional attacks on the Navy's fraternization policy have largely failed. In *Parker*, the Court recognized the military's special need for discipline against which certain personal liberties may pale.

A. Freedom of association. This right is accorded less weight because of the negative impact fraternization has on discipline. The prohibition is "valid and necessary." *Stanton v. Froehlke*.

B. Vagueness. The existence of a long-acknowledged custom and the circumstances surrounding the misconduct make the prohibition against fraternization specific. *Pitasi; Van Steenwyk; Moultak; Parker v. Levy*.

C. Equal protection. Officers have always been held to a higher standard of conduct, so it is reasonable to single them out. *Means; Moultak*. Some regulations governing fraternization apply to instructor-student relationships, even when the instructors are also enlisted. Singling out this group of enlisted personnel has also been held to be reasonable because of their temporary special status as teachers. *Hoard*. The fraternization policy is gender-neutral.

D. Privacy. There is no right to privacy when it compromises discipline. *Adams*. The need for discipline has been called a compelling state interest when weighed against a member's need for sexual privacy. *McFarlin*.

3018 PLEADING

The sample specification for the listed fraternization offense appears at Part IV, para. 83f, MCM, 1984. Where fraternization is alleged under Article 134, UCMJ, and the same conduct is alleged under article 133, the offenses will merge for findings with the conduct unbecoming. *Rodriquez; Jefferson*. Where fraternization and the underlying misconduct—such as adultery or sodomy—are both alleged, the offenses may merge for punishment purposes. *Lovejoy*. Where there is conduct amounting to fraternization which is different from the underlying offense which is

also alleged, the offenses may be separate for sentencing also. *Smith*. Pleading the same conduct as fraternization and violation of a local order or regulation is multiplicious charging. *Cantu*.

SEXUAL HARASSMENT

3019 SEXUAL HARASSMENT REFERENCES

A. Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972

B. The Civil Service Reform Act

C. Equal Employment Opportunity Commission Management Directive 704

D. SECNAVINST 5300.26B, Subj: DEPARTMENT OF THE NAVY POLICY ON SEXUAL HARASSMENT (6 January 1993)

E. OPNAVINST 5300.9, Subj: NAVY POLICY ON SEXUAL HARASSMENT (6 November 1989)

F. MCO 5300.10

G. Article 1166, *U.S. Navy Regulations (1993)*

3020 INTRODUCTION

The Navy requires a professional and productive work environment. The entire organization benefits from effective teamwork and good morale. Since both men and women are part of the Navy team, both genders must be able to work together effectively to ensure maximum productivity and mission accomplishment. Sexual harassment is a type of sex discrimination which interferes with performance and creates an intimidating, hostile, and inefficient work environment. Military and civilian leaders have a duty to take steps to prevent sexual harassment.

A. Defined. Sexual harassment is a form of sex discrimination that involves unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

1. Submission to or rejection of such conduct is made either explicitly or implicitly a term or condition of a person's job, pay, or career;

2. submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting this person; or

3. such conduct interferes with an individual's performance or creates an intimidating, hostile, or offensive environment.

B. Behavior. Sexual harassment refers to inappropriate and unacceptable behavior in the work environment which adversely affects work productivity. Generally, the term includes any behavior with sexual overtones which is intimidating or offensive to the recipient or observer of the behavior. The harassment is usually directed toward a specific person and manifests itself in several observable behaviors. The sexual nature of the conduct may be explicit or implicit. The conduct may be deliberate or repeated. Unlawful conduct may be verbal or physical. Sexual harassment may range from the obvious offensive touching to the more subtle double entendres or the display of sexist cartoons, magazines, or pictures. *Rabidue v. Texas-American Petrochemicals*, 805 F.2d 611 (6th Cir. 1986) (obscene comments and sexist photographs / posters).

3021 COMMAND ACTION

A. Training. OPNAVINST 5300.9 requires initial orientation and periodic training for all Navy personnel on the identification and prevention of sexual harassment. Every member of the command has the responsibility to ensure the work environment is free from sexual harassment.

B. Command response. Civilian and military leaders have full authority and responsibility for setting standards of conduct and performance for their subordinates. On receipt of a sexual harassment complaint, it is incumbent upon the supervisor to examine the matter and take actions necessary to ensure a work environment free from sexual harassment.

3022 ACTION AGAINST MILITARY OFFENDERS

In addition to the service instructions developed to provide guidance and policy, numerous articles of the UCMJ cover the variety of behaviors determined to be sexual harassment.

A. Article 93, UCMJ. An accused may be convicted under article 93 for cruelty, oppression, or maltreatment of a person subject to their orders. The victim need not be under the direct command of the accused or subject to the code. The offense lies if the victim's duties require obedience to the accused's lawful orders. *United States v. Dickey*, 20 C.M.R. 486 (1956). The MCM states that sexual

harassment may constitute this offense, defining that term to include influencing, offering to influence, or threatening the career, pay, or job of another person in exchange for sexual favors and deliberate or repeated offensive comments or gestures of a sexual nature.

B. Article 92, UCMJ. SECNAVINST 5300.26B is a punitive instruction. The instruction makes four types of conduct punishable under the UCMJ. Specifically, the instruction prohibits:

1. Sexual harassment;

2. taking reprisals against someone who provides information on an incident of alleged sexual harassment;

3. knowingly making a false accusation of sexual harassment; and

4. condoning or ignoring sexual harassment, of which you have knowledge or reason to have knowledge, while in a supervisory or command position.

C. Other punitive articles. Conduct which is alleged to constitute sexual harassment will also often make out an underlying offense of the UCMJ (e.g. simple assault). *See* section 3025, below, for other possibilities. The duty of the victim, under SECNAVINST 5300.26A, to complain to the perpetrator is not a condition precedent to prosecution or administrative action.

3023 ACTION AGAINST CIVILIAN OFFENDERS

A special provision of the Civil Rights Act prohibits sex discrimination in employment by the Federal Government and makes the Civil Service Commission (CSC) the agency responsible for ensuring that federal employment is free from discrimination based on sex. Under Title VII, the basis for determining whether the actions constitute discrimination is the effect, impact, or result of the conduct. The actor's intent is irrelevant. Accordingly, a claim that the harassment was entirely unintentional will not prevail as a defense. Behavior can lay the foundation for a sexual harassment charge whether alleged by the victim or a bystander.

A. Civil actions. The rights of federal employees contained in 42 U.S.C. § 2000e–16 are preemptive. The section creates a private right of action against the Federal Government; sovereign immunity is waived. Applicants for employment with military departments are specifically covered.

B. Administrative remedies. Before bringing a civil action, however, the employee must exhaust the available administrative remedies. Under 42 U.S.C. § 2000e–16, the victim must file a complaint with the CSC. The victim may sue after entry of final decision on that complaint or passage of 180 days from the date of filing without entry of final decision.

C. Grounds. Title VII specifically prohibits discrimination in the hiring and firing of individuals or in any other "terms and conditions of employment" based on race, color, religion, national origin, or sex. Federal courts are attempting to establish a clearer standard of what constitutes sexually harassing behavior. Social invitations, flirting, and isolated incidents of rude behavior by co–employees that made the plaintiff "uncomfortable" have been held insufficient to alter a "term, condition or privilege" of employment. A contrary result may lie where the employer's conduct is so egregious as to, in the interest of justice, dictate the imposition of liability. *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983) (sexual harassment demonstrated by extremely vulgar and offensive sexually related epithets by supervisory personnel and co–workers toward sole female air traffic controller in the crew; her superiors reacted to her complaints with further sexual harassment or indifference).

D. Victim consent. An employee's Title VII claim may be adversely affected where it is shown that the employee participated in, or consented to, the sexual conduct occurring in the work environment. Participation or consent establishes a rebuttable presumption that can only be overcome by evidence reflecting that the employee later gave specific notice to the alleged harasser that such conduct was no longer welcome.

3024 LIABILITY FOR SUBORDINATE HARASSMENT

Senior employers are not automatically liable for sexual harassment by junior supervisors or the victim's co–workers. Cases have turned on whether the employer knew or should have known of the harassment and upon the character of the employer's action or inaction in the wake of a complaint. Supervisory indifference in the face of verbal harassment has been the basis of liability. Merely investigating the complaint has been held to be insufficient to avoid liability. Corrective measures, including disciplinary action if appropriate, will be required to indicate the command's willingness to support and enforce a policy of prohibiting sexual harassment and preclude the imposition of liability. In *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), the Supreme Court set out four factors to consider in determining employer liability in cases not involving quid pro quo allegations:

A. Whether the employer had an established and specific policy prohibiting sexual harassment in the workplace;

B. whether the policy was communicated to employees;

C. whether and when the employer learned of the alleged harassment; and

D. if the employer knew of the conduct, whether the employer's response was adequate.

3025 SEXUAL HARASSMENT AND THE UCMJ

If the sexual harasser:		The harasser may be guilty of:
1.	Threatens to influence adversely the career, salary, or job of another in exchange for sexual favors.	Extortion, Art. 127; Assault, Art. 128; Communicating a threat, Art. 134.
2.	Offers rewards for sexual favors and / or gestures.	Bribery and graft, Art. 134.
3.	Makes sexual comments and / or gestures.	Indecent, insulting, or obscene language prejudicial to good order and discipline, Art. 134; Provoking speech or gestures, Art. 117; Disrespect, Arts. 89, 91.
4.	Makes sexual contact.	Assault consummated by a battery, Art. 128; Rape, Art. 120; Indecent assault, Art. 134.
5.	Engages in sexual harassment to the detriment of job performance.	Dereliction of duty, Art. 92.
6.	Is an officer.	Conduct unbecoming an officer, Art. 133.
7.	Is cruel to or maltreats any person subject to his / her orders.	Cruelty and maltreatment, Art. 93.
8.	Uses his / her official position to gain sexual favors or advantage.	Failure to obey a lawful general order, Art. 92.

URINALYSIS CASES

3026 URINALYSIS CHECKLIST

Each urinalysis should be conducted with the understanding that positive samples could result in administrative or disciplinary action. Collection procedures should be designed to avoid problems during administrative and disciplinary proceedings. Certain procedures have proven to be most effective in establishing the source of the urine sample.

A. Unit coordinator. The unit coordinator should:

1. Ask for the member's identification (ID) card.

2. Compare the ID picture with the face of the member.

3. Copy the social security number (SSN) from the ID card onto the urinalysis label and chain of custody.

4. Copy the name and SSN from the card into the urinalysis ledger.

5. Allow the subject to verify the label information and chain of custody form.

6. Place the label on a urine sample bottle and hand bottle to member for production of a sample under supervision of observer.

7. When member returns the sample, ask the member if the bottle contains his / her urine.

8. Again, allow member to verify the information on the label, chain of custody form, and ledger.

9. Have subject initial label.

10. Take sample bottle from bottom to confirm that it is warm.

11. Have member sign ledger.

12. Have observer sign ledger.

13. Have coordinator sign ledger.

14. Place bottle in original cardboard container.

15. After collecting all samples, sign the chain of custody document as releaser, and hand carry / send samples to the appropriate screening laboratory.

B. Observer. The observer should:

1. Walk with member from coordinator's table to the head.

2. Ensure male members use the urinal only. If there are two urinals, side-by-side, only one member should provide a sample at any one time. If there are more than two urinals, no more than two members should give samples at one time and each should use one of the two end urinals. If the member is female, keep the stall door open.

3. Stand and observe the urine actually entering the bottle.

4. Accompany the member back to the coordinator's table.

5. Initial and sign the ledger.

C. Problems. Problems arise when:

1. One person tries to observe multiple members at one time.

2. The observer is unprepared.

3. The observer fails to initial the ledger.

4. The observer fails to sign the ledger, or no ledger is maintained.

5. The member is absent when the label is finally attached to the bottle.

6. The observer does not accompany the member from the unit coordinator's table to the head and back.

7. The same exact procedures are not used on every member.

8. Only the last four digits of the SSN are printed on the label.

9. Unit coordinators or observers perform those duties within 90 days preceding their detachment, not mindful that if a case goes to trial they must be brought back at command expense.

10. Unit coordinator is unfamiliar with the provisions of OPNAVINST 5350.4B.

11. Unit coordinator performs those duties for a test to which the unit coordinator contributes a sample.

3027 RECENT URINALYSIS CASES

A. Adherence to regulations. *United States v. Konieczka*, 31 M.J. 289 (C.M.A. 1990) (Installation alcohol and drug control officer forwarded accused's urine sample for further testing even though the prescreen tests were negative because he suspected that the sample would test positive, not for quality control purposes. Such conduct was not authorized by service regulations and subjected accused to an unlawful inspection.); *United States v. Strozier*, 31 M.J. 283 (C.M.A. 1990) (gross deviations and gross discrepancies from urinalysis regulation may warrant exclusion of positive test results). *But see United States v. Pollard*, 27 M.J. 376 (C.M.A. 1989) (deviation from urinalysis regulation did not make sample inadmissible).

B. Negating probable cause. *United States v. Poole*, 30 M.J. 271 (C.M.A. 1990). Probable cause to order a urinalysis for marijuana metabolite was undercut and then destroyed by two negative field tests of the accused's urine. Results of a third test, this time done by a laboratory, were inadmissible because there was no longer probable cause to justify seizing the urine. Servicemember has a "Fourth Amendment interest in not being required to report repeatedly for compulsory urinalysis based on the same purported probable cause." Subordinate's knowledge of negative field test results can be imputed to the commander ordering the urine test.

C. Retesting policy. *United States v. Bickel*, 30 M.J. 277 (C.M.A. 1990) Commander's published policy requiring all soldiers whose urinalysis results indicated drug use to submit a second urine sample during the next scheduled urine inspection was proper. The results of the second urinalysis could be used to prosecute the accused even though there was no probable cause to order the second test. The second test was a continuation of the first "inspection" and was designed to determine if the initial "defect" had been corrected. Selection of the accused was rational and done pursuant to a clear, generally stated, published policy.

D. Criteria for testing. *United States v. Daskam*, 31 M.J. 77 (C.M.A. 1990) Order requiring everyone returning from an unauthorized absence (UA) to submit a urine sample for testing did not apply to chief petty officer who reported an hour or two late for work. Regulation was not intended to encompass accused because he neither "surrendered" nor was "apprehended" as UA and was never beyond military control. Court did ***not*** rule on the validity of the order as applied to those truly UAs who later returned to military control. Problems may also exist if a valid regulation is inconsistently applied.

E. Consent. *United States v. McClain*, 31 M.J. 130 (C.M.A. 1990) (*Simmons* overruled. Consent for urinalysis must be voluntary based on totality of the circumstances. If consent is not voluntary, test results are not admissible merely because there was probable cause to order the urinalysis. If involuntary consent is given to commander with the power to order urinalysis or to official with an actual search authorization, the urinalysis results may still be admissible.); *United States v. White*, 27 M.J. 264 (C.M.A. 1988) (when commander told accused he would direct a command urinalysis if the accused did not consent, the result was mere acquiescence); *United States v. Cook*, 27 M.J. 858 (A.F.C.M.R. 1989) (urine test following disorderly conduct at a rock concert; consent not voluntary: failure to advise an accused of the critical difference between a consent and a command-directed urinalysis, once the subject is raised, converts what purports to be consent into mere acquiescence); *United States v. Peoples*, 28 M.J. 686 (A.F.C.M.R. 1989) (accused was late for work and demeanor suggested drug use; consent not voluntary; commander failed to explain to accused that a consent or probable cause urinalysis may be used as evidence while a command-directed urinalysis may not); *United States v. Whipple*, 28 M.J. 314 (C.M.A. 1989) (aviator has an auto accident, commander orders flight physical and requests urine sample, Navy doctor also requests sample; consent held voluntary where accused never asked what his options were and his commander never intimated that he could order him to give a sample).

F. Judicial notice under Mil.R.Evid. 201. *United States v. Murphy*, 23 M.J. 310 (C.M.A. 1987); *United States v. Hunt*, 35 M.J. 345 (C.M.A. 1991) (if scientific evidence is used to meet government's burden of proof, government must provide a rational basis for understanding the evidence).

G. Reservist jurisdiction. *United States v. Chodara*, 29 M.J. 943 (A.C.M.R. 1990) (urine sample testing positive for presence of cocaine less than 36 hours after reservist had entered active duty is sufficient to establish jurisdiction).

H. Cocaine BZE and EME metabolites. *United States v. Thompson*, 34 M.J. 287 (C.M.A. 1992); *United States v. Mack*, 33 M.J. 251 (C.M.A. 1991).

UNAUTHORIZED ABSENCES / DESERTIONS

3028 NAVY UNAUTHORIZED ABSENCE

A. Policy. The policies and procedures regarding UAs and desertion of enlisted members are found in MILPERSMAN, arts. 3020220, 3430100, 3430150, 3430200, 3430250, 3430300, 3430350, 3640450. Consult these sections for further amplification of the checklist given below.

B. Procedures. The procedures for completing the service record entries can be found in the MILPERSMAN sections above and PAYPERSMAN sections 10381, 90419, and 90435.

C. Checklist

1. When a member is reported UA, immediately prepare a page 13 to document inception of UA.

2. When a member has been UA over 24 hours, ensure that the NAVPERS 601-6R is prepared. This will stop the servicemember's pay.

3. If member is absent less than 24 hours, prepare a page 13 to document the termination of absence.

4. If the member is gone 10 days, prepare a letter to the next of kin (NOK) notifying them of the member's absence; his / her personal effects should be collected, inventoried, and placed in safekeeping; prepare NAVCOMPT 3060.

5. Upon return of a member gone less than 30 days, complete the NAVPERS 601-6R and decide what type, if any, disciplinary action will be taken.

6. If the member is gone 30 days, he / she is declared a deserter. This may be done earlier if there is an indication the member has no intention to return. The following documents should be prepared and actions taken:

a. Deserter message;

b. DD Form 553 (Absentee Wanted by the Armed Forces);

c. charge sheet DD Form 458 (charge violation of Article 85, UCMJ; prefer and receive charges only; do not refer);

d. any evidence of desertion should be gathered (such as witness statements, pending incident complaint reports, restriction orders, any relevant message traffic, and any documentation of other pending disciplinary action); and

e. obtain health, dental, and pay records.

7. If member is gone 180 days, send the following to BUPERS:

a. Service record (including the page 601-6R, original charge sheet, and restriction orders);

b. health record;

c. dental record; and

d. pay record.

8. After 180 days, send the personal effects to Naval Supply Center, Oakland, CA, or Supply Annex, Williamsburg, VA.

9. A deserter file should be retained by the command. It should include the following:

a. Certified copy of the charge sheet;

b. certified copy of the restriction order;

c. right side of the service record (SRB);

d. copy of page 601-6R;

e. performance evaluations;

f. last leave and earning statement (LES);

g. copy of DD 553;

h. copy of deserter message; and

i. any other relevant messages.

10. Upon return of a member from UA, prepare page 13 documenting return.

11. Upon return of a member from UA over 24 hours, but less than 10 days, complete page 601-6R—sending fourth copy to disbursing. This starts member's pay.

12. Upon return of a member from UA over 10 days, but less than 30 days, complete page 601-6R; prepare letter to NOK notifying them of member's return.

13. Upon return of a member from UA over 30 days, complete page 601-6R; prepare letter to NOK notifying them of member's return; and prepare return deserter message if not done by an intermediate command.

3029 MARINE CORPS

A. References

1. MCO P5800.8, *Marine Corps Manual for Legal Administration* (LEGADMINMAN), Chapter 5

2. MCO P1080.35 (PRIM)

3. MCO P4050.38, *Marine Corps Personal Effects and Baggage Manual*

4. MCO P1070.12, *Marine Corps Individual Records and Administration Manual* (IRAM)

5. MCO P5512.11, Uniformed Service Identification and Privilege Card, DD Form 1173

6. MCO P11000.17, *Real Property Facilities Manual*, Vol. X

B. Checklist

1. UA entry (in excess of 24 hours) run on unit diary.

2. Page 12 SRB "to UA" entry made (IRAM 4015).

3. Inventory of government and personal property of absentee accomplished within 24 hours.

4. After 48th hour of absence, the CO telephoned NOK (if not in CONUS, only if dependents reside locally).

5. Prior to 10th day of UA, letter mailed to NOK and copy filed on document side of SRB (fig. 5-1, LEGADMINMAN).

6. Prepare charge sheet ***through*** block IV prior to 31st day of absence for violation of article 85 and all other known charges:

a. Charges sworn to, block III;

b. receipted for in block IV; and

c. original placed on document side of SRB.

7. Unit diary entry run declaring deserter status and dropping from roles to desertion on 31st day.

8. SRB pages 3, 12, and 23 completed per IRAM:

a. Chronological record (page 3);

b. offenses and punishments (page 12) administratively declaring deserter status and dropping from rolls; and

c. markings page (page 23).

9. DD 553 prepared and distributed (per para. 5002 of LEGADMINMAN):

a. Date published matches that of page 12 entry date (normally 31st day of UA);

b. if insufficient information, priority message sent to MMRB-10;

c. if incomplete information, permission requested from MHL-30; and

d. original sent to CMC (MHL-30) (Report Symbol MC-5800-01) within seven days of administrative declaration of desertion on page 12.

10. DD 553 distributed properly (para. 5002.2e(4) LEGADMINMAN):

a. Copy on document side of SRB;

b. copy to NOK and all known associates;

c. copy to each chief of police and county sheriff in area of civilian addressees of DD 553; and

d. copy to units assigned admin responsibility and appropriate area police (*see* MCO 5800.10).

11. If deserter has dependents, see para. 5004 of LEGADMINMAN:

a. Retrieved dependent ID cards;

b. if ***not*** surrendered, notify local medical facilities and military activities;

c. a ***terminate*** DD 1172 submitted to DEERS; and

d. dependents directed to vacate quarters.

12. Return of deserter within 91 days:

a. "From UA" entry made in diary;

b. page 12 entry recording date, hour, and circumstances of return to military control (*see* 4015 of IRAM);

c. page 12 SRB entry made removing mark of desertion (not removed if apprehended and / or convicted by civil authorities except as per LEGADMINMAN); and

d. if mark of desertion removed, notify disbursing office in writing of removal per LEGADMINMAN.

13. If no return by 91st day of absence:

a. Audit of SRB, pages 3, 12, and 23 completed and entries correct; and

b. charge sheet on document side correctly receipts for charge prior to page 12 date accused dropped from rolls (if not, redo).

APPENDIX A

FRATERNIZATION CASES

United States v. Adams, 19 M.J. 996 (A.C.M.R. 1985)
United States v. Adames, 21 M.J. 465 (C.M.A. 1986)
United States v. Arthen, 32 M.J. 541 (A.F.C.M.R. 1990)
United States v. Baker, N.M.C.M. 84-4043 (30 August 1985)
United States v. Calloway, 21 M.J. 770 (A.C.M.R. 1986)
United States v. Cantu, 22 M.J. 819 (N.M.C.M.R. 1986)
United States v. Carter, 23 M.J. 683 (N.M.C.M.R. 1986)
United States v. Clarke, 25 M.J. 631 (A.C.M.R. 1987)
United States v. Conn, 6 M.J. 351 (C.M.A. 1979)
United States v. Cottrell, 32 M.J. 675 (A.F.C.M.R. 1991)
United States v. Fox, 34 M.J. 99 (C.M.A. 1992)
United States v. Free, 14 C.M.R. 466 (N.B.R. 1953)
United States v. Graham, 9 M.J. 556 (N.C.M.R. 1980)
United States v. Hoard, 12 M.J. 563 (A.C.M.R. 1981)
United States v. Jefferson, 21 M.J. 203 (C.M.A. 1986)
United States v. Johanns, 20 M.J. 155 (C.M.A. 1985)
United States v. Livingston, 8 C.M.R. 206 (A.B.R. 1952)
United States v. Lovejoy, 42 C.M.R. 210 (C.M.A. 1970)
United States v. Lowery, 21 M.J. 998 (A.C.M.R. 1986)
United States v. March, 32 M.J. 740 (A.C.M.R. 1991)
United States v. Mayfield, 21 M.J. 418 (C.M.A. 1986)
United States v. McFarlin, 19 M.J. 790 (A.C.M.R. 1985)
United States v. Means, 10 M.J. 162 (C.M.A. 1981)
United States v. Moultak, 21 M.J. 822 (N.M.C.M.R. 1985), *aff'd*, 24 M.J. 316 (C.M.A. 1987)
United States v. Nelson, 22 M.J. 550 (A.C.M.R. 1986)
Parker v. Levy, 417 U.S. 733 (1974)
United States v. Parini, 12 M.J. 679 (A.C.M.R. 1981)
United States v. Parrillo, 31 M.J. 886 (A.F.C.M.R. 1990)
United States v. Pitasi, 44 C.M.R. 31 (C.M.A. 1971)
United States v. Rodriquez, 18 M.J. 363 (C.M.A. 1984)
United States v. Serino, 24 M.J. 848 (A.F.C.M.R. 1987)
United States v. Smith, 18 M.J. 786 (N.M.C.M.R. 1984)
Stanton v. Froehlke, 390 F. Supp. 503 (D.D.C. 1975)
United States v. Stocken, 17 M.J. 826 (A.C.M.R. 1984)
United States v. Tedder, 18 M.J. 777 (N.M.C.M.R. 1984), *aff'd*, 24 M.J. 176 (C.M.A. 1987)
United States v. Van Steenwyk, 21 M.J. 795 (N.M.C.M.R. 1985)
United States v. Wales, 31 M.J. 301 (C.M.A. 1990)
United States v. Wilson, 32 C.M.R. 517 (C.M.A. 1962)

APPENDIX B

URINALYSIS CONSENT FORM

I, _____, have been requested to provide a urine sample. I have been advised that:

(1) I am suspected of having unlawfully used drugs;

(2) I may decline to consent to provide a sample of my urine for testing; and

(3) If a sample is provided, any evidence of drug use resulting from urinalysis testing may be used against me in a court-martial.

I consent to provide a sample of my urine. This consent is given 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.

_____
Signature

_____
Date

_____
Witness' Signature

_____
Date

APPENDIX C

DRUG SCREENING LABS

Address	Telephone / Message Address
Commanding Officer Navy Drug Screening Laboratory Naval Air Station Jacksonville, FL 32214-5240	DSN: 942-7760 Commercial: (904) 777-7760/7761 NAVDRUGLAB JACKSONVILLE FL FL//JJJ//
Commanding Officer Navy Drug Screening Laboratory Bldg. 38-H Great Lakes, IL 60088-5223	DSN: 792-3701 Commercial: (312) 688-6862 NAVDRUGLAB GREAT LAKES IL IL//JJJ//
Commanding Officer Navy Drug Screening Laboratory Naval Air Station, Bldg. S-33 Norfolk, VA 23511-6295	DSN: 564-8089 Commercial: (804) 444-8120/8089 NAVDRUGLAB NORFOLK VA VA//JJJ//
Commanding Officer Navy Drug Screening Laboratory Bldg. 65, 8750 Mountain Blvd. Oakland, CA 94627-5050	DSN: 855-6184 Commercial: (415) 633-6175-6176 NAVDRUGLAB OAKLAND CA CA//JJJ//
Commanding Officer Navy Drug Screening Laboratory Naval Hospital, Bldg. 26-2B San Diego, CA 92134-6900	DSN: 522-9372 Commercial: (619) 532-2349 NAVDRUGLAB SAN DIEGO CA CA//JJJ//

AREAS OF RESPONSIBILITY

NDSL Jacksonville: Those units designated by CINCLANTFLT or CMC and those undesignated units in geographic proximity.

NDSL Great Lakes: All activities assigned to CNET, all USMC accession points as designated by CMC, and selected naval activities located in the Great Lakes area.

NDSL Norfolk: Those units designated by CINCLANTFLT, CMC, or CINCUSNAVEUR and those undesignated units in geographic proximity.

NDSL Oakland: Those units designated by CINCPACFLT or CMC and those undesignated units in geographic proximity.

NDSL San Diego: Those units designated by CINCPACFLT or CMC and those undesignated units in geographic proximity.

APPENDIX D

USE OF URINALYSIS RESULTS

BASIS FOR URINALYSIS / USE OF RESULTS	NJP, SCM, SPCM, GSM	Basis for admin sep'n	Basis for OTH
Search or Seizure Probable Cause Member's Consent	YES	YES	YES
Inspections Random or Unit Sweep	YES	YES	YES
Valid Medical Purposes	YES	YES	YES
Fitness for Duty Mishap / Safety Investigation All other Competency Exams	NO NO	NO YES	NO NO
Service Directed Rehab. Facility Staff Drug / Alcohol Rehab. Testing PCS Overseas, Brigs, "A" School Accession testing	YES NO YES NO	YES YES YES YES	YES NO YES NO

SOURCE: Appendix A to Enclosure (4)
OPNAVINST 5350.4B

APPENDIX E

SAMPLE 10-DAY UA NOTIFICATION LETTER FOR NEXT OF KIN

DEPARTMENT OF THE NAVY
USS NEVERSAIL (AS 00)
FPO AE 09501

1610
00
Date

Mr. & Mrs. Ronald Jones
235 Long Street
Los Angeles, CA 14790-9999

Dear Mr. and Mrs. Jones:

I regret the necessity of informing you that your son, Yeoman Third Class Fred Paul Jones, who enlisted in the Navy on June 24, 19CY-2, and was attached to USS NEVERSAIL (AS 00), has been on unauthorized absence since June 25, 19CY. Should you know of his whereabouts, please urge him to surrender to the nearest naval or other military activity immediately since the gravity of the offense increases with each day of absence. At this time, all pay and allowances, including allotments, have been suspended pending return to Navy jurisdiction. Should he remain absent for 30 days, we will declare him a deserter and a federal warrant will be issued. Information will be provided to the National Crime Information Center wanted person's file, which is available to all federal, state, and local law enforcement agencies.

Sincerely,

A. B. SEAWEED
Captain, U.S. Navy
Commanding Officer

Copy to:
(Apply name and address of Reserve chaplain nearest the absentee's home of record, according to NAVMILPERSCOMNOTE 1600)
Example:
Bee U. Humble
LCDR, CHC, USNR
1 Way Street
Upview, CA 12345-6789

APPENDIX F

SAMPLE LETTER NOTIFYING NEXT OF KIN OF RETURN FROM UA

DEPARTMENT OF THE NAVY
USS NEVERSAIL (AS 00)
FPO AE 09501

1610
00
Date

Mr. & Mrs. Ronald Jones
235 Long Street
Los Angeles, CA 14790-9999

Dear Mr. and Mrs. Jones:

Please be advised that your son, Yeoman Third Class Fred Paul Jones, was returned to USS NEVERSAIL (AS 00), on December 24, 19CY. You may write to your son at the above address.

Sincerely,

A. B. SEAWEED
Captain, U.S. Navy
Commanding Officer

Copy to:
(Include name and address of Reserve chaplain who was originally notified in the Letter of Notification sent out on 10th day)
Example:
Bee U. Humble
LCDR, CHC, USNR
1 Way Street
Upview, CA 12345-6789

[UPON RETURN OF ABSENTEE TO PARENT COMMAND, PREPARE A LETTER NOTIFYING NOK OF MEMBER'S RETURN - NO SPECIFIC LANGUAGE IS DICTATED BY MILPERSMAN. LANGUAGE OF LETTER IS LEFT TO DISCRETION OF PARENT COMMAND. WE RECOMMEND THAT THIS LETTER NOT BE SENT UNTIL THE ABSENTEE IS PHYSICALLY BACK ON BOARD THE COMMAND. *SEE* MILPERSMAN 3430200.1.c]

CHAPTER THIRTY-ONE

POST-TRIAL REVIEW AND APPELLATE PROCEDURES

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CHAPTER THIRTY-ONE

POST-TRIAL REVIEW AND APPELLATE PROCEDURES

3101 OVERVIEW

This chapter discusses the general sequence of events in the post-trial court-martial review process, highlighting the SJAs responsibilities. References include:

A. UCMJ, Arts. 57, 62, 66, 67, 69, 71

B. R.C.M. 908, 1101-1112, 1114, 1201-1205

C. JAGMAN, §§ 0151-0156, 0162, 0163

D. 28 U.S.C. § 1259

E. JAG / COMNAVLEGSVCCOMINST 5814.1

Note: SJAs must use enclosures (4) and (6) of reference E to assist in the preparation of their recommendations, the convening authority's action, and the promulgating order.

3102 POST-TRIAL SESSIONS UNDER R.C.M. 1102

A. Timing and powers. The military judge (MJ) may call a post-trial session before the record is authenticated to consider newly discovered evidence and, in proper cases, may set aside findings of guilty and the sentence. *United States v. Scaff*, 29 M.J. 60 (C.M.A. 1989). Proceedings in revision may be conducted to correct an apparent error, omission, or improper or inconsistent action by the court-martial. The CA may direct an article 39(a) session before taking initial action, or anytime if authorized by a reviewing authority, to inquire into and resolve any matter which arises after trial and which substantially affects the legal sufficiency of any finding of guilty or the sentence. The MJ shall take such action as may be appropriate. Article 39(a) proceedings shall be conducted in the presence of the accused. *United States v. Caruth*, 6 M.J. 184 (C.M.A. 1979).

B. Limitations. Post-trial sessions cannot increase the severity of a sentence unless the sentence is mandatory, reconsider a finding of not guilty as to a specification, or reconsider a finding of not guilty as to a charge—unless a finding of guilty to some other article is supported by a finding as to a specification. *United States v. Jordan*, 32 M.J. 672 (A.F.C.M.R. 1991) (MJ erred in entering findings of guilty on two specifications; should have held a post-trial session); *United States v. Wilson*, 27 M.J. 555 (A.C.M.R. 1988) (TC failed to administer oath to two enlisted panel members; MJ held a proceeding in revision); *United States v. Baker*, 32 M.J. 290 (C.M.A. 1991) (post-trial 39(a) session to correct the omission in sentence announcement; the president failed to announce the adjudged DD was ***error***, so held to avoid the appearance of unlawful command influence).

3103 PREPARATION OF THE RECORD OF TRIAL (ROT)

Article 54, UCMJ, requires every court-martial to keep a record of the proceedings.

A. Verbatim. The ROT must be verbatim if a BCD has been adjudged or any portion of the sentence adjudged exceeds a punishment which may be adjudged by an SPCM. Executive Order 12708, Amendments to the *Manual for Courts-Martial*, United States, 1984 (23 Mar. 1990) [hereinafter Exec. Order 12708]). *United States v. Alston*, 30 M.J. 969 (N.M.C.M.R. 1990) (verbatim means entirely verbatim); *United States v. Harmon*, 29 M.J. 732 (A.F.C.M.R. 1989) (tape recorder failure; burden on government to rebut presumption of prejudice); *United States v. Sneed*, 32 M.J. 537 (A.F.C.M.R. 1990) (DC argues ex parte motion telephonically to the MJ; TC rebutted presumption); *United States v. Kyle*, 32 M.J. 724 (A.F.C.M.R. 1991) (documents reviewed in camera must be sealed and attached to the ROT). Section 3122, *supra*, includes a discussion of frequent errors in ROT preparation.

B. Authentication. Article 54(a), UCMJ, requires authentication by the MJ unless (s)he is dead, disabled, or absent. *United States v. Cruz-Rijos*, 1 M.J. 429 (C.M.A. 1976). TC may authenticate the ROT only if the MJ is genuinely unavailable for a lengthy period of time. *United States v. Lott*, 9 M.J. 70 (C.M.A. 1980) (PCS to distant duty station qualifies); *United States v. Walker*, 20 M.J. 971 (N.M.C.M.R. 1985) (30-day leave is a prolonged absence). A statement of the reasons for substitute authentication should be included in the ROT. If multiple judges are on the record, each must authenticate their portion. *United States v. Martinez*, 27 M.J. 730 (A.C.M.R. 1988). If the authenticated ROT is lost, produce a new ROT for authentication. An authenticated ROT can be corrected only by the certificate of correction process.

3104 SUBMISSION OF R.C.M. 1105 MATTERS

After the ROT is authenticated, the accused will be served with a copy; the accused's receipt for the copy must be attached to the original ROT. The accused must be served well before the CA's action. The accused is also given the opportunity to submit matters which may affect the CA's action. This R.C.M. 1105 clemency letter may include clemency recommendations, matters in mitigation not in the record, and allegations of error. The matters need not be in writing. *United States v. Davis*, 29 M.J. 1004 (A.F.C.M.R. 1990), *aff'd*, 33 M.J. 13 (C.M.A. 1991) (CA should have considered the accused's 35-minute videotaped statement recounting his experiences of sexual molestation as a child, despite seemingly restrictive language of R.C.M. 1105). This option must be exercised within 10 days of service of the authenticated ROT in the case of a GCM or SPCM, and within seven days after the sentence of an SCM is announced.

3105 RECOMMENDATION OF THE SJA OR LEGAL OFFICER UNDER R.C.M. 1106

Before the CA can act on any GCM / BCD-SPCM case, the SJA or the legal officer (LO) must submit a written recommendation to assist the CA in making an appropriate disposition.

A. Qualifications. An officer is disqualified from preparing a post-trial recommendation if the officer's actions before or during trial appear to create a risk that the officer will be unable to evaluate the evidence objectively and impartially. *United States v. Decker*, 15 M.J. 416 (C.M.A. 1983) (SJA who obtained immunity or clemency for a witness in the case held not disqualified); *United States v. Grinter*, 28 M.J. 840 (A.F.C.M.R. 1989) (officer initially appointed as article 32 investigative officer (IO) was disqualified even though investigation was waived).

B. Contents. The recommendation shall contain the findings and sentence adjudged, a summary of the accused's service record, the nature and duration of any pretrial restraint, any pretrial agreement obligations, any recommendations by the MJ, a specific recommendation as to action to be taken, and, if prepared by an SJA, a response to any allegation of legal error raised in the accused's R.C.M. 1105 letter. Neither the SJA nor the LO, however, is required to examine the record for legal error [R.C.M. 1106(d)(4)]. If the SJA deems it appropriate to take corrective action on findings or sentence, or if the accused alleges a legal error in the matters submitted under R.C.M. 1105, the SJA must state an opinion as to the need for corrective action. No analysis or rationale is required to be included. *United States v. Keck*, 22 M.J. 755 (N.M.C.M.R. 1986). The SJA must respond even if the DC states the issue inartfully. *United States v. Hill*, 27 M.J. 293 (C.M.A. 1988). The *JAG Manual* provides a sample form at appendix A-1-k.

C. Exceptions to the requirement. No recommendation is needed for complete acquittals or other final terminations without findings. This now includes findings of not guilty only by reason of lack of mental responsibility. Exec. Order 12708 amending R.C.M. 1106(e).

D. Service on defense for R.C.M. 1106 response. Before forwarding the recommendation to the CA, the SJA / LO shall serve a copy on the DC ***and*** the accused. If it is impracticable to serve the accused, his / her copy shall be forwarded to the DC. A statement shall be attached to the record explaining why the accused was not personally served. DC shall be allowed 10 days to respond to the recommendation (20 additional days may be granted for a response). Failure of DC to submit a timely response may waive certain errors in the recommendation, except plain error. *United States v. Huffman*, 25 M.J. 758 (N.M.C.M.R. 1987) (plain error where findings and sentence were erroneously reported). If DC's response contains an allegation of legal error, the SJA must respond to it.

E. Addenda. R.C.M. 1106(f)(7) provides that the SJA / LO may supplement his / her recommendation based upon DC's response. DC must be served with any supplement containing new matter and be given an opportunity to comment. *United States v. Anderson*, 25 M.J. 342 (C.M.A. 1987). The same time periods apply. Serving the accused as well is a safe practice.

3106 CA's ACTION

The first official action to be taken with respect to the results of a trial is the CA's action, which will, as a practical matter, be drafted by the SJA / LO per the CA's wishes. The responsibility for the CA's action cannot be delegated. In exceptional circumstances, JAGMAN, § 0145 authorizes the CA to forward the case to a specifically designated officer exercising general court-martial authority (GCMA) with a statement of the reasons why the CA is unable to act (e.g., CA was a witness for the prosecution on a disputed issue or became an accuser after referral).

A. Before the action. Before taking action, the CA shall consider the result of trial, the SJA / LO recommendation when required, and any matter submitted by the accused pursuant to R.C.M. 1105 (clemency letter) and 1106 (response to SJA / LO recommendation). [R.C.M. 1107(b)(3)(A)]. The C.M.A. recommends listing each enclosure (petitions for clemency, etc.) that goes to the CA on the post-trial recommendation / addendum or having the CA initial and date all documents. *United States v. Craig*, 28 M.J. 321 (C.M.A. 1989). The CA may also consider any other appropriate matter, including matters outside the ROT. *United States v. Due*, 21 M.J. 431 (C.M.A. 1986). Any matter considered from outside the ROT, of which the accused is not reasonably aware and is of an adverse nature, must be disclosed to the accused to provide an opportunity for his / her rebuttal [R.C.M. 1107(b)(3)(B)].

United States v. Groves, 30 M.J. 811 (A.C.M.R. 1990) (upheld SJA's argument of the accused's "probable involvement in other misconduct" as a basis for rejecting the judge's recommendation to suspend the BCD); *United States v. Rich*, 26 M.J. 518 (A.C.M.R. 1988) (include any recommendations by the MJ); *United States v. Heirs*, 29 M.J. 68 (C.M.A. 1989) (SJA cannot refer to accused's statements during improvident guilty plea).

B. Action on findings and sentence. Although the CA must take action on any sentence awarded, (s)he is not required to review the case for legal errors or factual sufficiency. Consequently, any action taken on findings (i.e., disapproval of an LIO) is discretionary under R.C.M. 1107. *United States v. McKnight*, 30 M.J. 205 (C.M.A. 1990) (CA could disregard SJA's opinion that the evidence was insufficient as to a charge and its specification without stating reasons). Provided the sentence is within the jurisdiction of the court-martial and does not exceed the maximum limitations prescribed for each offense, the sentence is legal and may be approved by the CA. In the alternative, the CA may disapprove the sentence, in whole or in part, or may reduce or change the nature of the sentence so long as the sentence approved is not greater or more severe than the sentence adjudged. The CA may reduce a mandatory sentence adjudged. *United States v. Bono*, 26 M.J. 240 (C.M.A. 1988)

C. Timing. The CA cannot act before the R.C.M. 1105(c) time periods have expired or submissions have been waived. The CA may not take action to approve a sentence of an accused who lacks the capacity to understand or cooperate in post-trial proceedings. If an error is discovered after action is taken, inform higher headquarters. Action by the CA is a nullity. *United States v. Murphy*, 26 M.J. 658 (N.M.C.M.R. 1988).

D. Mitigation. The CA may mitigate the sentence by reducing it in quantity (e.g., 4 months confinement to 2 months confinement) or by reducing it in quality (e.g., 30 days confinement to 30 days restriction). When mitigating forfeitures, the duration and amount may be changed so long as the total amount forfeited is not increased and neither the amount nor duration exceeds the limits of the jurisdiction of the court-martial.

E. Commutation. The CA may commute a sentence by changing a punishment to one of a different (less severe) nature (e.g., BCD to 6 months confinement, not 12). *Waller v. Swift*, 30 M.J. 139 (C.M.A. 1990).

F. Suspension. After the sentence is approved, the CA may suspend the execution of any portion of the sentence per R.C.M. 1108. This grants the accused a specified probationary period during which the suspended part of the approved sentence is not executed. The suspended sentence will be remitted, if not sooner vacated, upon completion of the specified probationary period. If the accused commits an act of misconduct during the probationary period, a hearing may be held and the

suspension vacated. The procedural rules and hearing requirements are specified in R.C.M. 1109, and discussed in more detail at the end of this chapter.

G. Content of CA's action. Appendix 16, MCM, contains sample forms of action for an SCM, SPCM, and a GCM. Strict adherence to the forms is advised.

H. Execution of sentence. An order executing the sentence directs that the sentence be carried out. No sentence may be executed by the CA unless, and until, it is approved. Once approved, every part of the sentence, except for a punitive discharge, dismissal, or death, may be executed by the CA in the initial action. A suspended sentence is approved, but not executed [R.C.M. 1113(a-b)].

1. Confinement. As with other kinds of punishments, confinement is not executed until CA's action. Nevertheless, a sentence of confinement will run from the date it is adjudged by the court, whether or not the accused is placed in post-trial confinement, unless the sentence to confinement is deferred [R.C.M. 1113(d)(2)]. Since post-trial confinement is not the result of an executed sentence, the accused may not be placed in such a status on the basis of court-martial sentence alone. A confinement order from the CO is required. This authority may be delegated to the TC [R.C.M. 1101(b)(2)]. If confinement is ordered executed, the CA shall designate the place of confinement in the action. Under JAGMAN, § 0123e, the CA of a court-martial sentencing an accused to confinement is a competent authority to designate the place of temporary custody or confinement.

2. Deferment of confinement. The accused may request a postponement of the running of a sentence to confinement. Unless the request is in writing, confinement will continue to run. The accused has the burden of showing that his / her interests and the interests of the community in release outweigh the community's interest in confinement. The decision to defer is a matter of command discretion; the CA may consider "the command's immediate need for the accused" and "the effect of deferment on good order and discipline in the command." The CA must specify why confinement is not deferred. *Longhofer v. Hilbert*, 23 M.J. 755 (A.C.M.R. 1986). The CA's written action on deferment is subject to judicial review for abuse of discretion. If the request is granted, no other form of post-trial restraint is permitted [R.C.M. 1101(c)(5)].

3. Punitive discharge, dismissal, and death. A punitive discharge may be executed only by a GCMA after review is final. If more than six months have passed since the approval of the sentence by the CA, the GCMA over the accused shall consider the advice of his / her SJA as to whether retention of the accused would be in the best interest of the service [R.C.M. 1113(c)(1)]. Dismissal may be ordered executed only by the Secretary of the Navy (SECNAV) or his / her designee. Death may be ordered executed only by the President [R.C.M. 1113(c)(1-3)].

I. Sentence modification and partial execution. The following action shows the ***approval of part of the sentence and partial order of execution*** of the sentence awarded at trial. The CA only approved part of the sentence adjudged by the court. The court sentenced the accused to reduction to the grade of E-2, confinement for 120 days, forfeiture of $200.00 pay per month for four months, and a BCD. The CA approved the reduction to E-2 and the BCD, but approved only 90 days of confinement and forfeitures of only $150.00 pay per month for three months.

The provisions of article 58a(a), automatic reduction, are included in this case only because the reduction awarded by the court was from E-3 to E-2. Had the court reduced the accused to E-1, and that portion of the sentence been approved and ordered executed, article 58a(a) would no longer have been applicable.

3107 PROMULGATING ORDERS

A. After the CA acts on the findings and sentence of every SPCM or GCM, a promulgating order must be generated, normally by the SJA / LO, to enable the CA to publish the results of trial and the CA's action. The CA's action is always prepared first and then entered verbatim in the promulgating order. Any action taken on the case after the initial CA's action (e.g., to execute a discharge), shall be promulgated in supplementary orders (R.C.M. 1114; JAGMAN, § 0155c).

B. The order promulgating the CA's action shall set forth: the type of court-martial and the command by which it was convened; the charges and specifications, or a summary thereof, on which the accused was arraigned; the accused's pleas; the findings or other disposition of each charge and specification; the sentence, if any; and the action of the CA. Samples follow; *see* appendix 17, MCM.

3108 SUBSEQUENT REVIEW OF ROT. The ROT of every court-martial is reviewed by higher authority.

A. SCMs and non-BCD SPCMs (R.C.M. 1112, 1201(b)(2); JAGMAN, § 0153). A written review of these cases will be conducted by a judge advocate who is, in most instances, the SJA to the GCMA and has not been disqualified by acting in the same case as an accuser, IO, member, MJ, counsel, or otherwise on behalf of the prosecution or defense. The review will address jurisdiction over the accused, whether each guilty finding is based on a specification which states an offense, and whether the sentence is legal. The JA will also respond to each allegation of error made in writing by the accused. Generally, review of SCMs and non-BCD SPCMs is final when the JA completes his review. If corrective action is recommended, however, a statement as to appropriate action, and an opinion as to whether corrective action is required as a matter of law, will be forwarded with the ROT to

the GCMA for action. When the JA states that corrective action is required as a matter of law, and the GCMA fails to take action at least as favorable to the accused as that recommended by the JA, the ROT shall be forwarded to the Judge Advocate General for resolution.

B. BCD SPCMs (Arts. 66, 67, UCMJ; R.C.M. 1111, 1201-1205). If appellate review has not been waived, all SPCMs, including a BCD—whether suspended or not—will be sent directly to JAG upon completion of LO / SJA recommendation and CA action on the ROT. [JAGMAN, § 0153b(1)(b)]. After detailing appellate defense and government counsel, JAG will refer the case to N.M.C.M.R. who will review the case and may make findings of fact and law. After N.M.C.M.R. review, the case may be reviewed for errors in law only by C.M.A.—if certified by JAG or if C.M.A. grants the accused's petition for review. Finally, review by the Supreme Court of the United States is possible under 28 U.S.C. § 1259, Art. 67(a) (newly amended) and Art. 67(h), UCMJ (R.C.M. 1205). On the other hand, if the accused executes a written waiver of appellate review, a written review by a JA (similar to the review required in SCM / non-BCD SPCM cases) will be required. In the case of a BCD SPCM, however, the ROT and review must always be sent to the GCMA for final action.

C. GCMs (Arts. 66, 67, 69, UCMJ; R.C.M. 1111, 1201, 1203-1205). All GCM cases in which the sentence as approved includes a dismissal, a punitive discharge, or confinement of at least one year will be forwarded to JAG and reviewed in precisely the same way as a BCD SPCM. Cases involving death sentences are reviewed in a similar fashion, except that review by C.M.A. is mandatory. Other GCM cases (i.e., those not involving death, dismissal, punitive discharge, or confinement of one year or more) are reviewed by JAG under Art. 69(a), UCMJ, and R.C.M. 1201(b). The JAG may modify or set aside the findings or sentence, or both, if any part of the findings or sentence are found to be insupportable in law or if reassessment of the sentence is appropriate. As an alternative measure, JAG may forward the case for review to N.M.C.M.R. In this latter case, however, no further review by C.M.A. is possible unless the JAG so directs. Last, if the accused waives appellate review, written review by a JA is required. The ROT and the JA review must be sent to the GCMA for final action if corrective action is recommended or if the sentence includes dismissal, discharge, or confinement for greater than six months (R.C.M. 1112). There can be no waiver of appellate review in cases in which the approved sentence includes death (R.C.M. 1110).

3109 ARTICLE 69(b) REVIEW IN THE OFFICE OF THE JUDGE ADVOCATE GENERAL (R.C.M. 1201(b)(3); JAGMAN, § 0162)

A. The findings or sentence, or both, in a court-martial case that has been finally reviewed (e.g., SCM, SPCM, or GCM reviewed by JA and acted upon by GCMA under R.C.M. 1112), but has not been reviewed by N.M.C.M.R., may be vacated or

modified by JAG on the grounds of newly discovered evidence, fraud on the court, lack of jurisdiction, error prejudicial to the substantial rights of the accused, or inappropriateness of the sentence.

B. If the accused is still on active duty, the application for relief must be submitted via the CO, the command that convened the court, and the GCMA that reviewed the case under Art. 64(a) or (b), UCMJ (R.C.M. 1112). The SJA / LO attached to these commands will most likely be responsible for drafting the requisite endorsements on the application. The endorsement shall include, among other things, information and specific comment on the grounds for relief and an opinion on the merits of the application (JAGMAN, § 0153c). If the accused is no longer on active duty, the application may be submitted directly to JAG.

C. The application must be placed in military channels if the applicant is on active duty, or be deposited in the mail if the accused is no longer on active duty, not more than two years after the CA approved the sentence.

D. Article 69, UCMJ, has been amended to permit JAG to certify cases to N.M.C.M.R. when the sentence is not subject to automatic review. This could result in N.M.C.M.R.'s scrutinizing the decisions and JA's review of SCMs, non-BCD SPCMs and BCD SPCMs, and GCMs where appellate review has been waived.

3110 WAIVER OR WITHDRAWAL OF APPELLATE REVIEW UNDER R.C.M. 1110

A. After any GCM, except one in which the approved sentence includes death, and after any SPCM in which the approved sentence includes a BCD, the accused may elect to waive appellate review.

B. The accused has the right to consult with counsel before submitting a waiver or withdrawal. The waiver must be in writing, attached to the ROT, and filed with the CA. The written statement must include: statements that accused and counsel have discussed accused's appellate rights and the effect of waiver or withdrawal on those rights; statements that accused understands these matters; that the waiver or withdrawal is submitted voluntarily; and the signatures of accused and counsel. Apps. 19 and 20, MCM, 1984.

C. The accused may only file a waiver within 10 days after the accused or DC is served with a copy of the CA's action. The accused may file a withdrawal at any time before appellate review is completed. Once filed in substantial compliance with the rules, the waiver or withdrawal may not be revoked. C.M.R. is not required to grant a motion to withdraw. Instead, once a ROT has been properly referred to

a court for review, it is then within the sound discretion of that court to determine whether the record should be withdrawn pursuant to Art. 61, UCMJ. *United States v. Ross*, 32 M.J. 715 (C.G.C.M.R. 1991).

3111 RELEASE FROM CONFINEMENT PENDENTE LITE

Under the All Writs Act, 28 U.S.C. 1651, C.M.R.s and C.M.A. have the authority to order deferment of confinement pending completion of appellate review. If the accused has won a "favorable decision" from C.M.R. and "the situation is one in which the Government could establish a basis for pretrial confinement (*see* R.C.M. 305)," then it should have the opportunity to show why the accused should be kept in confinement pending the completion of appellate review. This can best be handled by ordering a hearing before a military judge or special master for a determination similar to that for pretrial confinement. *Moore v. Akins*, 30 M.J. 249 (C.M.A. 1990).

3112 POST-TRIAL PROCESSING TIME

A. Local delay. From sentence to action, unreasonable delay will be tested for prejudice. *United States v. Clevidence*, 14 M.J. 17 (C.M.A. 1982) (findings and sentence set aside when accused demonstrated that he had been specifically prejudiced in the pursuit of civilian employment during 313-day delay).

B. Appellate delay. Delay in the administrative handling and forwarding of the ROT to an appellate court was examined in *United States v. Dunbar*, 31 M.J. 70 (C.M.A. 1990) ("Appellant's case has languished for 1097 days in post-trial appellate limbo without explanation"). Chief Judge Everett's lead opinion identified concern for a claim of prejudice other than that which might inure to an accused at his rehearing or new trial ordered to remedy prejudicial error discovered on appeal. In cases involving "relatively nonserious offenses," the court would grant relief if the accused demonstrates that inexcusable delay in ministerial handling of a record caused him personal suffering apart from that flowing from the conviction. Judge Cox, concurring in the result, preferred the test applied in *United States v. Green*, 4 M.J. 203 (C.M.A. 1978) (after the CA's action, the case is at the appellate level; dismissal of the charges is appropriate only when some error in the trial proceedings requires a rehearing; appellant would be prejudiced at a rehearing because of the delay; and no useful purpose would be served by continuing the proceedings).

3113 NEW TRIAL (Art. 73, UCMJ; R.C.M. 1210; JAGMAN, § 0163)

A. Petition. An accused can petition JAG for a new trial (trial de novo), even after his / her conviction has become final, by completion of appellate review. JAG must receive the petition within two years after approval by the CA of the court-martial sentence.

B. Grounds. There are only two grounds for petition: newly discovered evidence and fraud on the court. To be considered newly discovered, the evidence must have been discovered after the first trial and petitioner must have exercised due diligence to discover it if its existence could have been known at the time of the first trial. Sufficient grounds will be found to exist only if it is established that an injustice has resulted from the findings or sentence and that a new trial would produce a result substantially more favorable to the accused.

3114 GOVERNMENT RIGHT TO APPEAL (Art. 62, UCMJ; R.C.M. 908; JAGINST 5810.2)

In any case over which an MJ presides, and in which a punitive discharge may be adjudged, the government may appeal a ruling which terminates the proceedings with regard to a charge or specification or which excludes evidence of a fact material in the proceedings. The government, however, may not appeal a ruling that amounts to a finding of not guilty.

A. TC decision. After an order or ruling which is subject to appeal by the United States, as described above, the trial may not proceed as to the affected specification if TC requests a delay to decide whether to appeal. TC has 72 hours in which to make this decision [R.C.M. 908(b)].

B. Notice of appeal. After coordinating with the Director, Appellate Government Division, Navy-Marine Corps Appellate Review Activity, TC may file a notice of appeal (para. 5.a of JAGINST 5810.2). The notice of appeal is a written document identifying the ruling or order to be appealed and the charges or specifications affected. The notice of appeal should also include a certification signed by TC that the appeal is not taken for the purpose of delay and, if the order or ruling appealed is one which excludes evidence, that the evidence excluded is substantial proof of a fact material to the proceeding.

C. Documentation. The following documents must be forwarded to the Director, Appellate Government Division, Navy-Marine Corps Appellate Review Activity, who shall make the final decision as to whether the appeal shall be pursued:

1. The notice of appeal filed by TC;

2. an appeal substantially in the form provided in the Rules of Practice and Procedure of the Court of Military Review including:

a. A summary of the proceedings;

b. a statement of facts which were decided by the MJ with respect to the error assigned (N.M.C.M.R. will be bound by the judge's findings of fact);

c. the error assigned, followed by an argument supporting the government's position on each error; and

d. the specific relief requested;

3. an authenticated record of the portion of the trial dealing with the error alleged; and

4. a letter of justification from TC indicating why the appeal is being taken and describing the anticipated consequences should the MJ's position be upheld (JAGMAN, § 0131).

D. N.M.C.M.R. action. Both parties will be represented by appellate counsel before N.M.C.M.R. The appeal will have priority over all other proceedings before the court. Unlike its normal scope of review, N.M.C.M.R. may take action on the appeal only with respect to matters of law [R.C.M. 908(c)]. The accused may petition a contrary ruling of N.M.C.M.R. to C.M.A. within 60 days of receiving notification of the ruling. JAG may certify a contrary ruling to C.M.A. [R.C.M. 908(c)]. Either the accused or the government may seek review by the Supreme Court (R.C.M. 1205).

3115 VACATION OF SUSPENDED SENTENCES UNDER R.C.M. 1109

The rule sets forth the procedural and substantive requirements for vacating a suspended sentence. DD Form 455 guides the hearing. A sample is reproduced in Appendix 18, MCM, 1984. The accused may be confined pending the decision to vacate the suspended sentence. Unless the proceedings are completed within seven days, a preliminary hearing must be held by an independent officer to determine whether there is probable cause to believe that the accused has violated the conditions of the suspension. The commencement of the proceedings to vacate the suspension interrupts the running of the period of suspension. The hearing (to vacate a suspended GCM or SPCM with BCD sentence) must be conducted ***personally*** by the officer exercising SPCM / SCM jurisdiction over the probationer. The hearing officer's recommendation is forwarded to the GCMA over the probationer, who decides

whether to vacate the suspension. To vacate a suspended SCM or SPCM sentence, the officer exercising SCM / SPCM jurisdiction over the probationer ***shall cause*** a hearing to be held—after which, (s)he shall determine whether to vacate the suspension. Vacation of a suspension must be based upon a violation of a condition that occurs during the period of the suspension. *United States v. Schwab*, 30 M.J. 842 (N.M.C.M.R. 1990). The CA and the accused can agree that vacation of a suspended sentence may be based upon misconduct that occurs post-trial, but prior to action. *United States v. Kendra*, 31 M.J. 846 (N.M.C.M.R. 1990).

3116 PAROLE

You may have heard judges announce sentences which included confinement "for one year and one day." The strange sentencing provision was actually a requirement for parole eligibility. Until recently, long-term confinees were not eligible for parole unless their sentences included "confinement for more than one year." The extra day of confinement is no longer required for parole eligibility under paragraph 3b(1)(b) of DOD Directive 1325.4, Subj: CONFINEMENT OF MILITARY PRISONERS AND ADMINISTRATION OF MILITARY CORRECTIONAL PROGRAMS AND FACILITIES (May 19, 1988). To be eligible under the new DOD Directive, the member must have an unsuspended punitive discharge or dismissal, administrative discharge, or retirement. *See also* SECNAVINST 5815.3. Members are now eligible for parole as follows:

A. If sentenced to confinement for 12 to 18 months, the member becomes eligible after serving six months;

B. if sentenced to confinement for 18 months to 30 years, the member becomes eligible after serving one-third of the sentence; and

C. if sentenced to confinement for 30 years or more, or for life, the member is eligible after serving 10 years.

3117 CHECKLIST FOR POST-TRIAL MATTERS

A. General guidance

-- Navy: If the accused will be confined for more than 30 days after trial, or a BCD and any confinement is adjudged, prepare TEMDU orders and deliver to the brig. These will cancel the previously issued TEMADD. *See* MILPERSMAN, art. 1850300 and BUPERS Instruction 1640.17.

B. General confinement issues

1. A confinement order (with three copies) should be completed prior to trial. The charges of which convicted and the sentence adjudged should be left for TC to complete. The order should be presigned at the command, or permission should be given to TC to sign "by direction." (Note: some NLSOs do not want a TC to sign the orders on their own authority as commissioned officers and, therefore, prefer the "by direction" authority be granted.)

2. The medical, dental, pay, and service records must be sent to the brig. The NLSO will have the service record, but the command should collect the others and hold them until the end of the trial. If confinement is less than 30 days, the pay record will not be needed; but, you should obtain it just in case more lengthy confinement is adjudged.

3. Prepare 30-day TEMADD orders for the accused. Give these to the bailiff also. If the accused will be confined for greater than 30 days after trial, or a BCD / DD and any confinement is adjudged, TEMDU orders will be needed. To save time after trial, however, the TEMADD orders will suffice initially and they can be canceled by the TEMDU orders the next day after trial.

4. A NAVPERS 3067 will be needed to obtain the member's pay record. If confinement is less than 30 days, the pay record may not be needed.

5. Comply with BUPERS Instruction 1640.17C concerning designation / redesignation of places of confinement.

6. *Note*: If your command is a deploying unit and the member will be confined for more than 30 days, you may not have to take the member back after confinement. Check with your personnel or administrative officer. MILPERSMAN, art. 1850300.

C. Confinement on bread and water / diminished rations. Held unconstitutional as a court-martial punishment. *United States v. Valead*, 32 M.J. 122 (C.M.A. 1991).

3118 POST-TRIAL REVIEW CASES

A. Clemency requests. *United States v. Craig*, 28 M.J. 321 (C.M.A. 1989); *United States v. Hallums*, 26 M.J. 838 (A.C.M.R. 1988).

B. SJA / LO recommendation

1. General. *United States v. Curry*, 28 M.J. 419 (C.M.A. 1989), *aff'd in part and rev'd in part*, 35 M.J. 359 (C.M.A. 1992); *United States v. Hill*, 27 M.J. 293 (C.M.A. 1988); *United States v. Allen*, 28 M.J. 610 (N.M.C.M.R. 1989), *aff'd*, 32 M.J. 209 (C.M.A. 1991); *United States v. Heirs*, 29 M.J. 68 (C.M.A. 1989); *United States v. Groves*, 30 M.J. 811 (A.C.M.R. 1990).

2. Service on DC. *United States v. Sprenkle*, No. 91-0309 (N.M.C.M.R. Apr. 16, 1991); *United States v. Haliday*, No. 90-2891 (N.M.C.M.R. Dec. 8, 1990).

3. Forwarded to DC instead of accused. *United States v. Roland*, 31 M.J. 747 (A.C.M.R. 1990); *United States v. Diaz-Carrero*, 31 M.J. 920 (A.C.M.R. 1990); *United States v. Davis*, No. 91-0071 (N.M.C.M.R. Apr. 29, 1991); *United States v. Rhynes*, No. 91-2886 (N.M.C.M.R. Mar. 29, 1991).

4. Comment on legal error. *United States v. O'Connor*, No. 89-3294 (N.M.C.M.R. June 29, 1990); *United States v. Coty*, No. 90-0919 (N.M.C.M.R. Dec. 4, 1990).

5. 10 days to comment on SJA recommendation. *United States v. Bjerke*, No. 90-2798 (N.M.C.M.R. Feb. 28, 1991).

6. CA's action prior to SJA recommendation. *United States v. Dunbar*, 28 M.J. 972 (N.M.C.M.R. 1989), *aff'd*, 31 M.J. 70 (C.M.A. 1990).

C. CA's action

1. Substitute CA. *United States v. McGuire*, No. 90-0868 (N.M.C.M.R. Dec. 27, 1990); *United States v. Snodgrass*, No. 90-1870 (N.M.C.M.R. Jan. 22, 1991).

2. Supplemental action. *United States v. Klump*, No. 90-2840 (N.M.C.M.R. Jan. 22, 1991).

3. Suspension of expired confinement. *United States v. Lamb*, 22 M.J. 518 (N.M.C.M.R. 1986); *United States v. Wood*, No. 90-2582 (N.M.C.M.R. Nov. 16, 1990); *United States v. Carter*, No. 90-2922 (N.M.C.M.R. Jan. 14, 1991).

4. Vacation of suspended sentence. *United States v. Jenkins*, 30 M.J. 1101 (N.M.C.M.R. 1989); *United States v. Schwab*, 30 M.J. 842 (N.M.C.M.R. 1990); *United States v. Kendra*, 31 M.J. 846 (N.M.C.M.R. 1990).

5. Execution of sentence. *United States v. Valead*, 30 M.J. 634 (N.M.C.M.R. 1988), *aff'd*, 32 M.J. 122 (C.M.A. 1991).

D. Unreasonable delay in appellate process. *United States v. Dunbar*, 31 M.J. 70 (C.M.A. 1991).

E. Verbatim transcript. *United States v. McCallum*, 31 M.J. 882 (N.M.C.M.R. 1990); *United States v. Alston*, 30 M.J. 969 (N.M.C.M.R. 1990); *United States v. Butler*, No. 90-2536 (N.M.C.M.R. Feb. 11, 1991).

3119 IMPACT OF A PUNITIVE DISCHARGE ON BENEFITS

A. VA benefits. Members who receive a punitive discharge face the potential loss of various federal benefits, such as VA disability benefits. Would-be "BCD Strikers" should be advised that a punitive discharge could severely limit the extent of VA benefits they will be eligible to receive. The VA does have a procedure by which, on a case-by-case basis, benefits can be awarded to an applicant who has received a discharge under less than honorable conditions. However, this procedure is typically used for short-term UA's and relatively minor offenses; it rarely is employed for more serious offenses. The statutory limits on the VA's ability to grant benefits notwithstanding a negative discharge are enumerated in 38 U.S.C. § 3103. Social Security disability remains an option, regardless of the character of discharge, even though veterans' disability may not be available.

B. Employment. Only members who leave the service with an honorable or general discharge may claim a veteran's preference when applying for federal employment. Depending on the nature of the underlying offense, a convicted member may be completely disqualified from holding many federal jobs. In addition, members who contemplate requesting punitive discharges (or waiving their right to an administrative discharge board hearing) should be aware that receiving a punitive or other than honorable (OTH) discharge may adversely affect their eligibility for state benefits as well.

C. "Tower amendment." Formerly, servicemembers with over twenty years of active duty were guaranteed that, when they retired or transferred into the Fleet Reserve, their entitlement to retired / retainer pay would not be reduced from the highest level attained even if they were later reduced in rate. This provision had the unintended effect of protecting undeserving servicemembers who were reduced, but not punitively separated, at court-martial. Congress modified 10 U.S.C. § 1401f to provide that a member reduced in rate by court-martial will receive retired / retainer pay based only on the actual grade at retirement / Fleet Reserve transfer. The change affects only those servicemembers who initially become eligible for retired or

retainer pay on or after October 1, 1988. Those who became eligible before October 1, 1988, will continue to benefit from the "guarantee" of the prior law.

3120 NAVY PAGES 7 AND 13 ENTRIES

Page 7 entries are required in the Navy in all cases where the sentence, as approved and ordered executed by the CA, includes confinement, reduction in rate, forfeiture of pay, or fine. (In addition, in the case of reduction, a page 4 entry is required.)

A. Procedure. If all of the above types of punishments have been suspended by the CA, a page 7 entry will not be prepared. Instead, a page 13 entry will be required. If any one of the above-mentioned types of punishments has been approved and not suspended, however, a page 7 entry must be prepared to reflect the results of the court-martial.

B. Vacation. In addition, in the event that a sentence which normally would have been documented on a page 7 entry was suspended (so a page 13 entry was initially completed) and the CA later vacates that suspended sentence, preparation of a page 7 entry will be required at the time the suspended sentence is vacated. This entry will reflect which portion of the suspended sentence has been vacated and thus "ordered executed."

3121 CASES ON COURT-MARTIAL PUNISHMENTS

A. Ultimate offense doctrine. *United States v. Battle*, 27 M.J. 781 (A.F.C.M.R. 1988).

B. Death. *United States v. Curtis*, 32 M.J. 252 (C.M.A. 1991); *United States v. Dock*, 28 M.J. 117 (C.M.A. 1989).

C. Discharge. *United States v. Lenard*, 27 M.J. 739 (A.C.M.R. 1988); *United States v. Harry*, 25 M.J. 513 (A.F.C.M.R. 1987) (commutation of BCD to 12 months' confinement unauthorized; BCD to 6 months' confinement authorized); *Waller v. Wift*, 30 M.J. 139 (C.M.A. 1990) (DD commuted to 18 months' confinement); *United States v. Coleman*, 31 M.J. 653 (C.G.C.M.R. 1990).

D. Confinement. *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984); *United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989).

E. Confinement to enforce fines. *United States v. Rascoe*, 31 M.J. 544 (N.M.C.M.R. 1990); *United States v. Brooks*, 32 M.J. 831 (N.M.C.M.R. 1991).

F. Forfeitures. *United States v. Warner*, 25 M.J. 64 (C.M.A. 1987); *United States v. Gonda*, 27 M.J. 636 (A.C.M.R. 1988); *United States v. Frierson*, 28 M.J. 501 (A.F.C.M.R. 1989); *United States v. Murphy*, 28 M.J. 758 (A.F.C.M.R. 1989); *United States v. Bowen*, 29 M.J. 779 (A.C.M.R. 1989); *United States v. Petty*, 30 M.J. 1237 (A.C.M.R. 1990); *United States v. Deisher*, 32 M.J. 579 (A.F.C.M.R. 1990).

G. Fines. *United States v. Shada*, 28 M.J. 684 (A.F.C.M.R. 1989); *United States v. Czeck*, 28 M.J. 563 (N.M.C.M.R.), *petition denied*, 29 M.J. 275 (C.M.A. 1989); *United States v. Harris*, 19 M.J. 331 (C.M.A. 1985); *United States v. Soriano*, 22 M.J. 453 (C.M.A. 1986); *United States v. Morales-Santana*, 32 M.J. 557 (A.C.M.R. 1990), *review denied*, 32 M.J. 492 (C.M.A. 1991).

H. Bread and water. *United States v. Yatchak*, 35 M.J. 379 (C.M.A. 1991); *Dukes v. Smith*, 34 M.J. 803 (N.M.C.M.R. 1991); and *United States v. Valead*, 32 M.J. 122 (C.M.A. 1991).

I. Article 58a administrative reduction. *United States v. Young*, 24 M.J. 626 (A.C.M.R. 1987).

J. Reconsideration of sentence. *United States v. Jones*, 3 M.J. 348 (C.M.A. 1977); *United States v. Feld*, 27 M.J. 537 (A.F.C.M.R. 1988).

3122 FREQUENT ERRORS IN THE SUBMISSION OF ROT

A. NAMARA observations. The Documents Examination Section (Code 40.31) of the Case Management Branch, Administrative Support Division, NAMARA receives and processes more than 5,000 ROTs each year. Upon receipt, these cases are examined for completeness before being forwarded for review to the N.M.C.M.R. under Art. 66, UCMJ, or to New Trials / Examination under Arts. 69 and 73, UCMJ, or filed after waiver of appellate review under Art. 64, UCMJ. Approximately 20 percent of all cases submitted to NAMARA for review contain errors in post-trial documents, notably the court-martial order. In at least 10 percent of the cases submitted, appellate processing is delayed because the records are incomplete or improperly forwarded. R.C.M. 1103 provides instructions on preparation of the ROT and specifies the documents to be included and attached.

B. Article 66. For cases submitted for review by N.M.C.M.R. under Art. 66, UCMJ, the most common problem is incomplete documentation. The most frequent omission is the SJA recommendation. When the SJA recommendation is included, often the proof of service on the DC is missing, as is the appellate rights statement of the accused—which includes the accused's election or waiver of appellate DC. The latter document should be in the format set out in the appendix to the *JAG Manual*, not the one-page advisement of appellate rights the MJ uses. For cases reviewed

under Art. 64, UCMJ, and submitted to OJAG for filing, the most frequently omitted documents in the ROT are the SJA advice and the action of the GCMA ordering the sentence executed. Often, appellate rights statements are included in the record even though the appellant waived the right to appellate review before N.M.C.M.R.

C. Article 69(b). For cases submitted for review under Art. 69(b), UCMJ, the most frequent errors are that the petition by the accused is not submitted under oath and that the petition is not submitted through the chain of command, the CA, and the GCMA. Complete instructions for submitting these petitions are set forth in Chapter I of the *JAG Manual*.

D. Copies. In addition to the errors noted above, records are frequently received missing the requisite number of copies. While only the original ROT is required for records submitted under Arts. 64 and 69, UCMJ, an original and two complete copies are required for records submitted for review under Art. 66, UCMJ. When used, post-trial forms need to be signed and dated, with inapplicable portions lined out.

E. JAG / COMNAVLEGSVCCOMINST 5814.1. Most errors in the submission of ROT can be eliminated through the use of the post-trial checklists in JAG / COMNAVLEGSVCCOMINST 5814.1.

F. NAMARA ROT contents review checklist:

1. Original and two copies of ROT;

2. appellate rights statement—signed by accused indicating desire for counsel;

3. signed original and three certified copies of court-martial order;

4. signed recommendation of JA / LO per R.C.M. 1106; Art. 60(d), UCMJ;

5. signed receipt by DC of JA / LO recommendation per R.C.M. 1106(f)(1), 1103(b)(3)(G);

6. DD Form 457 "IO's Report" for article 32 (GCM only);

7. advice of SJA pursuant to article 34 (R.C.M. 406) (GCM only);

8. companion case;

9. records of former trials of the same case;

10. index sheet;

11. signed receipt of accused for copy of ROT / "cert. in lieu of";

12. court-martial convening order;

13. verbatim record of proceedings / page check;

14. charge sheet (DD Form 458), inserted in ROT *after* arraignment. (App 14-4, MCM, 1984);

15. authentication of record by MJ;

16. signed original CA's action;

17. prosecution exhibits / defense exhibits; and

18. appellate exhibits / pretrial agreement.

3123 QUARTERLY CRIMINAL ACTIVITY, DISCIPLINARY INFRACTIONS, AND COURT-MARTIAL REPORT (QCAR)

Per JAG Instruction 5800.9, forward QCARs to: Navy-Marine Corps Appellate Review Activity, Building 111 (Code 40), Washington Navy Yard, Washington, D.C. 20374-1111. The message address is: NAMARA JAG WASHINGTON DC. The address for E-mail is: JAGO4.

APPENDIX A

SAMPLE SJA RECOMMENDATION

7 Jul 19CY

From: Staff Judge Advocate, Naval Surface Group FOUR
To: Commander, Naval Surface Group FOUR

Subj: RECOMMENDATION IN THE SPCM CASE OF YEOMAN SEAMAN JOHN Q. PUBLIC, USN, 111-22-3333

Ref: (a) R.C.M. 1106, MCM, 1984
(b) JAGMAN, § 0151c

Encl: (1) Record of trial ICO YNSN John Q. Public, USN

1. Pursuant to references (a) and (b), the following information is provided:

a. Offenses, pleas, and findings:

Charges and specifications	Pleas	Findings
Charge I: Violation of Article 86, UCMJ.	Guilty	Guilty
Specification: Unauthorized absence from his unit, USS EDSON, from 13 July 19CY(-1) to his surrender on 5 March 19CY.	Guilty	Guilty
Charge II: Violation of Article 121, UCMJ.	Guilty	Guilty
Specification: Larceny of a radio of a value of about $125.00, the property of Fireman Stoke T. Coals, U.S. Navy.	Guilty	Guilty

b. Sentence adjudged: On 15 June 19CY, the accused was sentenced to reduction to the grade of E-2, confinement for a period of 120 days, forfeiture of $200.00 pay per month for 4 months, and to be discharged from the naval service with a bad-conduct discharge.

c. Clemency recommendation by court or military judge: None.

d. Summary of accused's service record:

(1) Length of service: 3 years 2 months.

(2) Character of service: 3.4 average of evaluation traits.

(3) Awards and decorations: The accused is not entitled to any awards, medals, or commendations, except the Sea Service Deployment Ribbon.

(4) Records of prior nonjudicial punishment: CO's NJP on 1 September 19CY(-2) for a violation of Article 86, UCMJ, for missing morning muster on 28 August 19CY(-2). Awarded 15 days restriction to the limits.

(5) Previous convictions: Conviction by summary court-martial at which he was represented by lawyer counsel on 8 October 19CY(-2) for a violation of Article 121, UCMJ, wrongful appropriation of government property, for which a sentence of 1 month confinement and reduction to the grade of paygrade E-1 was finally approved. Conviction by special court-martial on 17 February 19CY(-1), for a violation of Article 86, UCMJ, unauthorized absence for a period of 27 days, for which a sentence of confinement for 1 month and forfeiture of $50.00 pay per month for 2 months was finally approved.

(6) Other matters of significance: None.

e. Nature and duration of pretrial restraint: The accused was in pretrial confinement from 29 May to 4 June 19CY, a period of 7 days. Per the decision rendered in *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984), the accused will be credited with 7 days of confinement against the sentence to confinement adjudged.

f. Judicially ordered credit to be applied to confinement, if any: None.

g. Terms and conditions of pretrial agreement, if any, which the convening authority is obligated to honor or reasons why the convening authority is not obligated to take specific action under the agreement: A pretrial agreement was submitted in this case and approved on 12 June 19CY. In return for the accused's provident guilty plea to all charges and specifications, the terms of this agreement called for a limitation on the punishment as follows:

Confinement:	If adjudged, confinement in excess of four months will be disapproved.
Restriction:	As adjudged.

Forfeitures:	If adjudged, forfeitures in excess of $150.00 pay per month for a period of four months will be disapproved.
Fine:	As adjudged.
Reduction:	As adjudged.
Punitive discharge:	As adjudged.

Your obligations concerning the terms of the pretrial agreement in this case are as follows: Since the confinement and forfeitures awarded are less than that provided for in the agreement, you are not obligated to suspend or disapprove any portion. The confinement, forfeitures, and bad-conduct discharge may be approved as adjudged.

h. The record of trial was served on the accused on 5 July 19CY. On behalf of the accused, the detailed defense counsel, LCDR I. Freeum, JAGC, USNR, has submitted a request for clemency in the form of reduction in confinement to be approved.

2. In my opinion, the court was properly constituted and had jurisdiction over the accused and the offense. The accused was found guilty in accordance with his pleas. The proceedings were conducted in substantial compliance with current regulation and policy. The offenses of which the accused was found guilty are described as offenses under the UCMJ. There is no error noted nor any issues of error raised by the accused or his counsel. The sentence as adjudged is legal and appropriate.

3. I recommend that the sentence as adjudged be approved in accordance with the terms of the pretrial agreement. I further recommend that YNSN Public be reduced to the grade of E-1 as authorized by Article 58a(a) of the Uniform Code of Military Justice.

R. U. GUILTY

APPENDIX B

MEMORANDUM FORWARDING SJA RECOMMENDATION TO DETAILED DC

9 Jul 19CY

From: Staff Judge Advocate, Commander Naval Surface Group FOUR
To: LCDR I. Freeum, JAGC, USNR, Naval Legal Service Office

Subj: SPCM CASE OF YEOMAN SEAMAN JOHN Q. PUBLIC, USN, 111-22-3333

Ref: (a) Article 64, UCMJ
(b) R.C.M. 1106(f)(1)

Encl: (1) Copy of SJA's post-trial review ICO YNSN John Q. Public

1. Pursuant to reference (a), a review of the court-martial of YNSN Public has been conducted. Enclosure (1) is a copy of this review.

2. Pursuant to rules established by reference (b), you are hereby served with a copy of this review in order to afford you an opportunity to correct or challenge any matter therein which you may deem erroneous, inadequate or misleading, or upon which you may otherwise wish to comment. Proof of service of this review upon you, together with any such correction, challenge, or comment you may make, shall be made a part of the record of proceedings.

3. You are advised that your failure to take advantage of the aforementioned opportunity within 10 calendar days from date of this service will normally be deemed a waiver of any error in the review.

4. You are requested to acknowledge receipt of this letter, with attached copy of review, by immediately completing the first endorsement.

R. U. GUILTY

APPENDIX C

DC's ACKNOWLEDGEMENT OF RECEIPT OF SJA RECOMMENDATION

FIRST ENDORSEMENT on SJA, NAVSURFGRU FOUR ltr of 9 Jul 19CY

From: LCDR I. Freeum, JAGC, USNR, Naval Legal Service Office
To: Staff Judge Advocate, Naval Surface Group FOUR

1. I, the undersigned, counsel for the accused in the above-captioned proceedings, hereby acknowledge receipt of the aforementioned staff judge advocate's review required by Article 64, UCMJ, for the subject case on this 11th day of July 19CY.

I. FREEUM

DETAILED DC's RESPONSE TO SJA RECOMMENDATION

From: LCDR I. Freeum, JAGC, USNR, Naval Legal Service Office
To: Staff Judge Advocate, Naval Surface Group FOUR

Subj: RECOMMENDATION IN THE SPCM CASE OF YEOMAN SEAMAN JOHN Q. PUBLIC, USN, 111-22-3333

Ref: (a) SJA review ICO YNSN John Q. Public, USN
(b) R.C.M. 1106(f)(4)

Encl: (1) Mr. R. D. Public's ltr of 7 July 19CY
(2) Mrs. R. D. Public's ltr of 5 July 19CY
(3) Mrs. J. Q. Public's ltr of 4 July 19CY

1. Reference (a) was received by me on 11 July 19CY and has been reviewed pursuant to reference (b).

2. I do not desire to submit a correction, challenge, or comment to the attached review.

3. The enclosures are letters from the accused's parents and his wife, Mrs. Public, for the convening authority's consideration.

APPENDIX D

CA's ACTION - ACQUITTAL RECORD OF TRIAL

LETTERHEAD

1 Feb 19CY

In the case of Boatswain's Mate Seaman Mickey E. Mouse, 123-45-6789, U.S. Navy, tried by special court-martial on 18 January 19CY, the court had jurisdiction over the accused and the offense(s) for which he was tried and the court was properly convened and constituted.

H. S. LAW
Captain, JAGC, U.S. Navy
Commanding Officer
Naval Justice School
Newport, Rhode Island

CA's ACTION (SENTENCE AWARDED AT TRIAL APPROVED AND ORDERED EXECUTED)

LETTERHEAD

1 Feb 19CY

In the case of Personnelman Third Class Mickey E. Mantel, 444-44-9944, the sentence is approved and will be executed. The Navy Brig, Naval Education and Training Center, Newport, Rhode Island, is designated as the place of confinement.

In accordance with Article 58(a), UCMJ, and JAGMAN, § 0152d(1), automatic reduction in rate to paygrade E-1 is effected.

The record of trial is forwarded to the Staff Judge Advocate, Commander, Naval Education and Training Center, Newport, Rhode Island, for review under Article 64(a), UCMJ.

H. S. LAW

Note: In this sample, ***the sentence does not include a punitive discharge, death, or dismissal***, and the paragraph pertaining to automatic reduction should be included only if the sentence awarded and approved contains confinement in excess of 90 days / 3 months.

LETTERHEAD

26 July 19CY

In the case of Yeoman Seaman John Q. Public, 111-22-3333, U.S. Navy, only so much of the sentence as provides for reduction to the grade of E-2, confinement for 90 days, forfeiture of $150.00 pay per month for 3 months, and a bad-conduct discharge is approved and, except for the part of the sentence extending to bad-conduct discharge, will be executed. The Navy Brig, Naval Education and Training Center, Newport, Rhode Island, is designated as the place of confinement.

In accordance with Article 58a(a), UCMJ and JAGMAN, § 0152d(1), automatic reduction in rate to paygrade E-1 is effected as of the date of this action.

Synopsis of the accused's prior conduct as required by JAGMAN, § 0152b:

Conviction by summary court-martial at which he was represented by lawyer counsel on 8 October 19CY(-2) for a violation of Article 121, UCMJ, wrongful appropriation of government property, for which a sentence of 1 month confinement and reduction to the grade of E-1 was finally approved. Conviction by special court-martial on 17 February 19CY(-1), for a violation of Article 86, UCMJ, unauthorized absence for a period of 27 days, for which a sentence of confinement for 1 month and forfeiture of $50.00 pay per month for 2 months was finally approved.

In addition to the two previous convictions considered by the court in this case, the accused was awarded 15 days restriction as a result of CO's nonjudicial punishment on 1 September 19CY(-2), for missing morning muster, in violation of Article 86, UCMJ.

The accused is not entitled to any awards, medals, or commendations, except the Sea Service Deployment Ribbon.

The record of trial is forwarded to the Navy-Marine Corps Appellate Review Activity (Code 40.2), Office of the Judge Advocate General, Washington Navy Yard, Washington, D.C. 20374-2002 for review under Article 66, UCMJ.

D. D. DUCK
Captain, U.S. Navy
Commander, Naval Surface Group FOUR
Newport, Rhode Island

APPENDIX E

CA's ACTION APPROVING THE SENTENCE ADJUDGED AND ALL BUT THE BCD ORDERED EXECUTED

DEPARTMENT OF THE NAVY
Naval Surface Group FOUR
Newport, Rhode Island 02841-5030

26 Jul 19CY

In the case of Yeoman Seaman John Q. Public, 111-22-3333, U.S. Navy, the sentence is approved and, except for the part of the sentence extending to bad-conduct discharge, will be executed. The Navy Brig, Naval Station, Philadelphia, Pennsylvania, is designated as the place of confinement.

In accordance with Article 58a(a), UCMJ and JAGMAN, § 0152(1), automatic reduction in rate to paygrade E-1 is effected as of the date of this action.

Synopsis of the accused's prior conduct as required by JAGMAN, § 0152b:

Conviction by special court-martial on 17 February 19CY(-1), for a violation of Article 85, UCMJ, desertion for a period of 10 days, for which a sentence of confinement for 2 months and forfeiture of $200.00 pay per month for 2 months was finally approved.

In addition to the previous conviction considered by the court in this case, the accused was awarded 15 days restriction as a result of CO's nonjudicial punishment on 5 August 19CY(-2), for missing morning muster, a violation of Article 86, UCMJ.

The accused is not entitled to any awards, medals, or commendations, except the Sea Service Deployment Ribbon.

The record of trial is forwarded to the Navy-Marine Corps Appellate Review Activity (Code 40.2), Office of the Judge Advocate General, Washington Navy Yard, Washington, D.C. 20374-2002 for review under Article 66, UCMJ.

D. D. DUCK
Captain, U.S. Navy
Commander, Naval Surface Group FOUR
Newport, Rhode Island

APPENDIX F

COMPLETED SAMPLES OF FORMS
Appendix 16, MCM

The court adjudged a sentence of confinement for six months, forfeiture of $200.00 pay per month for six months, and reduction to the grade of paygrade E-1.

Form 1. Adjudged sentence approved and ordered into execution without modifications.

In the case of Yeoman Seaman John Q. Public, U.S. Navy, the sentence is approved and will be executed. The Navy Brig, Naval Education and Training Center, Newport, Rhode Island, is designated as the place of confinement.

Form 2. Adjudged sentence approved in part (modified) and ordered executed.

In the case of Yeoman Seaman John Q. Public, U.S. Navy, only so much of the sentence as provides for confinement for three months and reduction to the grade of E-1 is approved and will be executed. The Navy Brig, Naval Education and Training Center, Newport, Rhode Island, is designated as the place of confinement.

Note: Since there is no mention of the forfeiture, it was not approved and SN Public will not forfeit his money. Also, the period of confinement was reduced from six months to three months.

Form 5. Adjudged sentence approved and entire sentence suspended.

In the case of Yeoman Seaman John Q. Public, U.S. Navy, the sentence is approved. Execution of the sentence is suspended for six months, at which time, unless the suspension is sooner vacated, the sentence will be remitted without further action.

Form 6. Adjudged sentence approved with part of the sentence suspended.

In the case of Yeoman Seaman John Q. Public, 111-22-3333, U.S. Navy, the sentence is approved and will be executed; however, the execution of that part of sentence extending to confinement is suspended for six months, at which time, unless the suspension is sooner vacated, the suspended part of the sentence will be remitted without further action.

APPENDIX G

SAMPLE PROMULGATING ORDER

LETTERHEAD

26 Jul 19CY

SPECIAL COURT-MARTIAL ORDER NO. 2-CY

Yeoman Seaman John Q. Public, 111-22-3333, U.S. Navy, Naval Surface Group FOUR, Newport, Rhode Island, was arraigned at Naval Legal Service Office, Newport, Rhode Island, on the following offenses at a court-martial convened by this command.

CHARGE I: ARTICLE 86. Plea: G. Finding: G.

Specification: Unauthorized absence from his unit, USS Edson, from 4 April 19CY to his apprehension on 1 June 19CY. Plea: G. Finding: G.

CHARGE II: ARTICLE 121. Plea: G. Finding: G.

Specification: Larceny of a radio of a value of about $125.00, the property of Fireman Stoke T. Coals, U.S. Navy. Plea: G. Finding: G.

SENTENCE

Sentence adjudged on 15 June 19CY: To be reduced to the grade of E-2, to be confined for 120 days, to forfeit $200.00 pay per month for four months, and to be discharged from the naval service with a bad-conduct discharge.

ACTION

LETTERHEAD

26 Jul 19CY

In the case of Yeoman Seaman John Q. Public, 111-22-3333, U.S. Navy, only so much of the sentence as provides for reduction to the grade of E-2, confinement for 90 days, forfeiture of $150.00 pay per month for three months, and a bad-conduct discharge is approved and, except for the part of the sentence extending to bad-conduct discharge, will be executed. The Navy Brig, Naval Education and Training Center, Newport, Rhode Island, is designated as the place of confinement.

In accordance with Article 58a(a), UCMJ and JAGMAN, § 0152d(1), automatic reduction in rate to paygrade E-1 is effected as of the date of this action.

Synopsis of the accused's prior conduct as required by JAGMAN, § 0152b:

Conviction by summary court-martial at which he was represented by lawyer counsel on 8 October 19CY(-2) for a violation of Article 121, UCMJ, wrongful appropriation of government property, for which a sentence of 1 month confinement and reduction to the grade of E-1 was finally approved. Conviction by special court-martial on 17 February 19CY(-1), for a violation of Article 86, UCMJ, unauthorized absence for a period of 27 days, for which a sentence of confinement for 1 month and forfeiture of $50.00 pay per month for 2 months was finally approved.

In addition to the two previous convictions considered by the court in this case, the accused was awarded 15 days restriction as a result of CO's nonjudicial punishment on 1 September 19CY(-2), for missing morning muster, in violation of Article 86, UCMJ.

The accused is not entitled to any awards, medals, or commendations, except the Sea Service Deployment Ribbon.

The record of trial is forwarded to the Navy-Marine Corps Appellate Review Activity (Code 40.2), Office of the Judge Advocate General, Washington Navy Yard, Washington, D.C. 20374-2002 for review under Article 66, UCMJ.

/s/ ***D. D. Duck***
D. D. DUCK
Captain, U.S. Navy
Commander, Naval Surface Group FOUR
Newport, Rhode Island

R. U. GUILTY
Lieutenant Commander, JAGC, U.S. Navy
Staff Judge Advocate
Naval Surface Group FOUR
Newport, Rhode Island
By direction of D. D. Duck
Captain, U.S. Navy
Commander, Naval Surface Group FOUR
Newport, Rhode Island

Distribution:
Original - Original ROT
Duplicate Original - Accused's SRB
Certified Copies - 3 to original ROT
1 to each copy ROT
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1 to COMNAVSURFGRU FOUR Newport, RI (OEGCMJ)
1 to COMNAVSURFLANT Norfolk, VA
1 to PRESNAVCLEMPARBD
Plain Copies - 1 to accused
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1 to MJ
1 to TC
1 to DC
1 COMNAVSURFGRU FOUR Newport, RI
1 to USS EDSON (DD 946)
1 to USS SAMUEL B. ROBERTS (FFG 58)
1 to USS SIMPSON (FFG 56)

APPENDIX H

DEPARTMENT OF THE NAVY
Naval Surface Group FOUR
Newport, Rhode Island 02841-5061

SUPPLEMENTAL COURT-MARTIAL ORDER NO. 2A-CY

In the special court-martial case of Yeoman Seaman John Q. Public, 111-22-3333, U.S. Navy, the sentence to a bad-conduct discharge, as promulgated in Special Court-Martial Order No. 2-CY, Commander, Naval Surface Group FOUR, Newport, Rhode Island, dated 26 Jul 19CY, has been affirmed by the Navy-Marine Corps Court of Military Review, NMCM CY 5464, dated 23 April 19CY(+1). Article 71(c) having been complied with, the bad-conduct discharge will be executed.

T. H. JUDGE
Lieutenant Commander, JAGC, U.S. Navy
Naval Surface Group FOUR
Newport, Rhode Island
By direction of D. D. Duck
Captain, U.S. Navy
Commander, Naval Surface Group FOUR
Newport, Rhode Island

Distribution:
Original - Original ROT
Duplicate Original - Accused's SRB
Certified Copies - 3 to original ROT
1 to each copy ROT
2 to COMNAVSURFGRU FOUR Newport, RI
1 to CHNAVPERS (Pers ???)
1 to COMNAVSURFGRU FOUR Newport, RI (OEGCMJ)
1 to COMNAVSURFLANT Norfolk, VA
1 to PRESNAVCLEMPARBD
Plain Copies - 1 to accused
1 to NAVLEGSVCOFF Newport, RI
1 to MJ
1 to TC
1 to DC
1 COMNAVSURFGRU FOUR Newport, RI
1 to USS EDSON (DD 946)
1 to USS SAMUEL B. ROBERTS (FFG 58)
1 to USS SIMPSON (FFG 56)

APPENDIX I

ACKNOWLEDGEMENT OF SERVICE PER R.C.M. 1106(f)

I hereby acknowledge receipt of a certified true copy of the Article 60(d), UCMJ, recommendation in the Special Court-Martial case of _____, USN, SSN, at ____ hours, this ___ day of _____, 19CY.

I understand I have ten (10) days to submit to the Staff Judge Advocate, Commander _____, written corrections or rebuttal to any matter in his / her recommendation which is believed to be erroneous, inadequate, or misleading, or to comment on any other matter. I further understand that any requests for delay in submitting my comments must be in writing and addressed to Commander _____ _____, via the Staff Judge Advocate.

I do / do not desire to submit a written statement.

LT, JAGC, USNR
DEFENSE COUNSEL

RECEIPT FOR COURT-MARTIAL PROMULGATING ORDER BY ACCUSED / DC OR CIVILIAN DC

ACKNOWLEDGEMENT OF SERVICE
PER R.C.M. 1107(h)

I hereby acknowledge receipt of two copies of the Court-Martial Promulgating Order in the Special Court-Martial case of _____, USN, SSN, at ___ hours, this ___ day of _____ 19CY.

NAME
LT, JAGC, USNR
DEFENSE COUNSEL

APPENDIX J

PROCEDURES FOR VACATION OF SUSPENDED SENTENCES

COURT-MARTIAL SENTENCE	ANY GCM, BCD, SPCM	NON-BCD SPCM, SCM
HEARING REQUIRED	Similar to Article 32, UCMJ, investigation. Use DD Form 455.	
RIGHT TO COUNSEL	Same as at GCM. No right to IMC	Same as at type of C-M which adjudged the sentence. No right to IMC.
WHO VACATES	GCMA	SPCMA, SCMCA
REQUIRED RECORD	Written statement of evidence and reasons for vacating.	

APPENDIX K

GCM Post-Trial Checklist
ICO _____ (JAG / COMNAVLEGSVCCOMINST 5814.1 20)

___ Prepare report of results of trial form, if required; attach to ROT. JAGMAN, § 0149, A-1-j.

___ Art. 32 appointing order inserted in ROT. R.C.M. 1103(b)(3).
- ___ Report of investigation (DD Form 457).
- ___ Art. 34 advice.
- ___ Waiver of Art. 32.

___ Convening order inserted in ROT. R.C.M. 1103(b)(2)(D).
- ___ Modifications inserted, if any.

___ Charge sheet inserted in ROT. R.C.M. 1103(b)(2)(D).

___ ROT examined by TC. R.C.M. 1103 (i)(1)(A).

___ ROT examined by DC, when unreasonable delay will not result. R.C.M. 1103(i)(1)(B).

___ ROT authenticated by each MJ participating in proceedings or substitute authentication. R.C.M. 1104(a)(2).

___ Original verbatim ROT and four copies prepared, or original summarized ROT and one copy if verbatim not required. R.C.M. 1103(b)(2), (3), (g). All exhibits included:
- ___ Prosecution.
- ___ Defense.
- ___ Appellate.
  - ___ Pretrial agreement.
  - ___ Motions.
  - ___ MJ alone request, if any.
  - ___ Written continuance requests with ruling.
  - ___ Written special findings by the MJ.
  - ___ Enlisted members request.
  - ___ Members questionnaires.
  - ___ Voir dire questions submitted.
  - ___ Members' questions.
  - ___ Appellate rights statement.
    - ___ Special power of attorney.

___ Waiver of appellate review.
___ Other _____.

___ Page check: sequential; # of pages: ___.

___ Index sheet.

___ Copy of ROT served on accused; attach receipt in ROT (or explanation in lieu of). R.C.M. 1104(b).

___ ROT and copies delivered to the LO / JA.

(*Note*: Items above this point are normally completed by the NLSO)

___ LO / JA recommendation prepared; inserted in ROT.
R.C.M. 1103(b)(3)(G); R.C.M. 1106; JAGMAN, § 0151(c).
___ SJA / LO recommendation checklist complied with.

___ LO / JA recommendation served on DC or accused; receipt in ROT (or explanation in lieu of). R.C.M. 1106(f). Date accused ____. Counsel _____.

___ Accused response to LO / JA recommendation inserted in ROT, if provided. R.C.M. 1106.

___ Forward all responses and recommendations (including supplementary responses and recommendations) to CA for review. R.C.M. 1107.
___ Allegations of legal error raised by accused in response addressed in an addendum to the recommendation. R.C.M. 1106(d)(4). (SJA only)
___ All other R.C.M. 1105, 1106, or other clemency matters addressed.
___ All supplementary recommendations raising new matter served on DC or accused; receipt in ROT (or explanation in lieu of). R.C.M. 1106(f)(7).

___ Attach other matters submitted by accused or DC, and any action on same, to ROT. R.C.M. 1105, R.C.M. 1106(f)(4), R.C.M. 1110; JAGMAN, § 0161.
___ Deferment requests.
___ All clemency requests.
___ Other matters.

___ Prepare CA's action using CA's input. R.C.M. 1107.
___ CA's action checklist complied with.

___ Attach CA's action or statement as to why (s)he cannot take action; include letter of reprimand if any. R.C.M. 1107.

___ Prepare promulgating order and appropriate copies for distribution. JAGMAN, § 0153, 0155; R.C.M. 1114(c)(3).
- ___ Promulgating order checklist complied with.

___ Complete time sheet and the back of the cover of the ROT.

___ Forward ROT to appropriate authority. JAGMAN, §§ 0153, 0154; R.C.M. 1111, R.C.M. 1112. (*Note*: If case assigned an NMCM number, it must always be forwarded to Navy and Marine Corps Appellate Review Activity.)
- ___ Waiver of appellate review in writing.
  - ___ Forward ROT to JA for review, this may be the SJA for CA. R.C.M. 1111; JAGMAN, §§ 0153, 0154. (*Note*: Appellate review with sentence to death may not be waived.)
    - ___ JA's review inserted in original ROT and all copies. R.C.M. 1103(b)(3)(G), R.C.M. 1112.
    - ___ Copy of review to accused.
- ___ Forward ROT and copies to the Navy and Marine Corps Appellate Review Activity, Code 40.31.
- ___ Forward one copy of the ROT to the President, Naval Clemency and Parole Board, if sentence includes an unsuspended punitive discharge or confinement for eight months or more.
- ___ No waiver of appellate review.
  - ___ Send ROT and two copies to the Navy and Marine Corps Appellate Review Activity, Code 40.31.
  - ___ Forward one copy of the ROT to the President, Naval Clemency and Parole Board, if sentence includes an unsuspended punitive discharge or confinement for eight months or more.

___ Prepare appropriate service record entries (usually pages 4, 7, 9, and 13).

___ Optional: retain copy of ROT, CA's action, and promulgating order.

___ Conditions on suspension, proof of service on probationer, and any records of procedures in connection with vacation of suspension. R.C.M. 1108, R.C.M. 1109.

___ Confinement order and medical officer's certificate for members sentenced to confinement on bread and water and diminished rations.

___ Appellate court directives (i.e., orders to conduct a rehearing, supplemental orders, etc.).

___ Records of former trial of the same case if case was a rehearing or new or other trial of the same case. R.C.M. 1103(b)(3)(A).

___ Compliance with requirements for national security and classified information. JAGMAN, §§ 0126, 0144, 0166; OPNAVINST 5510.1H; R.C.M. 407(b), R.C.M. 1104(b)(1)(D).

___ Other _____.

APPENDIX L

BCD SPCM Post-Trial Checklist
ICO _____ [JAG / COMNAVLEGSVCCOMINST 5814.1 20)

___ Prepare report of results of trial form, if required; attach to ROT. JAGMAN, § 0149, A-1-j.

___ Convening order inserted in ROT. R.C.M. 1103(b)(2)(D).
- ___ Modifications inserted, if any.

___ Charge sheet inserted in ROT. R.C.M. 1103(b)(2)(D).

___ ROT examined by TC. R.C.M. 1103(i)(1)(A).

___ ROT examined by DC, when unreasonable delay will not result. R.C.M. 1103(i)(1)(B).

___ ROT authenticated by each MJ participating in proceedings or substitute authentication. R.C.M. 1104(a)(2).

___ Original verbatim ROT and four copies prepared. R.C.M. 1103(b)(2), (3), and (g). All exhibits included:
- ___ Prosecution.
- ___ Defense.
- ___ Appellate.
  - ___ Pretrial agreement.
  - ___ Motions.
  - ___ MJ alone request, if any.
  - ___ Written continuance requests with ruling.
  - ___ Written special findings by MJ.
  - ___ Enlisted members request.
  - ___ Members questionnaires.
  - ___ Voir dire questions submitted.
  - ___ Members' questions.
  - ___ Appellate rights statement.
    - ___ Special power of attorney.
  - ___ Waiver of appellate review.
  - ___ Other _____.

___ Page check: sequential; # of pages: _____.

___ Index sheet.

___ Copy of ROT served on accused; attach receipt in ROT (or explanation in lieu of). R.C.M. 1104(b).

___ ROT and copies delivered to LO / JA.

(*Note*: Items above this point are normally completed by the NLSO)

___ LO / JA recommendation prepared; inserted in ROT. R.C.M. 1103(b)(3)(G), R.C.M. 1106, JAGMAN, § 0151(c).
  ___ SJA / LO recommendation checklist complied with.

___ LO / JA recommendation served on DC or accused; receipt in ROT (or explanation in lieu of). R.C.M. 1106(f). Date accused ___. Counsel _____.

___ Accused response to LO / JA recommendation inserted in ROT, if provided. R.C.M. 1106.

___ Forward all responses and recommendations (including supplementary responses and recommendations) to CA for review. R.C.M. 1107.
  ___ Allegations of legal error raised by accused in response addressed in supplementary recommendation. R.C.M. 1106(d)(4). (SJA only)
  ___ All other R.C.M. 1105, 1106, or other clemency matters addressed.
  ___ All supplementary recommendations raising new matter served on DC or accused; receipt in ROT (or explanation in lieu of). R.C.M. 1106(f)(7).

___ Attach other matters submitted by accused or DC, and any action on same, to ROT. R.C.M. 1105, R.C.M. 1106(f)(4), R.C.M. 1110; JAGMAN, § 0161.
  ___ Deferment requests.
  ___ Clemency requests.
  ___ Other matters.

___ Prepare CA's action using CA's input. R.C.M. 1107.
  ___ CA's order checklist complied with.

___ Attach CA's action or statement as to why (s)he cannot take action; include letter of reprimand if any. R.C.M. 1107.

___ Prepare promulgating order and appropriate copies for distribution. R.C.M. 1114(c)(3); JAGMAN, §§ 0153, 0155.
  ___ Promulgating order checklist complied with.

___ Complete time sheet and the back of the cover of the ROT.

___ Forward ROT to appropriate authority. R.C.M. 1111, R.C.M. 1112; JAGMAN, §§ 0153, 0154. (*Note*: If case assigned an NMCM number, it must be forwarded to Navy and Marine Corps Appellate Review Activity.)

___ Waiver of appellate review in writing.

___ Forward ROT to SJA of OEGCMA for review. R.C.M. 1111; JAGMAN, §§ 0153, 0154. (*Note*: ROT may have to be forwarded to OEGCMA for action or the JAG for action. R.C.M. 1112, 1201.)

___ The JA's review inserted in original ROT and all copies. R.C.M. 1103(b)(3)(G), R.C.M. 1112.

___ Copy of review to accused.

___ Forward ROT to OJAG, Code 40.31.

___ Forward one copy of the ROT to the President, Naval Clemency and Parole Board, if sentence includes an unsuspended punitive discharge.

___ No waiver of appellate review.

___ Send ROT and two copies to the Navy and Marine Corps Appellate Review Activity, Code 40.31.

___ Forward one copy of the ROT to the President, Naval Clemency and Parole Board, if sentence includes an unsuspended punitive discharge.

___ Prepare appropriate service record entries (usually pages 4, 7, 9, and 13).

___ Optional: retain copy of ROT, CA's action, and promulgating order.

___ If initiated as Art. 32, appointing order inserted in ROT. R.C.M. 1103(b)(3).

___ Report of investigation (DD Form 457).

___ Art. 34 advice.

___ Waiver of Art. 32.

___ Conditions on suspension, proof of service on probationer, and any records of procedures in connection with vacation of suspension. R.C.M. 1108, R.C.M. 1109.

___ Confinement order and medical officer's certificate for members sentenced to confinement on bread and water and diminished rations.

___ Appellate court directives (i.e., orders to conduct a rehearing, supplemental orders, etc.).

___ Records of former trial of the same case if case was a rehearing or new or other trial of the same case. R.C.M. 1103(b)(3)(A).

___ Compliance with requirements for national security and classified information. JAGMAN, §§ 0126, 0144, 0166; OPNAVINST 5510.1H; R.C.M. 407(b), R.C.M. 1104(b)(1)(D).

___ Other _____.

APPENDIX M

Non-BCD SPCM Post-Trial Checklist
ICO _____ (JAG / COMNAVLEGSVCCOMINST 5814.1 20)

___ Prepare report of results of trial form, if required; attach to ROT. JAGMAN, § 0149, A-1-j.

___ Convening order inserted in ROT. R.C.M. 1103(b)(2)(D).
- ___ Modifications inserted, if any.

___ Charge sheet inserted in ROT. R.C.M. 1103(b)(2)(D).

___ ROT examined by TC. R.C.M. 1103(i)(1)(A).

___ ROT examined by DC, when unreasonable delay will not result. R.C.M. 1103(i)(1)(B).

___ ROT authenticated by each MJ participating in proceedings or substitute authentication. JAGMAN, § 0150a: R.C.M. 1104(a)(2).

___ Original summarized ROT and one copy prepared. R.C.M. 1103(b)(2), (3), (g). All exhibits included:
- ___ Prosecution.
- ___ Defense.
- ___ Appellate.
  - ___ Pretrial agreement.
  - ___ Motions.
  - ___ MJ alone request, if any.
  - ___ Written continuance requests with ruling.
  - ___ Written special findings by MJ.
  - ___ Enlisted members request.
  - ___ Members questionnaires.
  - ___ Voir dire questions.
  - ___ Members' questions.
  - ___ Appellate rights statement.
  - ___ Other _____.

___ Page check: sequential; # of pages: ___.

___ Index sheet.

___ Copy of ROT served on accused; attach receipt of ROT (or explanation in lieu of). R.C.M. 1104(b).

___ ROT and copies delivered to LO / JA.

(*Note*: Items above this point are normally completed by the NLSO)

___ Attach accused's response to ROT, if provided. R.C.M. 1106.

___ Attach other matters submitted by accused or DC, and any action on same, to ROT. R.C.M. 1105, 1106.
- ___ Deferment requests.
- ___ Clemency requests.
- ___ Other matters.

___ Comment to CA on all matters raised under R.C.M. 1105, 1106 and any other clemency matter. (Only SJA's may respond to legal error.)

___ Forward all responses and recommendations to CA for review. R.C.M. 1107.

___ Prepare CA's action using CA's input. R.C.M. 1107.
- ___ CA's action checklist complied with.

___ Attach CA's action or statement as to why (s)he cannot take action; include letter of reprimand if any. R.C.M. 1107.

___ Prepare promulgating order and appropriate copies for distribution. R.C.M. 1114(c)(3); JAGMAN, §§ 0153, 0155.
- ___ Promulgating order checklist complied with.

___ Complete time sheet and the back of the cover of the ROT.

___ Forward ROT to SJA of OEGCMA for review. R.C.M. 1111; JAGMAN, §§ 1053, 0154. (*Note*: ROT may have to be forwarded to OEGCMA for action or the JAG for action. R.C.M. 1112, 1201.)

___ The JA's review inserted in original ROT and all copies. R.C.M. 1103(b)(3)(G), R.C.M. 1112.

___ Copy of review to accused.

___ Maintain and distribute ROT in accordance with JAGMAN, § 0154(2) and (3).

___ Shore activities: maintain two years after final action.
___ Fleet activities: maintain three months after final action.

___ Prepare appropriate service record entries (usually pages 4, 7, 9, and 13).
___ If initiated as Art. 32, appointing order inserted in ROT. R.C.M. 1103(b)(3).
___ Record of investigation (DD Form 457).
___ Art. 34 advice.
___ Waiver of Art. 32.

___ Conditions on suspension, proof of service on probationer, and any records of procedures in connection with vacation of suspension. R.C.M. 1108, R.C.M. 1109.

___ Confinement order and medical officer's certificate for members sentenced to confinement on bread and water and diminished rations.

___ Records of former trial of the same case if case was a rehearing or new or other trial of the same case. R.C.M. 1103(b)(3)(A).

___ Appellate court directives (i.e., orders to conduct a rehearing, supplemental orders, etc.).

___ Compliance with requirements for national security and classified information. JAGMAN, §§ 0126, 0144, and 0166; OPNAVINST 5510.1H; R.C.M. 407(b), R.C.M. 1104(b)(1)(D).

___ Other _____.

APPENDIX N

SJA / LO Recommendation Checklist
R.C.M. 1106, JAGMAN, § 0151(c)

SJA Recommendation ICO _____

___ Offenses, pleas, findings, and adjudged sentence set out.

___. Court or MJ's clemency recommendation, if any.

___ Summary of accused's service record.
- ___ Length of service.
- ___ Character of service (average pros and cons, average evaluation traits).
- ___ Decorations / awards.
- ___ Records of prior nonjudicial punishments (NJPs).
- ___ Previous convictions.
- ___ Other matters of significance.

___ Nature and duration of pretrial restraint, if any.
- ___ Judicially ordered credit to be applied to confinement if any.

___ Current confinement status.

___ Existence of pretrial agreement noted, if any.
- ___ Terms and obligations CA is obligated to take or reasons why CA is not obligated to take specific action under the agreement.

___ All R.C.M. 1105 matters and other clemency submitted prior to recommendation with all matters submitted attached as enclosures.

___ All claims of legal error addressed and statement whether corrective action on the findings or sentence is appropriate when an allegation of error is raised under R.C.M. 1105 or when deemed appropriate by the SJA. (*Note*: For SJAs only, LOs do not address legal error.)
- ___ All R.C.M. 1105 or other clemency matters noted and statement that they were taken into consideration.

___ Specific recommendation concerning action to be taken by CA on adjudged sentence after considering any clemency matters, any claims or legal error, and any pretrial agreement.

___ Optional matters, if any.
  ___ Accused notified and given opportunity to rebut adverse matters which are not part of the record and with knowledge of which the accused is not chargeable.

___ Recommendation signed by SJA or commissioned officer acting as LO.

___ Served on accused and counsel.
  ___ Statement stating why accused not personally served.
  ___ Date accused: _____, counsel: _____.

___ If R.C.M. 1105 or 1106 matters or other matters are raised after original recommendation, addendum to recommendation noting these issues completed. (*Note*: Only SJA may respond to legal errors.)
  ___ If addendum raises new matter, has accused and counsel been served and given opportunity to respond prior to CA taking action?

APPENDIX O

CA's Action Checklist
R.C.M. 1107; JAGMAN, § 0151(a) and (b).

CA's Action ICO _____

___ R.C.M. 706 hearing ordered if accused lacks mental capacity.

___ Action taken not earlier than 10 days after the later of service of the ROT or LO / SJA recommendation.
- ___ Waiver of right to submit matters, in writing, by accused.
- ___ Time period extended.

___ Optional: offenses, pleas, findings, and adjudged sentence properly promulgated.

___ Action states CA considered:
- ___ Result of trial.
- ___ LO / SJA recommendation.
- ___ Court or MJ's recommendation, if any.
- ___ Clemency matters submitted by anyone, if any.
- ___ Legal errors raised, if any.
- ___ Other matters raised under R.C.M. 1105 and 1106, if any. (***Note***: Indicate that no matters were received if that is the case, also indicate a failure of accused or counsel to respond to SJA / LO recommendation.)

___ Optional additional matters considered, if any.
- ___ ROT.
- ___ Personnel records of accused.
- ___ Other matters deemed appropriate by CA.
  - ___ Notification to accused and opportunity to rebut, if matters adverse to accused from outside record, with knowledge of which the accused is not chargeable are considered.

___ Specific action with regard to findings, if applicable.
- ___ Rehearing on findings ordered.
  - ___ If rehearing or new trial ordered, reasons for disapproval set forth.
- ___ If no rehearing ordered on disapproved charges and specifications, statement of dismissal.
- ___ If "other" trial ordered, reasons for declaring the proceedings invalid stated.

___ Specific action with regard to sentence adjudged.
- ___ Sentence consistent with pretrial agreement, if any.
- ___ CA executed portions of sentence not suspended, except for punitive discharge.
- ___ If sentence mitigated, equivalencies under R.C.M. 1003 complied with.
- ___ Sentence limited if the ROT does not meet requirements of R.C.M. 1103(b)(2)(B) or (c)(1).
- ___ Rehearing on sentence ordered.

___ Automatic reduction addressed (Article 58a), if accused not reduced to E-1 as part of adjudge sentence.

___ If portion of sentence suspended, accused has been informed of conditions in writing.

___ Place of confinement noted, if approved by CA.

___ Deferment date noted, if granted.
- ___ Deferment rescinded.

___ Credit for illegal pretrial confinement directed.

___ Any reprimand ordered executed included in action.

___ Companion cases noted, if any.

___ Signed by CA with authority to sign stated below.

___ If substitute CA, action notes CA is acting pursuant to a specific request.

___ If action on rehearing on new trial, limitations of R.C.M. 810(d) complied with.

___ Served on accused or counsel.

APPENDIX P

Promulgating Order Checklist
R.C.M. 1114; MCM Appendix 17; JAGMAN, § 0155

Promulgating Order ICO _____

___ Order bears date of initial action of CA, if any.

___ Type of court-martial specified.

___ Command which convened court-martial.

___ Charges and specifications, or summary thereof on which accused arraigned.

___ Accused's plea.

___ Findings or other disposition of each charge and specification.

___ Sentence, if any.

___ Action of CA, or summary thereof.
  ___ Date of initial action.

___ Signed by CA, other competent authority, or person acting under direction.

___ Distributed in accordance with JAGMAN, § 0155.

___ Supplementary order, if necessary.
  ___ Verbatim recitation of the action or order of the appropriate authority, or summary of thereof.

APPENDIX Q

SAMPLE "PAGE 13" ADMINISTRATIVE REMARKS (SENTENCE DOES NOT INCLUDE CONFINEMENT OR AFFECT PAY)

ADMINISTRATIVE REMARKS
NAVPERS 1070/613 (Rev. 1-76)
S/N 0106-LF-010-6990

SHIP OR STATION

USS IOWA (BB 61)

3FebCY: SPECIAL COURT-MARTIAL

DATE OF OFFENSE: 23 September 19-1

NATURE OF OFFENSE: Violation of UCMJ, Article 86 - unauthorized absence from 23 September 19-1 to 7 January 19CY

DATE OF TRIAL: 10 January 19CY

FINDINGS: Of the Charge and the Specification thereunder: Guilty

SENTENCE ADJUDGED: To be restricted to the limits of USS IOWA (BB61) for a period of 45 days.

CA's ACTION ON SENTENCE: Approved and ordered executed. The record of trial is forwarded to Commander, Naval Surface Force, U.S. Atlantic Fleet, Norfolk, Virginia, for review per Article 64(b), UCMJ.

/signature/
J. L. MASTERSON, PNCS, USN
By direction of the Commanding Officer

NAME	SSN	BRANCH AND CLASS
BYERS, Thomas Glenn	987-65-4321	USN

APPENDIX R

SAMPLE 'PAGE 7' COURT MEMORANDUM (P601-7R) SPCM CONVICTION

(Blocks not identified are left blank.)

1. DATE SUBMITTED: CYMAR22 2. SHIP / STATION: USS IOWA (BB 61)

3. DATE OF REFERRAL: CYFEB16 4. TYPE OF COURT: SPECIAL

5. DATE OF COURT: CYFEB28 6. UCMJ ARTICLE(S): 128, 134

7. DATE OF ACTION: CYMAR20 8. "X" REPORT OF ACTION

12. "X" RATE ADJUSTMENT

13. FROM: BT3 14. TO: BTFN 15. TIR: CYMAR20

42. SYNOPSIS . . .

CYMAR22: SPECIAL COURT-MARTIAL
DATE OF TRIAL: CYFEB28
VIOL UCMJ ART. 128 - ASSAULT ON A PETTY OFFICER BY STRIKING HIM IN THE FACE WITH HIS FIST ON CYFEB10; VIOL UCMJ ART. 134 - DRUNK AND DISORDERLY CONDUCT ON STATION ON CYFEB10.
SENTENCE ADJUDGED: CONF FOR 2 MONTHS AND REDUCTION IN GRADE TO PAY GRADE E-3
DATE SENTENCE ADJUDGED: CYFEB28

43. 1070/607 DTD: CYMAR20 44. AUTHORITY TYPE: CONVENING

45. CO USS IOWA (BB 61) LTR SER 325 DTD CYMAR20 FWD ROT TO COMNAVSURFLANT, NORFOLK, VA

CA'S ACTION: APPROVED AND ORDERED EXECUTED. THE NAVAL BRIG, NAVSTA, NORFOLK, VA IS DESIGNATED THE PLACE OF CONF. ROT FWD TO COMNAVSURFLANT, NORFOLK, VA FOR REVIEW PER ART. 64(a), UCMJ.

(Complete blocks 46-51 with identifying data.)

SAMPLE "PAGE 7" COURT MEMORANDUM (P601-7R) SPCM SENTENCE SERVED

(Blocks not identified are left blank.)

1. DATE SUBMITTED: CYAPR20 2. SHIP / STATION: USS IOWA (BB 61)

3. DATE OF REFERRAL: CYFEB16 4. TYPE OF COURT: SPECIAL

5. DATE OF COURT: CYFEB28 6. UCMJ ARTICLE(S): 128, 134

7. DATE OF ACTION: CYAPR19 8. "X" REPORT OF ACTION

36. CONFINEMENT ORDERED FROM: CYFEB28

37. COMPUTED TO CYAPR19

38. DAYS LOST TIME (30 DAY BASIS): 51

39. DAYS LOST TIME (DAY FOR DAY): 50

40. CHANGE EAOS TO: CY+1SEP25

41. CHANGE EXP. ENL. TO: CY+1SEP25

42. SYNOPSIS . . .

RELEASED FROM CONF HAVING SERVED 50 DAYS OF SENTENCE ADJUDGED ON CYFEB28. GIVEN 10 DAYS CREDIT FOR GOOD BEHAVIOR.

44. AUTHORITY TYPE: ADMINISTRATIVE

46. J. L. MASTERSON, PNCS, USN, BY DIR OF CO USS IOWA (BB 61)

(Complete blocks 47-51 with identifying data.)

APPENDIX S

COURT-MARTIAL PUNISHMENTS (R.C.M. 1003)

PUNISHMENT	FORUM		
	SCM	SPCM	GCM
DEATH (1)	No	No	Yes
SEPARATION			
Dismissal (2)(3)	No	No	Yes (Only Officers)
Dishonorable Discharge (DD) (2)(4)	No	No	Yes (All Enlisted)
Bad-Conduct Discharge (BCD) (2)	No	Yes (E-1 to E-6)	Yes (E-1 to E-6)
CONFINEMENT (2)	Yes 30 Days Maximum (E-1 to E-4)	Yes 6 Months Maximum (All Enlisted)	Yes Maximum Authorized (All Grades)
BREAD AND WATER (2)(5)(6)	Yes 3 Days Maximum (E-1 to E-4)	Probably No	Probably No
RESTRICTION (2)(7)	Yes 60 Days Maximum	Yes 60 Days Maximum	Yes 60 Days Maximum
HARD LABOR W/O CONFINEMENT (2)(7)(8)	Yes 45 Days Maximum (E-1 to E-4)	Yes 90 Days Maximum; 45 Days Per Each Month Of Authorized Confinement (All Enlisted)	Yes 90 Days Maximum; 45 Days Per Each Month Of Authorized Confinement (All Enlisted)
FORFEITURE (2)(9)	Yes Maximum 2/3's Pay Per Month For 1 Month (All Grades)	Yes Maximum 2/3's Pay Per Month For 6 Months (All Grades)	Yes Maximum Authorized (All Grades)
FINE (2)(10)	Yes May Not Exceed Amount Authorized For Forfeitures (All Grades)	Yes May Not Exceed Amount Authorized For Forfeitures (All Grades)	Yes No Limit (All Grades)
PUNISHMENT AFFECTING GRADE (2)			
Reduction in Rate	Yes To E-1 (E-1 to E-4) 1 Paygrade (E-5 to E-9)	Yes To E-1 (All Enlisted)	Yes To E-1 (All Enlisted)
Loss of Numbers	No	Yes (Only Officers)	Yes (Only Officers)
PUNITIVE LETTER (Reprimand) (2)	Yes (All Members)	Yes (All Members)	Yes (All Members)

Notes to chart on preceding page:

(1) Death includes a DD or Dismissal, as appropriate. Confinement is a necessary incident of death, but not part of it.

(2) Can be combined with any other lawful punishment.

(3) Permissible for any offense regardless of the listed maximum authorized punishment.

(4) For W-1s, permissible for any offense regardless of the listed maximum authorized punishment.

(5) Accused must be attached to or embarked in a vessel.

(6) Shall be treated as 2 days' confinement when combined with confinement, hard labor without confinement, or restriction [R.C.M. 1003b(9)].

(7) Combined restriction and hard labor without confinement shall be executed concurrently.

(8) When combined with confinement, the two punishments may not exceed the maximum allowable confinement at the equivalency rate of 1.5 months' hard labor w/o confinement for 1 month confinement.

(9) State both the amount of forfeiture per month and the number of months it is to run—state amount per month in whole dollars.

(10) At SCMs and SPCMs: when combined with forfeitures, combined amount may not exceed amount authorized for forfeitures.

PART VI

ADMINISTRATIVE LAW

THIRTY-TWO	ADMINISTRATIVE FACT-FINDING BODIES
THIRTY-THREE	LINE OF DUTY / MISCONDUCT DETERMINATIONS
THIRTY-FOUR	FREEDOM OF INFORMATION ACT (FOIA), PRIVACY ACT, AND RELEASE OF OFFICIAL INFORMATION AND TESTIMONY FOR LITIGATION PURPOSES
THIRTY-FIVE	STANDARDS OF CONDUCT AND GOVERNMENT ETHICS
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CHAPTER THIRTY-TWO

ADMINISTRATIVE FACT-FINDING BODIES

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PART VI - ADMINISTRATIVE LAW

CHAPTER THIRTY-TWO

ADMINISTRATIVE FACT-FINDING BODIES

3201 REFERENCES

A. JAG Manual, Chapter II

B. JAGINST 5830.1, Subj: PROCEDURES APPLICABLE TO COURTS OF INQUIRY AND ADMINISTRATIVE FACT-FINDING BODIES THAT REQUIRE A HEARING

COURTS OF INQUIRY

3202 INTRODUCTION

The Court of Inquiry (COI) is the most formal of the three administrative fact-finding bodies used in the Navy. Few active-duty judge advocates have had occasion to become involved in these investigations. This may change, however, under the guidelines for fact-finding body selection in the 1990 revision of the *JAG Manual*. Judge advocates can expect to see more and more of these investigations in the future.

3203 PRELIMINARY CONSIDERATIONS

The selection of the type of fact-finding body is left to the judgment and discretion of the commander. Before convening an investigation, the convening authority (CA) must consider the powers the fact-finding body will require and the desirability of designating parties. If the subject of the inquiry involves disputed issues of fact ***and*** a risk of substantial injustice if an individual is not afforded the rights of a party, a COI or an investigation required to conduct a hearing should be convened. If the ability to subpoena witnesses is necessary, a COI should be convened.

3204 MAJOR INCIDENTS

A COI should normally be convened if the subject of the investigation is a major incident. The character of the event as a major incident may be apparent when it is first reported or as additional facts are learned. For less serious cases, an investigation not required to conduct a hearing will normally be adequate.

A. Definition. JAGMAN, § 0202a(3) defines a major incident as an extraordinary incident occurring during the course of official duties where the circumstances suggest a significant departure from the expected level of professionalism, leadership, judgment, communication, state of material readiness, or other relevant standard resulting in:

1. Multiple deaths;

2. substantial property loss (i.e., loss which greatly exceeds what is normally encountered in the course of day-to-day operations);

3. substantial harm to the environment (i.e., harm that greatly exceeds what is normally encountered in the course of day-to-day operations); or

4. national public and press interest and significant congressional attention.

B. Death cases. Regardless of the fact that a death case may not be a major incident as defined, the circumstances surrounding the death or resulting media attention may warrant convening a COI or investigation required to conduct a hearing as the appropriate means of investigating the incident. If at any time during the course of an investigation into an incident it appears that the intentional acts of a deceased servicemember were a contributing cause to the incident, JAG will be notified and appropriate safeguards will be implemented to ensure a fair hearing regarding the deceased member's actions. JAGMAN, §§ 0207a(2) and 0226c(2).

C. Cognizance over major incidents. The first flag or general officer exercising general court-martial convening authority (GCMCA) over the incident or the first flag or general officer in the chain of command, or any superior flag or general officer, will take immediate cognizance over the case as the CA.

-- If, after preliminary investigation or otherwise, the CA concludes that an incident initially considered major does not fall within the definition, or a COI is not warranted under the circumstances, these conclusions must be reported to the next flag or general officer in his / her chain of command before convening any other type of investigation. This is a notification, not a request for approval, but the

senior commander could properly assume cognizance over the incident as appropriate. JAGMAN, § 0207b.

D. Preliminary investigation of major incidents. Because the investigation of major incidents is sometimes complicated by the premature appointment of a COI or investigation required to conduct a hearing, the CA may wish to initially convene a one-officer investigation not required to conduct a hearing to immediately begin collecting / preserving evidence and locating / interviewing witnesses. The CA may set a specific date for the investigating officer (IO) to submit an interim oral report so that the CA may decide at that time which type of investigation to convene. Summaries of testimony or evidence developed by the IO may be used as an aid by any subsequent investigative body, and the initial IO may be detailed to assist the fact-finding body. JAGMAN, § 0207.

3205 CONVENING, COMPOSITION, AND PROCEDURES

The COI can be convened by the written order of any person authorized to convene a GCM or by any person designated by the Secretary of the Navy.

A. Composition. The COI consists of three or more commissioned officers. When practicable, the senior member, who is the president of the court, should be at least an O-4. All members should also be senior to any person whose conduct is subject to inquiry. Legal counsel, certified and sworn under Articles 27(b) and 42(a) of the UCMJ, will be appointed to assist the court in matters of law, presentation of evidence, and in keeping and preparing the record; counsel will act in a fair and impartial manner and will not assume an adversarial role. JAGMAN, § 0204b; JAGINST 5830.1, encl. (1), para. 3.

B. Procedures. A formal hearing procedure is used. All testimony is taken under oath and a verbatim record is made. Though the proceeding is formal, the COI is administrative, not judicial. Therefore, as in any other administrative fact-finding body, the Military Rules of Evidence, except for Military Rules of Evidence 301, self-incrimination; 302, mental examination; 303, degrading questions; 501-504, dealing with privileges; 505, classified information; 506, government information other than classified information; and 507, informants, will not be followed. The court is held to the same burdens of proof / preponderance of evidence / applicable to other administrative fact-finding bodies. If, however, it appears to the court that the actions of a deceased servicemember may have caused a loss of life, including his / her own, or the loss of property by intentional or criminal acts, such findings of fact must be established by clear and convincing evidence. A complete description of the procedures to be followed by a COI are contained in JAGINST 5830.1, encl. (1), para. 10. The COI has the power to subpoena civilian witnesses to the same extent as a court-martial.

INVESTIGATIONS REQUIRING A HEARING

3206 INVESTIGATIONS REQUIRED TO CONDUCT A HEARING

The investigation required to conduct a hearing is intended to be an intermediate option between an investigation not requiring a hearing and a COI. Such investigations are used, for example, when a hearing with sworn testimony is desired or designation of parties may be required, but only a single IO is necessary to conduct the hearing.

A. Convening and composition. The investigation required to conduct a hearing can be convened by the written appointing order of any officer authorized to convene a general or special court-martial and should normally consist of a single commissioned officer, but may consist of a civilian employee when the CA considers it appropriate. The IO should be senior to any designated party and at least an O-4 or GS-13. The investigation may consist of more than one member but, if multiple members are deemed appropriate, a COI should be considered. *See* JAGINST 5830.1, encl. (2), para. 3b for additional rules when multiple members are appointed. JAGMAN, § 0204d.

B. Procedures. The investigation is similar to the COI in several respects: legal counsel should be appointed for the proceedings; the hearing is formal; and testimony should be given under oath with proceedings recorded verbatim. Unlike the COI, this investigation does not possess the power to subpoena civilian witnesses. JAGINST 5830.1, encl. (2), para. 10.

3207 PARTIES

A "party" is a person who has properly been designated as such, in connection with a COI or an investigation required to conduct a hearing, because their conduct is "subject to inquiry" or they have a "direct interest" in the inquiry. The designation of an individual as a party affords that individual a hearing on possible adverse information concerning them.

A. Subject to inquiry. A person's conduct or performance is "subject to inquiry" when the person is involved in the incident and it appears that disciplinary action may follow, their rights or privileges may be adversely affected, or their personal reputation or professional standing may be jeopardized. Persons subject to the UCMJ whose conduct is subject to inquiry must be designated parties at a COI. The CA may designate such personnel as parties at an investigation required to conduct a hearing. JAGMAN, §§ 0204b, c, and 0205b; JAGINST 5830.1, encl. (1), para. 3c, and encl. (2), para. 3d.

B. Direct interest. A person has a "direct interest" in the subject of inquiry when the findings, opinions, or recommendations may reflect questionable or unsatisfactory conduct or performance of duty or relate to a matter over which the person has a duty or a right to exercise control. Upon their request, servicemembers or DOD employees who have a direct interest in the subject of a COI must be designated as parties; designation is optional at an investigation required to conduct a hearing. JAGMAN, §§ 0204b, c, 0205c; JAGINST 5830.1, encl. (1), para. 3c, and encl. (2), para. 3d.

C. Designation. The CA of the COI or investigation required to conduct a hearing may designate parties. Also, the CA may authorize the fact-finding body to designate parties during the proceedings. JAGMAN, § 0204c; JAGINST 5830.1, encl. (1), para. 3c, and encl. (2), para. 3d.

D. Rights of a party. A party has certain rights which are akin to those afforded to respondents at administrative discharge boards, including the right to counsel. The rights of parties are listed in detail in JAGMAN, § 0205d; JAGINST 5830.1, encl. (1), para. 9, and encl. (2), para. 9.

E. Other uses of the record against parties. If a servicemember has been designated a party to a COI or investigation required to conduct a hearing, the record may be used as the basis for nonjudicial punishment (NJP) without further proceedings. Similarly, the record may theoretically be used in lieu of an article 32 investigation if a GCM is contemplated. Practically, however, this substitution is difficult; convening of a separate article 32 investigation will likely be more efficient. If the accused was designated as a party, sworn testimony given to the fact-finding body is admissible and may be useful. JAGMAN, § 0209c; JAGINST 5830.1, encl. (1), para. 9d, and encl. (2), para. 9d. Also, Art. 32(c), UCMJ; Part V, para. 4(d), and R.C.M. 405(b), MCM, 1984.

> *Note*: The investigation report: *See* encl. (7), JAGINST 5830.1 for sample report of a COI. A similar report must be made for an investigation requiring a hearing.

INVESTIGATIONS NOT REQUIRING A HEARING

3208 INVESTIGATIONS NOT REQUIRING A HEARING

The *JAG Manual* investigation not requiring a hearing is the most common administrative fact-finding body convened to search out, develop, assemble, analyze, and record all available information relative to an incident. The report is advisory in nature, intended primarily to provide convening and reviewing authorities

with adequate information on which to base decisions. *JAG Manual* investigations also serve as a repository of lessons learned which may be disseminated to other naval units.

A. Convening. Any officer with article 15 power may convene an investigation not requiring a hearing. The commander of the unit concerned is responsible for convening the investigation. If, however, an incident occurs far from the command (e.g., member dies on leave) or when the command has a practical difficulty in conducting the investigation (e.g., ship due to deploy), the commander can ask the Navy area coordinator (or a subordinate GCMA designated by the area coordinator for this purpose) or the Marine GCMA, in whose geographic area of responsibility the incident occurred, to assign another command to investigate the incident. The request should contain all available information such as time, place, and nature of the incident. JAGMAN, §§ 0204d and 0206.

B. Required investigations. The *JAG Manual* requires investigation of numerous events including significant fires, possible claims for or against the Navy, aircraft mishaps and vehicle accidents, collisions, grounding, and other significant events. A *JAG Manual* investigation must also be conducted in all servicemember death cases that are not a result of a "previously known medical condition" or combatant activities and when civilians are found dead on naval bases. (MILPERSMAN, art. 4210100 details PERSCASREP reporting requirements and follow-on status investigation reports every 14 days). JAGMAN, § 0226; *see* JAGMAN, §§ 0230-0241 for detailed requirements on specific types of incidents.

C. Appointing order. The commander initiates the investigation with the appointing order. Samples appear in the *JAG Manual* at appendices A-2-c and A-2-d and at the end of this chapter. The commander appoints one or more commissioned officers (usually one) or, when appropriate, a warrant officer, senior enlisted, or DON civilian employee to conduct the investigation. The IO should be mature, experienced, and senior to any person whose conduct may be in question. The appointing order must be prepared on command letterhead for the commander's signature. The appointing order must state the specific purposes of the inquiry and contain explicit instructions about its scope. Also, it must contain the attorney work product statement contained in JAGMAN, § 0211c. The appointing order should specify the deadline for the IO's report. The *JAG Manual* authorizes 30 days; the command may specify a shorter time in straightforward incidents to allow time for any corrective action by the IO which the commander deems necessary. JAGMAN, § 0211.

D. The investigation report. The report will normally consist of a preliminary statement, findings of fact (FOF), opinions, recommendations, and enclosures. Samples appear in the *JAG Manual* at appendix A-2-e(1) and at the end of this chapter. The report is: "From" the IO by name "To" the CO; prepared on

plain paper, not letterhead; and signed by the IO. Use the same subject line as the appointing order. Any additional references would follow sequentially. The sample at the end of this chapter provides additional information on requirements for the preliminary statement, FOF, opinions, and recommendations. JAGMAN, §§ 0202(c) and 0214.

E. Combining with other investigations. If different aspects of a single incident may require investigation, generally only one investigation need be done. For example, if a Sailor drives a command vehicle into the NLSO, seriously injuring him / herself and killing a typist inside, a single investigation will be adequate to address the claims, death, and line of duty (LOD) / misconduct issues involved. The exceptions to the general rule include prohibitions against using the following material in *JAG Manual* investigations:

1. NCIS report of investigation—the narrative summary portion [exhibits ***may*** be used with prior NCIS permission], JAGMAN, § 0214f;

2. polygraph examinations, JAGMAN, § 0214f;

3. evidence obtained pursuant to an Aircraft Mishap Investigation Reports (AMIR) or other mishap investigations conducted per OPNAVINST 5102.1, Subj: MISHAP INVESTIGATION AND REPORTING;

4. situation reports (SITREPS);

5. statements made in Medical Quality Assurance Investigations;

6. Inspector General reports; and

7. Administrative letter reports concerning security violations per OPNAVINST 5510.1, Subj: DEPARTMENT OF THE NAVY INFORMATION AND PERSONNEL SECURITY PROGRAM REGULATION.

F. CO's endorsement. The first endorsement is "From" the CO "To" the Judge Advocate General, via the GCMA, and via the chain of command as may be required by local directives. The CO has 20 days to prepare the endorsement in death investigations; 30 days in all other cases. A sample endorsement is provided at the end of this chapter. Use the same subject line as the appointing order. The endorsement will approve, modify, or disapprove the FOF's, opinions, and recommendations and indicate any action that has been taken on the IO's recommendations. If additional FOF's, opinions, or recommendations are made on the existing record, they will follow sequentially from the last FOF, opinion, or recommendation in the IO's report. The CO must specifically comment on any LOD / misconduct determinations. The endorsement must end with "subject to the

foregoing, the findings of fact, opinions, and recommendations of the basic investigation [as modified] are hereby approved." JAGMAN, §§ 0202c, 0209b, and 0225.

G. Making copies. In cases involving a death or serious injury, send JAG the original and three copies; in all other cases, send JAG the original and one. Provide one copy for each via addressee. If a potential claim exists, send a copy to the NLSO or Law Center. Advance copies with the first endorsement should be sent to: OJAG Code 33, in death and medical malpractice; to OJAG Code 31, in admiralty investigations; to CNO / CMC in postal investigations; and to COMNAVSAFECEN in material property damage investigations. Advance copies of Marine investigations must be sent via CMC (JA). JAGMAN, §§ 0210 and 0238.

H. Freedom of Information Act (FOIA). The only release authority for *JAG Manual* investigations requested under the FOIA is OJAG, ***not*** the local command. JAGMAN, § 0210d.

APPENDIX A

"COURT OF INQUIRY LESSONS LEARNED"

I. PERSONNEL

A. Counsel. Detail counsel / assistant counsel for the court as early as possible and get them on scene.

B. Court reporters. At least four (4) court reporters will be needed to maintain near-simultaneous transcription. A senior legalman (LN) with excellent leadership ability should be clearly identified as the boss.

C. Admin officer / evidence custodian / computer expert

1. Limited duty officer (LDO) or khaki LN

2. Key attribute is flexibility

3. Role is not head court reporter

D. Court members

1. CA should select based on particular expertise needed

2. Delay arrival until counsel have had sufficient time to prepare the case (minimum of one week)

3. Passive role

a. Counsel should prepare and present the case

b. Members should use their expertise to point counsel in relevant directions, but should not become active investigators

-- Avoids potentially contentious voir dire and challenges for cause

4. Need to identify potential parties ASAP so that number of defense counsel is known

E. Defense counsel

1. Need to identify command with authority and resources to detail all defense counsel required

2. Defense counsel will require time to meet with parties, interview witnesses, and examine evidence before procedures begin

F. Technical experts for unfamiliar complex areas; nonadversarial experts available to all participants

G. Law enforcement personnel. Although a law enforcement investigation is a separate and independent event, detailed counsel should cooperate with law enforcement personnel in order to facilitate both inquiries

H. PAO support. Need to have it established; if you are dealing with a major incident, there will be media interest

I. Miscellaneous

1. Bailiff

2. Security personnel

3. Junior enlisted personnel to run errands, serve as duty drivers, etc.

4. Aides—if court membership includes flag officers

II. EQUIPMENT AND MATERIAL

A. Court reporting gear

1. Enough mikes to cover all the players

2. At least three (3) court reporting stations

3. At least two (2) recording systems (one as backup which can also be used as transcriber)

4. Carry a minimum of 100 blank tapes and a box of mini computer discs

5. Hand-held recording device for use during "views"

B. Laptop computers - a minimum of four (4)

C. Laser printer. Must locate a high-quality, high-volume printer—portable laser printers just can't stand up to the volume of work generated

D. Dedicated, high-volume, rapid-reproduction copy machine

E. Office supplies

1. Paper, pens, pencils, etc. (can usually rely on local sources, but bring a small supply)

2. Make local arrangements for coffee / soda mess

3. Tables, chairs, flag, miscellaneous furnishings for hearing room (must use local sources)

F. Electrical power

1. Be aware of available voltage (110 or 220)—if electrical gear is not switchable, bring or locally obtain transformers.

2. Bring sufficient surge suppressors

3. If operating aboard ship, comply with rules regarding electrical safety checks (they protect you and your equipment)

4. Be prepared for power fluctuations (use surge suppressors and hit the "save" key frequently)

III. COMMUNICATIONS

A. Phones with commercial and DSN access

B. Separate message PLAD for court

IV. LOGISTICS

A. Transportation to site

1. Since government air travel is often unreliable, recommend commercial transportation

2. Counsel for court and admin support should arrive at least one week in advance to prepare, investigate, and take care of logistics

3. Defense counsel should travel as soon as number of potential parties is known

4. Court members should be the last to arrive

B. Hearing site

1. No problem if at a NLSO where you can take over a courtroom (many NLSO courtrooms, however, are too small for a multi-party court of inquiry)

2. Need large room with available facilities

   a. Deliberation room

   b. Witness room

   c. Admin / evidence room

   d. Coffee mess

   e. Head facilities

   f. Telephones

3. Must provide security for evidence and expensive court reporting equipment

C. Local transportation

1. Sedans for

   a. Court members

b. Counsel

c. Errands

2. Van for court-reporters

3. Bus or other means of commuter transportation for parties, counsel, and witnesses

D. Housing

1. Attempt to house most participants in one place. If ship can handle size of group, great; if not, assign personnel to a BOQ, hotel, etc. This will greatly reduce logistical problems.

2. Court members should be reasonably segregated from defense counsel and parties

E. Messing. Have an available option, particularly for noon meal

V. CONDUCTING THE HEARING

A. Every player must, at the outset, be thoroughly familiar with

1. Convening order

2. JAGMAN, Chapter II

3. JAGINST 5830.1

B. Court and its counsel must constantly be attuned to the fact that the proceedings are nonadversarial and must do everything possible to avoid even the appearance of advocacy; difficult to maintain since defense counsel will act in an adversarial capacity. Court and counsel must not let competitive instincts prompt them to depart from a neutral role.

C. Be attuned to potential fifth amendment / article 31 and privacy act issues

D. If civilian employees are potential parties

1. They cannot be designated as parties unless they so request—JAGMAN, § 0204b(6)

2. They cannot be provided military counsel unless the CA determines that the interests of the government will be best served—JAGINST 5830.1, encl. (1), para. 3.d.(2)(c)

E. Knowing the relative seniority of parties, including civilians, is important because

1. Members should be senior to all parties, unless exception granted by CA

2. Order of witness examination, defense case presentation, and argument are all based on seniority

F. Provide COI guide to president. Include

1. Calling court to order, recessing, closing, etc.

2. Rulings on challenges

3. Rulings on objections; with a few exceptions (e.g., relevance), proper ruling is, "Objection(s) is (are) noted"

4. Warnings to witnesses at end of their testimony

G. Don't get rushed; if necessary to stay organized and orderly, recess for reasonable time

VI. WHO'S THE BOSS?

A. The president and court members

B. The CA

C. Not NLSO CO, JAG, member of Congress, etc.

APPENDIX B

CHECKLIST FOR IO'S

I. INITIAL ACTION

A. Begin work on the investigation immediately upon hearing that you are to be appointed IO; don't wait until you have received a formal appointing order.

B. Carefully examine the appointing order to determine the scope of your investigation.

C. Review all relevant instructions on your investigation, including the appointing order and Chapters II and VIII of the JAGMAN.

D. When must your investigation be completed and turned into the CA?

E. Decide on the methodology of your investigation.

II. INTERVIEWING WITNESSES

A. Draw up a list, to be supplemented as the investigation proceeds, of all possible witnesses.

B. Determine if witnesses are transferring, going on leave, hospitalized, or the like, which might take them out of the area before review of the investigation is completed.

C. Inform the CA, orally, with confirmation in writing, immediately upon learning that a material witness might leave the area before review of the investigation is completed. Pending review of the investigation, the CA may wish to take appropriate action to prevent the witness from leaving.

D. Determine which witnesses may be suspected of an offense under the UCMJ and advise each of his / her rights against self-incrimination and to counsel using the form found in Appendix A-1-m of the JAGMAN.

E. Advise each witness who may have been injured as a result of the incident being investigated of his / her right not to make a statement

with regard to the injury in accordance with Section 0215b of the JAGMAN.

F. Conduct an intensive interview of each witness on the incident being investigated, covering their full knowledge of:

1. Names, places, dates, and events relevant to the incident investigated

2. Any other source of information on the incident investigated

G. Obtain an appropriate, signed Privacy Act statement from the individuals named in the subject line of the appointing order. (***Note***: Do not ask witnesses for their social security number (SSN). The SSN should be obtained from official records if needed, and the source of the SSN should be stated in the preliminary statement.)

H. Record the interview of each witness in detailed notes or by mechanical means.

I. Reduce each witness' statement to a complete and accurate narrative statement.

J. Obtain the signature of each witness, under oath and witnessed, on the narrative statement of his interview.

K. Review carefully your list of possible witnesses, as supplemented, to ensure that you have interviewed all such witnesses who are personally available to you.

L. Attempt to obtain statements from possible witnesses who are not personally available in other ways (e.g., by requesting that they be supplied to you be message, mail, or conducting a telephone interview).

III. COLLECTION OF DOCUMENTS

A. Draw up a list, to be supplemented as the investigation proceeds, of all possible documents using the following checklists.

B. Carefully examine your list of possible documents, as supplemented, to ensure that you have obtained all such documents personally available to you.

C. With regard to possible documents that are not personally available to you, attempt to obtain them in other ways (e.g., by requesting that they be supplied to you by message, telephone, fax, or mail).

D. To the extent possible, obtain originals or certified true copies of all documents available to you.

IV. COLLECTION OF OTHER INFORMATION

A. Draw up a list, to be supplemented as the investigation proceeds, of any other information which may be of assistance to reviewing authorities in understanding the incident investigated (e.g., objects (firearms, bullets, etc.) and maps or drawings of physical locations (e.g., accident sites, etc.)).

B. Examine your list of such information, as supplemented, to assure that you have obtained all such information personally available to you.

C. With regard to such information not personally available to you, attempt to obtain them in other ways (e.g. by requesting that they be supplied to you by message, phone, or mail).

D. To the extent possible, reduce such information to a form (such as photographs or sketches) which can be conveniently included in your investigative report.

E. With regard to other evidence gathered, take all steps possible to insure that any such evidence not an enclosure to the investigative report will be kept in an identified place (safe from tampering, loss, theft, and damage) pending review of the investigation.

V. PREPARATION OF THE PRELIMINARY STATEMENT

A. What you understand to be the purpose of your investigation.

B. Difficulties encountered in the investigation.

C. Conflicts in the evidence and reasons for reliance on particular information, if any.

D. Reasons for any delays.

E. Failure to advise persons of article 31, privacy act, injury / disease rights.

F. Any assistance received in conducting the investigation.

G. Your efforts to obtain possible statements of witnesses, documents, and other evidence which you were unable to obtain.

H. What your efforts have been to preserve evidence pending review of the investigation.

I. How you obtained SSN's.

J. If a possible claim is involved, include the appropriate "attorney work product" language required by sections 0211c and 0214c of the JAGMAN.

K. Provide any other preliminary information which will assist the reader of the report in developing a full and complete understanding of the incident. For a complex, highly technical incident, excerpts from technical manuals explaining systems operations might be helpful.

VI. PREPARING THE FINDINGS OF FACT (FOF)

A. Conduct an evaluation of evidence or lack of evidence (negative FOF).

B. Avoid speculation.

C. Address the special fact-finding requirements pertaining to specific incidents contained in the JAGMAN.

D. Be specific as to times, places, and events.

E. Refer to supporting enclosure(s) after each FOF.

F. Identify person(s) connected with the incident by grade or rate, organization, occupation or business, and residence.

[*Note*: Your personal observations are not, in and of themselves, sufficient to support an FOF. If you have made relevant "personal observations," reduce them to statement signed and sworn to by you and include the statement as an enclosure.]

G. Are enclosures used? (If not used, delete it.)

H. Ensure that, when read together, the FOF's tell the whole story of the incident investigated.

VII. PREPARING THE OPINIONS

A. Ensure that each of your opinions is an opinion and not an FOF or recommendation.

B. Ensure that each opinion references the FOF's that support it.

C. Ensure that you have rendered those opinions required by the appointing order or JAGMAN as well as any others you might feel are appropriate.

D. Ensure scope of employment opinions are rendered, if required.

[*Note*: In cases involving the death of a servicemember, it is forbidden to render any opinion concerning LOD. Also, misconduct, as defined in the JAGMAN, shall not be attributed to the deceased servicemember.]

VIII. PREPARING THE RECOMMENDATIONS

A. Ensure that each of your recommendations is a recommendation and not an FOF or opinion.

B. Ensure that each recommendation is logical and consistent with the FOF's and opinions.

C. Address those recommendations specifically required by the appointing order or the JAGMAN and ensure that any others considered appropriate are addressed.

D. Recommend any appropriate corrective, disciplinary, or administrative action.

1. Enclose an unsigned charge sheet if you recommend a service-member be charged with any offense. ***Do not inform an accused of recommended charges unless you are directed to do so by the proper authority.***

2. Draft a punitive letter of reprimand, if recommended, and attach it as an enclosure.

3. Nonpunitive letters are not attached as enclosures; rather, they are forwarded under separate cover.

4. Refer to JAGMAN, § 0209c when disciplinary action is recommended.

IX. PREPARING THE ENCLOSURES

A. Appointing order.

B. Statement of doctor and / or copies of medical records as to the extent of the injuries (copies of private medical bills if reimbursement may be claimed).

C. Report of autopsy and, where available, autopsy protocol in death cases.

D. Report of coroner's inquest or medical examiner's report in death cases.

E. Laboratory reports, if any.

F. Copy of reservists' orders, if applicable.

G. Statements or affidavits of witnesses or others.

H. Statement of IO, if applicable.

I. Necessary photographs and / or diagrams, properly identified and labeled.

J. Copy of local regulations, if applicable.

K. Exhibit material to support IO's findings and opinions.

L. Signed original privacy act statements IAW JAGMAN, § 0202e.

X. CONCLUDING ACTION

A. Have you stretched your imagination to the limit in gathering and recording all possible information on the incident investigated?

B. Have you checked and double-checked to ensure that your FOF's, opinions, recommendations, and enclosures are in proper order?

C. Have you carefully proofread your investigative report to guard against embarrassing clerical errors?

D. Work backwards through the investigation to be sure that all recommendations are supported by proper opinions and that all opinions are properly and completely supported by FOF's.

APPENDIX C

GENERAL CHECKLIST FOR *JAG MANUAL* INVESTIGATIONS NOT REQUIRING A HEARING

In reviewing a *JAG Manual* investigation, the following should be checked:

I. APPOINTING ORDER (IF WRITTEN)

A. Convened by CO, or officer in charge (OIC), or delegate

B. Name(s) of member(s) involved in the incident

C. Seniority rule for member(s)

D. Scope of inquiry defined, including sections in JAGMAN outlining special investigative requirements

E. Whether opinions / recommendations are required

F. Deadlines addressed

G. Warnings under Article 31, UCMJ; § 0215b, injury / disease; § 0202, Privacy Act

H. Attorney Work Product Statement, § 0211(c)

I. Assistance available

II. INVESTIGATIVE REPORT

A. Heading and copies

1. "From" command

2. "To" JAG

3. "Via" and "Copy to" addressees identified (JAGMAN, §§ 0209-0210)

4. Advance copies (JAGMAN, § 0209c)

5. Sufficient copies, complete with enclosures, for convening and reviewing authorities and JAG (JAGMAN, §§ 0209-0210)

6. Ensure all copies are legible

7. All necessary documents / exhibits / enclosures are attached

8. Investigation properly classified or unclassified (JAGMAN, § 0209d)

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, UCMJ; Privacy Act; injury / disease, or "party" rights

7. Attorney Work Product Statement

C. Findings of fact

1. Narrative or separate facts

2. Evaluation of evidence or lack of evidence (negative finding of fact)

3. No speculation as to cause of the incident (inferences drawn from evidentiary enclosures or personal observations, however, are permissible.

4. Special fact-finding requirements of Part B, Chapter II of the *JAG Manual* addressed

5. Specific as to times, places, and events

6. Reference enclosure(s)

7. Person(s) connected with the incident identified by grade or rate, organization, occupation or business, and residence

8. All factual evidence, including IO's personal observations, considered and included in the report as enclosure(s) and FOF

D. Opinions

1. Logical inferences or conclusions from facts

2. Reference FOF's

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 FOF's

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

6. If recommended, nonpunitive letters are forwarded under separate cover

F. Enclosures

1. Separately numbered

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

G. Endorsements

1. CA 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

4. Any action taken

APPENDIX D

DOCUMENTS CHECKLIST FOR *JAG MANUAL* INVESTIGATIONS NOT REQUIRING A HEARING

1. Appointing order
2. Extension request, if necessary
3. Police or incident complaint report, if necessary
4. Statement of doctor and / or copies of medical records as to extent of injuries (copies of private medical bills if reimbursement may be claimed)
5. Report of autopsy and, where available, autopsy protocol in death cases
6. Report of coroner's inquest or medical examiner's report in death cases
7. Laboratory reports, if any
8. Copy of reservist's orders, if applicable
9. Statements or affidavits of witnesses or others
10. Statement of IO, if applicable, regarding personal observations
11. Photographs and / or diagrams properly labeled
12. Copy of local regulations, if applicable
13. Any other documentary evidence necessary to support IO's findings and opinions
14. Signed original Privacy Act statement for each witness if personal information has been solicited
15. Message traffic surrounding the incident—do not include SITREPS

APPENDIX E

POSSIBLE SOURCES OF INFORMATION FOR SHIPBOARD INVESTIGATIONS

I. PERSONNEL

A. Allowance

B. Manning level

C. Stability / other physical factors

D. General personnel appearance

E. Service records

F. Any history of accidents for person(s) involved

G. Level of training / experience as documented in training records

II. EQUIPMENT

A. History of failures

B. Properly designed or jerry rigged

C. Consolidated Onboard Ship's Allowance List (COSAL), open purchase, substitute

D. Complete operating instructions

E. Safety precautions

F. Properly labeled: Compartments, piping, ducts

G. Piping systems

H. Preventive Maintenance System (PMS) / Maintenance Data System (MDS) coverage, documentation

I. Clocks synchronized, time-check log maintained and, if appropriate, any time check in affected spaces

J. Communication circuits adequate: Intercom systems and sound-powered phones

K. Age of ship

L. Firefighting and damage control equipment, operative v inoperative, and techniques used to control or reduce damage, effective or ineffective

III. LOCATION OF ACCIDENT (WHERE MOST DAMAGE OCCURRED)

A. Compartment number

B. Compartment noun name

C. In what compartment did primary accident *cause* occur?

IV. 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 log

E. Engineering officer smooth log

F. Engine bell book

G. Engine operating logs

H. Damage control closure log

I. Tag-out log

J. Standing orders: unit commander, CO, engineering officer, navigator

K. Night orders: unit commander, CO, 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. Inservice inspection (INSURV), command inspections, combined trials

R. Monthly hull reports, 2000 reports, zone inspections

S. Significant outstanding casualty reports (CASREPTS)

T. Machinery out-of-commission logs

U. Ships procedures adequate, followed

V. 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)

VI. CONDITION OF SHIP'S BOATS

VII. AVAILABILITY OF SHORE SERVICES

A. Electricity

B. Shore steam

C. Potable and firefighting water

D. High pressure air

VIII. ILLUMINATION

A. Exterior

B. Interior

C. At scene

IX. 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.)

X. PRIMARY AND CONTRIBUTING CAUSES

APPENDIX F

CLAIMS FOR / AGAINST GOVERNMENT - SPECIAL CHECKLIST

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 potential 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; arrests made, or charges preferred, and result of any trial or hearing in civil or military courts

15. Comments of IO as to the amount of damages, loss, or destruction

16. Attorney work product statements in convening order and preliminary statement of investigative report

APPENDIX G

FIRE - SPECIAL CHECKLIST

ITEMS IN ADDITION TO THE FORCES AFLOAT ACCIDENT / NEAR ACCIDENT REPORT (OPNAV FORM 3040/1) AND GENERAL CHECKLIST (*See also* JAGMAN, § 0236). Remember to contact NCIS immediately to allow them to investigate any fire when the origin is not immediately known or arson is suspected.

A. Location of fire

   1. Compartment noun name

   2. Compartment number

B. Class of fire [Alpha (A), Beta (B), Charlie (C), Delta (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 (GQ) 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 quantity
2. Nozzles / applicators (LC and HC)
3. Foam maker
4. Vehicles
5. Educators
6. Type and size of hoses
7. Other

Q. Firefighting organization used

1. Ad hoc fire party from on-scene personnel
2. Repair party (condition I or II watches)
3. Inport duty section fire party
4. Outside assistance (explain)

5. Fire party / repair locker personnel assigned per appropriate publications, ships organization and regulations manual, battle bill, etc.

6. Personnel duties and responsibilities assigned in writing and personnel properly trained for assigned duties

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. OBA's

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 (submarines: submerged, snorkeling, surfaced)

Y. Automatic vent closures

Z. Magazines flooded

AA. Operational problems

1. OBA's / canisters effective, sufficient number

2. EAB's 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

EE. Extent of damage / cost to repair, casualties

FF. Impact on mission readiness

GG. Possibility of occurrence on similar ship

APPENDIX H

FLOODING - SPECIAL CHECKLIST

ITEMS IN ADDITION TO THE FORCES AFLOAT ACCIDENT / NEAR ACCIDENT REPORT (OPNAV FORM 3040/1) AND THE GENERAL CHECKLIST (*see also* JAGMAN, § 0235).

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 / general quarters sounded

G. Response time

H. Dewatering equipment used (effective, available, operative)

I. Time flooding was stopped or under control

J. Time required to dewater

K. Time space was last inspected prior to flooding

L. Flooding contained within set boundaries

M. Amount of flooding (effect on list, trim or depth control)

N. Extent of damage (list all items)

1. Material costs

2. Labor costs

3. Outside assistance costs

O. Injuries (list and submit a navjag form 5800/15 for each member if applicable)

P. Ship's procedures and safety precautions

APPENDIX I

COLLISION - SPECIAL CHECKLIST

ITEMS IN ADDITION TO THE FORCES AFLOAT ACCIDENT / NEAR ACCIDENT REPORT (OPNAV FORM 3040/1) AND THE GENERAL CHECKLIST (*see also* JAGMAN, § 0234)

A. Tactical situation existing at time of collision (e.g., sea and anchor detail, underway replenishment detail, Condition I, etc.)

B. Personnel manning and qualification

1. OOD
2. JOOD / diving officer
3. Helmsman, planesman, and helms safety officer (if assigned)
4. Lookouts
5. Combat information center (CIC) team (*including sonar team*, fire control tracking party, and navigation team)
6. Phone talkers
7. Location of conning officer
8. Line handlers
9. Location of navigator, XO, and CO

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. Underway replenishment (UNREP) or other special equipment

D. Communication factors

1. Radio

2. Telephone

3. Oral (audibility / understanding)

4. Signal flags or lights

5. Interferences (e.g., background noise level)

E. Rules-of-the-road factors

F. Operating area factors

1. Adherence to operational area boundaries

2. Existence of safety lanes

3. Depth constraints for submarines

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

APPENDIX J

GROUNDING

ITEMS IN ADDITION TO THE FORCES AFLOAT ACCIDENT / NEAR ACCIDENT REPORT (OPNAV FORM 3040/1) AND THE GENERAL CHECKLIST (*see also* JAGMAN, § 0233).

A. Tactical situation (e.g., sea and anchor detail, Condition III, etc.)

B. Navigational factors

1. Charts (available / most recent / correct / in use)
2. Sailing directions / coastal pilot guide
3. Fleet guide
4. Tide / current condition (computed / displayed / recorded)
5. Track laid out / dead reckoning (DR) plot indicated / fixes plotted / track projected
6. Notices to mariners changing made to navigational charts
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 plots compared / plotting teams coordinated)

C. Material factors

1. Radar
2. Fathometer
3. Compasses
4. Ship's speed log (PIT sword)
5. Alidades, bearing circles, peloruses, periscopes, bearing repeaters
6. Ship's draft / submerged keel depth
7. Ship's anchor
8. Ship's control system

D. Personnel factors (posted / qualified)

1. OOD
2. JOOD
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

17. Location of navigator, XO, and CO

E. Communications factors

1. Radio

2. Telephone

3. Internal communication (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, pilots - experience, language barrier)

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

APPENDIX K

APPOINTING ORDER FOR A ONE-OFFICER INVESTIGATION WHEN A HEARING IS NOT REQUIRED (*See* section 0211)

(LETTERHEAD)

(File Info)
(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), AND DAMAGE TO GOVERNMENT VEHICLE (I.D. NUMBER)

Ref: (a) *JAG Manual*

1. Under chapter II, part B, of reference (a), you are appointed to inquire, as soon as practical, into circumstances surrounding the _____ that occurred on ___ August 19__.

2. You are to investigate all facts and circumstances surrounding the _____ that occurred at _____ on ___ August 19__. You must investigate the cause of the fire, resulting injuries and damages, and any fault, neglect, or responsibility therefor. You must express you opinion of the line of duty and misconduct status of any injured naval member. You should recommend appropriate administrative or disciplinary action. Report your findings of fact, opinions, and recommendations by ___ September 19__, unless an extension of time is granted. In particular, your attention is directed to sections 0202e, 0213, 0215b, and appendix A-2-e of reference (a). [Cites will vary depending on nature of incident.]

3. This investigation is appointed in contemplation of litigation and for the express purpose of assisting attorneys representing interests of the United States in this matter. You will contact (the judge advocate providing legal support) for direction and guidance as to those matters pertinent to the anticipated litigation.

4. Ordinarily, counsel for the proceedings will not be appointed. If appointment is desired, do so here.

5. By copy of this appointing order, LT Smith, Administrative Officer, is directed to furnish necessary administrative and clerical assistance for recording the proceedings and preparing the record.

/s/
A. B. SEA

Copy to:
AdminO

To focus the IO's efforts and ensure all relevant findings of fact are made, list all sections of the *JAG Manual* which may apply to the particular incident. The following list is provided for quick reference.

JAG Manual Sections	Warnings
0215b	Warning required before requesting statements regarding disease or injury
0202	Advice required by the Privacy Act
Art. 31 UCMJ	Persons suspected of violations of UCMJ
	Line of duty / misconduct determinations
0220	Mental responsibility and suicide attempts / gestures
0221	Intoxication and drug abuse
0226	Deaths
0227	LOD / Misconduct investigations which involve claims
0229	Checklists for fact-finding bodies
0230	Aircraft accidents
0231	Vehicle accidents
0232	Explosions
0233	Loss or stranding of a ship
0234	Collisions
0235	Flooding of a ship
0236	Fires
0237	Loss of government funds or property
0238	Claims for or against the government
0239	Reservist
0240	Firearm accidents
0241c	Security violations
0241d	Postal violations

APPENDIX L

APPOINTING ORDER FOR A BOARD OF INVESTIGATION WHEN A HEARING IS NOT REQUIRED (*See* section 0211)

From: Commander Carrier Group ONE, U.S. Pacific Fleet
To: Captain _____, USN

Subj: INVESTIGATION OF THE FIRE THAT OCCURRED ON BOARD USS _____, ON ___ AUGUST 19__

Ref: (a) *JAG Manual*

1. Under chapter II, part B, of reference (a), a Board of Investigation is hereby appointed to inquire into circumstances surrounding the fire that occurred on board USS _____ on ___ August 19__. The Board will convene in USS __ _____ at 1000 on ___ August 19__ or as soon thereafter as practical.

2. The Board consists of you as senior member, and Captain _____, USN, and Captain _____, USN, as members. [Ordinarily, counsel for the board will not be appointed. If appointment of counsel is desired, do so here.]

3. The Board is to investigate all facts and circumstances surrounding the fire, including the cause of the fire, resulting injuries and damages, and any fault, neglect, or responsibility therefor. After deliberation, the Board must report its findings of fact, opinions, and recommendations by ___ September 19__, unless an extension of time is granted. The Board must express its opinion of the line of duty and misconduct status of any injured naval member. The Board should recommend administrative or disciplinary action. In particular, the Board's attention is directed to sections 0202e, 0213, 0215b, 0229, 0236 and appendix A-2-e of reference (a).

4. This investigation is appointed in contemplation of litigation and for the express purpose of assisting attorneys representing interests of the United States in this matter. You will contact (the judge advocate providing legal support) for direction and guidance as to those matters pertinent to the anticipated litigation.

5. By copy of this appointing order, LT Smith, Administrative Officer, is directed to furnish necessary administrative and clerical assistance for recording the proceedings and preparing the record.

A. B. SEA

Copy to: AdminO

APPENDIX M

FORMAT FOR INVESTIGATIVE REPORT FOR INVESTIGATION NOT REQUIRING A HEARING

SSIC
Date

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, R.I. 02840
(4) Statement of SN Dan P. Jones, USN, 234-56-7890, with signed Art. 31b, UCMJ, warning, Privacy Act warning
(5) Description of _____ (knife found at scene of the accident)
(6) Photograph of _____ depicting _____

[NOTE: The statement of each witness should be a separate enclosure to the investigative report.]

Preliminary Statement

Section 0214b 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 . . .");

-- delay explained, extensions noted;

-- limited participation by a member;

-- "This investigation is being conducted and this report is being prepared in contemplation of litigation and for the express purpose of assisting attorneys representing interests of the United States in this matter.";

-- calling attention to conflicting facts in the enclosure;

-- the extent of compliance with rights warnings for injury / disease, Privacy Act, article 31; and

-- any other information necessary to a complete understanding of the investigation.

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 inquire 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 social security numbers contained in this report of investigation were obtained from official sources and were not solicited from the individual servicemember.

4. All enclosures attached hereto are either original documents or are certified to be true and accurate copies of the original documents they represent.

Findings of Fact

"Findings of Fact constitute an investigating officer's description of details of events based on evidence." JAGMAN, App. A-2-e(1). Consider the following problem:

-- 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.

-- Each fact must be supported by evidence and should be numbered separately rather than grouped into a cumbersome, narrative form.

-- 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 can find the information quickly: "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, the JAGMAN, or some other regulation. They are not factual evaluations, but rather logical inferences or conclusions drawn from the facts. Reference should be made to the underlying findings of fact which form the basis for each opinion. Facts should be developed so as to render opinions self-evident. Consider the following examples:

1. That Seaman Apprentice Flynn's injuries were incurred in the line of duty and not due to her own misconduct [FF (9), (11), (12), (14)].

2. That Mr. Ganzel was acting within the scope of his employment at the time of the accident [FF (7), (10), (13)].

Recommendations

Recommendations will be made only when specifically directed in the appointing order. They should flow from the findings of fact and opinions. Consider the following example.

1. That the Government pursue a claim under the Medical Care Recovery Act against Mr. Tortfeasor for causing the injuries to Seaman Apprentice Flynn requiring naval medical treatment in the amount of $2,348.76.

If a court-martial is recommended, a sworn charge sheet should normally be submitted as an enclosure. 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.

/s/ of IO
P. DRAKE

Copy to:

The convening authority should provide copies to all interested commands via the first endorsement of the investigation. Do not make them via addressees. The adjudicating authority, typically the cognizant NLSO, gets a copy of all claims investigations. COMNAVSAFCEN gets a copy of all accident investigations. Send a copy to the parent command of any member who is involved in the investigation when they may need to take action (e.g., lost time entries for line of duty / misconduct determinations).

APPENDIX N

SAMPLE ENDORSEMENT OF THE CONVENING AUTHORITY ON *JAG MANUAL* INVESTIGATION

COMMAND LETTERHEAD

FIRST ENDORSEMENT on LT _____'s ltr of _____

From: Commanding Officer, USS _____
To: Judge Advocate General
Via: (1) Commander, [General court-martial convening authority]
(2) [Consult local directives]
(3) [CMC (JA) for Marine Corps investigations]

Subj: (SAME)

Ref: (a) *JAG Manual*

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 (a) (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 0209e 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 0210c of reference (a).

* A Privacy Act record of disclosure sheet has been affixed before the first page of the report of investigation.

* Opinion _____ in the basic correspondence is not substantiated by the findings of fact because _____ and is therefore disapproved (modified to read as follows: _____).

* 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.

* The action recommended in Recommendation _____ has been accomplished by _____.

* The unauthorized absence of _____ at the time of his injury substantially and materially 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:

The convening authority should provide copies to all interested commands via the first endorsement of the investigation. Do not make them via addressees. The adjudicating authority, typically the cognizant NLSO, gets a copy of all claims investigations. COMNAVSAFCEN gets a copy of all accident investigations. Send a copy to the parent command of any member who is involved in the investigation when they may need to take action (e.g., lost time entries for line of duty / misconduct determinations).

APPENDIX O

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—using 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.

___ b. Any statements I do make may be used as evidence against me in trial by court-martial.

___ 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 no expense to the government, a military lawyer appointed to act as my counsel without cost to me, or both.

___ d. I have the right to have such retained civilian lawyer and / or appointed military lawyer present during this interview.

___ e. I have the right to terminate this interview at any time.

WAIVER OF RIGHTS

___ I further certify and acknowledge that I have read the above statement of my rights and fully understand them, and that:

___ a. I expressly desire to waive my right to remain silent.

___ b. I expressly desire to make a statement.

___ 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.

___ d. I expressly do not desire to have such a lawyer present with me during this interview.

___ 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.

_____ / _____ _____ / _____

(Witness' Signature) (Date) (Signature) (Date)

Understanding the above, I wish to make the following statement (attach continuation page, if necessary):

CHAPTER THIRTY-THREE

LINE OF DUTY AND MISCONDUCT DETERMINATIONS

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3303	"Line of Duty" Defined	33-1
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CHAPTER THIRTY-THREE

LINE OF DUTY AND MISCONDUCT DETERMINATIONS

3301 GENERAL

Per JAGMAN, §§ 0213-0224, commanding officers (CO's) are required to inquire into certain cases of injury or disease incurred by servicemembers and make what are referred to as line of duty / misconduct determinations. Opinions concerning line of duty are ***prohibited*** in death cases. The type of inquiry and the degree of formality of the report will depend upon the circumstances of each case.

3302 REQUIREMENT TO MAKE DETERMINATION

Commanders must make findings concerning line of duty (LOD) and misconduct in each case in which a servicemember incurs a "disease or injury" which:

1. ***Might*** result in permanent disability; ***or***

2. results in the physical inability to perform duty for a period exceeding 24 hours. Periods of hospitalization for evaluation or observation are excluded. Similarly, a return to "light duty" will stop this clock. JAGMAN, § 0215.

3303 "LINE OF DUTY" DEFINED

An injury or disease incurred by naval personnel while in active service is presumed to have been incurred "in line of duty," ***unless*** there is clear and convincing evidence that it was incurred:

1. While the member was in an unauthorized absence status which materially interfered with the performance of required military duties (typically, any absence in excess of 24 hours);

2. while the member was in a desertion status;

3. while the member was confined under sentence of a court-martial that included an unremitted dishonorable discharge;

4. while the member was confined for a civilian felony conviction; or

5. as a result of the member's own misconduct, as defined below. JAGMAN, § 0217.

3304 MISCONDUCT DEFINED

The fact that the conduct violated a law, regulation, or order does not, of itself, constitute a basis for a determination of misconduct. A servicemember's injury is presumed not to be the result of his / her own misconduct ***unless*** there is clear and convincing evidence that:

1. The injury was intentionally incurred; or

2. the injury was the result of gross negligence, demonstrating a reckless disregard for the foreseeable and likely consequences. JAGMAN, § 0218.

3305 SPECIAL RULES

A. Intoxication. Intoxication may be produced by alcohol, a drug, or inhalation of fumes, gas, etc.

1. A member's intoxication at the time of the injury does not, standing alone, constitute a basis for a determination of misconduct unless the investigation clearly shows:

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

b. the extent of such impairment; ***and***

c. that the impairment was ***the*** proximate cause of the injury.

2. A blood alcohol concentration above .10 mg / dl will, in many cases, be sufficient to satisfy the first two elements. However, other evidence should be sought in determining whether or not there existed any physical impairment which directly contributed to the injury of the servicemember (e.g., the member's appearance, coordination, attitude, and coherence). JAGMAN, § 0221.

B. Refusal of medical or dental treatment. If a member unreasonably refuses to submit to medical or dental treatment, any disability that proximately

results from such refusal shall be deemed to have been incurred as a result of the member's own misconduct. JAGMAN, § 0222a.

C. Venereal disease. Any disability resulting from venereal disease is the result of misconduct if the member has not complied with the regulations that require reporting and receiving treatment for such disease. JAGMAN, § 0222b.

D. Mental responsibility. All members are presumed to be mentally responsible. Consequently, that issue need not be addressed unless the nature of the act or the investigation reveals facts which call the member's mental responsibility into question. If so, the presumption is invalid and the member's mental responsibility must be shown by clear and convincing evidence. If the government is unable to make this showing, an adverse finding cannot be made. However, where the impairment of mental faculties is the result of the member's misconduct (e.g., the illegal use of drugs), resulting injuries would be deemed to have been foreseeable consequences of the member's gross negligence (i.e., misconduct).

1. Suicide attempts. Because of the strong instinct for self-preservation, an unsuccessful, but bona fide, attempt to kill one's self creates a strong inference of lack of mental responsibility.

2. Suicidal gestures and malingering. Self-inflicted injury, not prompted by a serious intent to die, is at most a suicide gesture. Unless lack of mental responsibility is otherwise shown, resulting injuries are deemed to be the result of the member's own misconduct. The mere act alone does not raise a question of mental responsibility since there is a presumption that the member does not intend to take his own life. Instead, the intent is merely self-injury for the purpose of achieving some secondary gain—such as getting attention or avoiding duty. JAGMAN, § 0220.

3306 RELATIONSHIP BETWEEN MISCONDUCT AND LINE OF DUTY

A. Permissible findings. A determination of "misconduct" always requires a determination of "not in the line of duty." Consequently, there are only three possible determinations:

1. In LOD, not due to member's own misconduct (favorable);

2. not in line of duty (NLOD), not due to member's own misconduct (adverse); or

3. NLOD, due to member's own misconduct (adverse). JAGMAN, § 0219.

B. Disciplinary action. An adverse determination as to misconduct or LOD is not a punitive measure. Disciplinary action, if warranted, may be taken independently of any such determination. A favorable determination as to LOD / misconduct also does not preclude separate disciplinary action, nor is such a finding binding on any issue of guilt or innocence in any disciplinary proceeding. JAGMAN, § 0223.

C. Administrative consequences. Adverse LOD/misconduct determinations may affect the servicemember's rights and eligibility for benefits. JAGMAN, § 0216.

1. Under 10 U.S.C. § 972, time lost due to the injury will extend the member's term of enlistment and will not count as creditable service toward any longevity and retirement multiplier.

2. Under 10 U.S.C. § 1207, the member may be ineligible for physical disability retirement or separation if the injury was intentional or resulted from willful neglect. In addition, the member will be ineligible if the disability was incurred during a period of unauthorized absence, regardless of its length or degree of interference with duties.

3. If the member's disease is a direct result of intemperate use of drugs or alcohol, the member may forfeit pay under 37 U.S.C. § 802.

4. Under 38 U.S.C. § 105, the member may be ineligible for VA benefits, including medical treatment eligibility.

3307 RECORDING LOD / MISCONDUCT DETERMINATIONS

A. Recording options. When LOD / misconduct findings must be made, they will be recorded in one of three ways per JAGMAN, § 0224:

1. JAGMAN investigation. A fact-finding body must be convened, and the CO must make findings concerning misconduct and LOD in any case in which:

a. The circumstances suggest an adverse LOD / misconduct finding might result;

b. a *JAG Manual* investigation is required for other reasons (e.g., possible claims ramifications); or

c. the CO considers the appointment of a fact-finding body the appropriate means to ensure an adequate official record is made concerning the circumstances surrounding the incident.

d. Following this chapter, appendix A contains an LOD / misconduct investigation checklist to ensure that all required information is contained in the report of investigation.

2. Form report. An injury report form (NAVJAG Form 5800/15) may be used when all of the following conditions are met:

a. A *JAG Manual* investigation is not required;

b. the medical representative and the CO agree that the injury or disease was incurred "in the line of duty" and "not as a result of the member's own misconduct"; and

c. the injury or disease could result in a permanent disability.

3. Health and dental record entries. Health and dental record entries suffice when:

a. A *JAG Manual* investigation is not required;

b. the medical representative and the CO agree that the injury or disease was incurred "in the line of duty" and "not as a result of the member's own misconduct"; and

c. the injury or disease is ***not*** likely to result in a permanent disability.

In any case, even if a health and dental record entry would suffice, a form report may be made to JAG if there appears to be any reason for maintaining a record in that office. The form report will be sent to JAG via a GCMCA for review. Appendix B, following this chapter, contains a flow chart to assist the command in deciding the proper method to record LOD / misconduct determinations. Appendix C lists some common errors made in LOD / misconduct determinations.

3308 ACTION BY REVIEWING AUTHORITIES

A. Convening authority's action. Unless the report is returned for further inquiry, the convening authority (CA) shall take one of the following actions per JAGMAN, § 0225:

1. If the CA concludes that such injury or disease was incurred "in the 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), this conclusion will be reflected in the endorsement of the record of proceedings. This action must be taken regardless of whether it differs from, or concurs with, an opinion expressed by the fact-finding body.

2. If, upon review of the report or record, the CA (or higher authority) believes that the injury or disease of the member was incurred not in line of duty and / or due to his own misconduct, he / she ***may, but is not required to***, afford the member an opportunity to submit any desired information. If provided the opportunity to submit additional information, members shall be advised of their rights under Article 31, UCMJ, and JAGMAN, § 0215b using the form in JAGMAN, appendix A-2-f.

3. If the report contains an LOD / misconduct finding in a death case, the CA or reviewing authority will note the error and disapprove the opinion in the endorsement.

B. Service record entries. Prior to forwarding the report of investigation of an injury to a member which the CA has concluded was incurred NLOD, the CA 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 OEGCMCA, corrective entries can be made later.

3309 FORWARDING

Unless the CA is empowered to convene general courts-martial, the record or report shall be forwarded to the GCMCA.

A. GCMCA's action. The GCMCA may take any action on the report that could have been taken by the CA. With respect to conclusions concerning misconduct and line of duty, the GCMCA shall indicate approval, disapproval, or modification of such conclusions unless the record is returned for further inquiry. A copy of this action shall be forwarded to the CO of the member concerned so that appropriate entries may be made in the service and medical records. JAGMAN, § 0225b.

B. Subsequent reviews. Reviewing authorities above the GCMCA need neither comment nor record approval or disapproval of the prior actions concerning LOD and misconduct.

APPENDIX A

LOD / MISCONDUCT INVESTIGATION CHECKLIST

I. IDENTIFYING DATA ON INJURED PERSON / DECEASED / WITNESS

A. Name

B. Sex and age

C. Military

1. Grade or rate
2. Social security number (obtain from official source)
3. Regular or Reserve
4. Organization and armed force
5. Experience / expertise (i.e., training, licenses, etc.)

D. Civilian

1. Title
2. Business or occupation
3. Address
4. Experience / expertise (i.e., training, licenses, etc.)

II. INJURY

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

D. Status of injured: leave, liberty, unauthorized absence (UA), active duty, active duty for training, or inactive duty for training at time of injury

E. If UA, whether any UA status at time of injury materially interfered with his / her 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, working excessive hours
2. Hungry
3. On medication, prescribed or unauthorized
4. Ill or experiencing dizziness, headaches, or nausea
5. Exposed to severe environmental extremes

6. 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. Mentally preoccupied with unrelated matters

3. Motivation

4. Knowledge of / adherence to standard procedures

5. Mental competence

   a. Presumption of sanity

   b. Attempted suicide (genuine intent to die v. gesture or malingering)

   c. Mental disease or defect (psychiatric eval)

L. Design factors

1. Equipment's condition, working order

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, cause heat stroke, or numbness

5. Suffering from eye fatigue due to inadequate lighting 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, hearing protectors)

2. Not using proper equipment due to lack of availability (identify)

3. Not using proper equipment due to lack of comfort or other reasons (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. Jerry-rigged equipment

3. Use of improper, noninsulated tools

4. Incorrectly installed equipment

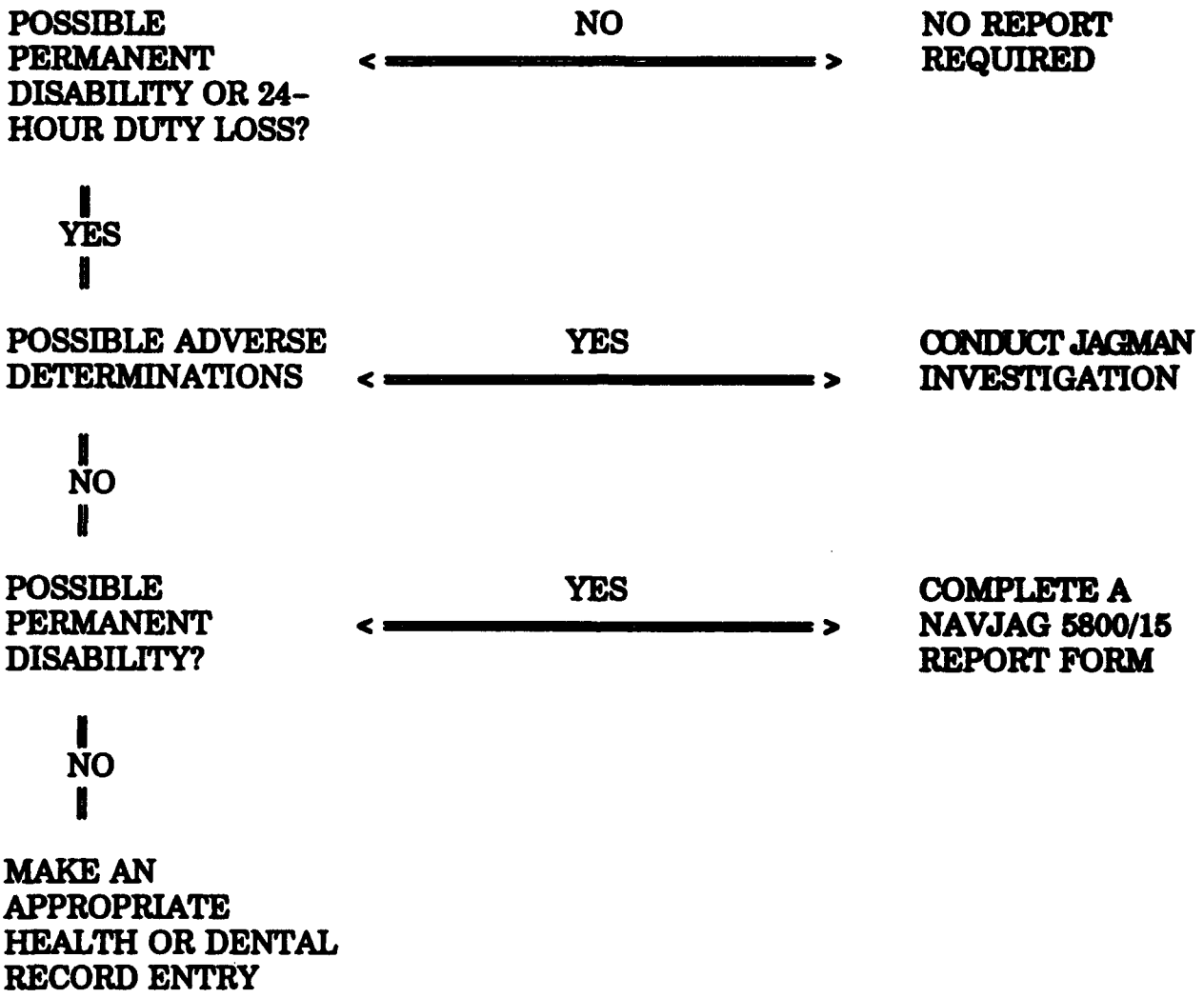
5. Defective / improperly maintained equipment

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)

APPENDIX B

LOD / MISCONDUCT REPORTING FLOW CHART



APPENDIX C

COMMON LOD / MISCONDUCT ERRORS

A. Failure to forward LOD / misconduct cases via a GCMCA if findings are adverse or possible permanent disability exists.

B. Failure to apply the correct burden of clear and convincing evidence when rebutting presumptions regarding LOD, misconduct, material interference, or mental responsibility.

C. Failure to properly analyze the three "intoxication alone" criteria for finding misconduct.

D. Failure to state the duty status of involved individuals.

E. Failure to include Privacy Act statements, article 31 warnings, or JAGMAN, § 0215b warnings when required.

F. Failure to determine whether hospitalization is for observation or treatment (if hospitalization for treatment is for less than 24 hours, or if hospitalization is for observation, no matter what the duration, and no permanent disability is likely, no LOD / misconduct determination is necessary).

G. Failure to secure the GCMCA's signature on the injury report form (NAVJAG 5800/15).

H. Failure of the GCMCA to make specific findings regarding LOD / misconduct or to specifically concur in the subordinate's findings.

I. Failure to include police reports in investigations.

J. Failure to collect all available evidence in suicide attempt / gesture cases (e.g., a psychiatric interview).

K. Failure to record the member's election regarding the opportunity to review the complete investigation before an adverse finding is approved, where the commander makes that discretionary offer.

L. Failure to exclude portions of other privileged investigations from the *JAG Manual* investigation (e.g., Aircraft Mishap Investigation Reports (AMIR), NCIS, safety reports).

CHAPTER THIRTY-FOUR

FREEDOM OF INFORMATION ACT (FOIA), PRIVACY ACT, AND RELEASE OF OFFICIAL INFORMATION AND TESTIMONY FOR LITIGATION PURPOSES

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CHAPTER THIRTY-FOUR

FREEDOM OF INFORMATION ACT (FOIA), PRIVACY ACT, AND RELEASE OF OFFICIAL INFORMATION AND TESTIMONY FOR LITIGATION PURPOSES

3401 FREEDOM OF INFORMATION ACT REFERENCES

A. Statute. Freedom of Information Act, 5 U.S.C. § 552 (1982).

B. Regulations

1. DOD Directive 5400.7, Subj: DOD FREEDOM OF INFORMATION ACT PROGRAM

2. SECNAVINST 5720.42, Subj: DEPARTMENT OF THE NAVY FREEDOM OF INFORMATION ACT (FOIA) PROGRAM

3. JAGMAN, Chapter V, part A

4. USMC - MCO 5720.56

5. USCG - COMDTINST M5260.2

6. SECNAVINST 5720.45, Subj: INDEXING, PUBLIC INSPECTION, AND FEDERAL REGISTER PUBLICATION OF DEPARTMENT OF THE NAVY DIRECTIVES AND OTHER DOCUMENTS AFFECTING THE PUBLIC

7. *Federal Personnel Manual*, chs. 293, 294, 297, 335, 339, and 713

8. U.S. Navy, *Manual of the Medical Department*, ch. 23-70 through 23-79

9. OPNAVINST 5510.161, Subj: WITHHOLDING OF UNCLASSIFIED TECHNICAL DATA FROM PUBLIC DISCLOSURE

10. SECNAVINST 5720.44, Subj: DEPARTMENT OF THE NAVY PUBLIC AFFAIRS POLICY AND REGULATIONS

11. OPNAVINST 5510.48, Subj: MANUAL FOR THE DISCLOSURE OF CLASSIFIED MILITARY INFORMATION TO FOREIGN GOVERNMENTS AND INTERNATIONAL ORGANIZATIONS

C. FOIA Information - DSN 224-2004 / 2817

PART A - FREEDOM OF INFORMATION ACT

3402 OBJECTIVES

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:

A. Disclosure (the general rule, not the exception);

B. equality of access (all individuals have equal rights of access to government information);

C. justified withholding (the burden is on the government to justify the withholding of information and documents from the general public and individuals); and

D. relief for improper withholding (individuals improperly denied access to documents have the right to seek relief in the judicial system).

3403 REQUESTS FOR RECORDS

A. General. Upon receipt of a request for information, a command must initially determine if the request is governed by 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, but not including another federal agency or a fugitive from the law. There is no distinction made between U.S. citizens and foreign nationals.

B. Agency record. FOIA provisions apply only to "records" of a federal agency. 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. Objects or articles, whatever their historical or evidentiary value;

2. commercially exploitable resources;

3. unaltered publications and processed documents that are available to the public through an established distribution system with or without charges;

4. anything that is an intangible or documentary record;

5. 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.); and

6. information stored within a computer for which there is no existing computer program for retrieval of the requested information.

C. In existence. A record must exist and be in the possession and control of the Department of the Navy (DON) at the time of the request in order to be subject to the provisions of SECNAVINST 5720.42. There is no obligation to create, compile, or obtain a record not already in existence.

D. Form of request. To qualify as a request for permission to examine or obtain copies of DON records, the request itself must:

1. Be in writing and indicate expressly, or by clear implication, that it is a request under the FOIA, DOD Directive 5400.7, or SECNAVINST 5720.42;

2. contain a reasonable description of the particular record or records requested (fishing expeditions are not authorized, nor are commands required to respond to blanket requests for all documents); and

3. contain:

a. a check or money order for the anticipated search and duplication fees determined in accordance with enclosure (3) of SECNAVINST 5720.42;

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 of fees.

3404 PROCESSING

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. Incomplete requests. If a request is received that does not meet the minimum requirements set forth above, it should still 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. The command has discretion to waive technical defects in the form of a FOIA request if the requested information is otherwise releasable.

3. Forwarding controls. When a command receives a request for information over which another activity has cognizance, the request must be expeditiously forwarded to that activity. 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 -- including the date and the activity to which it was forwarded.

4. Release of records. Subject to the foregoing, a requested record, or a reasonably segregable portion thereof, will be deemed "releasable" and, therefore, released to the requester, unless it is affirmatively determined that the record contains matters which are exempt from disclosure under the conditions outlined below. 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 (IDA). All officers authorized to convene general courts-martial and the heads of various Navy Department activities listed in paragraph 6(e) of SECNAVINST 5720.42 are designated as IDAs.

5. Denial of release

a. If a local CO 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 (s)he feels denial of a fee waiver is appropriate, (s)he must expeditiously refer the request—with all pertinent information and a recommendation—directly to the IDA.

b. If the IDA 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 60 days.

c. If the IDA determines that the requested record contains releasable information that is reasonably segregable from nonreleasable information, (s)he shall disclose the releasable portion and deny the request as to the nonreleasable portion. A ***complete*** file of those FOIA requests which have been denied, in full or in part, should be maintained by the IDA.

B. Time limits. The official having responsibility for making the initial determination regarding a request shall transmit his / her determination in writing to the requester ***within 10 working days*** after receipt by the appropriate activity. In unusual circumstances, however, denial authorities may extend the time limit for responding to requests. 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. Fee charges

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. The fee schedule can be found in para. 11, enclosure (3) of SECNAVINST 5720.42:

D. Appeals. Any denial of requested information or fee waiver may be appealed. The requester must be advised of 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 SECNAV as appellate authorities. The General Counsel handles contracts, commercial law, and civilian personnel matters, while the JAG handles military law, torts, and all other matters not under the cognizance of the General Counsel. An appeal from an initial denial, in whole or in part, must be in writing and received by the appellate authority not more than 60 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, (s)he may seek judicial review of a final denial in U.S. District Court; in which case, the requested document normally will be produced for examination prior to a 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 FOIA requires each agency submit annual reports to Congress regarding the costs and time expended to administer the Act. Naval activities that are IDAs at Echelon 2 commands will submit a consolidated annual FOIA report by 15 January of each year to the Chief of Naval Operations (OP-09B1P), while Marine Corps IDAs will forward their report by 5 January of each year to the Commandant of the Marine Corps (Code MI-3), who is then responsible for submitting a consolidated report to the Chief of Naval Operations by 15 January of each year. 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 sets forth detailed instructions and the appropriate format for submitting these reports.

3405 EXEMPTIONS

A. General. Matters contained in records may be withheld from public disclosure only if they come within one or more of the exemptions listed below. Even though a document may contain information which qualifies for withholding under one or more FOIA exemptions, FOIA requires that all "reasonably segregable" information be provided to the requestor.

B. Specific exemptions. The following types of information may be withheld from public disclosure if one of the aforementioned requirements 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, and implemented by OPNAVINST 5510.1, Subj: DEPARTMENT OF THE NAVY INFORMATION AND PERSONNEL SECURITY PROGRAM REGULATION.

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, emergency base evacuation plans, 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 on restricted data; 18 U.S.C. § 798 on communication intelligence; 50 U.S.C. §§ 402(d)(8) - (9) on intelligence sources and methods; 21 U.S.C. § 1175 on drug abuse prevention / rehabilitation; and 42 U.S.C. § 4582 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, 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 exemption 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-product privilege documents, and Inspector General reports.

6. Personnel and medical files and similar files. This exemption protects personnel and medical files, and other 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.

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.

3406 FOR OFFICIAL USE ONLY (FOUO)

The FOUO designation is not a statutory exemption. Rather, this label is given 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 above. Records requiring FOUO designation should be marked at the time of their creation to give notice of FOUO content and facilitate review once the record is requested under FOIA.

3407 NAMES AND ADDRESSES. The release of mailing lists is governed by JAGMAN, § 0508.

A. Names and home addresses. A request for home addresses and home telephone numbers without permission shall normally be denied as 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. A request for disclosure of a home address to individuals for the purpose 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, would not be a request for a "list." Disclosure under these circumstances 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.

B. Names and duty addresses. Requests for names and duty addresses of members attached to units that are stationed in foreign territories, routinely deployable, or operationally sensitive, must be denied as clearly unwarranted invasions of personal privacy and as threats to security. Exceptions must be coordinated with CNO (OP-09B30) or CMC (MPI-10) as appropriate. Routinely deployable units include ships (except those undergoing extensive yard work), aviation squadrons, operational staffs, and all Fleet Marine Force units.

C. Release. Names and duty addresses not covered by the above are not exempt from release. Directories and organizational charts must also be released. No administrative burden exists if the requested materials are already in the form requested.

PART B - PRIVACY ACT

3408 PRIVACY ACT REFERENCES

A. Statute. Privacy Act of 1975, 5 U.S.C. § 552a (1982).

B. Regulations

1. DOD Directive 5400.11, Subj: DEPARTMENT OF DEFENSE PRIVACY PROGRAM

2. SECNAVINST 5211.5, Subj: DEPARTMENT OF THE NAVY PRIVACY (PA) PROGRAM. 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. JAGMAN, Chapter V, part B

4. MCO P5211.2, Subj: THE PRIVACY ACT OF 1974

5. COMDTINST M5260.2

6. OPNAVNOTE 5211, 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.

7. MCBUL 5211, 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.

3409 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 where the information is maintained in records retrievable by the name of the individual or some other personal identifier. Federal agencies, with certain exceptions as noted later in this chapter, are required by the Act to:

1. Permit an individual to determine what records pertaining to him/her are collected, maintained, used, or disseminated;

2. permit an individual to prevent records pertaining to him / her, that were obtained by such agencies for a particular purpose, from being used or made available for another purpose without his / her consent;

3. permit an individual to gain access to information pertaining to him / her 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 personal identifiers 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.

3410 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. "Personal information" is 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.

B. Privacy Act statement contents. When the Navy or Marine Corps requests information that is personal and is for inclusion in a system of records (a group of records from which information is retrieved by name or other personal identifier), 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. the principle 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.

C. Use of the Privacy Act statement. The above information will be provided to the individual via the "Privacy Act Statement." There is nothing contained in the basic legislation or in SECNAVINST 5211.5 which formally requires that the subject be given a written Privacy Act statement or that (s)he sign the statement. In order to ensure that an individual fully understands the Privacy Act statement, however, it is strongly recommended that (s)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.

D. 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 NCIS, 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).

E. 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.

F. 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."

G. Exemptions. Exemptions from disclosure are provided by the Privacy Act. Exemptions are not automatic and must be invoked by the Secretary of the Navy who has delegated CNO (OP-09B30) to make the determination. No system of records within DON shall be considered exempt until the CNO has approved the exemption and an exemption rule has been published as a final rule 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, 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 FOIA;

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 18 U.S.C. § 3056;

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 or military 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.

3411 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. As a general rule, 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 exceptions discussed below.

1. Personnel within the DON or the DOD. 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 NJP, or at daily formations or morning quarters. JAGMAN, § 0509.

2. FOIA. If the information is of the type that is required to be released pursuant to the FOIA as implemented by SECNAVINST 5720.42, it may be released.

3. Routine use. Disclosure may be made for a routine use and declared and published in the system notice in the *Federal Register* and complementary Privacy Act statement.

4. 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 foreign law enforcement agencies is ***not*** authorized under this section.

5. 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.

6. 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 also 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.

7. Courts of competent jurisdiction. When complying with an order from a court of competent jurisdiction signed by a state, federal, or local 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.

8. Consumer reporting agency. Certain information may be disclosed to consumer reporting agencies as defined by the Federal Claims Collection Act of 1966 [31 U.S.C. § 952(d)].

9. Bureau of the Census

10. 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.

11. National Archives

12. Comptroller General. For the General Accounting Office (GAO).

C. Disclosure accounting. The Privacy Act and implementing instructions require each command to maintain an accounting record of all disclosures, including those requested or consented to by the individual. This allows 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. There is no uniform method for keeping disclosure accountings; the primary criteria are that the selected method be one which will:

1. Enable an individual to ascertain what person or agencies have received disclosures pertaining to him / her;

2. provide a basis for informing recipients of subsequent amendments or statements of dispute; and

3. provide a means to prove that the activity has complied with the requirements of the Privacy Act.

D. Retention of disclosure accounting. Commands should maintain a disclosure accounting of the life of the record to which disclosure pertains or 5 years after the date of disclosure—whichever is longer.

3412 PERSONAL NOTIFICATION, ACCESS, AND AMENDMENT

A. General provisions / purposes

1. Personal notification. Because one of the underlying purposes of the Privacy Act is to allow the individual, upon his / her request, to discover whether records pertaining to him / her 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. 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, enclosure (11)], and exercised by the denial authority.

2. Personal access. 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 / her 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 / her 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 / her when seeking 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."

3. Amendment. The Privacy Act permits the individual to ensure that the records maintained about him / her are as accurate as possible by allowing him / her 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. An individual requesting notification concerning records about him / herself must:

a. Accurately identify him / herself;

b. identify the system of records from which the information is requested;

c. provide the information or personal identifiers needed to locate records in that particular system; and

d. request notification of personal records within the system from the system manager; or

e. request access from the system manager; or

f. request amendment in writing from the system manager; and

g. state reasons for requesting amendment and provide information to support such request.

2. Command action

a. Denials / deficient requests. 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. A request may not be rejected, nor may the individual be required to resubmit the request, unless essential for processing the request.

b. Notification. 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.

c. 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 SECNAVINST 5211.5.

d. Amendments. If an available exemption is not exercised, an individual's request for amendment of a record pertaining to him / her 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.

3. Time limits. A request for notification shall be acknowledged in writing within 10 working days after receipt, and the requester must be advised of the decision to grant / deny access within 30 working days.

C. Denial authority. Denial authorities include all officers authorized to convene general courts-martial and the heads of designated Navy Department activities as indicated in paragraph 6(e) of SECNAVINST 5211.5D.

1. Notification. Denial authorities 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 ongoing law enforcement investigation). The denial letter shall inform the individual of his / her right to request further administrative review of the matter with the Judge Advocate General within 60 days from the date of the denial letter.

2. Access. 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. When none of the record is releasable, the denial authority 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 days of the date of the denial).

3. Amendment. 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 / her that he / she may request review of the denial within 60 days and the means of exercising that right.

D. Reviewing authority. Upon receipt of a request for review of a determination denying an individual's initial request for notification, access, or amendment, the Judge Advocate General (or the General Counsel, depending on the subject matter) 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. If the official who reviews the denial also refuses to amend the record as requested, that official must notify the individual of his / her 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.

3413 REPORTING. SECNAVINST 5211.5 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 March of each year. Units afloat and operational aviation squadrons are exempt from the reporting requirements described above unless they have received Privacy Act requests.

3414 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. Wrongfully refuses to amend the individual's record or wrongfully refused to review the initial denial of a requested amendment;

2. wrongfully refuses to allow the individual to review or copy his / her 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 A.3 or A.4 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, (s)he should be protected from criminal liability. Criminal violations of the Privacy Act are ***not*** punishable by incarceration.

3415 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 him/herself. As a general rule, the request will be processed under whichever Act cited in the request; however, special cases arise where the requester cites both Acts or where neither Act is cited.

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 him / herself 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 him/ herself. 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.

PART C - RELEASE OF OFFICIAL INFORMATION AND TESTIMONY FOR LITIGATION PURPOSES

3416 REFERENCES

A. DOD Directive 5405.2, Subj: RELEASE OF OFFICIAL INFORMATION IN LITIGATION AND TESTIMONY BY DOD PERSONNEL AS WITNESSES

B. JAGMAN, Chapter V Part C

C. SECNAVINST 5820.8, Subj: RELEASE OF OFFICIAL INFORMATION FOR LITIGATION PURPOSES AND TESTIMONY BY DEPARTMENT OF THE NAVY (DON) PERSONNEL

D. *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951)

3417 OBJECTIVES

The purpose of Part C of the *JAG Manual* and the instructions is to make ***factual*** official information, both testimonial and documentary, reasonably available for use in federal / state / foreign courts, and other governmental proceedings unless that information is classified, privileged, or otherwise protected from public disclosure.

DON personnel shall not provide, with or without compensation, opinion or expert testimony concerning official DOD information, subjects, personnel, or activities, except on behalf of the United States or a party represented by the Department of Justice or with the written special authorization required by SECNAVINST 5820.8. DON policy favors disclosure of factual matters and does not favor disclosure on expert or opinion matters.

3418 DEFINITIONS

A. Determining authority: the cognizant DON or DOD official designated to grant or deny a litigation request. In all cases in which the United States is—or might reasonable become—a party or in which expert testimony is requested, the Judge Advocate General or the General Counsel of the Navy will act as the determining authority. In all other cases, the general court-martial convening authority will act as the cognizant DON or DOD official.

B. DON personnel: active-duty or former military personnel of the naval service (including retirees); civilian personnel of DON; personnel of other DOD components serving with a DON component; nonappropriated fund activity employees; non-U.S. nationals performing services overseas for DON under status of forces agreements (SOFAs); and other specific individuals or entities hired through contractual agreements by, or on behalf of, DON.

C. Official information: all information of any kind, however stored, in the custody and control of the DOD or its components.

D. Request or demand (legal process): subpoena, order, or other request by a federal, state, or foreign court of competent jurisdiction, by any administrative agency thereof, or by any party or other person.

3419 AUTHORITY TO DETERMINE AND RESPOND

A. Matters proprietary to DON. For a litigation request or demand made upon DON personnel for official DON or DOD information, or for testimony

concerning such information, the cognizant DON official will determine availability and respond to the request or demand.

B. Matters proprietary to another DOD component. If a DON activity receives a litigation request or demand for official information originated by another DOD component or for non-DON personnel, the DON activity will forward appropriate portions to the originating DOD component and notify the requester of its transfer.

C. Litigation matters to which the United States is, or might reasonably become, a party. The cognizant DON official is either the Judge Advocate General or the General Counsel of the Navy.

1. Examples of such instances:

a. Suits under the Federal Tort Claims Act;

b. suits under the FOIA;

c. suits under the Medical Care Recovery Act; or

d. suits against a government contractor where the contractor may interplead the United States.

D. Litigation matters in which the United States is not, and is reasonably not expected to become, a party

1. Fact witnesses: Purely factual matters shall be forwarded to the Navy or Marine Corps officer exercising general court-martial jurisdiction in whose chain of command the prospective witness or requested documents lie.

2. Visits and views: A request to visit a DON activity, ship, or unit—or to inspect material or spaces located there—will be forwarded to the officer exercising general court-martial jurisdiction (OEGCMJ). Visits, views, and inspections shall not be accompanied by interviews of personnel unless separately requested and granted.

3. Documents: 10 U.S.C. § 7861 provides that the Secretary of the Navy has custody and charge of all DON books, records, and property. Under DOD Directive 5530.1 of 22 August 1983 (NOTAL), the Secretary of the Navy's sole delegate for service of process is the General Counsel of the Navy. Process not properly served on the General Counsel is insufficient to constitute a legal demand and shall be processed as a request by counsel.

4. Expert or opinion requests: Any request for expert or opinion consultations, interviews, depositions, or testimony shall be forwarded to the Deputy Assistant Judge Advocate General for General Litigation.

5. Matters not involving issues of Navy policy: Such matters shall be forwarded to the respective counsel of the activities listed in paragraph 4.b.(1) in enclosure (3) of SECNAVINST 5820.8A (depending upon who has cognizance over the information or personnel at issue).

6. Matters involving issues of Navy policy: Such matters shall be forwarded to the General Counsel of the Navy via the Associate General Counsel (Litigation).

7. Matters involving asbestos litigation: Such matters shall be forwarded to the Office of Counsel, Naval Sea Systems Command Headquarters, Personnel and Labor Law Section (Code OOLD).

8. Matters not clearly within the cognizance of any DON official: Such matters may be sent to the Deputy Assistant Judge Advocate General for General Litigation or the Associate General Counsel (Litigation).

3420 CONTENTS OF A PROPER REQUEST OR DEMAND

A. General policy. If official information is sought, through testimony or otherwise, a detailed written request must be submitted to the appropriate determining authority far enough in advance to assure an informed and timely evaluation of the request. The determining authority shall decide whether sufficient information has been provided by the requester. The necessary contents of a routine request are discussed in enclosure (4) of SECNAVINST 5820.8.

B. Generally, the following information is necessary to assess a request:

1. Identification of parties, their counsel and the nature of the litigation:

a. Caption of case, docket number, court;

b. name, address, and telephone number of all counsel; and

c. the date and time on which the information sought must be produced, the requested location for production, and, if applicable, the length of time that attendance of the DON personnel will be required.

2. Identification of information or documents requested:

a. Detailed description of information sought;

b. location of the information sought; and

c. a statement whether factual, opinion, or expert testimony is requested.

3. Description of why the information is needed:

a. A brief summary of the facts of the case and the present posture of the case;

b. a statement of the relevance of the matters sought to the proceedings at issue; and

c. if expert or opinion testimony is sought, an explanation of why exceptional need or unique circumstances exist justifying such testimony, including why it is not reasonably available from any other source.

C. Additional information. The circumstances surrounding the underlying litigation, including whether the United States is a party, and nature and expense of the requests made by a party may require additional information before a determination can be made.

1. A statement of the requester's willingness to pay in advance all reasonable expenses for searching and producing information—including travel expenses and accommodations;

2. in cases in which deposition testimony is sought, a statement whether attendance at trial or later deposition testimony is anticipated and requested;

3. agreement to notify the determining authority at least 10 working days in advance of all interviews, depositions, or testimony;

4. an agreement to conduct the deposition at the location of the witness, unless agreed to otherwise;

5. in the case of former DON personnel, a brief description of the length and nature of their duties and whether such duties involve directly or indirectly the testimony sought;

6. an agreement to provide free of charge to any witness a signed copy of any written statement made or, in the case of an oral deposition, a copy of that deposition transcript;

7. if court procedures allow, an agreement granting the opportunity for the witness to read, sign, and correct the deposition at no cost to the witness or the government;

8. a statement of understanding that the United States reserves the right to have a representative present at any interview or deposition; and

9. a statement that counsel for other parties to the case will be provided with a copy of all correspondence originated by the determining authority.

D. Deficient requests. A letter request that is deficient in providing necessary information may be returned to the requester by the determining authority with an explanation of the deficiencies and a statement that no further action will be taken until they are corrected. If a subpoena has been received for official information that is deficient, the determining authority must promptly notify the General Litigation Division of the Office of the Judge Advocate General or the Navy Litigation Office of the Office of General Counsel. Timely notice is essential.

E. Emergency requests. The determining authority has discretion to waive the requirement that the request be made in writing in the event of a bona fide emergency. An emergency is when factual matters are sought, and compliance with the requirements of a proper written request would result in the effective denial of the request and cause an injustice in the outcome of the litigation for which the information is sought. If the determining authority concludes that a bona fide emergency exists, (s)he will require the requester to agree to the conditions set forth above.

3421 ACTION TO GRANT OR DENY A REQUEST

General policy. A determination to grant or deny a request should be made as expeditiously as possible to provide the requester and the court with the matter at issue or with a statement of the reasons for denial. The decisional period should not exceed 10 working days from receipt of a completed request complying with the requirements set out in SECNAVINST 5820.8, enclosure (4).

In cases in which a subpoena has been received and the requester refuses to pay fees, or if the determining authority declines to make some or all the material available or has insufficient time to complete the determination as to how

to respond to the request, the determining authority must promptly notify OJAG, General Litigation Division (Code 34) or the Litigation Office of the General Counsel.

3422 RESPONSE TO REQUESTS OR DEMANDS IN CONFLICT WITH DON POLICY

Make every effort to get the requester to comply with the instruction and / or service-of-process requirements. Most requesters are simply unaware of the requirements for obtaining official DON information or how to serve process on SECNAV. Direct the requester's attention to the requirements of 32 C.F.R. Parts 257.5(c) and 725.

If a court of competent jurisdiction or other appropriate authority declines to stay the effect of the request or demand in response to action taken by a determining authority, or orders that the request must be complied with, DAJAG or the Associate General Counsel (Litigation) must be notified. After consultation with the Department of Justice, DAJAG or the Associate General Counsel will determine whether to comply with the request or demand and will notify the requester, the court, or other authority accordingly. Generally, DON personnel will be instructed to decline to comply with a court order only if the Department of Justice commits to represent the DON personnel in question.

3423 FEES AND EXPENSES

General policy. Except as provided below, determining authorities shall charge reasonable fees and expenses to parties seeking official DON information or testimony. Under 32 C.F.R. 288.10, the fees should include all costs of processing a request for information, including time and material expended.

1. When DON is a party. No fees normally shall be charged when DON is a party to the proceedings.

2. When another federal agency is a party. No fees shall be charged to the requesting agency.

3. When neither DON nor another federal agency is a party. Fees shall be charged to the requester for time taken from official duties by DON personnel who are authorized to be interviewed, give testimony, or escort persons on views and visits of installations. Fees are payable to the Treasurer of the United States for deposit in the Treasury's miscellaneous receipts.

CHAPTER THIRTY-FIVE

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CHAPTER THIRTY-FIVE

STANDARDS OF CONDUCT AND GOVERNMENT ETHICS

3501 STANDARDS OF CONDUCT REFERENCES

A. 5 C.F.R. Part 2635, U.S. Office of Government Ethics (OGE) Regulations

B. DOD Directive 5500.7-R of 30 August 1993, Subj: DOD JOINT ETHICS REGULATIONS

C. SECNAVINST 5370.2, Subj: STANDARDS OF CONDUCT AND GOVERNMENT ETHICS

D. SECNAVINST 4001.2, Subj: ACCEPTANCE OF GIFTS

3502 PURPOSE AND SCOPE

The principal purpose of the federal standards of conduct is to ensure that public officials serve the public good as a whole, rather than private or personal interests. To deter conflicts of interest involving federal officials, the rules not only bar specific wrongful acts, such as bribery, but also inhibit a broad range of general situations that pose the threat or appearance of wrongful acts. That is because, even though many of the situations or actions barred by the rules are not bad in and of themselves, they could lead to situations where an official may be too easily tempted or where a reasonable person could perceive a conflict of interest. As noted by the Supreme Court in *United States v. Mississippi Valley Generating Company*, 364 U.S. 520, 549 (1961), "The moral principle upon which [the rules are based] is the Biblical admonition that 'no man may serve two masters,' Matt. 6:24, a maxim which is especially pertinent if one of the masters happens to be economic self-interest." Thus, a key purpose of standards of conduct is to remove the temptation for federal employees to violate their trust with the government. *Mississippi Valley Generating Company*, 364 U.S. at 550. At the same time, the rules seek to balance the ideal of conflict-free government with the reality of complex human situations, relationships, and interactions. In addition, to further clarify the balances involved in defining standards of conduct, the rules contain several examples of how they are applied.

3503 APPLICATION

Although the Office of Government Ethics (OGE) regulations are generally only applicable to commissioned officers and civilian employees, the Joint Ethics Regulations (JER) have made the standards of conduct, contained in 5 C.F.R. Part 2635, applicable to enlisted personnel as well—subject to minor exceptions. In addition, service regulations—including SECNAVINST 5370.2—are applicable to all DON personnel.

3504 GENERAL PRINCIPLES

A. The general principles of the standards of conduct, originally declared in Executive Order 12674 of April 12, 1989, and codified at 5 C.F.R. § 2635.101, are critically important in applying or interpreting the standards of conduct. Because of the complex nature of the rules, the general principles serve as a touchstone for ethical decision-making. The rules may be applied to permit a wide range of conduct, provided the conduct accords with the intent and spirit of the standards of conduct as declared in the general principles.

B. The general principles of the standards of conduct can be summarized as follows:

1. Public service is a public trust;

2. employees shall not use public office for private gain;

3. employees will not permit themselves to develop any interests in conflict with their official duties;

4. employees must avoid even the ***appearance*** of impropriety;

5. employees must act impartially in the performance of official duties; and

6. official property is for official use only.

3505 ETHICS COUNSELORS

A. Because of the complexity of the rules regarding the standards of conduct, the regulations establish ethics officials in each agency. Agency ethics officials establish a number of ethics counselors throughout each agency to provide advice and assistance to employees regarding standards of conduct issues

B. The following officers are designated as ethics counselors.

1. Navy and Marine Corps: General Counsels of Navy activities; commanding officers of NLSOs; and staff judge advocates for officers exercising general court-martial authority.

2. Coast Guard: district legal officers (MLC) and legal officers (G-LGL).

C. Safe harbor provision. The rules provide that no disciplinary action may be taken against a person who engaged in conduct in good faith reliance upon the advice from an ethics official, provided the employee made full disclosure to the counselor. 5 C.F.R. § 2635.107(b).

-- The rules do not insulate persons from criminal liability, but reliance upon the advice of an ethics official is a factor considered by the Department of Justice (DOJ) in deciding whether to prosecute. 5 C.F.R. § 2635.107(b).

D. Any disclosures made to an ethics official are not protected by the attorney-client privilege. 5 C.F.R. § 2635.107(b). An agency ethics officer is required to report any information relating to a violation of the criminal code (Title 18 of the U.S. Code). 28 U.S.C. § 535. Persons acting as ethics counselors represent the Federal Government and not those seeking ethics advice. Attorneys must be particularly careful to ensure that persons seeking advice about the standards of conduct understand their relationship with the ethics counselor.

3506 GIFTS FROM OUTSIDE SOURCES - 5 C.F.R. § 2635: Subpart B (200 *et seq.*)

A. General standards. Federal employees are forbidden from soliciting or coercing gifts, or accepting gifts given because of the employee's official position. Also, employees may not accept gifts given by a prohibited source—defined as a person or entity that seeks action, does business with, or is affected by the performance of official duties.

B. Definition of gifts. In general, a gift is defined as anything of value (such as gratuities, meals, entertainment, hospitality, travel, favors, loans, or meals). Certain items, however, are excluded [5 C.F.R. § 2635.203(b)]:

1. Snacks: modest items of food (e.g., coffee, donuts, etc.), other than as a meal.

2. Trinkets: items with little intrinsic value (e.g., cards, trophies, or plaques).

3. Widely available benefits: loans, benefits, or discounts generally available to the public or all government employees, or all uniformed military personnel.

4. Prizes: awards from contests open to the public, unless the entry was part of official duty.

5. Pensions: pension payments from participation in a pension plan through a former employer.

6. Government-provided items: items paid for by the government or accepted by the government. *See also* 41 C.F.R. Part 304-1.

7. Market value: anything for which the employee paid market value.

C. Exceptions. Despite the general prohibition against gifts, federal employees may accept a number of gifts in circumstances where the gift would clearly not violate the general principles of the standards of conduct. 5 C.F.R. § 2635.204. Specifically:

1. The de minimis exception: Most employees may accept unsolicited gifts worth $20.00 or less; procurement officials may accept gifts worth $10.00 or less (41 C.F.R. § 3.104). Employees may decline any distinct and separate item to bring the aggregate value of a gift within the limitation, but they may not use the exception as a type of discount by paying the value over $20.00. Employees may not accept gifts totaling over $50.00 from the same source in any calendar year.

2. Personal gifts exception: Employees may accept gifts that are in fact based on a personal, unofficial relationship rather than the official position of the employee. The exception is very fact-specific; persons should look at factors such as who paid for the gift and the nature and history of the relationship.

3. Group benefits and discounts: Nondiscriminatory benefits that are available to all employees may be accepted if they are reduced fees for joining a professional organization, offered to a broad segment of the population in addition to the government employees, or offered by nonprohibited sources.

4. Awards: Awards of $200.00 or less may be accepted if they are received subject to an established recognition program, with written standards, for meritorious service from other than a prohibited source. An agency ethics official may approve a greater award under some circumstances.

5. Moonlighting exception: Federal employees may accept gifts from outside employment activities not related to their official duties, provided the gifts are not offered because of official status and they are of a type customarily provided by employers or prospective employers. The employee, however, must first be disqualified from any future actions involving the outside employer.

6. Widely attended gathering exception

a. Employees may accept gifts of free attendance at a gathering or event from the sponsor of the event under two circumstances:

(1) Speaking if the employee will participate or speak at the event; or

(2) agency interest. If the event will be widely attended by persons throughout an industry, or will represent a range of interests, the employee's supervisor may permit attendance based on a determination that the attendance will further agency programs or operations.

b. Free attendance includes items such as food, entertainment and instruction, or materials, but does not include transportation, lodging, expenses, or meals not incident to the event.

7. Social exception. Employees may freely attend parties and enjoy the food and entertainment provided, as long as the host is not a prohibited source and no fee is charged to others at the affair.

8. Foreign meals exception. An employee may accept food and entertainment in conjunction with a meeting in a foreign area, provided the cost of the meal is within the applicable per diem rate and the attendance is part of the employee's official duties. In addition, the event must include participation by non-U.S. persons and the gift must be provided by a person other than a foreign government.

9. Charity participation exception. Employees may accept free attendance, course and meeting materials, transportation, lodging, and food provided by a tax-exempt organization and incident to training or meetings if approved by the employee's agency. 5 U.S.C. § 4111.

10. Foreign gifts exception. Employees may accept a gift from a foreign government or international organization pursuant to the Foreign Gifts and Decorations Act, 5 U.S.C. § 7342, if the gift is of minimal value as defined at 41 C.F.R. § 101-49.001-5. Even so, members may never solicit or encourage gifts, decorations, or awards from a foreign government. All decorations, awards, and gifts from foreign governments to U.S. military and civilian personnel, and their spouses and dependents, must be processed under the procedures outlined in chapter 7 of SECNAVINST 1650.1, *Navy and Marine Corps Awards Manual*.

11. Festival exception. In addition to the exceptions provided in the Federal Regulations, the JER states that DOD personnel may accept a gift of free attendance at an event sponsored by a state or local government, or a tax-exempt organization, if the supervisor approves it as justified by community relations.

D. Notwithstanding the foregoing exceptions, federal employees may not accept any gifts in the following circumstances. 5 C.F.R. § 2635.202(c). Specifically:

1. In return for being influenced in an official act;

2. given because of solicitation or coercion;

3. given on a recurring basis; or

4. in violation of any law, such as the Procurement Integrity Act.

E. Gifts to the DON. The DON may accept gifts to the department or certain commands under specific circumstances outlined in SECNAVINST 4001.2 and MCO 4001.2. All gifts received must be forwarded to an approval authority for decision. The department will decline any gift that might embarrass the department or the government, or that may imply an endorsement of commercial enterprise. In any event, personnel may not solicit gifts. A sample memorandum to the acceptance authority is provided in the appendices to this chapter.

F. Returning gifts. 5 C.F.R. § 2635.205.

1. In some instances, an employee may receive a gift that cannot be accepted. In those cases, the employee must either return it, pay for it, or accept it on behalf of the agency—if authorized. If the gift is perishable, though (such as food or flowers), the gift may be given to a charity, shared within the office or unit, or destroyed.

2. In any event, reciprocation does not equal reimbursement. An employee cannot accept a free meal in violation of the rules, even if the employee will or has paid for a free meal for the other person on some other occasion.

3. When accepting items on behalf of the government, the gifts must be properly forwarded. To forward gifts from foreign governments, see 41 C.F.R. § 101-49; materials from official travel, see 41 C.F.R. § 101-25.103.

3507 GIFTS BETWEEN EMPLOYEES - 5 C.F.R. § 2635 Subpart C (300 *et seq.*)

A. General standards. The regulations strictly prohibit supervisors from coercing the offering of a gift from a subordinate. 5 C.F.R. § 2635.301(c). In addition, the rules bar employees from giving gifts to superiors or their families and from soliciting for gifts, except under some specific exceptions.

B. Exceptions. The exceptions to the general prohibition on gifts between employees are:

1. Gifts based on a personal relationship. If the two employees have a personal relationship justifying a gift and they are not in a subordinate-superior relationship, one may give a gift to the other.

2. Voluntary contributions. Groups may solicit contributions to gifts for fellow employees provided no coercion is used and the amount is determined by the giver. In addition, contributions cannot exceed $10.00, except for contributions towards food and entertainment. Finally, the total value of the group gift cannot exceed $300.00, regardless of the size of the group. 5 C.F.R. § 2635.303(f); JER 2-203.

3. Token gifts. Occasionally, employees may give token gifts (with a value of $10.00 or less) to superiors. That exception would permit an employee to bring back a coffee mug or bag of candy from a vacation trip without violating the rules. 5 C.F.R. § 2635.304.

4. Food and refreshments. Employees may share food and refreshments in the office. In addition, they may offer reasonable personal hospitality at a residence or provide a gift in return for personal hospitality. 5 C.F.R. § 2635.304(a).

5. Transferred leave. Employees may transfer leave to a person other than an immediate supervisor under appropriate circumstances. 5 C.F.R. § 2635.304(a)(5).

6. Special occasions. On special infrequent occasions—such as marriage, childbirth, retirement, or transfer—a subordinate may give a gift appropriate to the occasion. 5 C.F.R. § 2635.304(b).

3508 CONFLICTING FINANCIAL INTERESTS - 5 C.F.R. § 2635 Subpart D (400 *et seq.*)

A. Disqualifying financial matters. Employees are prohibited by criminal law from taking official action in any particular matter in which they have a financial interest, actual or imputed, if the action will have a direct and predictable effect on the interest. 5 C.F.R. § 2635.402; 18 U.S.C. § 208a. Employees faced with such conflict of interest must provide written notice of their disqualification to the appropriate supervisor. JER 2-204.

B. Definitions. The following definitions are particularly important in this complex area of standards of conduct.

1. Direct and predictable. Actions have a "direct and predictable effect" when there is a close causal link between an action taken and a resulting effect on a certain financial interest—an effect that is not a result of unrelated matters and is not speculative. The actual amount of the direct effect is irrelevant to the regulations. 5 C.F.R. § 2635.402(b).

2. Imputed interests. In addition to the interests of the employee's family, the interests imputed to a federal employee include those of a general partner; an organization in which the employee is an officer, director, trustee, general partner, or employee; and any person with whom the employee is negotiating about prospective employment.

3. Particular matter. Particular matters that implicate the regulatory prohibition include only those that focus on specific facts and circumstances, not broad statements or principles. For example, although an employee with an interest in a small business could not negotiate a government contract with his / her own business, (s)he could make a broad statement that the government must receive full efficiency from its contractors.

C. Required divesture. 5 C.F.R. § 2635.403. An agency may prohibit employees, or classes or positions of employees, from holding specific financial interests where the agency determines that the holding will require the employee to be disqualified to such an extent that the employee cannot do the job or where the limitation would adversely affect the agency mission.

3509 IMPARTIALITY IN OFFICIAL DUTIES - 5 C.F.R. § 2635.502 Subpart E (500 *et seq.*)

In order to foster public confidence in the government, the regulations prohibit employees from acting in matters where a reasonable person would question

the employee's impartiality unless the actions are authorized by an appropriate supervisor who determines that no conflict or possible lack of impartiality exists. Matters that would cast doubt on an official's impartiality would include those that could have a direct and predictable effect on the official's household or interests. Note that this section would prohibit some actions that would not violate 18 U.S.C. § 208 for lack of financial motive or imputed interest. In addition, federal officials who receive an "extraordinary payment" from a former employer are not permitted to act in matters affecting that former employer for a period of two years after receipt of the payment. 5 C.F.R. § 2635.503. The term "extraordinary payment" refers to a payment over $10,000.00 that is based on a determination made after the employee was considered or appointed to a government job and is from other than an established compensation, partnership, or benefits program.

3510 SEEKING OTHER EMPLOYMENT - 5 C.F.R. § 2635 Subpart F (600 *et seq.*)

A federal official is not permitted to take any official action with regard to a prospective employer with whom person is seeking employment. 5 C.F.R. § 2635.604. When faced with a potential conflict, the member must give the supervisor a written notice of disqualification. JER 2-204. As long as the employee provides timely notice, the employee may accept interviews—including travel, lodging, and meals—even from a prohibited source. 5 C.F.R. § 2635.204(f).

3511 MISUSE OF POSITION - 5 C.F.R. § 2635 Subpart G (700 *et seq.*)

A. A fundamental principle of the standards of conduct is that federal employees may not use public office for private gain. 5 C.F.R. § 2635.702. Therefore, they may not use their official positions to endorse products or services, coerce benefits, help friends, or give any appearance of government sanction for private benefit.

B. Employees may not use nonpublic information for personal benefit or allow the improper use of nonpublic information by others. 5 C.F.R. § 2635.703. Nonpublic information includes information exempt under 5 U.S.C. § 552; information otherwise protected by statute, Executive order, or regulation; information designated as confidential; and information not released or not authorized for release to the general public.

C. Federal employees may not misuse government property. 5 C.F.R. § 2635.704. Since government property is for government use only, actions such as using government computers for personal profit, mailing personal letters as official mail, or misusing a government vehicle, is clearly improper. Telephones are for

official use as well, although no-cost, no-interference-with-duty use for minor, necessary personal business is authorized by the JER. JER 2-301.

D. Federal officials shall also not misuse official time; either their own or that of their subordinates. Hours for which personnel are receiving pay from the government should be dedicated to the government, not personal interests. 5 C.F.R. § 2635.705. This rule bars such misuse as ordering junior personnel to trim the lawn of a superior or to provide off-duty taxi service.

E. DOD employees shall not solicit or make any sales, either on-duty or off-duty, to other DOD personnel who are junior to them, except for two specific situations. First, employees may sell or lease noncommercial personal or real property. Second, they may make sales in a retail store during off-duty employment. JER 2-205.

3512 OUTSIDE ACTIVITIES - 5 C.F.R. § 2635 Subpart H (800 *et seq.*)

A. Outside employment. 5 C.F.R. § 2635.802; JER 2-206, 2-303. Personnel are authorized to engage in outside employment, both paid and unpaid, provided the second job doesn't conflict with the general principles of ethical conduct. Specifically, personnel may not engage in outside employment that interferes with official duties, involves conflicts of interest, violates regulations, or creates an appearance of impropriety. In addition, military members must have command approval before undertaking outside employment. JER 2-206, 2-303. Two other staunch prohibitions limit outside employment. First, employees may not receive outside compensation for their official duties in violation of 18 U.S.C. § 208. Second, employees may not act as agents for anyone, other than family members, in any matter in which the U.S. Government has a substantial interest or is a party. Certain employees, such as attorneys, have additional restrictions. *See* JAGINST 5803.1A.

B. Expert witnesses. 5 C.F.R. § 2635.805. Federal employees are prohibited by regulations from serving as expert witnesses in court, except on behalf of the United States or as authorized by the employee's agency in consultation with the DOJ and the agency most closely involved in the litigation. If subpoenaed, though, employees are permitted to testify as fact witnesses. Coast Guard employees and retirees are subject to even stricter limitations contained in 49 C.F.R. Part 9. Those regulations require parties seeking Coast Guard witnesses to first seek all available information through the Freedom of Information Act (FOIA), then to schedule one deposition only to examine the witness. The regulations, however, do not authorize an agency to disregard a court order or a court-approved subpoena. *Dean v. The Veterans Administration*, 151 F.R.D. 83 (N.D.Ohio 1993).

C. Teaching, speaking, writing. 5 C.F.R. § 2635.807.

1. Federal employees may not be compensated by outside entities for teaching, speaking, or writing, if the subject of the effort relates to official duties. The subject relates to official duties if the communication of the material is part of the employee's duties, the invitation was based upon the person's official position, the information is derived from nonpublic information, the subject deals with the employee's official ongoing duties or those within the past year, or the subject relates to any ongoing or announced policy, program, or operation of the agency.

2. Current regulations regarding honoraria further restrict federal officials, including commissioned officers, from receiving compensation for speaking, writing, or making an appearance, even when the subject matter does not relate to the person's official duties. Those restrictions are discussed below.

3. The rules provide an exception to the foregoing general prohibition for persons who engage in teaching at an approved school. Employees may be paid for teaching if it is not part of the employee's official duties and the course is part of the regular curriculum of an elementary school, secondary school, institute of higher learning as defined at 20 U.S.C. § 1141(a), or is sponsored by the state, local, or Federal Government.

4. Employees may generally not use their official title in connection with teaching, speaking, or writing, except that the title may be included in the author's biography or used in connection with a professional article as long as the article has a disclaimer that the views are not necessarily those of the government. In addition, employees who customarily use their titles as a term of address or rank may use the term in connection with speaking, writing, or teaching.

D. Fund-raising. 5 C.F.R. § 2635.808.

Employees may participate in charitable fund-raising, provided they do not personally solicit from subordinates or prohibited sources or use their official position. In addition, employees may not engage in actions that violate other ethics rules—such as giving away or using official property or creating an appearance of partiality or impropriety. As noted below, other regulations permit CO's to use official property in support of charitable organizations.

3513 GAMBLING

Gambling is generally not allowed for DOD employees on duty or on federal property. JER 2-302. The rule makes an exception for private wagers in living quarters, based on personal relationships, provided that the wagers do not violate local law. Note, however, that gambling with subordinates may violate Articles 133 or 134 of the UCMJ, by constituting fraternization. The rules also make an exception for gambling activities conducted by organizations made up of DOD members or dependents when the gambling is only among the members and is approved by the CO. Finally, gambling by undercover law enforcement agents in the line of duty does not violate the rule.

3514 SANCTIONS

Supervisors may sanction violators of the standards of conduct in a number of ways. Although the federal regulations are limited only to civilians and commissioned officers, the JER has made most provisions of the ethics regulations applicable to enlisted members as well. JER 1-300(b).

A. Administrative sanctions. Practically speaking, most violations of the standards of conduct are not punished through criminal proceedings for a variety of reasons. The most common sanction is through administrative sanctions such as letters of reprimand, poor marks, or removal from positions of trust. Those administrative tools provide an immediate means of correcting potential ethics problems before they develop.

B. Criminal sanctions. Although the regulations themselves do not establish criminal sanctions, the underlying statutes do. 5 C.F.R. § 2635.106. For example, a person who accepts outside compensation for performing official duties not only violates the regulation, but also violates 18 U.S.C. § 208 and is subject to prosecution.

C. Uniform Code of Military Justice. In addition to the specific ethics statutes, most violations of the standards of conduct by military personnel may be punished under the UCMJ. The JER is a punitive general regulation and applies to all military members without further implementation. DOD Directive 5500.7, sec. B.2.a. Potential UCMJ violations include:

1. Misappropriation (article 121);

2. Bribery and graft (article 134);

3. False pretenses (article 134);

4. Failure to obey (article 92);

5. Conduct unbecoming (article 133);

6. Wrongful disposition of government property (articles 108, 109);

7. Wrongful appropriation (article 121);

8. Dishonorably failing to pay debts (article 134);

9. Bad checks (article 134); and

10. False pretenses (article 34).

3515 HONORARIA

The current prohibition against honoraria contained in 5 C.F.R. Part 2636 is currently one of the most dynamic areas of standards of conduct regulations. The regulation has been successfully challenged by the National Treasury Employee's Union in Federal Circuit Court. The Department of Justice has filed an appeal with the Supreme Court, however, so the issue is still unresolved. Until the matter is settled, ethics practitioners must remain familiar with the rules regarding the receipt of honoraria by federal employees. The regulations were initiated in 1989 as a reaction to excessive speaking and writing fees received by some highly placed government officials. The rules seek to prohibit speaking, appearance, and article fees (which are subject to abuse), while permitting nonoffensive income (such as salaries, book royalties, and fees for artistic expression). Therefore, the term "honoraria" should be construed narrowly.

A. General standard. An individual may not receive honoraria while serving as an employee of the Federal Government. 5 C.F.R. § 2636.201.

B. Definitions. As always, when interpreting federal regulations, the definition of terms is critical.

1. Honoraria: includes money, or anything of value, given for an appearance, speech, or article. 5 C.F.R. § 2636.203(a).

-- Honoraria does not include incidental items such as those acceptable under the gift rules or copies of an article, the refund of actual expenses for producing an article or speech, witness fees, awards, or salaries. In addition, it does not include compensation for producing a series of three or more different—but related—articles, speeches, or appearances. 5 C.F.R. § 2636.203(a).

3. Appearance. Includes attendance and incidental remarks at a conference, meeting, hearing, or other event—not including performances, a demonstration of skills, or a display. 5 C.F.R. § 2636.203(b).

-- For example, a federal employee who receives compensation for singing country-western tunes at a nightclub would not be making an "appearance" under the rules.

4. Speech. A speech is an address, oration, or other oral presentation, but not scripted material (such as theater, play, or religious ceremonies). 5 C.F.R. § 2636.203(c). Also note that a speech does not include writing a speech for presentation by someone else. 5 C.F.R. § 2636.203(c), example 4. Thus, a federal employee rendering Hamlet's soliloquy is not making a "speech" under the regulations.

5. Article. An article is a writing, other than a book or a chapter of a book, intended to be published. It does not include fiction, poetry, lyrics, or scripts. 5 C.F.R. § 2636.203(d).

6. Receipt (as in compensation). To actually receive honoraria means that the honoraria was paid to the employee, or paid to someone else at the employee's direction. That regulatory definition does not include situations where the payment is given directly to a charity, as long as the funds are $2,000.00 or less, and does not violate conflict of interest rules or provide a direct benefit to the employee. 5 C.F.R. §§ 2636.203(e), 2636.204(b). Note, though, that the funds directed to charity by the employee may still be included in the person's gross income under federal tax law. Also, persons who are required to file financial disclosure reports must report to the ethics official any payments to charity in lieu of honoraria that exceed $200.00. 5 C.F.R. § 2636.205.

3516 NON-FEDERAL ENTITIES

A. Definition. Non-Federal entities include a wide range of organizations that provide charitable, moral, civic, entertainment, and recreation support to servicemembers or the public. They include military spouse organizations, the Red Cross, the American Bar Association, the Girl Scouts, and the Reserve Officer's Association, among others.

B. Official participation. DOD employees may be permitted to attend meetings or other functions as a part of their official duties if the supervisor determines that the attendance would serve a legitimate Federal Government purpose. They may also be authorized to participate as speakers or panel members. JER 3-200. In addition, DOD members may be detailed to serve as official liaisons

where DOD has a significant and continuing interest that may be served. JER 3-201. Members, however, may not receive any payment for performing official duties, and may generally not serve in a management position with the non-Federal entity. JER 3-202.

C. Nonofficial participation. In off-duty time, a federal employee may freely participate in non-Federal entities, provided that the participation is not within the scope of official duties and the employee does not take official action in any matter in which the employee is an active participant. JER 3-300.

D. Official support of non-Federal entities. A unit may support non-Federal organizations for a number of proper and ethical considerations—such as supporting the local community, maintaining good public relations, enhancing morale, or assisting worthy charities. The restrictions imposed on support to outside organizations are intended to ensure that support is provided in an equitable and nondiscriminatory manner.

1. A unit may sponsor an event only when the activity is not a business function of the civilian entity, the event is relevant to the mission of the unit (including maintaining morale), and the entity is recognized or approved for the purpose. JER 3-208.

2. Units may endorse or support fund-raisers only when they involve the Combined Federal Campaign (CFC), emergency and disaster appeals approved by the Office of Personnel Management (OPM), or service relief funds. JER 3-210.

3. Units may support the events of a non-Federal entity only when the event serves community relations, is of interest to the local civilian or military community as a whole, and the support will not interfere with official duties and readiness. In addition, a unit providing such support to one entity must provide like support to other similarly situated organizations. Finally, the entity may only charge a reasonable admission to the event. JER 3-211.

4. The JER authorizes CO's to permit their members to use some federal resources in support of non-Federal entities. JER 3-305a. Specifically, a CO may authorize the occasional use of telephone systems, on a not-to-interfere with official duty basis. Also, a CO may authorize the use of office equipment, libraries, and so forth, as long as the entity is not a prohibited source. The use must serve a legitimate public interest or enhance the professional development of the employee, occur only during personal time, and not interfere with official duties. In no event, however, may personnel use clerical or staff personnel to support a non-Federal entity, nor may they use copiers. JER 3-305b. The use of the command secretary to photocopy newsletters for the spouse's club would be a clear violation of the regulations.

5. Notwithstanding all of the foregoing, military relationships with certain organizations—such as the USO, the CFC, and the Red Cross—are governed by specific regulations or statutes. *See* JER 3-212 for additional information.

3517 TRAVEL BENEFITS

A. Acceptance of travel from non-Federal sources. Personnel may accept official travel from non-Federal sources in connection with their attendance in an official capacity at a meeting or similar event in accordance with 31 U.S.C. § 1353. However, personnel may not accept cash payments on behalf of the Federal Government. JER 4-100.

B. Acceptance of incidental benefits. JER 4-200.

1. Any benefit, such as frequent flyer miles, that a federal employee receives as a result of official travel becomes government property and must be used in connection with official travel. The best use of the benefits is to purchase additional official travel, although they may also be used for ticket upgrades. Personnel may use the government frequent flyer mileage to upgrade to business class, but not to the highest class of seat available on the flight because of the appearance of impropriety. JAG13 memo dated 10 Dec 93.

2. If the travel benefits from a non-Federal source cannot be used for official purposes, then they must be treated and handled as a gift. For example, frequent flyer miles on account when the member leaves active duty may not be used by the departing member without violating U.S. law; therefore, the mileage must be declined in accordance with 5 C.F.R. § 2635.

3. Many airlines provide free tickets to persons "bumped" from overbooked flights or persons who voluntarily surrender their tickets in lieu of later, less-crowded flights. When a member receives free tickets for surrendering a seat on an overbooked flight, the member may use the tickets for personal travel as long as the delay incurred was on the member's own time and not on duty time. If the delay was on government time, the tickets become the property of the U.S. Government.

3518 CONFLICTS OF INTEREST - 18 U.S.C. § 208; JER 5-300

A. Financial conflicts of interest. 18 U.S.C. § 208 and JER 5-300 provide that DOD employees may not participate personally and substantially in a particular matter in which they have a private financial interest if the particular matter will have a direct and predictable effect on that interest. Members may seek a waiver

from the strict application of 18 U.S.C. § 208 and its accompanying regulations in cases where the financial interests are so minor or attenuated as to present little actual conflict of interest with official duties. SECNAVINST 5370.2; JER 5-302.

B. Representing others

1. Employees, other than enlisted personnel, may not act as an agent or representative for anyone in any matter that involves the United States as a party, or in which the United States has a direct and substantial interest. 18 U.S.C. § 205. The types of matters in which representation are barred include: judicial or other proceedings, applications, requests for rulings or other determinations, contracts, claims, controversies, investigations, charges, accusations, arrests, or other matters.

2. The law does provide some exceptions to the general ban. Specifically, the law does not bar employees from giving testimony under oath; representing another person in a disciplinary, loyalty, or other administration proceeding; or representing family members or an estate in which the employee is the fiduciary. 18 U.S.C. § 205; JER 5-403.

C. Civil office. JER 5-407. Officers on active duty may not hold civil office unless expressly authorized by law; however, officers may serve on a nonpartisan basis on an independent school board provided the school board is located wholly on military property. 10 U.S.C. § 973.

D. Commercial dealings. JER 5-409. In general, personnel may not solicit or make solicited sales to junior personnel, on or off-duty, except in a few strictly limited circumstances. Specifically:

1. The sale or lease of noncommercial personal or real property in the absence of intimidation or coercion;

2. commercial sales solicited or made in a retail establishment during off-duty employment; and

3. sales made because the junior approached the senior and requested the sale, absent coercion or intimidation.

3519 POLITICAL ACTIVITIES

A. Reference: DOD Dir. 1344.10, Subj: POLITICAL ACTIVITIES BY MEMBERS OF THE ARMED FORCES ON ACTIVE DUTY

B. General policies and limitations

1. Members on active duty are encouraged to take advantage of their rights as citizens, subject only to the limitations necessary to protect good order and discipline and ensure that the U.S. military remains an apolitical defender and protector of the Constitution of the United States.

2. Therefore, military members may engage in private political activity not involving partisan politics. They may not, however, participate in partisan politics, including management of campaigns or conventions, making campaign contributions to another member of the armed forces or employees of the Federal Government, or becoming a candidate for civil office. The law, however, does provide some exceptions to the ban on campaigning for office. Enlisted members may seek and hold nonpartisan civil offices—such as a notary public or member of the school board, neighborhood planning commission, or similar local agency—as long as it is in a private capacity and does not interfere with military duties. In addition, Reserve members not on extended active-duty may hold civil office as long as it is in a private capacity and does not interfere with the performance of military duties.

C. Permissible political activities. Members may engage in a number of political activities. Specifically, a member may:

1. Register, vote, and express personal opinion in a private capacity;

2. encourage others to exercise their vote (as long as it is not an attempt to influence or interfere with the outcome of an election);

3. join political clubs and attend meetings (as long as member is not in uniform);

4. serve as an election official with Secretarial approval;

5. sign petitions for specific legislative action or to nominate a candidate (as long as it does not require partisan activity and is done as a private citizen);

6. write letters to the editor;

7. make contributions to political organizations, subject to the certain limits; and

8. display a political sticker on the member's private vehicle.

D. Prohibited political activities. In order to prevent the military from become politicized, military members are not allowed to:

1. Conduct any political activity while in uniform;

2. use official authority to influence or interfere with elections;

3. poll members of the armed forces (18 U.S.C. § 596);

4. be a candidate for civil office, except as noted above;

5. actively participate in partisan political activities—such as publishing partisan political articles, participating in partisan political management or campaigns, making public speeches in the course of partisan campaigns, making or soliciting contributions from or to other servicemembers or civilian officers or employees of the United States for promoting a political cause or objective;

6. use contemptuous words against the officeholders described in Article 88 of the UCMJ;

7. display a large political sign, banner, or poster on the top or side of a private vehicle; or

8. join in an effort to provide transportation to polls if organized by partisan activity.

E. Relationship to first amendment rights. The Supreme Court has consistently upheld the foregoing and related regulations against challenges that the regulations unduly restrict the First Amendment rights of servicemembers. *See Greer v. Spock*, 424 U.S. 828 (1976); *Ethredge v. Hail*, 996 F.2d 1173 (11th Cir. 1993).

3520 FINANCIAL DISCLOSURE REPORTS

A. Reference: JER, chapter 7; 5 C.F.R. 2634.

B. Public financial disclosure reports (SF-278). The purpose of the public financial disclosure report system is to uncover actual or potential conflicts of interest involving senior government officials and to ensure public confidence in the integrity of government. 5 C.F.R. § 2634.104.

1. Only senior personnel are required to file the public financial disclosure report. Specifically, officers in paygrade O-7 or above, civilian presidential

appointees, members of the Senior Executive Service, and persons who are GS-15 or above, need to file the report. JER 7-200.a.; 5 C.F.R. § 2634.202.

2. Filing deadline. The report must be filed within thirty days of assuming the covered position. If the report is late, the employee must pay a late filing fee of $200.00. JER 7-203; 5 C.F.R. § 2634.201.

3. Contents. In the report, the employees must generally list their financial interests and holdings over $1,000.00. JER 7-204; 5 C.F.R. § 2634.301 - 5 C.F.R. § 2634.501. The regulations are extremely detailed regarding the specific interests that must be disclosed.

4. Procedure. The employee initially submits the report to the supervisor, who reviews it for apparent conflicts of interest. The supervisor then forwards the report to the ethics counselor, who reviews the report for completeness and conflicts. If the counselor detects conflicts, the counselor notifies the employee. The employee may respond by challenging the determination of conflict, or may apply the counselor's advice to resolve the conflict of interest. The counselor then forwards the report to the Agency Ethics Official for review. The report ultimately ends up on file for six years, although it may be forwarded to the Office of Government Ethics. The reports are available for public inspection upon request. JER 7-206; 5 C.F.R. § 2634.602 - 5 C.F.R. § 2634.605.

C. Confidential financial disclosure reports (SF-450). The purpose of the confidential financial disclosure report is to uncover actual or potential conflicts of interest regarding government officials involved in procurement matters or in particular positions of trust, other than those required to file public reports. 5 C.F.R. § 2634.901.

1. Those who must file the confidential report include CO's of Navy shore installations with 500 or more military or civilian personnel and CO's of all Army, Air Force, and Marine Corps installations, bases, air stations, or activities. In addition, the report must be filed by other employees, GS-15 or O-7 and below, who participate personally and substantially in contracting or procurement, licensing, auditing non-Federal entities, or other activities with a direct and substantial financial impact on non-Federal entities, and those who are determined by their supervisor to be in a position requiring disclosure to avoid actual or apparent conflicts of interest. People who would otherwise be required to file the report may be exempted by the agency designee if that senior official determines that the report is not necessary to preclude conflicts of interest or to protect the integrity of the government. JER 7-300.a.; 5 C.F.R. §§ 2634.9045, 2634.905.

2. Filing deadline. The report must be filed within thirty days of assuming the covered position. In addition, an annual report must be filed by November 30 of each year. JER 7-303; 5 C.F.R. § 2634.908.

3. Contents. In the report, the employees must list their financial interests and holdings over $1,000.00. JER 7-304; 5 C.F.R. § 2634.907.

4. Procedure. The procedure for the confidential reports is generally the same as for the public reports. The primary difference is that the report is not normally available to the Office of Government Ethics. Further, the reports are exempt from disclosure to the public and are protected by the Privacy Act. JER 7-306 to 7-308.

5. Status reports. Ethics counselors are required to file a status report with the Agency Ethics Official not later than December 15 every year. The report must provide the number of individuals required to file a confidential financial report and the number of those persons who had not filed as of November 30.

3521 SEEKING OTHER EMPLOYMENT

A. Reference: JER, chapter 8

B. General rules

1. All members, including enlisted members, may not participate in matters in which they, their family, or an entity they are seeking employment from, have a financial interest. JER 8-200.

2. During a procurement, a procurement official may not discuss or negotiate employment with one of the competing contractors. JER 8-300; FAR 3.104-6. The only exceptions to that rule are when the procurement official has left the Federal Government service, has been recused from the procurement, or whose only communication with the competitor has been to reject the offer of employment.

C. Reporting employment contacts. JER 8-400; 10 U.S.C. § 2397a. Any military officer of paygrade O-4 or above, or civilian employee GS-11 or above, who performed a procurement function involving a defense contractor who received at least $25,000.00 in DOD business, and who is subsequently contacted by that defense contractor about future employment, must report the fact of the contact in writing to the appropriate supervisor. The report must include the names of the government officer or employee and the contractor involved, as well as the date of the contact and a description of what happened. In addition, the federal official involved must submit

a written statement disqualifying the officer from any procurement function involving that contractor until such time as the employment negotiations have ceased without a hire.

3522 POST-EMPLOYMENT RESTRICTIONS

A. References

1. JER, chapter 9

2. 5 C.F.R. 2641.

B. Purpose. Federal regulations impose a number of restrictions on federal employees after they leave the government service. The regulations seek to avoid the possibility that an employer could appear to make unfair use of an employee's prior government service and affiliations. At the same time, they seek to avoid unduly restricting the ability of persons to move back and forth between government and the private sector.

C. Restrictions on post-government employment. JER 9-300, 18 U.S.C. § 207.

1. No former employee may attempt to influence the government on a matter involving specific parties in which the employee participated personally and substantially as a government employee and in which the United States is a party or has a direct and substantial interest. This is a lifetime restriction.

2. For two years, a former employee may not represent another person before the government in an attempt to influence the government in connection with a matter that was pending under the former employee's responsibility.

3. For one year, a former employee may not represent another with regard to any ongoing treaty or trade negotiations in which the former employee participated.

4. For one year, a former senior employee, such as an O-7 or above, may not represent another before the former employee's agency in connection with seeking official action.

5. Military officers may not represent others in the sale of anything to the Federal Government through the department in which they hold retired status for a period of two years. 18 U.S.C. § 281a; JER 9-700. They may, however, represent themselves. JER 9-700.

3523 TRAINING REQUIREMENTS

All DOD employees must receive initial ethics training within 90 days of entering on duty. JER 11-301. In addition, all employees who file an SF-278 or an SF-450, contracting officers and procurement officials, shall receive ethics training every year. JER 11-302. The training must last at least one hour, and must be conducted by a qualified person. A qualified person is someone who either serves as an agency ethics official, is an employee of the Office of Government Ethics, or who is determined by the agency to be sufficiently familiar with the statutes and regulations to respond to routine questions during training. The training must include, at a minimum, a review of Part I of Executive Order 12674, Principles of Ethical Conduct for Government Officers and Employees (JER 12-100); and 5 C.F.R. Part 2635 (JER 2-100) and the JER itself.

3524 FUND-RAISING

A. References

1. DODDIR 5035.1, Subj: FUND-RAISING WITHIN THE DEPARTMENT OF DEFENSE

2. SECNAVINST 5340.2, Subj: FUND-RAISING AND SOLICITATION OF PERSONNEL MILITARY AND CIVILIAN, IN THE NAVY DEPARTMENT; RESPONSIBILITY FOR

3. SECNAVINST 4001.2, Subj: ACCEPTANCE OF GIFTS

4. SECNAVNOTE 5340

B. General policies

1. Preferential treatment. Command support of fund-raising activities must not involve or create an appearance of preferential treatment for any organization or person. If one organization is afforded support, the command must be prepared to give similar support to similarly situated organizations. This policy does not apply to fund-raising support for the CFC, Navy and Marine Corps Relief, a disaster appeal approved by OPM, or an approved Olympic event.

2. DOD policy prohibits government participation in events clearly sponsored by, or conducted for the benefit of, commercial interests.

3. Unless authorized by the Secretary of the Navy, personnel may not solicit contributions for Department of the Navy organizations or augment appropriated funds through outside resources. For example, commands are not permitted to seek donations from local merchants for a command holiday party.

4. Voluntariness. Where solicitation for charity is authorized, fund-raisers must ensure that requests are made in an environment and manner which ensures that contributions are in fact voluntary. Any actions that do not allow free choices or create the appearance that servicemembers do not have a free choice to give any amount, or not to give at all, are prohibited. The coercive practices prohibited by this rule include:

a. Supervisory solicitation of supervised employees;

b. setting 100% participation goals, mandatory personal dollar goals, or quotas;

c. providing or using contributor lists for purposes other than the routine collection and forwarding of contributions and pledges or, in the alternative, developing or using noncontributor lists; and

d. counseling or grading individual service personnel or civilian employees about their failure to contribute or about the size of their donation.

C. On-the-job solicitations for the Combined Federal Campaign. Servicemembers have the opportunity through a single on-the-job solicitation to make voluntary contributions to such charitable health and welfare agencies within the local CFC as they wish to support. Such solicitations must be conducted in strict conformity with guidelines published annually.

D. Off-the-job solicitations. An installation commander may authorize voluntary agencies to solicit at private residences or family quarters located in unrestricted areas of the base as long as similarly situated agencies are afforded the same privileges. In addition, charitable agencies may be permitted to engage in limited solicitation at public entrances or concourses of federal buildings or installations that are normally open to the public. Collection boxes for purely voluntary donations of goods may be placed in work spaces and offices. Federal employees may not conduct solicitations while on duty, however, or in any official capacity. Further, they may not allow the use of their titles, grades, or positions to support fund-raising for any private organization.

E. Navy-Marine Corps Relief Drive. The Secretary of the Navy publishes the "Navy-Marine Corps Relief Society Annual Call for Contributions" and specifically establishes the guidelines under which the campaign is to be conducted.

F. Fund-raisers conducted by Morale, Welfare, and Recreation (MWR) activities. Fund-raising events may be held in support of MWR activities provided that all members or patrons of the sponsoring MWR activity are authorized patrons, the activities are conducted entirely on federal property, the solicitations are restricted to authorized patrons, and all proceeds from the fund-raising event are used by the sponsoring MWR activity solely for the benefit of authorized patrons. Strict limitations apply to use of golf courses and bowling alleys for fund-raising.

G. Other fund-raising activities. Service public affairs manuals authorize participation in limited public fund-raising events: (a) military support organizations (e.g. USO); (b) local, community-wide programs (e.g. volunteer fire departments, rescue units, or youth activity funds); and (c) the Olympic and Pan American Games.

FRAUD, WASTE, AND ABUSE HOTLINE COMPLAINTS AND WHISTLEBLOWERS

3525 REFERENCES

A. SECNAVINST 5430.92A, Subj: ASSIGNMENT OF RESPONSIBILITIES TO COUNTERACT FRAUD, WASTE, AND RELATED IMPROPRIETIES WITHIN THE DEPARTMENT OF THE NAVY

B. SECNAVINST 5370.5A, Subj: DOD / NAVY HOTLINE PROGRAM

C. SECNAVINST 5370.2J, Subj: STANDARDS OF CONDUCT AND GOVERNMENT ETHICS

D. MCO 7510.4A

3526 NAVAL INSPECTOR GENERAL (NAVINSGEN)

The NAVINSGEN is the focal point for all DOD-referred and Navy Hotline allegations. The NAVINSGEN receives the allegations and tasks appropriate naval organizations with conducting investigations.

3527 INVESTIGATION

Substantive allegations referred through the DOD or Navy Hotline Programs are normally examined within the traditional chain of command structure. Navy organizations tasked with examining hotline allegations must comply with the responsibilities specified in SECNAVINST 5370.5A and pertinent local directives. The completed results of such examinations are reported to NAVINSGEN via the chain of command which reviews the reports to ensure full compliance, directing corrective action when appropriate. Commanders must ensure that standards of independence, completeness, timeliness, and accountability are met.

A. Independence. In all matters relating to an investigation, the individual or the organization performing the inquiry must be completely independent and impartial in appearance as well as in fact. As a starting point, the persons selected to conduct an investigation must be outside of the organization or operation specified in the complaint.

B. Completeness. Reports must thoroughly address all relevant aspects of the investigation. Although reports should be concise, they must accurately, logically, and completely address all relevant facts, actions taken, and recommendations.

C. Timeliness. Investigations must be conducted within the time limits specified in paragraph 7 of SECNAVINST 5370.5A. If the time limits for meeting the completion report deadline to NAVINSGEN cannot be met, the investigator must promptly notify NAVINSGEN in accordance with paragraph 7.

D. Accountability. Commanders are responsible for holding their subordinates accountable for their actions and correcting systemic faults. An SJA will often be called on to advise a CO regarding the lawfulness of proposed remedial actions and the appropriateness of disciplinary action. Measures may be educational, corrective, administrative, or punitive and must always be proportional to the act. The Defense / Navy Hotline Completion Report shall contain a statement of all action taken. NAVINSGEN will not close a case involving a substantiated allegation until action is taken and reported.

3528 GENERAL PROVISIONS

A. Retention of documents. All working papers and files (excluding personal notes of a criminal investigator) resulting from the inquiry into the hotline complaint will be retained at the originating activity for two years following closing action by the tasking activity. Such papers and files are to be made available immediately upon request of DOD or Navy auditors, inspectors, or investigators.

B. Reference to the *JAG Manual*. In addition to adhering to the prescribed investigative standards, personnel charged with the conduct of a hotline examination may refer to the *JAG Manual* as the Navy's standard guideline for conducting an inquiry or investigation. The checklists and general information in that chapter of this Deskbook may likewise be helpful.

C. Informants. Informants under the DOD and Navy Hotline Programs are assured confidentiality to encourage full disclosure of information without fear of reprisal. Normally, hotline users are encouraged to identify themselves so that additional facts can be obtained if necessary. To protect the identity of DOD and Navy Hotline users who have been granted confidentiality to the maximum extent possible, NAVINSGEN shall be the point of contact when such identity is required by the investigator assigned to conduct that examination. In those instances where NAVINSGEN discloses the source, the identity shall be protected to the utmost of the investigator's capabilities.

D. Program publicity. Commands are required to provide the widest dissemination of the Hotline Programs within their areas of responsibility. To assist in this effort, hotline posters are available through the Naval Publications and Forms Center.

E. Reporting. 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: DSN 288-6743 for DON; DSN 224-2172 for USMC IG);
4. 356-3464 (NAVSEA IG);
5. 424-9071 (DOT IG);
6. 538-8429 (USAF); and
7. 446-9000 (USA).

3529 WHISTLEBLOWING

Whistleblowing is the lawful disclosure to the Special Counsel, an Inspector General, agency officials or others, of information which the discloser reasonably believes evinces the following types of wrongdoing:

A. A violation of any law, rule, or regulation; or

B. gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

3530 PROHIBITED PERSONNEL PRACTICES

Federal agency heads, managers, supervisors, and personnel officials are responsible for complying with and enforcing civil service laws, rules, and regulations. In addition, they are required to prevent prohibited personnel practices and reprisals for whistleblowing. Specific prohibited personnel practices include situations where supervisors:

A. Discriminate based on race, color, religion, sex, national origin, age, handicapping condition, marital status, or political affiliation;

B. solicit or consider employment recommendations based on factors other than personal knowledge of records of job-related abilities or characteristics;

C. coerce the political activity of any person;

D. deceive or willfully obstruct any person from competing for employment;

E. influence any person to withdraw from competition for any position to improve or injure the employment prospects of any person;

F. give unauthorized preference or advantage to any person to improve or injure the employment prospects of any particular employee or applicant;

G. engage in nepotism (hire or promote or advocate the hiring or promotion of relatives within the same agency component);

H. take or threaten to take a personnel action against an employee for any disclosure of information which the employee reasonably believes evidences a violation of law, rule or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

I. take or threaten to take a personnel action against an employee for the exercise of an appeal right;

J. discriminate based on personal conduct which is not adverse to on-the-job performance of the employee, applicant, or others; or

K. violate any law, rule, or regulation which implements or directly concerns the merit system principles.

3531 THE OFFICE OF SPECIAL COUNSEL (OSC)

The OSC is an independent investigative and prosecutorial agency created to protect employees, former employees, and applicants for employment from prohibited personnel practices, particularly reprisal for whistleblowing. The OSC serves as a conduit between a federal employee whistleblower and the affected agency by referring information of wrongdoing to the agency while affording anonymity to the employee. The OSC is not authorized to conduct the actual investigation of whistleblowing disclosures, but may require the concerned agency to investigate and report the results of the investigation for transmittal to the President, Congress, and the employee.

A. OSC responsibilities. The OSC has three basic areas of statutory responsibility:

1. Providing a secure channel through which information evidencing a violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety may be disclosed without fear of retaliation and without disclosure of identity except with the employee's consent;

2. receiving and investigating allegations of prohibited personnel practices and other activities prohibited by civil service law, rule, or regulation and, if warranted, initiating corrective or disciplinary action; and

3. enforcing the Hatch Act.

B. OSC powers. OSC investigators may require evidence from federal employees, including testimony and records. OSC regulations are published at 5 C.F.R. Part 1250, *et seq.*

C. Deference to agency. While the OSC is statutorily authorized to investigate allegations of age, race, or sex discrimination, procedures and facilities for investigating such complaints have already been established in the agencies and the

Equal Employment Opportunity Commission. To avoid duplicating those procedures, the OSC normally defers a complaint involving discrimination to those agencies procedures rather than initiate an independent investigation.

D. Stays. An employee may request the OSC to seek to postpone or "stay" an adverse personnel action pending investigation by the OSC. If the OSC has reasonable grounds to believe that the proposed action is the result of a prohibited personnel practice, the OSC may ask the Merit Systems Protection Board (MSPB) to delay the personnel action until an investigation can be completed.

3532 HATCH ACT

A. Prohibitions. The Hatch Act prohibits federal employees from participating in certain political activities. Specifically, it prohibits the use of official authority or influence to interfere with or affect the result of an election. It also prohibits taking an active part in political management or partisan campaigns. The law does not restrict an employee's right to vote in any election, or to publicly or privately express opinions, participate in nonpartisan activities, or petition Congress. State and local government employees who work in connection with federal funds are also subject to some restrictions on political activity.

B. Complaints. Anyone who believes that a violation of the Hatch Act has occurred may file a complaint with the OSC which will investigate and, if warranted, prosecute the offender for breaking the law. The OSC will also give advisory opinions as to whether or not any specific political activity an employee wishes to undertake violates the law.

3533 AFTER AN OSC INVESTIGATION

Following investigation of an alleged prohibited personnel practice, the OSC may recommend that an agency take corrective action if there is reason to believe that a prohibited personnel practice has occurred, exists, or is to be taken. If the agency does not take the recommended action after a reasonable period, the OSC may request the MSPB to order corrective action. The OSC may also request the MSPB to order disciplinary action against an employee who commits a prohibited personnel practice or who violates civil service laws, rules, and regulations. The charged employee's rights in such cases are set forth in the MSPB regulations. A complaint may be filed against an employee for knowing and willful refusal or failure to comply with an MSPB order. Evidence of a criminal violation uncovered during any investigation is normally referred to the DOJ.

3534 EMPLOYEE CONTACT WITH THE OSC

SECNAVINST 12200.2 provides that the DON will comply with the merit system principles, cooperate fully with the OSC's investigations of prohibited personnel practices, and conduct internal investigations of alleged illegal or improper conduct referred to the department by the OSC.

A. The General Counsel normally acts on behalf of SECNAV in these matters, including obtaining a suitable investigation of any allegations referred to the department for investigation. Upon request, the General Counsel will ensure that legal counsel is assigned to represent a DON employee suspected or accused by the OSC of committing a prohibited personnel practice or illegal or improper act, when the act complained of was within the scope of the employee's official responsibilities and such representation is considered to be in the interests of DON. The General Counsel may coordinate the assignment or use of judge advocates as employee representatives with the Judge Advocate General (JAG) or the SJA to the Commandant of the Marine Corps (CMC), as appropriate.

B. The Assistant General Counsel (Civilian Personnel) acts as Senior Management Official in OSC matters and arranges the appointment of a liaison officer to serve as point-of-contact for any OSC investigation of an employee at a DON facility, base, or installation. Whenever the OSC is investigating allegations of improper or illegal conduct by a military member, the Assistant General Counsel coordinates the appointment of a judge advocate as liaison officer. Thus, in any OSC matter, judge advocates might be required to act as liaison officer to the investigation; represent an individual suspected or accused employee; or simply to provide legal advice to an affected command.

3535 WHISTLEBLOWER PROTECTION

A. Reference. SECNAVINST 5370.7, Subj: MILITARY WHISTLE-BLOWER PROTECTION

B. Policy. Any person who takes an act of reprisal against a military member because the member makes or prepares to make a lawful communication to a Member of Congress or an Inspector General violates 10 U.S.C. § 1034 and is subject to criminal sanctions.

C. Procedures. If a member reasonably believes that a personal action, meaning any action that may affect the member's career, has been taken in reprisal for making a lawful communication to Congress or the Inspector General, that

member may file a complaint with the DOD Hotline at (800) 424-9098. The appropriate agency will conduct an investigation, culminating in a report due within 90 days of the complaint. In addition, the member may file an application with the appropriate Board for the Correction of Military Records. If the investigation finds that the complaint is valid, the Secretary of the Military Department may take disciplinary action against the wrongdoer and may order correction of records.

APPENDIX A

SAMPLE GIFT FORWARDING LETTER

5800
JA
2 Feb CY

MEMORANDUM FOR THE COMMANDING GENERAL

Subj: OFFER OF GIFT

Ref: (a) MCO 4001.2A

Encl: (1) CO, MCAS, Iwakuni ltr 4001 MASD of 18 Jan CY
(2) Iwakuni OWC ltr of 12 Jan CY

1. By the enclosure, the Commanding Officer, Marine Corps Air Station, Iwakuni, forwards a gift of $1,779.90 from the local Officers' Wives Club for the station Child Development Center. I recommend that you accept this gift on behalf of the Marine Corps.

2. This gift was not solicited. The value of the gift is within your authority to accept under the reference. Acceptance of this gift will not result in embarrassment to the Marine Corps. The donor has not placed any conditions on the gift other than using the money to enhance the Child Development Center. Acceptance of this gift will not create any expectation of reciprocal benefit for the donor. The donor does not do or seek business with the government.

3. I recommend you accept the gift. If you concur, we will coordinate its deposit with CMC (FD), notify the commander, and ensure he sends an appropriate letter thanking the donor.

Very respectfully,

S. J. ADVOCATE

CG Decision:

Approved _____

Disapproved _____

APPENDIX B

SAMPLE MEMORANDUM OF DISQUALIFICATION

MEMORANDUM FOR

Subj: FINANCIAL DISCLOSURE REPORT (SF-278) OR (SF-450)

Ref: (a) DOD Dir. 5500-7.R, Joint Ethics Regulations

Encl: (1) List of reported holdings involving defense contractors

1. As required by reference (a), I have reviewed your Financial Disclosure Report dated _____.

2. Your report reveals that you, your spouse, minor child, or a member of your household hold a financial interest in one or more entities that do business with the Department of the Navy. Comparing these reported holdings to your assigned duties as _____, I have concluded that your responsibilities require your participation in matters involving, directly or indirectly, the firms identified in enclosure (1). Therefore, as required by reference (a), you are hereby disqualified from taking any action in connection with matters involving these firms.

3. As a result of this disqualification, you and, by copy of this memorandum, your immediate subordinates, are directed to refer to me all official matters involving the firms listed in enclosure (1) (and their subsidiaries and affiliates) that would normally come to you for action.

4. You are advised that, in accordance with reference (a), your Financial Disclosure Report has been forwarded to _____, the cognizant Deputy Ethics Official, for final review.

F. P. ADAMS
Commander, Naval Sea Systems Command

Copy to:
(Immediate subordinates)

Received by: [Involved Employee]

Date: _____

APPENDIX C

SAMPLE PROCUREMENT INTEGRITY CERTIFICATION

3 Dec CY

MEMORANDUM FOR THE COMMANDING OFFICER

From: Staff Judge Advocate
Via: (1) Executive Officer

Subj: PROCUREMENT INTEGRITY CERTIFICATION

Ref: (a) 41 U.S.C. § 423

Encl: (1) Certifications

1. In my opinion, you, the Executive Officer, and the Supply Officer are considered "procurement officials" for the purposes of reference (a). All persons identified as procurement officials are required to file certifications that they are familiar with the requirements of the Federal Procurement Policy Act.

2. Should you concur, proposed memoranda for the affected individuals are enclosed. Once signed, the certificates will be retained on file.

Very respectfully,

S. J. ADVOCATE

APPENDIX D

SAMPLE PROCUREMENT OFFICIAL CERTIFICATION DOCUMENTS

Date

MEMORANDUM

From: Commanding Officer
To: Colonel David Charles, USMC

Subj: PROCUREMENT OFFICIAL CERTIFICATION

Ref: (a) The Office of Federal Procurement Policy Act, Title 41, U.S.C. § 423, as amended by section 814 of Pub. L. No. 101-189

Encl: (1) OGE Memo of 31 Oct 90
(2) Procurement Official Certification

1. I have determined that the duties and responsibilities of your position, like my own, subject you to the certification requirements of reference (a) that took effect on December 1, 1990. All individuals subject to certification must review the information contained in enclosure (1) and indicate their understanding and compliance by signing enclosure (2), the Procurement Integrity Certification and the attached Privacy Act Notice.

2. This must be done before performing any procurement functions. If you have any questions, Major Dadd stands ready to assist you. Return the signed certification to Ms. DeMeana for filing.

Respectfully,

M. E. SHAWSHIK
Colonel, USMC
Commanding Officer

APPENDIX E

PROCUREMENT INTEGRITY CERTIFICATION FOR PROCUREMENT OFFICIALS

As a condition of serving as a procurement official, I, _____, hereby certify that I am familiar with the provisions of subsections 27(b), (c), and (e) of the Office of Federal Procurement Policy Act, Title 41, U.S.C. § 423, as amended by section 814 of Pub. L. No. 101-189. I further certify that I will not engage in any conduct prohibited by such subsections and will report immediately to the contracting officer any information concerning a violation or possible violation of subsections 27(a), (b), (d), or (f) of the Act and applicable implementing regulations. A written explanation of subsections 27(a) through (f) has been made available to me. I understand that, should I leave the government during the conduct of a procurement for which I have served as a procurement official, I have a continuing obligation under section 27 not to disclose proprietary or source selection information relating to that procurement and a requirement to so certify.

_____	_____
Signature of Procurement Official	Date
_____	_____
Department or Agency	Office Telephone Number
_____	_____
Name of Procurement Official	Social Security Number

* * * * *

PRIVACY ACT NOTICE TO EMPLOYEES AND OFFICIALS

In accordance with the Privacy Act of 1974, as amended (5 U.S.C. § 552a), the following notice is provided:

AUTHORITY FOR THE COLLECTION OF INFORMATION: 41 U.S.C. § 423 and Executive Order 9397.

Your signature on the Optional Form 333, Procurement Integrity Certification for Procurement Officials, and disclosure of your Social Security Number on this page, are voluntary, but possible effects upon you if the certification is not signed and the Social Security Number is not provided include the following:

Disqualification from the particular work or duty assignments, or from the position for which you applied or which you currently hold, or other appropriate action, or administrative delay in processing your certification.

PRINCIPAL PURPOSE FOR COLLECTION OF THIS INFORMATION

To obtain and maintain a completed certification from any person designated as a "procurement official," as defined by 41 U.S.C. § 423 and applicable procurement regulations.

ROUTINE USES WHICH MAY BE MADE OF THE COLLECTED INFORMATION

Transfers to federal, state, local, or foreign agencies when relevant to civil, criminal, administrative, or regulatory investigations or proceedings, including transfer to the Office of Government Ethics in connection with its program oversight responsibilities, or pursuant to a request by any appropriate federal agency in connection with hiring, retention, or grievance of an employee or applicant, the issuance of a security clearance, the award or administration of a contract, the issuance of a license, grant, or other benefit, to committees of the Congress, or any other use specified by the Office of Personnel Management (OPM) in the system of records entitled "OPM / GOVT-1 General Personnel Records," as published in the Federal Register periodically by OPM.

APPENDIX F

DEFENSE / NAVY HOTLINE COMPLETION REPORT AS OF ( )

1. Name of official(s) conducting the audit, inspection, or investigation:

2. Rank and / or grade of official(s):

3. Duty position and contact telephone number of official(s):

4. Organization of official(s):

5. Hotline control number:

6. Scope of examination, conclusions, and recommendations:

a. Identify the allegations, applicable organization and location, person or persons against whom the allegation was made, and a dollar significance of actual or estimated loss or waste of resources.

b. Indicate the scope, nature, and manner of the investigation conducted (documents reviewed, witnesses interviewed, evidence collected, and persons interrogated). The report shall reflect whether inquiries or interviews were conducted by telephone or in person. The identity of the person interviewed need not be reflected in the report, but must be documented in the official field file of the examining agency. Indicate whether individuals cited in the allegation were interviewed. The specific identity and location of documents reviewed during the course of the investigation must be reflected in the report. Procurement history data must be recorded in complaints of excessive price increases in spare parts.

c. Report findings and conclusions of the investigating official. This paragraph may include program reviews made, comments as to the adequacy of existing policy or regulations, system weaknesses noted, and similar comments.

7. Criminal or regulatory violation(s) substantiated:

8. Disposition: For investigations involving economies and efficiencies, report management actions in the final report. For investigations involving unlawful acts, provide the results of prosecutions including details of all charges and sentences. Include the results of administrative sanctions, reprimands, value of property or money recovered, or other deterrent actions.

9. Security classification of information: When applicable, the investigating organization must determine and state the report's security classification.

10. Location of field working papers and files:

APPENDIX G

DEFENSE / NAVY HOTLINE PROGRESS REPORT AS OF ( )

1. Applicable DOD component: Department of the Navy
2. Hotline control number:
3. Date referral initially received:
4. Status
   a. Name of organization conducting investigation.
   b. Type of investigation being conducted.
   c. Results of investigation to date (summary).
   d. Reason for delay in completing investigation.
5. Expected date of completion:
6. Action agency point of contact (POC)
   a. Name of POC:
   b. Duty telephone number:

CHAPTER THIRTY-SIX

CLAIMS

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CHAPTER THIRTY-SIX

CLAIMS

3601 CLAIMS OVERVIEW

Claims involving the U.S. Government and its military activities are governed by a complex system of statutes, regulations, and procedures. This chapter provides a basic reference outline of the claims the SJA is most likely to encounter. The Foreign Claims Act (FCA) dealing with overseas issues is discussed in part III, chapter 16 of this Deskbook. This chapter is a starting point for research; this discussion is not offered as a substitute for the detailed guidance in chapter VIII of the *JAG Manual* and JAGINST 5890.1.

3602 FEDERAL TORT CLAIMS ACT (FTCA)

A. References

1. 28 U.S.C. §§ 1346(b), 2671-2672, 2674-2680

2. JAGINST 5890.1, Subj: ADMINISTRATIVE PROCESSING AND CONSIDERATION OF CLAIMS ON BEHALF OF AND AGAINST THE UNITED STATES, enclosure (1)

B. Overview. The government's liability under FTCA is limited to money damages for injury, death, or property damage caused by the negligent or wrongful act or omission of government employees acting within the scope of their employment. FTCA applies only to claims arising in the United States or in its territories or possessions.

C. Scope of liability

1. Negligent conduct. "Negligence" is the failure to exercise the degree of care, skill, or diligence that a reasonable person would exercise under the same circumstances. Whether certain conduct was negligent will be determined by local tort law. Claims based on a theory of liability other than negligence (e.g., implied warranty or strict liability) do not lie under the FTCA.

2. Intentional torts. The FTCA will compensate for the following intentional torts, but only when committed by federal law enforcement officers: assault, battery, false imprisonment, false arrest, abuse of process, and malicious prosecution. 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 engaged in law enforcement duties. No other intentional tort claims are payable under FTCA.

3. Government employees. Under the FTCA, the government is liable only for the wrongful acts of its employees. In addition to military and civilian DON employees, the term "government employee" includes persons acting on behalf of a federal agency in an official capacity, either temporarily or permanently, and either with or without compensation.

4. Scope of employment. The government is liable under the FTCA only when the employees are acting within the scope of their employment. 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.

D. Exclusions from liability

1. Exempted governmental activities. 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 FTCA does not apply to any postal claims or claims relating to detention of goods in connection with law enforcement or customs. FTCA will not pay claims arising out of combat activities involving direct engagement with the enemy during time of war, declared or not. Claims arising in a foreign country are not cognizable under the FTCA, but may be allowed under either the Military Claims Act (MCA) or the Foreign Claims Act (FCA).

2. Claims cognizable under other statutes. Certain claims cannot be paid under the FTCA because they are cognizable under some other claims statute. Although the claimant may still recover under another statute, the amount 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 include: the Personnel Claims Act (PCA); Federal Employee Compensation Act (FECA); Admiralty; and (for NAFI employees) the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901.

3. Excluded claimants. Under *Feres v. United States*, 340 U.S. 135 (1950), military personnel cannot sue the Federal Government for personal injury or death occurring incident to military service. Civilian federal employees usually cannot recover under the FTCA for injuries or death that occur on the job because of FECA coverage, 5 U.S.C. § 8116c.

E. Procedures. Claims must be presented in writing within two (2) years after the claim accrues. The cognizant NLSO can settle claims up to $20,000.00 and deny up to $40,000.00. Claims above those limits are resolved at OJAG. DOJ approval is needed to pay claims above $25,000.00. If the claim is denied, the claimant must file suit or seek reconsideration within six (6) months of denial. Venue lies in the judicial district where the plaintiff resides or where the act or omission complained of occurred. The plaintiff is not entitled to a jury trial.

3603 MILITARY CLAIMS ACT (MCA)

A. References

1. Military Claims Act, 10 U.S.C. § 2733

2. JAGINST 5890.1, enclosure (2)

B. Overview. The MCA compensates for personal injury, death, or property damage caused by the negligence of DON personnel acting within the scope of their employment or noncombat activities of a peculiarly military nature. The first theory is similar to the FTCA, except that the MCA applies worldwide and affords no statutory rights. The latter theory covers activities which have little parallel in civilian society or involve incidents for which the government has traditionally assumed liability. Under this second theory of MCA liability, neither negligence nor scope of employment issues apply. Examples of activities of a peculiarly military nature include: practice firings of missiles and other weapons, sonic booms, and training exercises.

C. Exclusions from liability

1. Exempted governmental activities. A claim will not be payable under the MCA if based on an exempted governmental activity (examples: combat action; certain postal activities; property damage claims based on alleged contract violations by the government; and other claims identified in paragraph 4 of enclosure (2) of JAGINST 5890.1).

2. Covered by other statutes. Claims are not cognizable under MCA if they are payable under any of the following claims statutes: FTCA; PCA; FCA; FECA; or Admiralty.

3. Excluded classes of claimants. DON personnel may recover under the MCA, but only for property damage not covered by another claims statute—not for personal injury or death occurring incident to service or employment. Any claim of a national of a country at war with the United States—or an ally of such country—unless the individual claimant is determined to be friendly to the United States, are excluded from MCA coverage. Also, other federal agencies and departments are not proper claimants.

4. Negligent claimants. An MCA claim for injury, death, or property damage caused in whole or in part by the claimant's own negligence or wrongful acts can be paid, but only to the extent such recovery would be allowed under local law. Recovery would be barred in jurisdictions which have adopted the contributory negligence theory and reduced in jurisdictions which follow the comparative negligence doctrine.

D. Procedures. Claims must be presented within two (2) years after the claim accrues. Overseas commands with a judge advocate attached may settle or deny claims up to $5,000.00. OICs of NLSO Detachments may settle or deny claims up to $10,000.00. COs of NLSOs may settle or deny claims up to $15,000.00. Claims which exceed those amounts must be forwarded to OJAG. Advance payments may be made. An appeal may be taken to the next higher settlement authority within 30 days of disapproval; no hearing is authorized. If the appeal is denied, the claimant has no right to sue.

3604 ADMIRALTY CLAIMS

A. References

1. *JAG Manual*, Chapter XII

2. Suits in Admiralty Act, 46 U.S.C. App. §§ 741-752

3. Public Vessels Act, 46 U.S.C. App. §§ 781-790

4. Admiralty Jurisdiction Extension Act, 46 U.S.C. App. § 740

B. Overview. 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 attorneys in the Admiralty Division of OJAG. 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.

C. Scope of liability. The 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: collisions; wave wash and swell damage; damage to commercial fishing beds, equipment, or vessels; damage resulting from oil spills, paint spray, or blowing tubes; damages or injuries to third parties resulting from a fire or explosion aboard a naval vessel; damage to commercial cargo carried in a Navy bottom; damage caused by improperly lighted, marked, or placed buoys or navigational aids for which the Navy is responsible; and personal injury or death of civilians not employed by the Federal Government (e.g., longshoremen, harbor workers, and passengers).

D. Exclusions from liability. 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. Civil Service employees and seamen aboard Military Sealift Command vessels are limited to compensation under the FECA, 5 U.S.C. §§ 8101-8150, for personal injury or death.

E. Procedures. The procedures for investigating and adjudicating admiralty claims are explained in sections 1203-1216 of the JAGMAN.

1. Immediate preliminary report. The most critical command responsibility in admiralty cases is to ***immediately*** notify the Admiralty OJAG (Code 31) and an appropriate local judge advocate of ***any*** maritime incident which ***might*** result in an admiralty claim for, or against, the government. Call DSN 221-9744 or commercial (703) 325-9744. In the alternative, make NAVY JAG ALEXANDRIA VA//31// an info addressee on message reports required by other directives. The initial report should include all information and detail available at that stage (e.g., date / time / place of the incident, a brief description of the incident and resulting injury or damage, and identification of the vessels and parties involved).

2. Subsequent investigative report. After initially notifying OJAG (Code 31), the command must promptly begin an investigation of the incident. A JAGMAN investigation will usually be required although, in some circumstances, a letter report will be appropriate. Section 1205 of the *JAG Manual* provides guidance for determining whether an investigation is necessary. Chapter II of the *JAG*

Manual provides specific investigatory requirements for certain maritime incidents. Also, sections 1207 through 1210 of the *JAG Manual* prescribe requirements and procedures concerning witnesses and documents in admiralty investigations.

3605 NONSCOPE CLAIMS

A. References

1. 10 U.S.C. § 2737

2. JAGINST 5890.1, enclosure 4

B. Overview. The Nonscope Claims Act (NCA) covers claims for death, injury, damage to or loss of property caused by military personnel or civilian employees incident to the use of a government vehicle anywhere *or* the use of any other U.S. property on a government installation. Claims cannot be paid under NCA if they are cognizable under any other provision of law. The NCA applies worldwide.

C. Scope of liability

1. The personal injury, death, or property damage must be caused by a servicemember or civilian employee of the armed forces or Coast Guard. Acts by NAFI employees are not covered. Negligence is not required. The scope-of-employment concept does not apply to nonscope claims.

2. Recovery is barred 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. Subrogees and insurers may not recover subrogated nonscope claims.

3. The claim must be presented within two (2) years after the claim accrues. Recovery is limited to a maximum of $1,000.00 or the actual cost of property damage, medical treatment, or burial expenses—whichever is less. If the injured party presents a claim under another statute or regulation but is denied recovery, the claims adjudicating authority will determine if recovery is permissible under the NCA. If an NCA claim is denied, the claimant does not have a right to sue.

3606 ARTICLE 139, UCMJ, CLAIMS

A. Reference - *JAG Manual*, Chapter IV

B. Overview. Article 139, UCMJ, provides a mechanism for victim compensation for private property damage or loss caused by riotous, willful, reckless, or wanton acts of, or the wrongful taking of property by, a member of the naval service. Article 139 applies only in the United States; the Foreign Claims Act applies overseas. Article 139 claims are unique in that they provide for the checkage of the military pay of the member responsible for the damage. Although the individual member, not the government, is liable for the damage, the member's command has significant procedural responsibilities which can be found in Chapter IV of the *JAG Manual*.

C. Scope of liability for property damage

1. Willful damage. The property damage, loss, or destruction must be caused by acts of military members which involve riotous or willful conduct, or demonstrate such a reckless and wanton disregard for the property rights of other persons that willful damage or destruction is implied. Only damage that is directly caused by the conduct will be compensated.

2. Wrongful taking. Claims for property that was taken through larceny, forgery, embezzlement, misappropriation, fraud, or similar theft offenses will normally be payable. Loss of property that involves a dispute over the terms of a contract, or over ownership of property, are ***not*** normally payable unless the dispute is merely a cover for an intent to steal.

D. Exclusions from liability. The following types of claims are not payable under article 139:

1. Claims resulting from conduct that involves only simple negligence;

2. subrogated claims (e.g., insurers);

3. claims cognizable under other claims statutes or regulations;

4. claims for personal injury or death;

5. claims arising from conduct occurring within the scope of employment;

6. claims for reimbursement for damage, loss, or destruction of government property;

7. claims arising from contractual or fiduciary relationships; and

8. claims for indirect or consequential damages—including interest and attorney fees.

E. Procedures

1. Presentment. Article 139 claims can be made by any property owner: military or civilian, business or charitable, governmental or private. The claimant may make an oral claim, but it must be reduced to a personally signed writing that sets forth the specific amount of the claim, the facts and circumstances surrounding the claim, and any other matters that will assist in the investigation. If a single incident generates multiple claimants, each must submit a separate claim. The claim must be submitted within 90 days of the incident.

2. Investigation. Claims cognizable under article 139 may be investigated by an investigation not requiring a hearing. There is no requirement that the alleged offender be designated as a party to the investigation and afforded the rights of a party. The investigation inquires into the circumstances surrounding the claim, gathering all relevant information about the claim. The standard of proof is a preponderance of the evidence.

3. Measure of damages. The amount of recovery is limited to only the direct physical damage caused by the servicemember. Using a comparative liability theory, the assessment against the member will be reduced by the amount of property damage or loss of property that was proximately caused by the acts or omissions of the property owner, his lessee, or agent. Recovery is limited to the lesser of the repair cost or the depreciated replacement cost for the same or similar item, using the Military Allowance List-Depreciation Guide.

4. Charge against pay. The investigation shall make recommendations about the amount to be assessed against the responsible parties. The maximum amount that may be approved by a general court-martial convening authority (GCMA) under article 139 is $5000.00 per offender, per incident. Where there is a valid claim for over $5000.00, the claim, investigation into the claim, and the CO's recommendation shall be forwarded to JAG or CMC (JAR) before checkage against the offender can begin. The amount that can be charged against an offender in any single month cannot exceed one-half of base pay for that month.

5. Offenders attached to the same command. If all offenders are attached to the command convening the investigation, the commander shall ensure that the offenders have an opportunity to see the investigative report and be advised that they have 20 days in which to submit a statement or additional information. If any member declines to submit further information, (s)he shall state so in writing

during the 20-day period. The commander reviews the investigation and determines whether the claim is in proper form, conforms to article 139, and whether the facts indicate responsibility for the damage by members of the command. If the commander finds that the claim is payable, (s)he shall fix the amount to be assessed against the offenders. The commander's action on the investigation is then forwarded to the GCMA for review and action on the claim. The GCMA will notify the CO of his / her determinations, and the CO will implement that action.

6. Offenders are members of different commands. If the offenders are members of different commands, the investigation will be forwarded to the GCMA over the commands to which the alleged offenders are assigned. The GCMA will ensure that the alleged offenders are shown the investigative report and are permitted to comment on it before action is taken on the claim. If the GCMA determines that the claim is payable, (s)he will fix the amount to be assessed against the offenders and direct the offenders' CO's to take action accordingly.

7. Reconsideration. The GCMA may, upon request by either the claimant or the member assessed for the damage, reopen the investigation or take other action required in the interest of justice. If the GCMA anticipates acting favorably on the request, (s)he will give all interested parties notice and an opportunity to respond.

8. Appeal. If the claim is for $5000.00 or less, the claimant or the member against whom pecuniary responsibility has been assessed may appeal the decision to the GCMA within five (5) days of receipt of the GCMA's decision. The GCMA may extend the appeal time for good cause. The appeal is submitted via the GCMA to the Judge Advocate General for review and final action. Action on the GCMA's decision will be held in abeyance pending JAG action.

E. 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. The investigation will not be delayed merely because criminal charges are pending. Court-martial findings may be considered by an article 139 investigation, but are not dispositive given the different issues involved. The article 139 investigation is required to make its own independent findings.

3607 MILITARY PERSONNEL AND CIVILIAN EMPLOYEES' CLAIMS ACT

A. References

1. Military Personnel and Civilian Employees' Claims Act of 1964, 31 U.S.C. § 3721 [Personnel Claims Act (PCA)]

2. JAGINST 5890.1, enclosure (5)

B. Overview. The PCA provides relief to both military and civilian employees for personal property damage or loss incurred incident to service. The PCA applies worldwide. Generally, the maximum recovery is $40,000.00. Claims must be presented within two (2) years after the claim accrues.

C. Scope of liability. To be payable under the PCA, the claimant's loss must have occurred incident to military service or employment under one of the following general categories of losses incident to service. The rules governing each of these areas can be complex. The SJA must refer to JAGINST 5890.1 to determine whether a particular personnel claim is contemplated by one of the categories.

1. Property losses in quarters or other authorized places;

2. transportation and storage losses (e.g., PCS shipments);

3. vehicle losses, certain noncollision damage to motor vehicles (e.g., vandalism, Acts of God (limited to $2,000.00, not including the contents of the vehicle), and PCS shipments);

4. damage to house trailers and contents while on federal property or shipped under government contract;

5. borrowed property;

6. clothing and articles being worn if the loss is caused by fire, flood, or some other unusual occurrence;

7. personal property held as evidence, or confiscated property;

8. certain thefts aboard military installations from the possession of the claimant;

9. property used for the benefit of the government;

10. money deposited with authorized personnel for safekeeping or other authorized disposition;

11. fees for replacing birth certificates, marriage certificates, etc. provided the original is lost incident to service; and

12. any loss or damage which is not specifically designated as payable, but deemed meritorious and payable as a PCA claim by SECNAV or JAG.

D. 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. While the PCA provides broad protection for the military member's personal property, the government has not undertaken to insure all property against any risk. 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 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.

E. Excluded circumstances of loss

1. Claimant negligence. If the property damage was caused, either in whole or in part, by the claimant's negligence or wrongful acts, the personnel claim will be denied. Contributory negligence is a complete bar to recovery.

2. Collision damage. Damage to motor vehicles is not payable as a personnel claim when it was caused by collision with another motor vehicle. Collision claims may be payable under other claims statutes (e.g., FTCA, MCA) depending on the circumstances. Damage to rental cars while on military orders is governed by the Joint Federal Travel Regulations (JFTRs).

F. Excluded types of property. JAGINST 5890.1 limits or prohibits recovery for certain types of property damage, including:

1. Losses in unassigned quarters in the United States;

2. currency or jewelry shipped or stored in baggage;

3. enemy property or war trophies;

4. unserviceable or worn-out property;

5. inconvenience or loss-of-use expenses;

6. items of speculative value (i.e. manuscripts, unsold paintings, or similar artistic works);

7. business property and real property;

8. property acquired, possessed, or transmitted in violation of law or regulation;

9. sales tax;

10. refundable estimates and appraisal fees;

11. quantities of property not reasonable or useful under the circumstances;

12. intangible property representing ownership or interest in other property (such as bank books, checks, stock certificates, and insurance policies);

13. government property;

14. articles acquired for others (i.e. not members of the claimant's household); and

15. contraband.

G. Procedures. PCA claims must be presented within two (2) years after the claim accrues. For claims in connection with PCS moves, claimants must give notice of claim within 70 days of delivery; failure to give timely notice bars the later claim. The claimant files DD Forms 1842 and 1844 (e.g., JAGINST 5890.1, App. A-5-1 and -2) with Privacy Act statement, evidence of ownership, estimates, police reports, etc. An investigating officer "investigates" and forwards the claim with a recommendation to the adjudicating authority. Among the various personnel identified in JAGINST 5890.1, enclosure (5), NLSO COs may adjudicate and pay PCA claims up to $40,000.00. They may delegate authority to pay claims up to $5,000.00. Authority to pay PCA claims in the Marine Corps is centralized at HQMC. The computation of the award includes depreciation and various sub-limits based on property classes. Partial payments are authorized; up to one-half of the estimated total may be paid in hardship situations. Dissatisfied claimants may request reconsideration by the next higher adjudicating authority or, in the case of Marine Corps claimants, by OJAG.

3608 FEDERAL CLAIMS COLLECTION ACT (FCCA)

A. References

1. Federal Claims Collection Act, 31 U.S.C. § 3711

2. 4 C.F.R. Chapter II, FCCA Regulations

3. JAGINST 5890.1, enclosure (6), section A

B. Overview. Under the FCCA, the government may recover compensation for property damage caused by private parties to the same extent as could a private person under local law. The FCCA applies worldwide; claims must be made within three (3) years after the claim accrues.

1. Liable parties. FCCA claims may be pursued against private persons, corporations, associations, and nonfederal governmental entities. Liability must be determined in accordance with the law of the place where the damage occurred. An FCCA claim also can be asserted against any federal employee responsible for the damage and, if the responsible party is insured, the claim may be presented to the insurer. Unless aggravating circumstances exist, however, the government does not seek recovery from servicemembers and government employees for damage caused by their simple negligence.

2. 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.

C. Procedures. Specific procedures and collection policies are promulgated in the JAGINST 5890.1, enclosure (6), section A.

1. Authority to handle FCCA claims. JAGINST 5890.1 lists the officers authorized to pursue, collect, compromise, and terminate action on FCCA claims. These include certain officers in OJAG and most NLSO COs. These officers may collect claims in any amount; claims over $20,000.00 can be terminated or compromised only with DOJ approval.

2. Repair or replacement in kind. In some cases, the party responsible for the damage, or that party's insurer, may offer to repair or replace the damaged property. The CO of the property may accept repair or replacement if such a settlement is in the government's best interest.

3609 MEDICAL CARE RECOVERY ACT (MCRA)

A. References

1. Medical Care Recovery Act, 42 U.S.C. §§ 2651-2653

2. JAGINST 5890.1, enclosure (6), section B

B. Overview. When the government treats, or pays for the treatment of, a military member, retiree, or dependent, the United States may recover the reasonable value of those medical services from any third party legally liable for the injury. The MCRA applies worldwide; claims must be made within three (3) years after the claim accrues.

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 tortfeasor's procedural attack or defense against the injured party will not bar recovery by the government; substantive defenses do apply.

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.

3. Liable parties. MCRA claims may be asserted against private individuals, corporations, associations, insurers, 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 servicemembers injured as a result of their own willful or negligent acts. On a subrogation theory, however, the United States can seek recovery against the member's private medical insurance coverage.

D. Procedures. MCRA procedures are governed by JAGINST 5890.1, enclosure (6), section B. 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). JAG designees include COs and OICs of Naval Legal Service Command (NLSC) activities who have been assigned geographic areas of responsibility. JAG designees may assert and receive full payment of MCRA claims in any amount, but they may compromise, settle, or waive claims up to $40,000.00. Claims in excess of $40,000.00 may be compromised, settled, or waived only with DOJ approval.

2. Investigations. When a military member, retiree, or dependent receives federal medical care for injuries or disease for which another party may be legally responsible, an investigation will be conducted. The CO of the local naval activity most directly concerned, usually the CO of the personnel involved in the incident or of the activity where the incident took place, is responsible for directing the investigation. A copy of any investigation involving a potential MCRA claim should be forwarded to the cognizant JAG designee.

3. Injured person's responsibilities. 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. In addition, if the injured person receives compensation for medical expenses, the government is entitled to recover its MCRA claim from the injured person out of the proceeds of the settlement. To preserve the government's rights, the JAG designee will advise injured members of their obligations under MCRA, including the duty 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;

c. cooperate in the prosecution of the government's claim against the liable party;

d. give the JAG designee the name and address of any civilian attorney representing the injured party;

e. refuse to execute a release or settle any claim concerning the injury without first notifying the JAG designee; and

f. refuse to provide any information to the liable party, that party's insurer, or attorney without prior approval of the JAG designee.

PART VII

LEGAL ASSISTANCE

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CHAPTER THIRTY-SEVEN

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PART VII

LEGAL ASSISTANCE

CHAPTER THIRTY-SEVEN

GENERAL TOPICS

3701 INTRODUCTION

The sheer breadth of the legal assistance field prevents a detailed analysis here of every topic the SJA might encounter in a given tour. This single Part would be more voluminous than the others combined. Instead, subjects in this Part are presented in more abbreviated form. Where adequate substitutes exist and are likely to be available, the SJA will be pointed in the direction of those resources. The topics addressed here reflect the subjects that field judge advocates have sent us.

3702 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. Department of the Navy, Office of the Judge Advocate General (Code 36), *Legal Assistance Memoranda* (LAM)

B. Naval Justice School, *Civil Law Study Guide*, Chapter 8

C. JAGINST 5801.1, Subj: LEGAL CHECKUP PROGRAM

D. OPNAVINST 5801.1, Subj: LEGAL CHECKUP PROGRAM

E. Drafting Libraries (DL) Wills Software (military version), a commercial computer-assisted wills drafting program created by Attorneys' Computer Network, Inc., made available to naval legal assistance attorneys under a licensing agreement with the Judge Advocate General (not posted)

F. *Off The Record*, Office of the Judge Advocate General of the Navy (not posted)

G. *The LAMPlighter*, a quality legal assistance newsletter published by the American Bar Association Standing Committee on Legal Assistance for Military Personnel (not posted)

H. *The Reporter*, AFRP 110-2, Office of the Judge Advocate General of the Air Force (not posted)

I. *Martindale-Hubbell Law Directory: Law Digests, Uniform Acts, A.B.A. Codes* (not posted)

J. *Marine Corps Manual for Legal Administration* (LEGADMINMAN) MCO P5800.8 (30 June 92)

K. *Pub 17 / Package X*, Department of the Treasury, Internal Revenue Service

L. *LA Law Powers of Attorney Program for WordPerfect*, prepared by the Office of the Judge Advocate General, Legal Assistance Division (Code 36), this WordPerfect merge-macro program drafts general and special powers of attorney, with forms keyed to those found in Chapters 3 and 4 of the *Legal Assistance Deployment Guide*

M. *Child Support Enforcement Deskbook*, Office of the Judge Advocate General, Legal Assistance Division (Code 36)

N. *Essentials for Attorneys in Child Support Enforcement*, Second Edition, U.S. Department of Health and Human Services, Office of Child Support Enforcement (not posted)

O. Department of the Navy, Office of the Judge Advocate General (Code 36), *Tax Information Memoranda*

P. *Bankruptcy Overview for Military Legal Assistance Attorneys*, Desktop Reference, Office of the Judge Advocate General, Legal Assistance Division (Code 36)

Q. *Legal Assistance Mass Casualty Manual* (Dec. 1989), Office of the Judge Advocate General, Legal Assistance Division (Code 36)

R. *Consumer Law Guide*, Pub JA 265, The Judge Advocate General's School, U.S. Army

S. *Will Guide*, Pub JA 262, The Judge Advocate General's School, U.S. Army

T. *All State Income Tax Guide*, The Judge Advocate General's School, U.S. Army

U. *Naval Military Personnel Manual Notarial Guide*, Pub JA 268, The Judge Advocate General's School, U.S. Army

V. *Soldiers' and Sailors' Civil Relief Act Guide*, Pub JA 260, The Judge Advocate General's School, U.S. Army

W. *Family Law Guide*, Pub JA 263, The Judge Advocate General's School, U.S. Army

X. *Real Property Guide*, Pub JA 261, The Judge Advocate General's School, U.S. Army

Y. *Legal Assistance Office Directory*, Pub JA 267, The Judge Advocate General's School, U.S. Army

Z. *Legal Assistance Office Administration Guide*, Pub JA 271, The Judge Advocate General's School, U.S. Army

AA. *Legal Assistance Deployment Guide*, Pub JA 272, The Judge Advocate General's School, U.S. Army

BB. *USFSPA Outline and References*, Pub JA 274, The Judge Advocate General's School, U.S. Army

CC. *Model Tax Assistance Guide*, Pub JA 275, The Judge Advocate General's School, U.S. Army

DD. *Preventative Law Series*, Pub JA 276, The Judge Advocate General's School, U.S. Army

EE. *The Army Lawyer*, Headquarters, Department of the Army, DA Pam. 27-50

FF. *Legal Assistance Handbook*, Headquarters, Department of the Army, DA Pam. 27-12

(***Note***: Most of these publications are available on the JAG Bulletin Board (JAGNET BBS) and the Naval Justice School Bulletin Board (NJS BBS, DSN

948-3990 or commercial (401) 841-3990). Attorneys unable to access JAGNET BBS may contact the Legal Assistance Division for a 'zipped' publication on disk.)

3703 GENERAL MATTERS

Chapter 7 of the *JAG Manual* provides general guidance on the Navy's legal assistance program. Chapter 7 also provides guidance on questions relating to eligibility, confidentiality of services, extent of services rendered, limitations on judge advocate representation, prohibited practices, the Expanded Legal Assistance Program (ELAP), and the Preventive Law Program.

3704 PERSONS ELIGIBLE FOR LEGAL ASSISTANCE

A. The first subparagraph of 10 U.S.C. § 1044 lists three categories of persons who are eligible to receive legal assistance services: members of the armed forces who are on active duty; members and former members entitled to retired or retainer pay or equivalent pay; and dependents of either of the above. JAGMAN, § 0706, specifies that legal assistance is intended primarily for active-duty personnel, and that other eligible persons may be provided assistance when resources permit.

B. JAGMAN, § 0706, identifies certain other persons or classes that are authorized to receive legal assistance services—such as civilian personnel accompanying the armed forces overseas (and their overseas dependents)—and members of allied forces and their dependents serving with our armed forces in the United States. The legal assistance eligibility of Reserve personnel is limited, but does include authorization to receive assistance intended to enhance their readiness for mobilization or recall to active duty (such services as preparation of wills, living wills, and powers of attorney).

C. No individual person or class of persons has a ***right*** to legal assistance, and it may be necessary in the allocation of resources to restrict services from time to time. JAGMAN, § 0706, establishes a priority among those authorized to receive services. Another basis on which services may be allocated among authorized persons is provided in 10 U.S.C. § 1044(c), which states that legal representation is not intended for those who can afford legal fees without undue hardship.

3705 LIMITATIONS ON SERVICES PROVIDED (JAGMAN, § 0709)

A. Nonlegal advice. Legal assistance officers should provide legal advice only. Clients should be referred to the appropriate person or agency for counseling on nonlegal issues.

B. Personal legal matters. Legal assistance is authorized for personal legal advice as contrasted with military justice problems, business ventures, or matters not of a personal nature.

C. Dual representation prohibited. The same lawyer ***shall not*** represent opposing parties in a matter (e.g., a domestic relations case). Similarly, separate attorneys within the same legal assistance office shall not provide legal assistance to opposing parties. The other party should be directed to another legal assistance provider if available (i.e. another Navy, Army, Marine Corps, Air Force, or Coast Guard legal assistance office, an SJA, or a Reserve judge advocate). When no other legal assistance practice is available, the conflicted individual should be referred to the civilian community.

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 JAG's specific approval. This includes Article 138, UCMJ, petitions; filing claims for monetary damages against the United States; and restraining orders against the United States.

E. Compensation. Judge advocates 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.

F. Telephonic advice. In the absence of unusual or compelling circumstances, legal advice should not normally be given over the telephone.

3706 REFERRAL TO CIVILIAN LAWYERS (JAGMAN, § 0710)

Referral of cases to civilian lawyers is appropriate in some cases, including expertise of the attorney or regulations that prohibit involvement of the legal assistance attorney. 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. If possible, refer the client to:

A. An appropriate bar organization;

B. a lawyer referral service; or

C. a legal aid society or other organization.

3707 EXPANDED LEGAL ASSISTANCE PROGRAM

Per JAGMAN, § 0711, the ELAP allows legal assistance officers to represent certain military personnel in civilian court at no expense to the member. ELAP's give deserving servicemembers free in-court representation and participating ELAP attorneys civilian courtroom experience. ELAP's must be specifically authorized by the JAG. An ELAP will not be authorized for an SJA because the time and resources necessary for a proper ELAP are inconsistent with provision of SJA legal assistance services as a collateral basis. Questions regarding ELAP should be referred to the Office of the Judge Advocate General (Code 36) or call DSN 221-7928 -- Commercial (703) 325-7928.

3708 NOTARIAL ACTS AND OATHS

Notarial powers are governed by federal and state law. JAGMAN, Chapter 9 is the main reference in the Navy and Marine Corps for notarial powers.

A. Oaths. 10 U.S.C. § 936 governs notarial acts for purposes of military justice and administration. 10 U.S.C. § 1044a authorizes notarial acts for legal assistance purposes. Article 136, UCMJ, allows SECNAV by departmental regulations to extend notarial powers to certain other military members for limited purposes. JAGMAN, § 0902, lists those members authorized to administer oaths. The oaths are valid only for those situations described in section 0902. 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 / 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 9.

On August 9, 1993, the Acting Judge Advocate General signed a change to JAGMAN, § 0902, authorizing all limited duty officers (law) and certain legalmen to exercise federal notarial authority of 10 U.S.C. § 1044a. Authority to notarize documents pursuant to section 1044a and JAGMAN, § 0902c(1)(b), is expanded to include:

> (vii) all limited duty officers (law), all legalmen E-7 and above, all independent duty legalmen, and all legalmen

assigned to legal assistance offices or staff judge advocates providing legal assistance;

(viii) Marine Corps legal services specialists E-5 and above, while serving in legal assistance billets when authorized by the cognizant commander.

All supervising attorneys must ensure legalmen are trained in the proper procedures for taking acknowledgements and notarizing documents.

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, § 0906.

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 / her 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, § 0907.

D. Authority to perform. JAGMAN, § 0902, discusses the authority for performing certain notarial acts for ***federal*** purposes. To varying degrees, all fifty states, the District of Columbia, and the U.S. possessions have granted limited notarial powers to all commissioned officers (0-1 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, § 0910. 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. This is especially important in the case of real estate transactions; a member's or dependent's interests could be seriously jeopardized by their reliance upon an ineffective notarial act. Notarial acts performed under the authority of 10 U.S.C. § 1044a are legally effective for all purposes. Oaths administered under the authority of 10 U.S.C. § 936 are legally effective for the purposes for which the oath was administered. Federal notarial authority may be exercised without regard to geographic limitations and is not dependent on any state or local law.

CHAPTER THIRTY-EIGHT

FAMILY LAW ISSUES

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CHAPTER THIRTY-EIGHT

FAMILY LAW ISSUES

3801 NONSUPPORT

A. References

1. MILPERSMAN, art. 6210120

2. LEGADMINMAN, ch. 8

3. USCG: PERSMAN 8-G

B. Policy. Servicemembers must provide continuous and adequate support per their legal and moral obligations.

1. Spouse. Member must support unless:

a. A court order relieves the obligation;

b. spouse relinquishes support in writing;

c. a separation agreement exists between the parties whereby spousal support is waived; or

d. DFAS, Cleveland, CMC, or CCG grants a waiver to the servicemember (limited to cases of desertion, infidelity, or physical abuse).

2. Children. Member must support unless:

a. The child is adopted by another;

b. the child attains majority; or

c. the divorce decree specifically relieves the member of the obligation (the conduct of the spouse does not relieve the member of this obligation). Such a provision would be highly unusual, as courts are hesitant to deprive a child of sources of support.

C. Amount of support. The member must provide such support as required by:

1. A court order; or

2. mutual agreement.

[*Note*: In the absence of either of the above, consider the support ***guidelines*** in the MILPERSMAN, LEGADMINMAN, or PERSMAN.]

D. Possible consequences. Members who fail to honor their just support obligations are subject to:

1. Lower evaluations;

2. administrative separation for pattern of misconduct (USCG misconduct or unsuitability: financial irresponsibility);

3. garnishment of pay or involuntary allotment pursuant to 42 U.S.C. §§ 659-662 or 665;

4. criminal charges under Article 134, UCMJ: dishonorable failure to pay debt;

5. withhold or recoup BAQ; and

6. loss of dependent tax deduction.

E. Caution to SJA's. As an SJA, you may be called upon to advise your CO concerning measures to take on allegations of nonsupport by a member. Consequently, SJA's should not provide nonsupport legal assistance to members of their command, but should refer such clients to another legal assistance provider. If the SJA provides such assistance and the CO later requests advice or action, the SJA must recuse him / herself.

3802 CIVILIAN SUPPORT ENFORCEMENT MECHANISMS

A. Involuntary allotments

1. Citations

a. 42 U.S.C. § 665

b. 32 C.F.R. Part 54 (DOD implementing regulations)

c. 33 C.F.R. Part 54 (Coast Guard implementing regulations)

2. Basic requirements

a. A state court or a state's administrative procedure support order that includes a child support component.

b. An arrearage equal to or exceeding the support required for a two-month period.

3. Procedure

a. A state (but not a foreign court) child support enforcement (CSE) agency (or court) sends a letter (or order) to the military finance center stating that the requisite arrearage exists and requesting that a "mandatory allotment" be started.

b. The finance center notifies the member's commander and the member concerning the request.

c. Absent presentation of an adequate and timely defense by the member, the allotment is started.

(1) The allotment will be for the amount of the monthly support obligation, payable per the request order and continuing until the requester advises that it should stop.

(2) Arrearages may be computed into the allotment if included in the order and subsequent procedure for involuntary allotment. A letter from a CSE agent asking for arrearages is insufficient.

4. Limitations (32 C.F.R. § 54.6)

a. If the member is supporting other family members, the maximum amount of the involuntary allotment is 50% of disposable earnings.

(1) "Disposable earnings" consists of basic pay plus most bonuses and special pay, minus taxes and other deductions.

(2) The term also includes BAS for officers and warrant officers and BAQ for members with dependents and all members in the grade of E-7 and above. *See* 32 C.F.R. § 54.6(b).

b. If the member is not supporting other family members, the maximum is 60% of disposable earnings.

c. An additional 5% is tacked on to the maximum (i.e., the maximum is boosted to 55% or 65%) if "the total amount of the member's support payments is 12 or more weeks in arrears." 32 C.F.R. § 54.6(a)(5)(iii).

5. Strategies for the member

a. Show that information in the request is in error. 32 C.F.R. § 54.6(d)(5).

(1) Member must submit an affidavit and evidence to support the claim of error.

(2) This information must be provided to the finance center within 30 days of their notice.

b. Negotiate a mutually acceptable resolution with the child support agency or the custodial parent.

c. Do not start a voluntary allotment upon receiving notification of an involuntary allotment action; the member will simply have two allotments deducted from their military pay.

6. Helping the custodial parent

a. The custodial parent must first have a child support order issued by a U.S. court.

b. There are two approaches to getting a mandatory allotment:

(1) Ask the applicable CSE agency to submit the request (The "applicable" agency is probably in the state where the order was issued. This approach usually works well if the order calls for payments to be made through the court or agency so they have a record of the arrearage.); or

(2) submit a request directly to the court that issued the order asking it to request initiation of a mandatory allotment. The court will need a sworn statement from the custodial parent alleging the appropriate arrearage.

B. Garnishments

1. References

a. 42 U.S.C. §§ 639-662

b. 5 C.F.R. Part 581

2. There is no "federal garnishment law."

a. The garnishment statute is merely a waiver of federal sovereign immunity allowing state garnishment orders to be served on federal officials.

b. The garnishment statute applies to active-duty and retired military pay, Reserve drill pay, and current and retired federal civilian employee salaries.

c. The federal statute allows federal agencies to comply with garnishment orders for child support or alimony obligations.

d. The garnishment can be for current support or support arrears, or both, according to state law.

e. The ceiling on the amount subject to garnishment is the lower of state law or the limits stated in the federal Consumer Credit Protection Act (CCPA) (15 U.S.C. § 1673).

(1) CCPA provides for garnishment of a maximum of 50% of disposable earnings if the member is supporting other family members and 60% if he / she is not; an additional 5% can be garnished if the support obligation is more than 12 weeks in arrears.

(2) Disposable pay includes basic pay and most bonus and special pay entitlements, but not BAQ or BAS.

3. Defenses for the member

a. The finance center will not entertain defenses raised by the member in garnishment actions from U.S. courts.

b. Disputes must be litigated in the state issuing the garnishment order.

c. If the member is supporting family members other than those to whom the garnishment order pertains, make sure the finance center knows this—since it can affect how much money is deducted from the member's pay.

C. Wage assignment orders

1. These are "involuntary allotments" created by state law that can be used to enforce support obligations against civilian and military parents.

a. The trigger for a wage assignment generally is an arrearage of not more than 30 days.

(1) Some states currently have automatic wage withholding that takes effect immediately upon issuance of the support order, whether or not there is an arrearage.

(2) The Family Support Act of 1988, Pub. L. No. 100-485, requires that all states implement automatic wage withholding in phases based on varying categories of obligees.

b. In cases involving contingent withholding provisions, the absent parent receives notice of intent to initiate a wage assignment and, if no defense is presented, a notice of assignment is sent to the employer.

c. All employers must honor wage assignment orders; DOD agencies process them as if they were garnishment orders.

2. Assisting the absent parent

a. Upon receipt of notice to initiate a wage assignment, notify the agency of any error in alleged arrearages. Notify the agency of modifications of the underlying support order or other facts which negate the support obligation.

b. Ensure the finance center knows that the member is supporting other family members.

c. If a member is paying support by allotment, and a decree or support order is pending in a state with automatic wage assignments, stop the allotment several months before the decree will be issued.

3. Assisting custodial parents. Refer custodial parents to the nearest state or county child support enforcement office.

D. Uniformed Reciprocal Enforcement of Support Act (URESA)

1. The primary purpose of URESA is the enforcement of an order issued by another court. URESA itself does not create a support obligation; its purpose is to enforce obligations created under other provisions of state law. The Act provides a uniform process for a support obligee to use the courts of that state without traveling to that state or becoming subject to jurisdiction of that state's court for other purposes.

2. The custodial parent goes to the court where he / she resides and files a petition to enforce a support order against the absent parent who resides in another jurisdiction. The court in the "initiating state" reviews the petition and sends it on to the appropriate court or agency where the absent parent is believed to reside (the "responding state").

3. The district attorney or other official in the responding state prosecutes the enforcement action against the absent parent. The custodial parent need not appear, but may present evidence through an affidavit or less formal means. The law of the forum court applies. The court issues an order based on the facts presented.

4. URESA can establish a support order in most jurisdictions and establish paternity in many others.

5. All 50 states, plus the District of Columbia, Guam, Puerto Rico, the Virgin Islands, and American Samoa, have enacted some form of URESA or similar legislation.

3803 PATERNITY COMPLAINTS

A. References

1. MILPERSMAN, art. 6210125

2. LEGADMINMAN, ch. 8

3. PERSMAN 8-G-5

4. Part IV, *Support Enforcement Deskbook*, Office of Judge Advocate General Legal Assistance Division

B. Policy. Members owe the same duty of support to children born out of wedlock. Paternity is established by a court decree or by the member's admission.

C. Processing. Refer the complaint to the member. If a court order exists, the member must pay. Similarly, the member must pay if he admits paternity. If the member denies paternity, the command advises the complainant of the results of the interview.

3804 FORMER SPOUSES' PROTECTION ACT

A. 10 U.S.C. § 1408 (1982 and Supp. II, 1984)
10 U.S.C. § 1072 (1982 and Supp. II, 1984)

B. The Act legislatively overruled *McCarty v. McCarty*, 453 U.S. 210 (1981).

C. Main provisions

1. State courts may treat disposable military retirement pay as marital or community property of the member and his spouse according to state law. ***Note***: there is ***no federal right*** to any portion of retired pay under USFSPA.

-- Disposable retired pay. 10 U.S.C. § 1408(a)(4), 32 C.F.R. § 63.6(e)2, *Military Retired Pay Manual* (DOD 1340.12M)

2. To prevent "forum shopping," a court purporting to divide such retirement pay must have jurisdiction over the servicemember by:

a. Residence, other than presence in jurisdiction due to military orders;

b. consent; or

c. domicile in the jurisdiction.

3. If the marriage lasted ten years or more (overlapping 10 years' service), payment of the spouse's portion of pension can come directly from the military finance center (finance center will also pay any alimony and child support specified in the same judgment or court order).

4. An unremarried former spouse may also qualify for exchange, theater, commissary, and medical benefits depending on the duration of marriage / length of service / years of overlap between the two.

a. 20 / 20 / 20 (20 year marriage / 20 years' military service / 20 years' overlap of marriage and service) -- Entitled to: exchange; commissary; theater; military medical (unless already covered by employer).

b. 20 / 20 / 15 (20 year marriage / 20 years' service / 15 year overlap), ***and***

(1) Divorced ***before*** 1 April 1985 - entitled only to military medical (unless already covered by employer); or

(2) divorced ***after*** 1 April 1985 - entitled to military medical benefits (unless employer covers) until (at most) two years from date of divorce—spouse may then "convert" to private coverage.

c. These benefits terminate upon remarriage; benefits may be "revived" upon termination of the subsequent marriage.

5. Allowing former spouses to be designated as Survivor Benefit Plan (SBP) beneficiaries.

3805 SURVIVOR BENEFIT PLAN (SBP)

A. References. The SBP was enacted by Pub. L. No. 92-425 on September 21, 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, 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).

B. Automatic enrollment. Unless a retiree elects not to participate in the SBP, or elects to participate at less than the maximum level (full gross retired pay) before the first day on which he / 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.

C. Former spouses. The Uniformed Services Former Spouses' Protection Act provides that former spouses may be beneficiaries under the SBP. A former spouse election must be voluntary and cannot be court ordered 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. If the member designates a spouse as a beneficiary, then divorces and remarries, the former spouse will continue as the beneficiary unless expressly changed by the member.

D. Amount of annuity. The monthly annuity payments shall equal 55% of the retiree's monthly 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.

CHAPTER THIRTY-NINE

TAX INFORMATION FOR SJAs

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CHAPTER THIRTY-NINE

TAX INFORMATION FOR SJAs

3901 FEDERAL INCOME TAX INFORMATION

A. Obtaining forms, publications, and information from the Internal Revenue Service (IRS). The IRS offers a number of free services to taxpayers which can also be of great help to tax practitioners and are summarized in IRS Publication 910, *Guide to Free Tax Services*. This publication also contains a description and topical index of other IRS publications. IRS Publication 1194 is a four-volume, bound set of common IRS publications.

Up to 15 copies each of these and other IRS publications and tax forms can be obtained free of charge by calling 1-800-TAX-FORM (829-3676). The toll-free number to IRS for questions and information is 1-800-829-1040.

Forms and publications in bulk are available through the IRS Banks, Post Offices and Libraries (BPOL) Program. Participating offices must establish an account with the IRS; thereafter, the IRS will mail an order form every year (usually in June). Contact BPOL at:

Internal Revenue Service
Attn: Library Program
2402 East Empire
Bloomington, IL 61799
(800) 829-2765

IRS forms can also be ordered through the Tax Practitioner Program. This program is not designed to provide forms for distribution to the public, but as a research and reference tool for the tax practitioner. Participants can order, free of charge, two informational copies of major tax forms and one copy of instructions and publications. Call the IRS 800 number (1-800-TAX-FORM) and request Publication 1045—which includes an order form (Form 3975).

IRS Publication 1192 is the *Catalogue of Reproducible Forms, Instructions and Publications*. This publication offers reproducible proofs of tax materials—which can be ordered at costs ranging from $4.00 to $14.00 per form, and from $40.00 to over $400.00 per publication.

B. Tax assistance available from the OJAG Legal Assistance Division, Tax Branch. The OJAG Tax Branch provides support and assistance on tax matters to the attorney in the field. The Tax Branch publishes the annual series of indexed Tax Information Memoranda which form a basic reference library on tax issues. The OJAG tax attorney may be consulted by phone, email, or LAN to assist in framing issues, interpreting the Internal Revenue Code, and finding relevant authorities in a tax matter. The Tax Branch can provide hard copies of tax materials, such as revenue rulings, not readily available in SJA office libraries. (Note, however, that most tax materials are available on the LEXIS and WESTLAW services.)

The OJAG Tax Branch does not provide direct client services. Therefore, do not refer clients there.

The Tax Branch should be consulted when either the IRS or, more likely, a state, institutionally takes an apparent incorrect position on a question of general application (as opposed to a position in a particular taxpayer's case). The OJAG Tax Branch is the conduit to the Armed Forces Tax Council, the forum where such issues are addressed.

C. Selected substantive topics

1. Combat zone service

a. Combat zone tax exclusion. The Persian Gulf and Vietnam combat zones are still in effect with no immediate prospects for termination. Military personnel may exclude from income military compensation earned during a month, any part of which the member served in a combat zone, or is hospitalized on account of disease or injury incurred while serving in a combat zone. IRC § 112. Even one hour in a combat zone will qualify a member for the combat zone exclusion for that month (Private Letter Ruling 6601104860A); on the other hand, casual presence in a combat zone (such as when transiting through or for personal convenience) will not qualify for the exclusion. Treas. Reg. 1.112-1(f). Any income earned while serving in a combat zone which is not compensation for active military service (such as winnings from games of chance conducted for Navy-Marine Corps Relief) is taxable.

The combat zone exclusion also applies to the military compensation of members who perform services outside the combat zone in support of operations within the combat zone, under conditions which qualify them for hostile fire / imminent danger pay. Treas. Reg. 1.112-1(e); Revenue Ruling 70-621. The conditions which qualify the members for hostile fire or imminent danger pay must be related to the combat zone. *See* SECDEF Washington DC 141656Z Mar 1991 and DODPM 70103b(5).

Enlisted members who serve in a combat zone can exclude from income ***all*** military compensation earned that month. Officers are limited to an exclusion of $500.00 per month. For these purposes, commissioned warrant officers are treated as enlisted persons and may exclude from income all compensation earned in a combat zone. IRC § 112(c)(1). However, temporary officers, including temporary limited duty officers, are treated as officers for the purpose of the combat zone tax exclusion. Revenue Ruling 68-11.

Application of the combat zone exclusion depends on where and when the service was performed for which the compensation is paid, not the time or place of payment. Therefore, a servicemember who reenlists in the combat zone will receive his reenlistment bonus tax-free even though it is paid after he leaves the combat zone.

Leave earned in the combat zone is tax-free whether used or paid in a lump sum. Treas. Reg. 1.112-1(b)(5), Example (2). However, at present, DFAS is applying the combat zone tax exclusion only to leave paid in a lump sum.

No income taxes are withheld from the pay of servicemembers, enlisted or officer, for months when they are entitled to the combat zone exclusion, even though, in the case of officers, only $500.00 per month is exempt from taxation. IRC § 3401(a)(1). As a result, officers may find themselves in a serious underwithholding situation. However, because of the IRC section 7508 extension of time to perform acts (discussed below), officers from whom taxes are underwithheld are not required to pay estimated taxes, and no penalties or interest will accrue. Social Security (FICA) taxes are not included in the combat zone exclusion and will continue to be withheld from the pay of personnel serving in the combat zone.

A member's W-2 form should reflect only taxable income; pay which is exempt from taxation by reason of the combat zone exclusion should not be included. A taxpayer who suspects that the amount of pay listed on the W-2 incorrectly includes tax-exempt income must request DFAS to issue a corrected W-2; the IRS will not issue corrected W-2s, and IRS will question a tax return if the taxable income entered does not conform to the amount on the W-2.

b. Extension of time to file and pay taxes. IRC section 7508 suspends the time for a taxpayer to perform certain acts under the IRC while the taxpayer is serving in a combat zone, and for 180 days thereafter. Included among the requirements suspended are filing a tax return, paying any tax (including estimated tax), rolling over gain from the sale of a principal residence, and making an IRA contribution. No interest or penalties will accrue, and the IRS will pay interest from 15 April to any taxpayer who files late and is entitled to a refund.

Once the suspension period expires, the taxpayer still has the same amount of time to perform the act as when they entered the combat zone. Thus, if a servicemember enters the combat zone on 1 February 1992, he has 74 days left to file his 1991 tax return. When he leaves the combat zone, the time to file his tax return starts to run again 180 days later. His tax return would be due 180 + 74 days after leaving the combat zone.

Unlike the combat zone exclusion, the section 7508 extension of time applies to civilians (such as Red Cross workers, contractors, correspondents, and government employees) serving in a combat zone in support of the armed forces. *See Internal Revenue Manual*, Part 5, para. 3b. The suspension of time applies equally to spouses of personnel serving in a combat zone [§ 7508(b)], but whether it applies to children is questionable, despite a statement in IRS Publication 945 to that effect.

c. Other combat zone tax effects. IRC section 692 forgives all income tax due for the year in which a member dies while serving in, or from disease or injury incurred while serving in, a combat zone. Taxes are also forgiven for prior years ending on or after the first day that the member served in the combat zone. Taxes paid or withheld for any year to which section 692 applies will be refunded. These provisions also apply to any military member or civilian U.S. employee who dies outside the United States in a terroristic or military action.

If a servicemember dies while the IRS is attempting to collect disputed taxes from any tax year, section 692 also forgives those taxes, and any disputed taxes collected must be refunded. This provision applies only to armed forces members serving in, or dying from disease or injury incurred in, a combat zone, and not to members or civilian employees who die in a terroristic or military action.

IRC section 2201 forgives estate tax in the case of servicemembers who are killed in action while serving in a combat zone or die as a result of disease or injury suffered in the line of duty (LOD) while serving in a combat zone. In the latter case, the disease or injury must also have been incurred as a result of a hazard to which the member was subjected incident to service in the combat zone.

2. Gain on sale of personal residence

a. Nonrecognition of gain from sale of principal residence. IRC section 1034 permits taxpayers to "rollover" gain from the sale of a principal residence into a new residence. No gain is recognized to the extent that the taxpayer purchases a new residence for at least as much as the "adjusted sales price" of the old residence. "Adjusted sales price" is the selling price minus certain fix-up expenses, not otherwise deductible, incurred in the 90 days prior to entering into the sales contract [§ 1034(b)]. To the extent the new residence costs less, tax is paid on the difference.

As with most nonrecognition transactions, the basis of the new residence is "carried over" from the old one [§ 1034(e)]. Looked at another way, the basis of the new residence is determined by subtracting the amount of rolled over gain from its cost. When the new residence is sold, because of its lower basis, the taxpayer will pay tax on the gain from both properties unless he can roll over the gain again. Thus, paying tax on the gain is actually deferred, not excused.

The period allowed for replacing the property begins two years ***before*** and ends two years ***after*** the old residence is sold. The taxpayer must actually occupy the new property as his principal residence within the replacement period. Occupancy by a family member is insufficient.

The replacement period is suspended during any period of time that the taxpayer serves on extended (in excess of 90 days) active duty in the armed forces, not to exceed a total of four years after the sale of the old residence [§ 1034(h)]. The four years can be extended if a servicemember is stationed outside of the United States, so that the member has at least one year (if that period would extend past the four years) after returning to replace the old property, but the total replacement period may not exceed eight (8) years under any circumstances. There is no extension of the normal replacement period merely because the taxpayer is required to reside in base housing.

The IRS' statute of limitations will not begin to run on the gain from the sale of the residence until the taxpayer has notified the IRS that replacement property has been purchased, and identified it.

Renting a property for a time prior to its sale does not per se disqualify it for nonrecognition treatment. Treas. Reg. 1.1034-1(c)(3)(i). The taxpayer may also deduct rental expenses and depreciation for the rental period. *See Bolaris v. CIR*, 776 F.2d 1428 (9th Cir. 1985).

A taxpayer may also roll over the gain from the sale of rental property if the taxpayer can establish that the property remained his principal residence, that he was absent from the property temporarily, and that he intended to return to it. The IRS looks to the "facts and circumstances in each case, including the good faith of the taxpayer." Treas. Reg. 1.1034-1(c)(3)(i).

Accordingly, taxpayers in *Barry v. CIR*, T.C. Memo 1971-179 (1971), were able to obtain nonrecognition treatment on the sale of a former residence from which they had been absent pursuant to military orders for over five years. The Tax Court found that the taxpayers had a bona fide intent to return to the property until they decided to retire elsewhere and placed the house on the market. Among the factors the court considered were:

(1) The taxpayers rented the property in part in order to provide for its proper care and maintenance;

(2) it was the only home the taxpayers did not sell when transferred during the husband's military career;

(3) they lived in military housing after vacating the residence;

(4) the intention to retire to the home was believable (even though it did not occur) because the property was located in an area with good military facilities, near the wife's original home, where the taxpayers had many friends and other ties; and

(5) the taxpayers never attempted to sell the house during the five-year period and rejected several unsolicited purchase offers.

b. Exclusion of gain on sale of principal residence by taxpayer over 55 years old. IRC section 121 provides a one-time ***exclusion*** from income of up to $125,000.00 of the gain from the sale of a principal residence by a taxpayer over the age of 55. This provision differs from section 1034 which merely defers or postpones gain, but which has no cap on the amount of gain and which can be used an unlimited number of times. Also unlike section 1034, section 121 requires only that the taxpayer has owned and used the property as his principal residence for three of the previous five years. Election of the section 121 exclusion is optional with the taxpayer.

In the case of married taxpayers filing jointly, both spouses may claim the benefit of section 121 with regard to jointly owned property even if only one satisfies the age, ownership, and occupancy requirements.

The section 121 exclusion may be combined with the section 1034 deferral if the gain from the sale of a residence exceeds $125,000.00. That is, $125,000.00 of gain can be excluded under section 121; the remainder of the gain can be rolled over into a new residence. In order to roll over all of the gain, the purchase price of the new residence must be at least as much as the sale price of the old residence, but the amount of gain excluded under section 121 can be subtracted. This principle can be illustrated by the following hypothetical:

Sale price of old residence	$ 300,000.00
Basis of old residence	100,000.00
Amount of gain	200,000.00
Amount of section 121 exclusion	125,000.00
Amount of gain to roll over	75,000.00

Minimum new residence purchase price (300,000-125,000)	175,000.00
Basis of new residence (175,000-75,000)	100,000.00

3. Employee business expense deductions

a. Personal money allowance. The personal money allowance (PMA) authorized by 37 U.S.C. § 414 is a flat amount paid monthly to compensate certain flag and general officers for increased expenses (such as for entertainment) incident to their positions. The PMA is paid on a regular monthly basis without regard to actual expenditures. While recipients should keep adequate records to support their personal tax returns, they are not required to make a regular accounting of their expenses to DOD.

As a result of this lack of a substantiation requirement, PMA recipients must include the entire amount of PMA in income. IRC § 62(c). DFAS will withhold income (but not FICA) taxes from each PMA payment. The expenses may be deducted as miscellaneous itemized employee business expenses, subject to the 50% limit on deducting meal and entertainment expenses (as applicable) and the 2% of adjusted gross income floor on miscellaneous deductions.

b. Change of command ceremonies. Expenses for change of command ceremonies may be deducted as employee business expenses, *Fogg v. CIR*, 89 T.C. 310 (1987), because they are directly related to the business of being a military officer. However, the expenses of retirement ceremonies are probably ***not*** deductible business expenses. *See, e.g. Carlisle v. CIR*, 37 T.C. 424 (1961) (expenses, such as legal fees and telephone calls, incurred in successfully securing medical discharge are not deductible as business expense since they are not connected with the taxpayer ***carrying on*** the business of being a military officer).

Fogg also held that contributions to the squadron officers' fund, which was used to purchase plaques for departing personnel and flowers for the hospitalized, were deductible, but dues to the officers' club and the Blue Angels Association were not.

c. Commuting expenses. The cost of commuting to work is a personal expense. Treas. Reg. 1.162-2(e), 1.262-1(b)(5). Therefore, the payment by an employer of an employee's commuting expenses is a taxable fringe benefit except under limited circumstances.

(1) Under IRC section 132, employees may exclude up to $60.00 per month of employer-provided vanpooling and transit passes (combined).

Employees may also exclude free parking up to a value of $155.00 per month. Only the excess over these amounts is included in income.

(2) Meal money or local transportation provided on an ***occasional*** basis (e.g., to enable an employee to work overtime) is excludable from income as a de minimis fringe benefit. Treas. Reg. 1.132-6(d)(2).

Some flag officers and other high-ranking officials are provided home-to-work transportation by government vehicle, usually including a driver. This benefit, even if provided for security reasons, is taxable. Treas. Reg. 1.132-5(m).

However, Treas. Reg. 1.132-5(m) excludes from income part of the value of transportation provided by an employer to an employee, spouse and dependents, for personal use (which can include commuting), as a result of "bona fide business-oriented security concerns." This exclusion is very narrow; it is intended to apply to a situation in which security measures are instituted because an employee has received actual threats. The employer must conduct an independent security study which finds the security measures reasonable and necessary under the circumstances. If the exclusion applies, only the additional value of the security features of the transportation is excluded from income; the full value of the transportation without the security features is still taxable.

Employers must report to the IRS and the employee the value and method of valuation (if a special method is used) of taxable home-to-work transportation provided.

4. Tax-exempt organizations. Many informal clubs and other groups (such as wives' clubs, social committees, and coffee messes) are organized by military members or dependents for quasi-official purposes. Like any other entity, any such group which takes in money has income subject to taxes. Most of these groups (the $3.00 per month coffee mess, for example) have such small amounts of income as to not be a concern. Others, like social committees, may perform enough of an official function to be considered tax exempt as government activities.

Wives' clubs, on the other hand, may not be able to claim tax exemption as a government activity, and may collect substantial amounts from dues, fund-raising, sales of merchandise, or other activities. These groups may be "non-profit" (a state law corporation concept), but that status does not automatically mean "tax exempt." Such groups may apply to the IRS for formal recognition of their tax-exempt status.

Section 501(c) of the IRC lists the types of organizations which may qualify for tax-exempt status, including:

a. Organizations which have charitable (religious, educational, literary, scientific, etc.) purposes - 501(c)(3);

b. civic leagues operated exclusively for the promotion of social welfare, or local employee associations, the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes - 501(c)(4);

c. clubs organized for pleasure, recreation, and other nonprofit purposes - 501(c)(7); and

d. a post or organization of past or present members of the armed forces, organized in the United States or a possession - 501(c)(19).

Obtaining tax-exempt status requires filing an application with the IRS on Form 1023 (for 501(c)(3) organizations) or 1024 (most others) with accompanying documentation. *See* IRS Publication 557 for complete information on how to file for tax-exempt status.

Organizations which have obtained tax-exempt status must file annual information returns with the IRS on Form 990 or 990EZ. An organization with annual gross receipts not exceeding $25,000.00 is relieved of this requirement.

The fact that an organization is tax exempt does not in itself determine whether donations are deductible by the donor. Generally speaking, only donations to 501(c)(3) and some 501(c)(19) exempt organizations, churches, and governments (federal, state, and local), are deductible.

Organizations which obtain tax-exempt status from the IRS should also contact state tax authorities wherever the organization is located or operates to obtain a state sales tax exemption which will enable it to purchase merchandise without paying sales tax. The organization may still be required to collect and remit state sales tax on any merchandise it sells—since the incidence of the sales tax is on the purchaser, not the seller. Local jurisdictions may provide limited exemptions from the requirement to collect sales taxes.

As a pertinent aside, organizations (such as wives' clubs) are not authorized legal assistance services, regardless of the nature of the membership. However, some organizations (such as wives' clubs) are accorded quasi-official status and may be provided with limited assistance as a command advice function, in accordance with guidance in para. 0406f(1) of the *Public Affairs Officer Manual* (SECNAVINST 5720.44, Subj: DEPARTMENT OF THE NAVY PUBLIC AFFAIRS POLICY AND REGULATIONS). Organizations with substantial receipts should obtain the services of an accountant or other tax professional.

3902 STATE INCOME TAX INFORMATION

A. Residence and domicile. State taxation violates the due process clause of the U.S. Constitution unless there is sufficient connection or "nexus" between the state and the individual or entity taxed. *International Shoe v. Washington*, 326 U.S. 310 (1945); *National Bellas Hess, Inc. v. Dep't of Revenue*, 386 U.S. 753 (1967); *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 (1992). Nexus generally consists of one of the following:

1. Domicile;

2. physical presence and / or activities in the state (the "statutory resident" or "resident for tax purposes"); or

3. location where income is earned ("source" of the income).

States may impose income tax on ***all*** the income of domiciliaries or statutory residents. An individual who fits neither category with regard to a particular state can still be taxed on income "sourced" to the state.

Most state tax codes specify who will be treated as a "resident," and thus taxed on all income wherever earned, and who will be treated as a nonresident, and taxed only on income earned in (sourced to) the state. A typical definition of "resident" is that of Virginia which specifies (a) any domiciliary, or (b) anyone who is physically present in the state for over 183 days during the tax year.

Several states—including New York, New Jersey, Connecticut, Pennsylvania, and Missouri—define "resident" in their tax codes similarly to Virginia, except that domiciliaries (military or civilian) living outside the state are defined as nonresidents if they satisfy certain criteria, characteristically:

a. Spend no more than 30 days in the aggregate during the tax year in the state;

b. do not maintain a permanent place of abode in the state; and

c. maintain a permanent place of abode outside the state.

Servicemembers outside their state of domicile who qualify for this nonresident status would be required to pay taxes to their domicile only on income earned in, and therefore sourced to, that state. Intangible income (such as interest and dividends) is often (but not always) considered sourced to the state of domicile. However, states which treat absent domiciliaries as nonresidents will usually define the types of

nonresident income which is considered earned in the state, and intangible income is often not included. For example, Connecticut considers income to be earned in the state if it is attributable to: the ownership or disposition of real or tangible personal property located in the state; a business, trade, occupation, or profession carried on in the state; or ownership of shares in an S corporation. Income from intangibles is sourced to Connecticut only if the income derives from property employed in a trade or business in Connecticut.

Whether or not a taxpayer who is treated like a nonresident because of absence from the state is required to file a tax return, even if he has no tax liability and is not claiming a refund, again varies from state-to-state. Taxpayers should check with their state tax authorities and / or review instructions accompanying tax forms to determine the applicable rules.

B. Soldiers' and Sailors' Civil Relief Act (SSCRA) limitations on state income taxes. Section 514 of the SSCRA, 50 U.S.C. App. § 574, provides that military members do not gain or lose a domicile or residence solely by reason of compliance with military orders, and that military compensation may not be considered income for services performed, or from sources, within the state of military assignment. Thus, the SSCRA prevents state income taxation of military compensation based on the member's residence or assignment within the state.

This SSCRA protection is not unlimited. A state may impose income tax on military compensation under *the following circumstances:*

1. The state may tax a member who is domiciled there;

2. the SSCRA does not apply to dependents, who may be treated as statutory residents and taxed on all income or taxed on income earned in the state;

3. the state may tax any nonmilitary compensation (such as income from a part-time job or rental property) a servicemember earns in the state;

4. the SSCRA apparently does not apply to retired pay—although there is no specific authority on this point;

5. the SSCRA does not prevent a state from taking into account the servicemember's military income in determining the marginal tax rate imposed on the spouse's, or the servicemember's nonmilitary, income [*United States v. Kansas*, 810 F.2d 935 (10th Cir. 1987)]; and

6. it is unclear to what extent a state may require a servicemember to comply with administrative requirements (e.g., refund procedures, statutes of limitation, etc.) as a prerequisite to recognizing rights under the SSCRA.

C. Taxation of nonresidents' pensions ("source" taxes). Some states impose income tax on the pension income of nonresidents (also known as a "source" tax). For example, California will tax pension income of taxpayers who were employed in California, but retire and move to another state. California and 8 or 10 other states take the position that they can tax such taxpayers' pensions because the pensions were earned in the state of employment and, therefore, are "sourced" there for tax purposes.

Source taxes are generally not a problem for military personnel because the SSCRA precludes a state from "sourcing" military compensation to itself merely as a result of a member's assignment there. However, a state could impose a source tax on a percentage of the military retirement of a domiciliary who performed military duty in the state.

Nonetheless, states have few means of enforcing source taxes against military personnel. The states cannot compel the Federal Government to withhold taxes as they can private employers. Pursuant to 10 U.S.C. § 1045, Defense Finance Centers will withhold state tax for only one state at a time and only as designated by the retiree.

3903 STATE SALES, USE, AND PERSONAL PROPERTY TAX INFORMATION

A. SSCRA limitations on personal property taxes. State personal property taxes are generally imposed only on property which is physically present in the state. The SSCRA provides that personal property will not be deemed to be located in the state by reason of a military member's assignment. Accordingly, military members are usually exempt from paying state personal property taxes.

This general rule does not apply in the following circumstances:

1. As with income taxes, the immunity from personal property taxes does not extend to taxation by the member's state of domicile. Property which is physically present in the member's domicile (whether or not accompanied by the member) will be subject to taxation.

2. The SSCRA does not preclude states from imposing taxes on property owned by dependents. Property owned jointly by a member and nonmember is probably subject to full taxation, although there is no specific authority on this point.

3. The SSCRA prohibits states from imposing property taxes or the equivalent (e.g., "license fees," "excise taxes," etc.) on motor vehicles. States can

require members to pay a fee for registering a vehicle if the fee merely offsets administrative costs and is not a general revenue-raising measure (i.e., a tax). Fees which are measured by the value of the car are generally considered to be prohibited taxes. *California v. Buzard*, 382 U.S. 386 (1966). The SSCRA similarly does not preclude a state from requiring servicemembers to register their cars locally or to get a local driver's license. Under their own laws, most states exempt members from these requirements, but are not required to do so.

4. The SSCRA does not exempt servicemembers from paying real property taxes; however, mobile homes which are truly mobile (not affixed to the land) are personal, not real, property—regardless of the state's classification. *Snapp v. Neal*, 382 U.S. 397 (1966).

5. Servicemembers who lease cars may be required to pay personal property taxes if the contract so provides. The tax is imposed on the owner of the car, the lessor, who is not protected under the SSCRA. The member cannot transfer SSCRA immunity to the lessor; the member can contractually agree to reimburse the lessor for the taxes that he would not have to pay if he legally owned the car.

6. The SSCRA does not prevent states from requiring service-members to pay a use tax on their property (*see* below).

B. Sales and use taxes. State sales taxes are normally imposed on transactions occurring within the state (unless the merchandise is shipped to an address in another state.) The incidence of the tax is on the purchaser; that is, the purchaser is primarily liable for the tax. However, such laws routinely impose a duty to collect the tax, and secondary liability for its payment, on the seller.

Most states which have sales taxes also have complementary use taxes to deter circumvention of their sales tax laws. Use taxes are imposed when property purchased out-of-state is brought into the state. The rate is ordinarily the same as the state's sales tax rate, and credit is accorded for sales tax paid to the state of purchase. Unlike sales taxes, use taxes present an enforcement problem for the state because it cannot constitutionally impose a duty to collect the use tax on an out-of-state seller who lacks nexus with the taxing state. Despite the difficulty of enforcement, a state will sometimes aggressively pursue taxpayers for use taxes (e.g., by auditing the records of trucking companies that transport high-cost merchandise into the state).

Sales and use tax applicable to automobiles may be payable when the vehicle is registered rather than when it is purchased. Therefore, no tax may be due to the state of purchase if the vehicle will be registered in another state. Some states, such as New Jersey, will permit domiciliary servicemembers living outside the state to

register a car without paying use tax—which will be payable only when the car is brought into the state.

The Supreme Court has held that, unlike the annually recurring personal property tax, the SSCRA does not prohibit imposition of state sales and use taxes which are payable only at the time of the transaction or when the property is first brought into the state. *Sullivan v. United States*, 395 U.S. 169 (1969).

C. Federal contractors' payment of state property, sales, and use taxes

1. Federal litigation contesting state taxes on contractors. The Federal Government is immune from taxation by the states. *McCulloch v. Maryland*, 4 Wheat. 316 (1819). With minor exceptions (one of which is discussed below), this immunity extends to instrumentalities of the government such as nonappropriated fund activities [*United States v. Mississippi*, 421 U.S. 599 (1975)], but is limited to ***direct*** taxation of the government and its instrumentalities. (Informal organizations like command social committees are not government instrumentalities for this purpose.) There is no bar to imposition of state taxes (usually sales, use, or property taxes) on government contractors, even though the taxes will ultimately be paid or reimbursed by the Federal Government. *Alabama v. King & Boozer*, 314 U.S. 1 (1941). Governmental immunity extends to a contractor only if the contractor is directly performing a governmental function or "stands in the shoes" of the government—a very difficult standard to meet. *United States v. New Mexico*, 455 U.S. 720 (1982).

Nonetheless, the United States has standing to file suit, and often does so, if a state tax is improperly imposed on a contractor who will pass on the cost to the government under a "cost-plus" contract. Since *New Mexico* severely restricted the extension of governmental immunity to contractors, grounds to contest taxation most often involve interpretation and application of state law.

The U.S. Supreme Court decision in *United States v. California*, 113 S.Ct. 1950, 123 L.Ed.2d 655 (1993), dealt another severe blow to much litigation brought by the United States to recover illegal state taxes imposed on contractors. The Court held that the United States could not sue a state for a refund of taxes imposed on a contractor under an independent federal common law cause of action for "money had and received," on which the United States had frequently based such claims. The United States was a mere subrogee of the contractor; if the contractor's rights have been extinguished—for example, for failing to meet a statute of limitations, raise certain arguments or pursue certain remedies, or by executing a release—the United States is similarly barred.

2. State taxes on contractors' "possessory interests." Some states impose a tax on a contractor's "interest" in federal property. That is, if a contractor

is using federal property in performing its contract, the contractor may be deemed to have a taxable interest in the property. States may tax the value of this interest, even though they may not directly tax the Federal Government as owner of the property. While possessory interest taxes occasionally have been held unconstitutional as disguised direct taxes on the Federal Government [*see, e.g. United States v. Nye County*, 938 F.2d 1040 (9th Cir. 1991)], states are becoming more adept at properly structuring their taxes to avoid this problem.

Older cases upholding possessory interest taxes have generally involved traditionally recognized property interests (such as contractor leases of federal property). Recently, courts are taking an increasingly broad view of what is a taxable contractor interest. For example, in *United States v. County of San Diego*, 965 F.2d 691 (9th Cir. 1992), the court upheld a tax on a contractor that conducted research for the government in atomic fusion using a federally owned experimental device. The contractor's "interest" in the property was largely its resulting accumulation of experience and technical expertise.

3. The Buck Act. The Buck Act, 4 U.S.C. § 104 *et seq.*, permits states to impose income, sales, or use taxes on individuals and entities residing or doing business on federal enclaves—including areas of exclusive federal jurisdiction—while preserving the immunity of the government and its instrumentalities. Therefore, contractors, as well as other private businesses operating on base (such as Navy Exchange concessionaires) are not immune to state taxation of their operations. Similarly, states may tax servicemembers and their dependents who reside on base (if permitted under the SSCRA). The Buck Act does not address personal property taxes; therefore, states may be precluded from imposing those taxes on property located in areas of exclusive federal jurisdiction. *Surplus Trading Co. v. Cook*, 281 U.S. 647 (1930).

The Buck Act is a limited waiver of governmental tax immunity. Gasoline or other motor vehicle fuels sold by exchanges, commissaries, ships' stores, etc., are subject to state taxes which are "measured by sales, purchases, storage, or use," unless the fuel is for the exclusive use of the United States. 4 U.S.C. § 104.

The Buck Act also provides that the states "shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area." 4 U.S.C. § 105(a); similarly, 4 U.S.C. § 106(a). Therefore, it provides authority for a state to audit or inspect taxable entities on federal installations, and such requests should generally be honored. On the other hand, the Buck Act imposes no affirmative obligation to assist the state authorities (such as by compiling or providing documents).

D. Federal travelers' payment of state sales and hotel occupancy tax. Federal employees on official travel are required to pay state sales and hotel occupancy taxes incurred in connection with their travel. Federal law does not provide an exemption from these taxes when the traveler pays them directly, even if the traveler will be reimbursed by the government. As with taxes imposed on contractors, federal immunity applies only if the government enters into the taxable transactions directly.

On the other hand, some states, notably Texas and Pennsylvania, may exempt federal travelers from sales or hotel taxes. Therefore, federal travelers may be provided with an exemption form or certificate which states that the traveler is on official Federal Government business—for whatever effect it may have.

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CHAPTER FORTY

SERVICEMEMBER PROTECTIONS

4001 SOLDIERS' AND SAILORS' CIVIL RELIEF ACT (SSCRA)

For a detailed discussion of the provisions of the SSCRA, 50 U.S.C. App. §§ 501-591 (1982), see SSCRA Guide of Judge Advocates Generals School, U.S. Army and Chapter 8 of the Naval Justice School *Civil Law Study Guide* or download the Professional Development Module (PDP) on the subject from the NJS electronic bulletin board (EBB).

A. Eviction and distress. The 1991 amendments modified 50 U.S.C. App. § 530 (protection from eviction, except by court orders) by striking $150.00 and substituting $1,200.00—with a future tie to BAQ(D) and VHA—recognizing that rents have increased somewhat. The amendment applies to evictions or distress begun after July 31, 1990.

B. Extension of power of attorney protection. 50 U.S.C. App. § 591 (extension of power of attorney executed by servicemember who is subsequently missing in action) was amended to include powers of attorney that expire after July 31, 1990.

1. Section 591 provides an automatic extension of a power of attorney for the period a servicemember is missing if it:

a. Was executed by a person in the military service who is now in a missing status;

b. designates a spouse, parent, or other named relative to be the attorney in fact; and

c. expires by its own terms after the person entered a missing status.

2. If a power of attorney is executed after the effective date of the SSCRA Amendments of 1991, and "by its terms clearly indicates that the power granted expires on the date specified," this provision probably will not act to extend the power of attorney.

C. Exercise of rights under the Act not to affect certain future financial transactions. This is a new section (108) in Article I of the SSCRA and likely will be codified at 50 U.S.C. App. § 518.

1. This provision prohibits retaliatory action against those who invoke the SSCRA. Under this amendment, an application under the provisions of the SSCRA for a stay, postponement, or suspension of any tax, fine, penalty, insurance premium, or other civil obligation or liability cannot be the basis for certain actions. Specifically, lenders cannot then determine that the servicemember is unable to pay an obligation or liability.

2. With respect to a credit transaction between servicemembers and creditors, creditors cannot then deny or revoke credit, change the terms of an existing credit arrangement, refuse to grant credit in the terms requested, submit adverse credit reports to credit reporting agencies or, if an insurer, refuse to insure a servicemember. This amendment should be broad enough to pick up exercise of rights under section 526 limiting interest to six percent.

D. Statute of limitations. The Supreme Court recently decided a major SSCRA case: *Conroy v. Aniskoff*, ___ U.S. ___, 113 S.Ct. 1562, 123 L.Ed.2d. 229, 1993 WL 89113 (31 Mar 93). In re Robbins Company, *Alice Anderson v. Dalkon Shield Claimants Trust*, 996 F.2d. 716.

1. The case deals with section 205 of the SSCRA, 50 U.S.C. App. § 525, a section that tolls the statute of limitations and real property redemption periods for the period of military service.

2. Conroy was an active-duty Army colonel whose Maine property was foreclosed for nonpayment of taxes. The land was sold to a lumber company who entered and removed trees.

3. The Supreme Court declared:

a. That the SSCRA applies to all servicemembers, not just those who are suddenly called to service from civilian life; and

b. that the section does not, as some other sections do, require a showing of prejudice caused by military service.

4002 VETERANS' REEMPLOYMENT RIGHTS

The 1991 amendments changed 38 U.S.C. § 2024(g) to leave no doubt that reemployment rights for Reserve Component servicemembers called to active duty under 10 U.S.C. § 673b are available regardless of length of active service. The Veterans' Reemployment Rights Law (VRRL) applies to all employers, regardless of the organization's size. It protects the job and benefits of a servicemember participating in military training or giving up a civilian job to enter active duty, whether voluntary or involuntary, in peacetime or wartime. Members are entitled to return to their civilian jobs and receive pay raises, promotions, pension credit, and other seniority benefits as if they had been continually employed, provided certain eligibility criteria are met. If a member is unable to settle a disputed reemployment case, the U.S. Attorney must provide legal representation at no cost and on a priority hearing basis.

A. Recall for training. Members called to active or inactive duty for training only must "request" a leave of absence from their civilian employer. The employer cannot refuse.

1. The employer is not required to pay the servicemember for time spent on military obligations, but cannot require the use of sick leave or earned vacation.

2. The member-employee must return to their civilian job at the first scheduled shift following the completion of military duties.

3. The member is entitled to be put back to work immediately without loss of seniority, status, or rate of pay. Credit towards pension benefits is not interrupted by military service.

B. Recall to extended active duty. If called to extended active duty, the member is not required to request a leave of absence from the employer. Protection under the VRRL applies if:

1. The member held a job that was "other than temporary";

2. the member left this job for the purpose of entering active duty;

3. the period of active duty is less than four years;

4. the member is later discharged under honorable conditions; and

5. the member applies for reemployment within the applicable time limit.

C. Protections. The VRRL provides the following protections:

1. The member is entitled to the former job with the same seniority, benefits, and pay—together with any promotion or raise the member could reasonably have expected had he remained continuously in the civilian job.

2. The employer is required to offer disabled veterans the "nearest approximation" of the job the member could have reasonably expected with continuous employment.

3. The member is protected from being discharged by the employer for a certain time period following active duty, unless the employer can show misconduct. The protected time period varies with the time served on active duty.

D. Additional information. For additional details, contact the Veterans' Employment and Training Service, Department of Labor, at (202) 523-8611.

4003 VETERANS' BENEFIT ACT OF 1992 (BENEFITS FOR SURVIVORS OF DECEASED PERSONNEL)

A. Dependency and Indemnity Compensation (DIC) is money paid monthly to the survivor's spouse after the servicemember dies on active duty. For each child under the age of 18, the spouse is paid an additional amount.

-- Impact. DIC formerly paid the surviving spouse a monthly income based upon the servicemember's rank. The higher the rank, the larger the DIC payment. Under the Veterans' Benefit Act of 1992, DIC payments will be fixed at $750.00 per month for all spouses effective January 1993.

a. For surviving spouses of servicemembers in grades E-1 through E-6, DIC is ***increased***. For spouses of servicemembers in grades E-7 and above, all warrant officers and all commissioned officers, the new DIC payments represent a ***decrease*** in monthly benefits.

b. Supplements for each dependent child will increase from $71.00 to $100.00 per month effective January 1993.

B. Servicemen's Group Life Insurance (SGLI) is group life insurance available to active-duty servicemembers and certain members of the Ready Reserve and Retired Reserve.

-- Impact. This Veterans' Benefits Act allows all servicemembers up to $100,000 of additional SGLI—for a total availability of $200,000.

a. For grades E-7 through O-10, additional SGLI will be necessary to ***offset the reduction*** in the no-cost DIC benefit.

b. The cost of SGLI remains the same at 80 cents per $10,000. (SGLI must be purchased in $10,000 increments.)

c. Enrollment is ***not automatic***. Servicemembers have 120 days after December 1, 1992, to enroll. After March 30, 1993, servicemembers must pass a physical to qualify for increased SGLI.

C. Veterans' Group Life Insurance (VGLI) is group life insurance available to veterans who participated in the SGLI program.

-- Impact. The amount of VGLI available to members leaving the service has been increased.

a. Instead of one five-year block of insurance, VGLI will be renewable and convertible in five-year increments.

b. VGLI cost will depend on the veteran's age at VGLI election.

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CONSUMER LAW

4101 INDEBTEDNESS

A. References

1. MILPERSMAN, art. 6210140
2. LEGADMINMAN, ch. 7
3. PERSMAN 8-F
4. Hatch Act Reform Bill of 1993 (Pub. L. No. 103-94)
5. Section 5520a of Title 5, U.S.Code
6. Section 659 of Title 42, U.S.Code
7. Vol. 59, Red. Reg., pp. 21713-20 (26 Apr. 94)
8. DOD Directive to be published at 32 C.F.R., Part 50

B. Policy. Debts between members and creditors are private matters. The armed forces will act neither as debt collector nor safe haven for those seeking to evade just obligations. The Navy and Marine Corps will, however, refer ***qualified correspondence*** to the member. In the Coast Guard, the commanding officer (CO) refers all correspondence to the member and responds to the creditor within 30 days, and ensures the member does also. The CO should note any good-faith dispute in his reply.

C. SJA caution. Providing legal assistance to members of the SJA's command jeopardizes a conflict of interest if the CO asks for advice or action on the matter from the command perspective. If an SJA has provided individual assistance to a member and the CO requests advice or action, the SJA must recuse himself / herself from acting as SJA on such matters.

D. Debts reduced to a judgment. The Hatch Act Reform Bill of 1993 was signed on October 6, 1993. The bill included a provision allowing for involuntary

allotment of military pay and garnishment of federal leave pay for routine indebtedness. Debts reduced to judgments by court or state administrative procedures may be submitted to the military for involuntary allotment in a manner similar to involuntary allotments for child support judgments. Implementing instructions have been issued in references 5-8. Requests for involuntary allotments/ garnishment of federal civilian pay are made to civilian pay centers and are based upon garnishment orders. Requests for involuntary allotments of military pay do not require garnishment orders, but must be submitted on form through the service finance center for input from the member's CO and back to the finance center for approval / disapproval of the request.

E. Qualified correspondence. In the Navy and Marine Corps, qualified correspondence is that which does not have to be reduced to judgment, but which:

1. Demonstrates compliance with the Federal Truth in Lending Act and DOD Standards of Fairness (DOD Directive 1344.9); or

2. involves types of credit ***not*** subject to Truth in Lending or DOD Standards of Fairness (e.g., utility bills, business debts, revolving credit arrangements); and

3. [***Navy only***] correspondence involving types of credit where compliance with Truth in Lending and DOD Standards of Fairness has been waived per MILPERSMAN, art. 6210140.8: debts less than $50.00; real estate transactions; co-signers; etc.

F. Debt collectors. The Federal Fair Debt Collection Practices Act, 15 U.S.C. 1692 *et.seq.*, prohibits professional debt collectors (collection agencies) from contacting employers (e.g., CO's). This law prohibits debt collectors from using any means of interstate commerce, such as the mail, to contact a debtor's employer (except for the purpose of confirming or collecting information concerning the debtor's location) unless the debt collector is acting with the consent of the debtor.

G. Processing indebtedness complaints

1. Prior to referral to the member, the debt must be accompanied by:

a. A court judgment for the debt, direct communication to the command, or a request for involuntary allotment; or

b. a certificate of compliance that the transaction was made in accordance with the Truth in Lending Act and the Standards of Fairness and a statement of Full Disclosure (*see* Marines, Figure 7-2, LEGADMINMAN).

2. Requests for involuntary allotments based on judgment debts shall be processed through the pay centers (*see* references 5 and 6).

3. If the complaint of indebtedness is made properly, the legal officer confronts the member. If the member acknowledges the debt as good, payment is recommended. Advise the member that failure to comply may result in adverse consequences similar to those listed above for nonsupport (i.e., disciplinary or administrative measures for failure to pay just debts). If a genuine dispute exists, refer the member to legal assistance. The command should send an acknowledgement to the creditor indicating the referral of the debt to the member if the letter of indebtedness complies with service regulations. (Sample letter 3 in MILPERSMAN, art. 6210140.3 or Figure 7-4, LEGADMINMAN.)

4. If the debt is questionable (i.e., no indication of a judgment or compliance with Truth in Lending or Standards of Fairness), send MILPERSMAN sample letter 2 or Figure 7-5, LEGADMINMAN—provides information and sample letters which direct the creditor on the proper course of action. If the creditor resubmits the debt without the required forms indicating compliance, send MILPERSMAN sample letter 4—with a copy to the Chief of Naval Personnel.

4102 BANKRUPTCY

A. Policy. The services neither encourage nor discourage the filing of a petition in bankruptcy. 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; CG PERSMAN 8-F-2j.

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. In all likelihood, the member will need civilian counsel.

4103 CONSUMER PROTECTION

A. References

1. Consumer Credit Protection Act, 15 U.S.C. §§ 1601-1693

2. Truth in Lending Act, 15 U.S.C. §§ 1601-1667

3. Fair Credit Billing Act, 15 U.S.C. § 1666

4. Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681t

5. Equal Credit Opportunity Act, 15 U.S.C. § 1691

6. Fair Debt Collection Practices Act, 15 U.S.C. § 1692

7. Electronic Fund Transfer Act, 15 U.S.C. § 1693

8. Fair Credit and Charge Card Disclosure Act of 1988, Pub. L. No. 100-583, 102 Stat. 2960 (to be codified at 15 U.S.C. §§ 1610, 1637, 1640, 1647)

9. Home Equity Loan Consumer Protection Act of 1988, Pub. L. No. 100-709, 102 Stat. 4725 (to be codified at 15 U.S.C. §§ 1637, 1647, 1665)

10. Equal Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619

11. Women's Business Ownership Act of 1988, Pub. L. No. 100-533, 102 Stat. 2689

12. Regulation Z, 12 C.F.R. Part 226

13. Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691

14. Regulation B, 12 C.F.R. § 202 [as amended by Federal Reserve Board, with mandatory compliance beginning April 1, 1990, 54 Fed. Reg. 50,514 (Dec. 7, 1989)]

B. Truth in Lending Act (TILA)

1. Scope. Under 15 U.S.C. § 1602, TILA applies to:

a. Consumer credit transactions:

(1) Must be conducted for personal, family, or household purposes; and

(2) must involve creditors who regularly extend consumer credit which is payable in more than four installments or for which the payment of a finance charge may be required.

b. *ALL* credit and charge card transactions.

c. Persons who provide applications and solicitations for open-end home equity loan plans to consumers.

d. Persons who provide applications and solicitations for open-end consumer credit and charge cards.

2. 12 C.F.R. § 226, Supplement I, § 226.1(c) applies TILA and Regulation Z to those who extend consumer credit to residents (including resident aliens) of any state or territory of the United States.

a. If the account is located in the United States and credit is extended to a U.S. resident, TILA and Regulation Z apply.

b. This is true regardless of whether the advance or purchase takes place in the United States or whether the entity extending credit is chartered or based in the United States.

3. Credit card holders are liable for unauthorized use of the card only up to $50.00. 15 U.S.C. § 1643.

a. *See Transamerica Insurance Co. v. Standard Oil Co.*, 325 N.W.2d 210 (N.D. 1982) (company liable for unauthorized charges in excess of $50.00 when company continued to pay monthly bills).

b. Check monthly billing statements.

4. TILA is inapplicable to:

a. Creditors who extend credit primarily for business purposes or other purposes which are otherwise regulated, such as securities brokers. 15 U.S.C. § 1603.

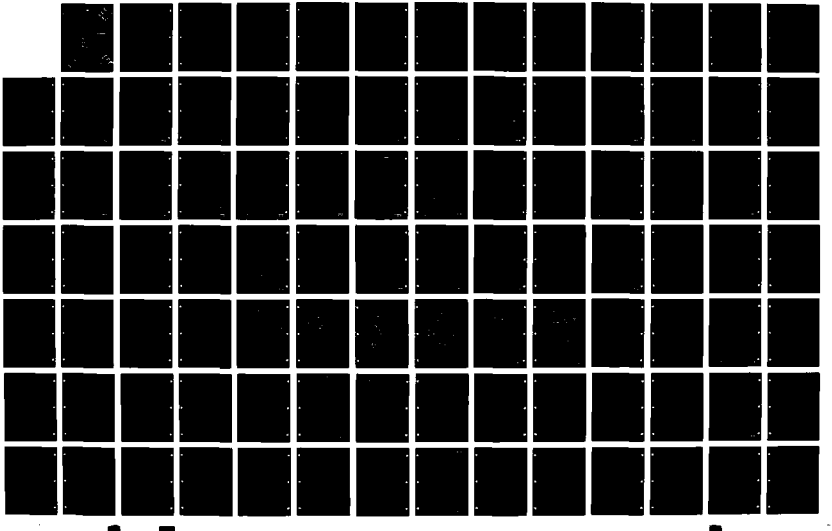
b. "Credit transactions, other than those in which a security interest is or will be acquired in real property, or in personal property used or expected to be used as the principal dwelling of the consumer, in which the total amount financed exceeds $25,000." 15 U.S.C. § 1603.

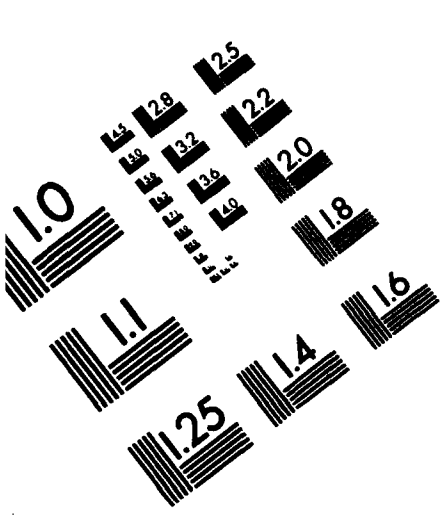
5. Rescission

a. Other than door-to-door sales, the remedy of rescission is available only with respect to transactions involving nonpurchase-money security interests in the consumer's principal dwelling (e.g., second mortgage "equity" loans).

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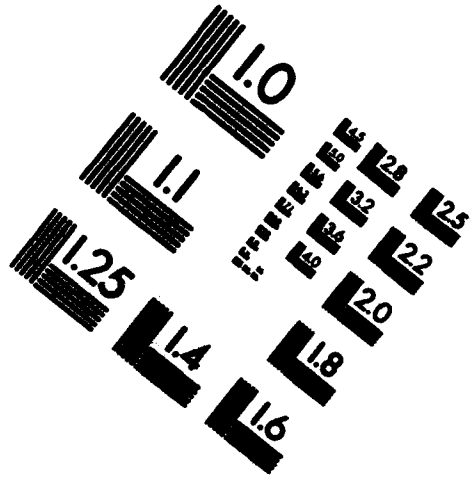
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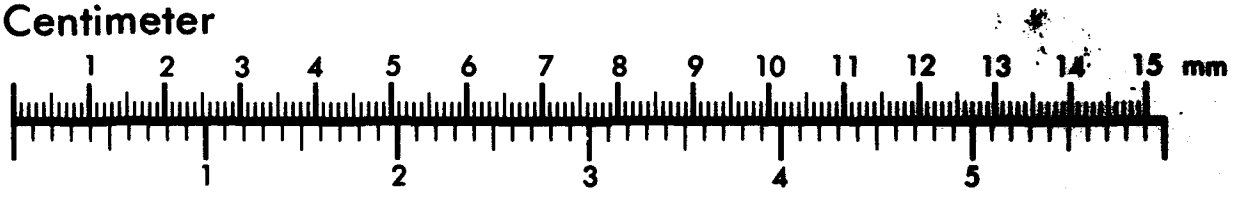


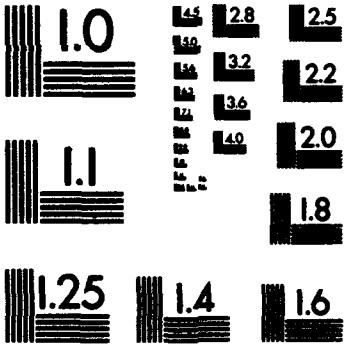


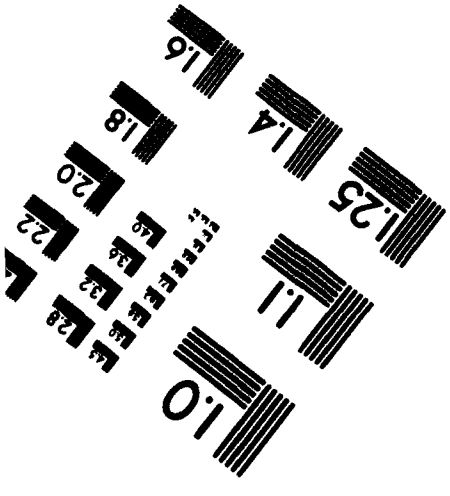


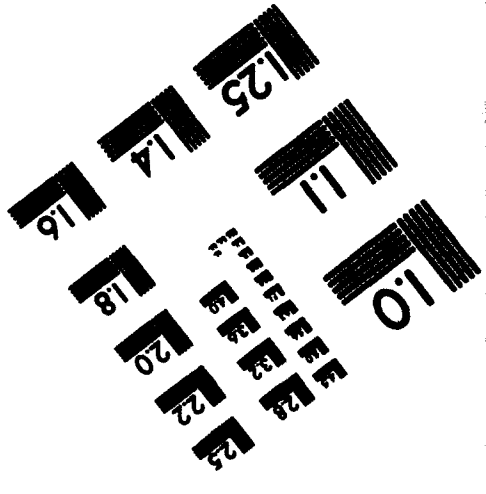
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b. If the creditor makes the required "material disclosures" when such a transaction is consummated, the consumer may rescind the transaction until midnight of the third business day following consummation of the transaction or delivery of the rescission forms and material disclosures, whichever is later.

c. If the creditor fails to make the "material disclosures," the consumer may rescind the transaction up to three years from the date of the transaction or upon the sale of the house, whichever occurs first.

C. Electronic Fund Transfer Act (EFTA)

1. "Electronic fund transfer" means any transfer of funds—other than a transaction originated by check, draft, or similar paper instrument—which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. This includes, but is not limited to:

a. Point-of-sale transfers;

b. automated teller machine transactions;

c. direct deposits or withdrawal of funds; and

d. transfers initiated by telephone.

15 U.S.C. § 1693(a).

2. Consumer liability for unauthorized transfers

a. Maximum liability of $50.00 if consumer reports within two business days of discovery.

b. Maximum liability of $500.00 if consumer fails to report within two business days of discovery.

c. Unlimited liability for all transactions made 60 days after transmittal of a periodic statement showing unauthorized electronic fund transfer.

3. Waiver. The consumer cannot waive these limitations or any other protections provided by the Act.

4. Error resolution. Written or oral notice within 60 days of statement transmittal is required. Notice should include the consumer's name and

account number, the consumer's belief that an error exists and the amount of the error, and the reasons for the consumer's belief.

5. Institution action. Upon notification, the institution has ten business days (20 days if the consumer is overseas) to investigate and report the results of the investigation to the consumer. The institution, at its option, can extend the report period by provisionally recrediting the account within ten business days of notice. Recrediting gives the bank 45 days (90 days if consumer is overseas) to investigate and report the results of the investigation to the consumer. Following completion of the investigation, the institution shall:

a. Correct any errors within one business day.

b. If no errors are found, so notify the consumer within three business days and forward copies of all documents relied upon if requested by the consumer.

6. Remedies. Remedies include:

a. Actual damages;

b. statutory damages of $100.00 to $1,000.00;

c. court costs and reasonable attorney's fees;

d. criminal penalties of up to one-year imprisonment and a $5,000.00 fine for knowing and willful noncompliance;

e. criminal penalties of up to ten years' imprisonment and a $10,000.00 fine for violations affecting interstate or foreign commerce; and

f. treble damages, in some circumstances (e.g., if the institution knowingly and willfully concludes that no error exists contrary to the available evidence).

D. Fair Credit Billing Act (FCBA). The purpose of the FCBA is to reduce the volume of consumer complaints by encouraging cooperation between consumers and creditors, by clarifying the consumer's rights and obligations, and by establishing dispute resolution procedures.

1. Applicability. The FCBA applies to open-end consumer credit transactions involving billing errors, including:

a. Bills for transactions that never occurred;

b. transactions conducted by unauthorized people;

c. bills for erroneous amounts;

d. bills for goods / services that were not delivered or not accepted;

e. failure to properly apply credit to accounts;

f. computation errors; and

g. bills sent to incorrect addresses.

2. Procedures

a. Consumer must notify creditor of error in writing within 60 days of creditor's transmittal of bill to consumer.

b. Creditor must acknowledge the complaint or resolve the error within 30 days of receipt.

c. Not later than two billing cycles (but in no event later than 90 days) after the creditor's receipt of the debtor's notice of error, the creditor must either:

(1) Make appropriate corrections in the debtor's account; or

(2) conduct an investigation and send the debtor a written explanation of why the creditor believes the debtor's account was correctly shown in the statement.

d. Pending resolution of a billing dispute, a creditor operating an open-end consumer credit plan may not, prior to sending the written explanation or clarification to the debtor: take any collection action; restrict or close the account in issue; or report or threaten to report adversely on the debtor's credit rating based on the disputed amount.

e. The creditor may, however, apply the unpaid amount against the debtor's credit limit.

3. Remedies. Remedies available are similar to those under the EFTA above. If the creditor violates the billing error resolution procedures, the consumer recovers from the creditor the disputed amount and any finance charges

thereon up to $50.00. If the billing issue remains unresolved, the consumer's claims and defenses can be asserted directly against the credit card issuer if:

a. The consumer has made a good-faith effort to resolve the problem with the individual honoring the card;

b. the amount of the initial transaction exceeds $50.00;

c. the initial transaction was in the same state as the cardholder's designated address or within 100 miles of such address; and

d. the merchant is not the same as or controlled by the card issuer.

E. Fair Credit Reporting Act (FCRA). The purpose of the FCRA is to ensure that the credit reports on which the banking industry depends are current, accurate, and fair and that the reporting agencies respect the consumer's right to privacy.

1. Consumer Reporting Agencies (CRAs). CRAs are those entities that "regularly engage in . . . the practice of assembling or evaluating consumer credit information on consumers for the purpose of furnishing consumer reports to third parties." A CRA is not a creditor; FCRA does not regulate reports by creditors to CRA's.

2. Release. CRA's may furnish consumer reports only:

a. In response to a court order;

b. with the consumer's consent; or

c. to a person who the CRA "has reason to believe" intends to use the report:

(1) In connection with the consumer's credit transaction;

(2) for employment purposes;

(3) for the consumer's insurance;

(4) in connection with the consumer's eligibility for a license or other government benefit; or

(5) in connection with the consumer's business transaction where the user has a legitimate business need.

3. Obsolete information. Unless otherwise specified, the following information is considered "obsolete" and cannot be included in a CRA's consumer report:

a. Paid tax liens that antedate the consumer report by more than seven years;

b. accounts placed for collection, or charged to profit and loss, that antedate the consumer report by more than seven years;

c. records of criminal arrest, indictment, or conviction which, from the date of disposition, release, or parole, antedate the consumer report by more than seven years;

d. suits and judgments which, from the date of entry, antedate the consumer report by more than seven years or until the governing statute of limitations has expired, whichever is the longer period; or

e. bankruptcy adjudications which antedate the consumer report by more than ten years.

4. Using "obsolete" information. "Obsolete" information ***can*** be included in the consumer report ***if*** the report is intended for use involving:

a. The consumer's participation in a credit transaction of $50,000.00 or more;

b. issuance of life insurance coverage on the consumer of $50,000.00 or more; or

c. employment of the consumer at an annual salary of $20,000.00 or more.

5. Consumers' rights

a. Upon request, the consumer can obtain (15 U.S.C. § 1681g):

(1) A summary of the nature and substance of the information in the CRA's files; and

(2) the identities of those who have received the report:

(a) Within the past two years for employment purposes; or

(b) within the past six months for other purposes.

b. If the consumer disputes the completeness or accuracy of the report, the CRA must reinvestigate and record the current status of the disputed information unless the CRA has reason to believe that the dispute is frivolous or irrelevant. 15 U.S.C. § 1681i.

c. If the investigation does not resolve the dispute, the consumer may file a ***brief*** statement. In future reports, the CRA must note that the entry is disputed by the consumer and provide the consumer's statement.

d. If the investigation reveals that the disputed entry is inaccurate or can no longer be verified, the CRA must delete the information.

e. Following either correction of the report or receipt of a consumer's statement in rebuttal, the CRA must furnish a copy of the annotated report (and consumer's statement, where appropriate) to "any person specifically designated by the consumer" who has received the report:

(1) Within the past two years for employers; or

(2) within the past six months for others.

6. Remedies

a. Civil liability for ***willful*** noncompliance: actual damages, punitive damages, and court costs and reasonable attorney's fees if the consumer prevails.

b. Civil liability for ***negligent*** noncompliance: actual damages plus court costs and reasonable attorney's fees if the consumer prevails.

c. Criminal penalties for obtaining information under false pretenses: maximum penalty of $5,000.00 fine and imprisonment for one year.

7. Current problems with the FCRA. Creditors send reports to CRA's on a monthly basis, not just when adverse information occurs. Creditors report minor as well as substantial adverse information. Adverse information, even of a minor nature, stays in credit records for seven years. Consumers are not notified

when creditors send in reports to CRA's. The FCRA does not require accurate credit reports; CRA's must only follow "reasonable procedures" to avoid errors. The definition of "legitimate business need" for release does not protect consumers from improper releases. Although the CRA must give consumers the nature and substance of information in its files, it has the latitude to refuse to give consumers copies of their credit files. Creditors may develop lists of qualifications for credit and send the lists to CRA along with a list of names of consumers they want checked for credit-worthiness. The FCRA has no provision that allows a consumer to dispute an item of information in a credit report with the creditor who furnished the information to the CRA in the first place.

8. CRA addresses and phone numbers

a. Equifax

P.O. Box 4081
Atlanta, GA 30302
(404) 885-8000

b. Transunion

Transunion Disclosure Center
760 West Sproul Rd
Springfield, PA 19064
(215) 690-3248

c. TRW credit data

TWR Credit Bureau
P.O. Box 2106
Allen, TX 75002
(214) 390-3000

F. Cooling-off period for door-to-door sales. The FTC promulgated the home solicitations trade practices rule (16 C.F.R. Part 429) because it believed that door-to-door sales were especially prone to fraud and predatory practices. The rule permits a consumer to withdraw unilaterally from contracts resulting from door-to-door solicitations.

1. "Door-to-door sale" defined. A door-to-door sale is:

a. A sale, lease, or rental of consumer goods or services;

b. with a purchase price of $25.00 or more;

c. in which the seller or his representative personally solicits the sale, including those in response to or following an invitation by the buyer; and

d. the buyer's agreement or offer to purchase is made at a place other than the place of business of the seller. 16 C.F.R. § 429.1, Note 1(a).

2. Door-to-door sales under 16 C.F.R. Part 429 do ***not*** include:

a. Transactions conducted and consummated entirely by phone;

b. transactions in which the buyer has initiated the contact and the goods or services are needed to meet a bona fide immediate personal emergency of the buyer, and the buyer furnishes the seller with a signed statement so stating;

c. transactions in which the buyer has contacted the seller and specifically requested that the seller visit the buyer's home to perform repair or maintenance work on the buyer's personal property;

d. sales of automobiles at public auctions and tent sales if the seller has at least one permanent place of business [53 Fed. Reg. 45455 (Nov. 10, 1988)]; and

e. sales of arts and crafts at fairs, shopping malls, civic centers, community centers, and schools [53 Fed. Reg. 45455 (Nov. 10, 1988)].

3. The Federal Trade Commission has determined that it is a deceptive trade practice if, among other practices, a door-to-door sales representative (16 C.F.R. § 429.1):

a. Fails to furnish the buyer with a contract informing the buyer of the right to cancel the transaction within three business days, where the contract is in the same language as that in which the sale was negotiated;

b. fails to furnish the buyer an easily detachable cancellation form in the language in which the sale was negotiated, stating the seller's name and address and the date by which the transaction may be canceled (this can be a copy of the contract as long as it contains the cancellation language);

c. fails to inform the buyer orally of the right to cancel or misrepresents the buyer's right to cancel; or

d. fails to honor a valid notice of cancellation and to refund any payments made within ten days of the cancellation.

4. Buyer's responsibilities to effect cancellation:

a. Mail or deliver to the seller a signed and dated copy of the notice of cancellation within three business days of the transaction;

b. make any goods delivered by the seller available to the seller at the buyer's residence in substantially as good condition as when received, or comply with the seller's instructions regarding the return of the goods at the seller's risk and expense;

c. if the buyer fails to make the goods available to the seller, the buyer remains liable for performance of all obligations under the contract; and

d. if the seller fails to collect any goods delivered to the buyer within 20 days of the date of the notice of cancellation, the buyer may retain or dispose of the goods without any further obligation.

5. Remedies

a. Rescission (for any reason or no reason) during the three-day cooling-off period. The consumer has an automatic right to rescind such contracts by midnight of the third business day after the date of the transaction to cancel. Sundays and federal holidays are not included within the three-day cancellation period.

b. Otherwise, for failure to comply with disclosure requirements:

(1) Treatment as an unfair or deceptive trade practice under state law. State remedies may include rescission of the contract.

(2) Treatment under state laws respecting door-to-door sales, where appropriate. State remedies may include rescission of the contract.

(3) Look to state law and argue rescission beyond three business days when notice to rescind was not given or was inadequate.

6. Effecting cancellation. Cancellation is effected by:

a. Mailing to the seller the signed and dated notice of cancellation provided by the seller at the time of the sale;

b. sending the seller any other written notice; or

c. sending the seller a telegram.

G. Equal credit opportunity. The ECOA, Regulation B, and the Women's Business Ownership Act prohibit discrimination against credit applicants at any stage of a credit transaction on a prohibited basis.

CHAPTER FORTY-TWO

PRACTICE AIDS

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CHAPTER FORTY-TWO

PRACTICE AIDS

SAMPLE LETTER TO CREDITOR ON INSTALLMENT CONTRACT

(DATE)
(YOUR NAME)
(YOUR ADDRESS)

(CREDITOR'S NAME)
(CREDITOR'S ADDRESS)

RE: (YOUR ACCOUNT NUMBER)

Dear Sir or Madam:

This is to advise you that I have been ordered to active service with the U.S. [Navy] [Marine Corps]. As a result of my call-up, and for its duration, I will lose my civilian employment income. My ability to repay the above-referenced debt as previously agreed has been materially affected by the temporary reduction in my income attendant to this situation. I will send what amounts I can during this period and resume normal payments upon my return. I estimate that my period of active service will end on _____, and I will notify you in writing upon that event.

I understand that the Soldiers' and Sailors' Civil Relief Act prohibits the exercise of a right or option to unilaterally rescind or cancel this contract or repossess any property for nonpayment of any installment due prior to or during the period of my military service. (50 U.S.C. App. § 531.) I also understand that the Act prohibits the imposition of a default judgment against me unless the court appoints an attorney to represent my interest. (50 U.S.C. App. § 520 and § 521.) Lastly, I am aware that the Act limits the rate of interest on this debt to six percent (6%) per annum while I am on active service. (50 U.S.C. App. § 526.) As used in the Act, the term "interest" includes service charges, carrying charges, renewal charges, fees, and any other charges (except bona fide insurance) in respect of such obligation or liability. My dependents are also provided protection under the Act if they co-signed on the obligation. Upon receipt of this request, please adjust my account to reflect the statutory six percent rate and notify me of the revised payment schedule.

Thank you for your understanding and cooperation in this matter. I regret any inconvenience this may cause.

Sincerely,

SAMPLE LETTER TO LANDLORD WHEN TERMINATING RENTAL

(DATE)
(YOUR NAME)
(YOUR ADDRESS)

(LANDLORD'S NAME)
(LANDLORD'S ADDRESS)

RE: [RENTAL OF (ADDRESS OF RENTAL PROPERTY)]

Dear Sir or Madam:

This is to advise you that I have been ordered to active service with the U.S. [Navy] [Marine Corps]. Due to this unexpected situation, and in order to carry out my orders, I must terminate my lease / rental agreement concerning the above-referenced property.

The Soldiers' and Sailors' Civil Relief Act provides for this action in Title 50 U.S.C App. § 534. According to this Section, month-to-month rentals will terminate thirty (30) days after the first date on which the next rental payment is due subsequent to the date when this notice is mailed. Using this formula, the lease will terminate on _____. I will vacate the premises by that date.

Please forward my security deposit and any prepaid rent covering periods after the termination of the lease to the following address: [INSERT FULL ADDRESS].

Thank you for your understanding and cooperation in this matter. I regret any inconvenience this may cause.

Sincerely,

SAMPLE LETTER TO MORTGAGE OR TRUST DEED HOLDER

(DATE)
(YOUR NAME)
(YOUR ADDRESS)

(CREDITOR'S NAME)
(CREDITOR'S ADDRESS)

RE: (YOUR ACCOUNT NUMBER)

Dear Sir or Madam:

This is to advise you that I have been ordered to active service with the U.S. [Navy] [Marine Corps]. As a result of my call-up, and for its duration, I will lose my civilian employment income. My ability to repay the above-referenced debt as previously agreed has been materially affected by the temporary reduction in my income attendant to this situation. I will send what amounts I can during this period and resume normal payments upon my return. I estimate that my period of active service will end on _____, and will notify you in writing upon that event.

I understand that the Soldiers' and Sailors' Civil Relief Act prohibits the sale, foreclosure, or seizure of property for nonpayment of any sum due under this obligation, or for any other breach of the terms of the contract, prior to or during the period of my military service or for three (3) months thereafter. (50 U.S.C. App. § 532.) I also understand that the Act prohibits the imposition of a default judgment against me unless the court appoints an attorney to represent my interests. (50 U.S.C. App. § 520 and § 521.) Lastly, I am aware that the Act limits the rate of interest on this debt to six percent (6%) per annum while I am on active service. (50 U.S.C. App. § 526.) As used in the Act, the term "interest" includes service charges, carrying charges, renewal charges, fees, and any other charges (except bona fide insurance) in respect of such obligation or liability. My dependents are also provided protection under the Act if they co-signed on the obligation. Upon receipt of this request, please adjust my account to reflect the statutory six percent rate and notify me of the revised payment schedule.

Thank you for your understanding and cooperation in this matter. I regret any inconvenience this may cause.

Sincerely,

WILL EXECUTION PROCEDURES

Note: The Notary, 3 witnesses, and the client must remain in the room until the notarization is completed. Then proceed with the following checklist:

1. Check everyone's ID card.

2. Are you _____? (Read the person's name exactly as it appears on the Will.)

3. Have you read your Will?

4. Does it dispose of your property as you wish?

5. Are you voluntarily signing this Will?

6. Is anyone forcing you to sign this Will?

7. Witnesses, do the Testators and Testatrixes appear to be of sound mind and memory?

When everyone has completed signing all of the pages, make sure you, as Notary, check to ensure everyone has printed and signed in the proper spaces. Draw a diagonal line on the bottom of the last page of the Will (the page before the first signature page) to ensure the client does not type in additions after the Will has been notarized. After everyone has witnessed the Will, ask the following questions of all witnesses.

> Do you solemnly swear that the Testator or Testatrix signed and executed the instrument as his or her Last Will and Testament;
>
> that he or she has signed willingly;
>
> that he or she executed it as his or her free and voluntary act for the purposes therein expressed;
>
> that each of the witnesses, in the presence and hearing of the Testator or Testatrix, signed the Will as witness;
>
> that, to the best of his or her knowledge, the Testator or Testatrix was at that time an adult, of sound mind, and under no constraint or undue influence?

All witnesses must answer yes to the above questions. After this is completed, you then notarize the Will. After notarizing the Will, you should inform the client of the following:

1. Ensure the Will is kept in a safe place.

2. Ensure someone else knows about the Will (and where it can be located).

3. If there is an earlier Will, it should be destroyed.

4. Be aware that, if you keep your Will in a safety deposit box, it will be sealed upon your death and may delay the probate procedure.

5. The copy of the Will is for the client's own personal use. Most people give the copy to their Executor; however, if the original is lost, the Executor may encounter problems trying to get a copy of the Will probated without the original.

6. If circumstances change, or for any reason a change to your Will is necessary, make an appointment to have a new Will made. Do not make pen-and-ink changes to your Will.

ADOPTIONS

Ref: DOD Instruction 1341.9, Subj: DOD ADOPTION REIMBURSEMENT PROGRAM

Note: Guidance for the DOD's Adoption Reimbursement Program is set forth in DODINST 1341.9 (dated 29 JUL 93). Such reimbursement is a fairly new program and provides great benefit to the member. Also, a sample adoption information worksheet is provided below for those counsel providing assistance on adoptions and / or the adoption reimbursement program. This worksheet will assist in gathering relevant information, but state laws may require different or additional information. This worksheet should be modified to fit your state requirements.

****

ADOPTION WORKSHEET

1. _____ Interview client to determine whether this is a stepparent adoption or an adoption of a child who is not the child of either parent. Determine if avenues other than adoption are more desirable.

    a. _____ Determine if the needs of the client may be satisfied by the appointment of a guardian rather than by an adoption.

    b. _____ If this is a stepparent adopting the child of his or her spouse, explain in detail the legal ramifications of the adoption and impact on legal obligations and rights of both adoptive parents and child.

    c. _____ Separate counseling of the adoptive parent in the absence of the natural parent may be desirable in light of the obligation being undertaken.

2. _____ For nonfamily member or non-stepparent adoptions, take the following steps:

    a. _____ Ascertain that the adoption is being handled through a reputable public or private agency. Counsel against adoptions from suspect sources.

b. _____ Advise thoroughly with regard to the consequences of the adoption with regard to the legal rights and obligations of the adoptive parents and child once the adoption is completed.

c. _____ Advise generally of the steps involving the process of adoption including any need for termination of natural parents' rights. Explain the adoption process as set forth in the statute.

3. _____ It may be that an adoption will involve minor or nonadoptive parent(s) who (is) (are) not a citizen(s). Consultation with the Immigration and Naturalization Service should be considered. Ask if the child is an American Indian; if so, the tribe has a right under federal law to be notified of the proceedings and possibly be represented.

4. _____ If the client seeking advice about adoption is concerned for the welfare of an adult rather than a child, consult local law on conservators.

5. _____ *See* DODINST 1341.9 on potential government reimbursement of adoption expenses.

****

ADOPTION INFORMATION WORKSHEET

1. Name (*First, middle, last*):

2. Current address (*complete address*):

3. Current phone number:

4. Permanent address (*if different from above*):

5. Relationship to child (*stepfather, etc.*):

6. Name (*First, middle, last*):

7. Current address (*complete address*):

8. Current phone number:

9. Permanent address (*if different from above*):

10. Relationship to child (*natural mother, etc.*):

11. Maiden name (*First, middle, last*):

12. Name (*First, middle, last*):

13. Age:

14. Address where currently residing. 14a. Since? (*date*)

15. Was the child brought into the state for the purpose of adoption?

16. Parent, guardian, etc. (*first, middle, last names*) with whom the child currently resides:

    a. Relationship to child:

    b. Address: (*if different from child's address*)

17. Child's name change request (*first, middle, last*):

18. Full name(s) of natural mother and / or father:

19. Current address (*complete address*):

20. Current phone number:

21. Will he / she consent to adoption?

22. Has he / she waived parental right to consent?

23. If he / she will not consent to the adoption and his / her whereabouts are unknown, please answer the following:

    a. What was your last contact with natural father / mother?

    b. Last known address: (*complete address*)

    c. Last known phone number:

    d. Last known employer:

    e. Names and addresses of relatives who might know of his / her current address or phone number:

    f. City, county, and state where he / she would most likely be living:

g. Name of newspapers for area listed in 23f:

h. Department of Motor Vehicles' address for the city and state he / she last had driver's license:

24. If either the adopting ***mother or father*** (*circle one*) were previously married to a natural parent of the child, please answer the following questions:

a. Date of marriage:

b. County and state of marriage:

c. Date of divorce:

d. County and state of divorce:

e. Were any child custody arrangements made in the divorce decree (*if yes, please summarize the arrangements*)?

f. Were any child support arrangements made in the divorce decree (*if yes, please state the general terms*)?

LETTERHEAD

Date

CERTIFIED MAIL—RETURN RECEIPT REQUESTED
Family Court
Juvenile Clerk's Office
Address

RE: Adoption of _____

Dear Sir / Madam:

I am currently assisting [servicemember's name], U.S. Navy, and his wife, [name], in my capacity as a legal assistance attorney. [Name] and [name] desire to adopt their [son / daughter], [name]. To that end, I am forwarding the following documents:

a. Petition of adoption (1)

b. Report(s) of adoption (2 originals)

c. Original birth certificate (1)

d. Photocopy of Petitioner's marriage license (1)

e. Natural mother's consent to adoption (1)

f. Petitioner's affidavit of whereabouts unknown (1)

g. Natural mother's affidavit of whereabouts unknown (1)

I respectfully request that this matter be set down for hearing in [place]. If you should have any questions, please feel free to contact me at the letterhead address.

Sincerely,

//s// Signature
S. A. VICHESSE
Lieutenant, JAGC, U.S. Naval Reserve
Legal Assistance Attorney

Note: A legal assistance attorney is a licensed attorney who acts solely on behalf of an individual client and not the U.S. Government

SEPARATION AGREEMENT

Note: Generally, the drafting of separation agreements by legal assistance attorneys is discouraged. Particularly in cases with substantial property, dual career couples, child custody and support issues, or a significant investment by a servicemember toward a military career with attendant issues of divisibility of retired pay and application of the Uniformed Services Former Spouses' Protection Act, the law has become quite complex and practice is perilous for both the client and the attorney who has not developed and maintained expertise. Furthermore, because requirements for separation agreements vary among states, and even among local courts within the same state, it may be difficult for legal assistance attorneys to maintain sufficient current information to determine these requirements for other than the local jurisdiction(s). Finally, the investment of time necessary to do a thorough job on drafting and negotiating a single separation agreement, when measured against limited resources and heavy client demand for other services, militates against widespread availability of this service. Under no circumstances should one judge advocate represent opposing parties in the same domestic relations matter.

Note: If the SJA becomes involved in drafting a separation agreement, caution should be exercised because the agreements are occasionally incorporated or referred to in divorce decrees. The following questions will assist in gathering information, but may need to be modified to include all state requirements.

****

SAMPLE: CLIENT INFORMATION QUESTIONNAIRE

I. **INSTRUCTIONS**. Answer all of the following questions carefully, completely, and legibly. Based upon the information provided, your attorney will assess your marital situation and render appropriate legal advice. If a question is inapplicable, mark it "NA" and move on to the next one; if additional space is required, attach additional sheets. If you have questions, write them down for discussion at your next appointment.

Your legal assistance attorney represents only you in this matter. It is his / her duty to ensure that you are fully informed about both the substantive and procedural law relating to your separation agreement and that you receive timely and proper legal advice; however, this advice is based on receiving complete and accurate information from you. Although much of the information requested is very personal, you may be assured that it will be held in the strictest of confidence and that it will not be disclosed to anyone under any circumstances.

II. BIOGRAPHICAL DATA

Your Full Name: SSN:

Rank and pay grade: Branch of Service:

Pay entry base date: Date of birth:

Occupation:

Military address:

Current mailing address:

Work phone: Home phone:

State of legal residence: Place of birth:

Are you employed (by other than the military)? _____ If yes, state:

Name of employer:

Job title: Nature of job:

Employed since: Gross salary:

Describe your health:

Under treatment for:

Were you previously married?

If so, when and where divorced:

Are you receiving or paying any money for the support of children of a former marriage or illegitimate children?

If so, number of children: Amount:

Any arrearages due for support? _____ If yes, amount:

Alimony to former spouse: per: until:

Are any arrearages due for alimony? _____ If yes, amount:

Spouse's full name: SSN:

Rank and pay grade: Branch of service:

Pay entry base date: Date of birth:

Occupation:

Military address:

Current mailing address:

Work phone: Home phone:

State of legal residence: Place of birth:

Is spouse employed (by other than the military)? _____ If yes, state:

Name of employer:

Job title: Nature of job:

Employed since: Gross salary:

Describe spouse's health:

Under treatment for:

Was spouse previously married? If so, when and where divorced?

Is spouse receiving or paying any money for the support of children of a former marriage or children born out of wedlock?

If so, number of children: Amount:

Are any arrearages due for support? _____ If yes, amount:

Alimony to former spouse: per: until:

Any arrearages due for alimony? _____ If yes, amount:

III. MARRIAGE DATA

Date of marriage:

Location (*city and state*):

Date of separation:

If not already separated, expected date of separation:

IV. CHILDREN

List all children of this marriage (*natural or adopted*):

FULL NAME	BIRTHDATE	LIVING WITH

Physical or emotional disabilities of child(ren):

Are you (or your wife) pregnant or could you (or your wife) be pregnant?

List all children of any prior marriage by you or your spouse:

FULL NAME	BIRTHDATE	PARENT (H / W)	LIVING WITH

Who has legal custody of these children?

V. PERSONAL PROPERTY: List all property wherever located (*United States [list by state], overseas, etc.*):

A. Automobiles, trucks, motorcycles, boats, etc.

Vehicle 1 (*type of vehicle*):

Serial #: Year: Make: Model:

Titled in name of:

Is there a balance owed?

If so, to whom?:

Current balance: Monthly payment:

Who gets the vehicle?

Who makes the payment?

Vehicle 2 (*type of vehicle*):

Serial #: Year: Make: Model:

Titled in name of:

Is there a balance owed?

If so, to whom:

Current balance: Monthly payment:

Who gets the vehicle?

Who makes the payment?

[*Add additional vehicles on separate sheets.*]

Are any of the above vehicles to be sold?

If so, which one(s)? Who will sell?

Current value: Selling for:

Disposition of proceeds:

B. Household goods

Do you have furniture or household goods overseas?
If so, state where:

Have you mutually agreed upon its division?

Has it already been divided?

Are you satisfied with the division?

Who gets it? Husband Wife Split

If the property is to be split, state:

When will the split occur?

How is it to be divided?

Do you have furniture or household goods in nontemporary storage? If so, state:

Where (*city and state*):

Name of storage company:

Have you mutually agreed upon its division?

Are you satisfied with the division?

Who gets it? Husband Wife Split

If the property is to be split, state:

When will the split occur?

How is it to be divided?

BRING A COPY OF THE INVENTORY TO YOUR APPOINTMENT

If your spouse is in the United States, does he / she have furniture or household goods in his / her possession?

Have you mutually agreed upon its division?

Are you satisfied with the division?

Where is it located (*city and state*)?

What will you receive? When?

C. Bank accounts

Account 1 (*type of account—checking, savings, etc.*):

Name of institution:

Location:

In whose name? Husband Wife Joint

Account #: Balance:

If joint, who gets the account?

What happens to the proceeds?

Account 2 (*type of account, checking–savings, etc.*):

Name of institution:

Location:

In whose name? Husband Wife Joint

Account #: Balance:

If joint, who gets the account?

What happens to the proceeds?

D. Stocks, bonds, and other financial assets

Own U.S. Savings Bonds? If yes, state:

Total face value:

Owner: Beneficiary:

To be retained by? Husband Wife Split

If bonds are to be split, describe how:

Own stocks? If yes, state:

Corporation	# Shares	Par Value	Reg Owner

To be retained by? Husband Wife Split

If stocks are to be split, describe how:

BRING STOCK CERTIFICATES TO YOUR APPOINTMENT

Have an individual retirement account (IRA)?

Does your spouse?

If so, state:

Institution	Account #	Amount on Deposit:

Yours:

Spouse's:

Disposition of IRA's?

BRING IRA ACCOUNT STATEMENT TO YOUR APPOINTMENT

List all other financial assets by name, account #, present value, and account holder (*e.g., mutual funds, Keough plans, investment accounts, certificates of deposit, notes, bonds, etc.*).

BRING COPY OF ACCOUNT STATEMENTS TO YOUR APPOINTMENT

Do you or your spouse have any money or property held or owed by others? If so, give details:

Was any part of your marital estate received by you or your spouse as the result of inheritance, gift, or damages resulting from personal injury claims? If yes, state by whom received, from whom received, nature and date received:

Are you, your spouse, or both of you, beneficiaries under any estate now in probate? If yes, state which party, whose estate, and approximate amount involved:

VI. REAL PROPERTY

A. Marital home

Do you own a home?

Address:

Date purchased: Purchase price:

Titled in name of:

Mortgage in name of: and held by:

with approximate balance of: as of:

Monthly payments:

Second mortgage, if any (*give same details*):

BRING COPY OF DEED AND MORTGAGE TO YOUR APPOINTMENT

B. Other real estate

Do you own any other real estate (*e.g., house, condo, undeveloped land, timeshare, etc.*)? If yes, state:

Address:

Date purchased: Purchase price:

Titled in name of:

Mortgage in name of: and held by:

with approximate balance of: as of:

Monthly payments:

Second mortgage, if any (*give same details*):

BRING COPY OF DEED AND MORTGAGE TO YOUR APPOINTMENT

VII. LIFE INSURANCE

Do you have an SGLI policy? Amount:

Current beneficiary:

Does your spouse? Amount:

Current beneficiary:

Do you or your spouse have any privately obtained insurance policies?

Type of insurance: Term Whole Life Universal Life

Policy of: with:

On life of: for: beneficiary:

Type of insurance: Term Whole Life Universal Life

Policy of: with:

On life of: for: beneficiary:

Do you or your spouse have any life insurance through an employer or labor union (other than SGLI)? If so, describe in same terms as above if possible:

VIII. CURRENT DEBTS: List all outstanding obligations of the parties (*individual and joint debts*), regardless of amount—except car payments:

Creditor	Account #	Balance	Who will pay? H / W

IX. FAMILY CONSIDERATIONS

If you have children, who will receive custody?

Husband Wife Split

If split, describe:

What do you consider a fair (*not what you want*) amount of support based upon the assets and earnings of the parties?

SUPPORT FOR WIFE:

SUPPORT FOR CHILDREN:

Signature of client / date

Reread the entire questionnaire and be sure that you have included everything that is asked of you. After you have completed all applicable questions and secured the necessary documents, call the Legal Assistance Office for an appointment. Our phone number is: _____.

SEPARATION AGREEMENT
CLIENT INTERVIEW FORM

Client: _____ Date: _____

1. Is spouse in (*list location, area, etc.*)? Yes / No

2. Accompanied tour? Yes / No

3. If accompanied, has servicemember spouse requested early return of dependents? Yes / No. If yes, when? _____

4. **CHILD SUPPORT**

   a. Amount: _____ per month per child for a total of _____ per month

   b. Commencing: _____

   c. Paid by: allotment, personal check, money order?

   d. In what state will the custodial spouse be residing? _____

   e. Will child support continue beyond 18 if the child attends college? Yes / No

   f. Discuss tax consequences (*i.e., nondeductible by payor or includible by payee*).

5. **VISITATION**

   a. "Reasonable" or specific? If specific, describe:

   b. How many weeks during the summer? 2, 4, 6, or 8?

   c. Notice for normal visitation? 24, 48, or 72 hours?

   d. Notice for summer visitations? 4, 6, or 8 weeks?

   e. Who pays for the cost of visitation? H or W?

6. **SPOUSAL SUPPORT**

   a. Yes or no? If no, discuss the ramifications of a waiver. Consider a minimal amount of support (*e.g., $5.00 per month*) for a limited period in order to keep this provision executory.

   b. Amount: _____ per month

   c. Commencing: _____

   d. Terminating on: (1) divorce, (2) remarriage or cohabitation of wife, or (3) specific date _____

   e. Paid by: allotment, personal check, money order?

   f. Discuss tax consequences (*i.e., normally deductible by payor and includible by payee, but it doesn't have to be*). Deductible by payor spouse? Yes / No

7. **LIFE INSURANCE**

   a. Servicemember spouse to maintain SGLI? Yes / No

   b. Beneficiary: (1) child(ren) until emancipation, or (2) wife for as long as parties remain married?

   c. If servicemember discharged, must he / she convert SGLI to term policy in principal amount? Yes / No

   d. Additional policies? Yes / No

   e. If divorced, can owner of additional policy do whatever he / she wants with it? Yes / No

8. **MILITARY RETIREMENT**

   a. Waive? Court to retain jurisdiction? Divide?

   b. If divided, describe monthly percent or dollar amount to be received:

9. **INCOME TAX**

   a. Option 1: Separate returns
   Tax liability responsibility of filing party
   Refund - property of filing party

   b. Option 2: Joint returns (*for as long as entitled*)
   Tax liability: each pays proportionate share
   Refund: (1) divided proportionately, (2) divided equally, or (3) sole property of H or W?

   c. Option 3: Joint return this year, separate all others;
   For joint-return year:
   Tax liability - each pays proportionate share;
   Refund: (1) divided proportionately, (2) divided equally, or (3) sole property of H or W?
   For separate return years:
   Tax liability: responsibility of filing party;
   Refund: property of filing party

   d. Who claims dependent exemptions for children? H, W, or split? If split, describe:

   e. If joint return, who prepares it? H or W?

10. **SUBSEQUENT DIVORCE**: Who pays for attorney fees and court costs? H, W—or each pays their own?

11. **GOVERNING LAW**

   a. Who is filing for divorce? H or W?

   b. Where (*list all pertinent information*)?

12. **SEPARATE COUNSEL**

   a. Is other spouse represented by counsel? Yes / No

   b. If yes, who?

13. **MISCELLANEOUS INFORMATION**

a. What about relocation expenses for returning spouse (*e.g., security deposits; electricity, gas, and water deposits; car, insurance, and gas; and day care expenses*). Is this required? Yes / No. If yes, how much? _____ Paid when? _____

b. Do you have a will? Yes / No. Should it be reviewed?

c. Are there joint bank accounts to which your spouse has access? Yes / No

d. Does your spouse have credit cards for which you are responsible? Yes / No. If yes, specify:

e. Have you safeguarded your passport (*and your child(ren)'s*) and other valuable documents from your spouse? Yes / No

14. **NOTES:**

SPOUSE TAX EXEMPTION LETTER

Date

Tax Collector and Tax Assessor
Town of _____

To Whom It May Concern:

My spouse is on active duty in the U.S. Navy and is currently deployed. Because of my spouse's status as a member of the armed forces, he / she is exempt from personal property taxation by the State of [*INSERT STATE*] and its political subdivisions in accordance with the provisions of section 514 of the Soldiers' and Sailors' Civil Relief Act (codified at 50 U.S.C. App. 501 *et seq.*).

On [*INSERT DATE*], my spouse and I moved to the State of [*INSERT STATE*] and currently reside at [*INSERT FULL CURRENT ADDRESS*]. Our presence in [*INSERT STATE*] is solely the result of official military orders.

My spouse's permanent residence is the State of [*INSERT STATE*], and we intend to return there upon my spouse's separation or retirement from the armed forces.

When my spouse returns from deployment, he / she will provide you with an affidavit setting forth the above information. In the interim, please annotate your records accordingly and cancel your collection efforts.

Thank you for your attention to this matter.

Sincerely,

MILITARY CONSUMER COMPLAINT FORM

I desire to submit a complaint against a business which I believe has treated me unfairly. I understand that the ***sole*** purpose of this complaint is to provide information for possible use by the Armed Forces Disciplinary Control Board in determining whether the business complained against should be placed off limits to military personnel. I authorize the Armed Forces Disciplinary Control Board to notify the business of my complaint and to release any or all of the following information to the business during the course of its inquiry into my complaint.

Name: _____

Command: _____

Rank: _____ Branch of Service: _____ Work Phone: _____

My complaint is against: ***Insert name and address of business***

The general nature of my complaint is:

_____ Insurance
_____ Auto repair
_____ Auto rental
_____ Auto purchase
_____ Purchase of other goods (Specify: _____)
_____ Other

I believe I have been treated unfairly for the following reasons, and ***I have attached supporting documentation***:

(Use the back of the form if you need more room)

_____ _____
Signature Date

Submit completed forms to: Command Address (in full)

5801
NLSO
Date

[Name and address of creditor]

RE: [*insert subject matter*]

Dear [*insert name of creditor*]:

A review of your records for the above account indicates a failure by [*name of creditor*] to fully comply with the Federal Truth in Lending Act [15 U.S.C. §§ 1601-1613, 1631, 1671-1677 (1982)]. Please be advised that the onus of proving compliance with the above Act is on [*name of creditor*].

Sincerely,

/s/
ATTORNEY'S NAME
Rank, JAGC, U.S. Naval Reserve
Legal Assistance Officer

Copy to:
Client

5801
NLSO
Date

[Name and address of creditor]

_____

_____

RE: [*insert subject matter*]

Dear [*insert name of creditor*]:

[*Insert name of state*] Civil Code [*insert code numbers*] provides that debt collectors may contact the debtor's employer regarding a consumer debt only if the debtor has consented, in writing, to such communication or the communication is made solely to verify employment, locate the debtor, or to effect garnishment of the debtor's wages or, in the case of a medical debt, to verify the existence of medical insurance.

Therefore, writing to [*insert name of command*], or anyone else in the [*U.S. Navy/ Marine Corps*], in an attempt to obtain assistance in collection of an alleged debt of [*insert rank / name of client*] is a violation of [*insert state name*] state law, _____ Civil Code _____. For this reason, your letter alleging indebtedness of [*insert client's name*] is returned.

Additionally, the Secretary of Defense prohibits the command from taking action on allegations of indebtedness unless the alleged creditor can show that the disclosure requirements of 15 U.S.C. § 1601 and Regulation Z have been met and the standards of fairness have been applied.

Sincerely,

/s/
ATTORNEY'S NAME
Rank, JAGC, U.S. Naval Reserve
Legal Assistance Officer

Copy to:
Client

5801
Command
Date

[Name and address of attorney]

RE: [*insert subject matter*]

Dear Attorney [*insert name*]:

I am currently assisting [*insert rank / rate / name of client*], U.S. Navy, and his wife, [*insert wife' name*], in my capacity as a legal assistance attorney. Please be advised that my clients desire to satisfy the debt owed to [*insert name of creditor*] and, to that end, request that your client accept a payment plan in lieu of litigation.

I respectfully request that you confer with your client and inform me as to whether [*insert name of creditor*] would be amenable to such an arrangement. In the meantime, please forward any and all future correspondence on this matter to my attention.

Thank you for your anticipated cooperation. I look forward to hearing from you in the near future.

Sincerely,

/s/
ATTORNEY'S NAME
Rank, JAGC, U.S. Navy
Legal Assistance Officer

Copy to:
Client

CONSUMER PROTECTION POINTS OF CONTACT

Legal assistance attorneys deal with complex consumer problems affecting not only servicemembers and family members, but also the general public. Consumer protection offices are very helpful in providing legal advice and coordination. The following are points of contact (up to date as of 9/1/92).

Alabama

Assistant Attorney General
Chief, Consumer Protection Division
Office of the Attorney General
State House, 11 South Union St.
Montgomery, AL 36130
(205) 242-7334

American Samoa

Assistant Attorney General
Office of the Attorney General
American Samoa Government
P.O. Box 7
Pago Pago, AS 96799
(684) 633-4163

Arizona

Office of the Attorney General
1275 West Washington
Phoenix, AZ 85007
(602) 542-3702

Arkansas

Office of the Attorney General
200 Tower Bldg.
323 Center St.
Little Rock, AR 72201
(501) 682-7506

California

Department of Consumer Affairs
400 R. Street, Suite 1840
Sacramento, CA 95814
(619) 237-7754

Colorado

First Assistant Attorney General
Office of the Attorney General
Department of Law
110 16th St., 10th Floor
Denver, CO 80202
(303) 620-4578

Connecticut

Assistant Attorney General
Office of the Attorney General
Antitrust & Consumer Protection Dept.
110 Sherman St.
Hartford, CT 06105
(203) 566-5374

Delaware

Deputy Attorney General
Office of the Attorney General
Civil Division
820 North French St.
Wilmington, DE 19801
(302) 577-2500

District of Columbia

General Counsel
U.S. Office of Consumer Affairs
Premier Bldg., Suite 1003
1725 I Street, NW.
Washington, DC 20201
(202) 634-9610

Director, Bureau of Consumer Protection
Federal Trade Commission
Bureau of Consumer Protection
6th & Pennsylvania Ave., NW.
Washington, DC 20580
(202) 326-3238

Counsel to the General Counsel
Federal Trade Commission
Office of the General Counsel
6th & Pennsylvania Ave., NW.
Washington, DC 20580
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Washington, DC 20001
(202) 727-7140

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Financial Fraud Section
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(503) 378-4732

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Utah	Chief, Fair Business Enforcement Office of the Attorney General State Capitol Salt Lake City, UT 84114 (801) 538-1331
Vermont	Assistant Attorney General Office of the Attorney General Consumer Protection Section Pavilion Office Bldg. Montpelier, VT 05602 (802) 828-3171
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BILL OF SALE

Description of merchandise: _____

_____

For the sum of [***insert dollar amount***] and / or any other valuable consideration, the receipt and sufficiency of which is hereby acknowledged, I did sell, deliver, and transfer to [***insert name of purchaser***], whose address is [***insert full address of purchaser***], on the ___ day of _____, 19 __, all my right, title, and interest in and to the above-described property.

I certify under penalty of perjury that I, as lawful owner of said [***specify property***], have the right to sell same, that I warrant and will defend the title to the [***specific property***] against the claims and demands of all persons whomsoever, and that said [***specify property***] is free from all liens and encumbrances, except those listed below.

Lien: _____

Lien: _____

STATE OF _____)
CITY OF _____)
COUNTY OF _____)

On this ___ day of _____, 19 __, before me personally appeared _____, known to me to be the person(s) described in and who executed the same as _____ free act and deed.

_____
Notary Public, State of _____

My commission expires: [***insert date***]

STANDARD MILITARY CLAUSE FOR CANCELLATION OF LEASE

Military tenant: The tenant is a member of the U.S. Armed Forces and may terminate this lease on thirty (30) days' written notice to the landlord in any of the following events:

1. If the tenant receives military orders to transfer to a duty station, the main gate of which is more than twenty (20) miles from the main gate of his / her former duty station.

2. If the tenant receives military orders requiring him / her to move into government quarters or the tenant voluntarily moves into government quarters.

3. If the tenant retires or is released from active duty.

4. If the tenant has leased the property prior to arrival in the area, and his / her orders are changed to a different area prior to occupancy of the property.

The written notice becomes effective thirty (30) days after the date of service of notice upon the landlord, or such time as dictated by the military orders. If the date of written notice falls between days on which rent becomes due, the notice becomes effective on the first day of the next rental period, provided that the tenant is liable for the proportionate part of the rent which would be due but for the termination. If the tenant terminates the lease under this military clause, and is in compliance with all other terms of the lease, the landlord will refund to the tenant, within fourteen (14) days after the tenant vacates, any and all security and / or damage deposit held.

Dated: [*insert date*] [*insert tenant's signature*]

Dated: [*insert date*] [*insert tenant's signature*]

Dated: [*insert date*] [*insert landlord's signature*]

NOTE: Some states have enacted a sample military clause. Local laws must be reviewed to ensure the clause is consistent with state law.

POWER OF ATTORNEY WORKSHEET
(Please read prior to giving a Power of Attorney)

PUB. L. NO. 103-160 -- *See* Legal Assistance Division, power of attorney disc

A. Powers of Attorney (POA)

1. Section 574 of the FY-94 Authorization Act amends 10 U.S.C. to add the following section (quoted in its entirety):

> Sec. 1044b. MILITARY POWERS OF ATTORNEY: REQUIREMENT FOR RECOGNITION BY STATES
>
> (a) INSTRUMENTS TO BE GIVEN LEGAL EFFECT WITHOUT REGARD TO STATE LAW. -- A military power of attorney --
>
> (1) is exempt from any requirement of form, substance, formality, or recording that is provided for powers of attorney under the laws of a State; and
>
> (2) shall be given the same legal effect as a power of attorney prepared and executed in accordance with the laws of the State concerned.
>
> (b) MILITARY POWER OF ATTORNEY. -- For purposes of this section, a military power of attorney is any general or special power of attorney that is notarized in accordance with section 1044a of this title or other applicable State or Federal law.
>
> (c) STATEMENT TO BE INCLUDED. --
>
> (1) Under regulations prescribed by the Secretary concerned, each military power of attorney shall contain a statement that sets forth the provisions of subsection (a).
>
> (2) Paragraph (1) shall not be construed to make inapplicable the provisions of subsection (a) to a military power of attorney that does not include a statement described in that paragraph.

(d) STATE DEFINED. -- In this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and a possession of the United States.

2. Discussion. For some years, a federal law has been sought to bolster the acceptance of POA's prepared at legal assistance offices. During Operation Desert Storm, the Army, in particular, experienced problems with rejection of POA's generated at legal assistance offices; as a result, the legislative effort was renewed. What finally surfaced in the law was a mixture of military services and DOD input, with considerable Senate Armed Services Committee (SASC) spin. Important features of this law are discussed below:

a. The acceptance issue. A federal law purporting to mandate that a POA be accepted by a party in a private business transaction could raise questions about federal overreaching; some lenders, for example, will not transact a loan without the actual participation of and signature by the named borrower—to them, a POA-armed individual is simply not an acceptable substitute. SASC staffers working with DOD on this legislation recognized the federal intrusion issue, and you will note that the law does ***not*** mandate acceptance of a POA for purposes of conducting any particular transaction. What the Congress was willing to do, and what the law does require, is that the military power of attorney ***be accorded the same legal effect as a POA executed under the laws of the jurisdiction concerned***. Notwithstanding this technical legal distinction, it is hoped that some portion of transactions that might have been delayed by someone balking at accepting a legal assistance generated POA will go through once the "federal law" blessing is made apparent—and, to facilitate that, a recitation of the federal authority is to be included in the POA (*see* "preamble" at para. 3 below).

b. The exemption from state law requirements of form, substance, recording, etc. Whereas a federal law mandating acceptance of a POA in all cases was problematic, what federal law clearly could do was to create a federal species of POA and then exempt it from the picayune requirements of state laws respecting POA's. The new law does that. For example, Texas law required that durable POA's (excepting health care POA's) be recorded with the county clerk; to the extent that requirement still exists, it is preempted by this law.

3. Action. Legal assistance providers should insert the preamble from paragraph 3.b below at the beginning of all general and special POA's prepared for legal assistance clients.

a. Providers using the *LA LAW Powers of Attorney Program for WordPerfect* can do this easily by retrieving the general and special POA shell documents (-GPOA and -SPOA) from the C:\POA directory, entering the preamble

at the top of the document between the title and the "Know All Persons By These Presents" line, and resaving the shell document into the C:\POA directory. After doing that, all general and special POA's prepared using the LA LAW POA Program will display the new preamble. (*Note*: A revised and improved *LA LAW Powers of Attorney Program for WordPerfect* has been distributed; it incorporates the preamble and display it on all POA's produced.)

b. The preamble language, developed by the legal assistance chiefs of the military services, follows. We suggest using some distinctive typeface (**bold**, *italics*, ALL CAPS, etc., *see* legal assistance, division' power of attorney disc) to set it off somewhat from the text of the POA:

> PREAMBLE: this is a MILITARY POWER OF ATTORNEY prepared and executed pursuant to Title 10, United States Code, section 1044b, by a person authorized to receive legal assistance from the military services. Federal law exempts a MILITARY POWER OF ATTORNEY from any requirement of form, substance, formality, or the law of any state, commonwealth, territory, district, or possession of the United States. Federal law specifies that a MILITARY POWER OF ATTORNEY shall be given the same legal effect as a power of attorney prepared and executed in accordance with the laws of the jurisdiction where it is presented.

c. Certain POA's also are produced by DL Wills (general POA and durable health care POA); legal assistance providers should check their programs and edit the preamble into the WordPerfect document produced by the DL Wills program (the new disc supplied by OJAG). If the preamble is not automatically inserted by that program, insert it. Code 36 has this preamble inserted.

d. Please note that, while the law "requires" that a statement like the preamble be included in a military POA, the failure to include such a statement does ***not*** defeat the protections accorded by the new law. The real incentive to include the preamble is to conspicuously parade the federal law connection, blessing, and entitlements of this new and special breed of POA.

POWER OF ATTORNEY NOTES

1. A General Power of Attorney (POA) authorizes the agent to act with respect to ***any*** matter (i.e., do anything that the giver of the power could do personally). A Special Power of Attorney authorizes the agent to perform one or more ***specified*** acts (e.g., sell a house, cash a check).

2. Servicemembers should grant no greater power than is absolutely necessary. In addition, the agent should be someone in whom the member has absolute trust and confidence. The agent may intentionally or negligently misuse the power. If marital discord exists, a General POA should not be given to the spouse.

3. Determine what the member seeking a POA wants to accomplish. Is there something specific the member wants the agent to do? If so, does the member really need a POA to accomplish this goal? If so, give the member a Special POA, particularly for real estate matters and household goods shipment arrangements.

4. How long a period is necessary to accomplish the task, allowing for Murphy's Law? Some states have duration limits. The period should be limited to that reasonably necessary because POA's are difficult to revoke. A POA is not effectively revoked so long as a third party could be misled. Unless durable, the termination date cannot exceed twelve months from the day the POA is executed. The attorney-in-fact should only carry the POA when actually needed. The POA should be physically destroyed when no longer needed.

5. Third parties need not accept a POA. The member should take the POA to the bank or other intended recipient and find out if they will accept it before deploying. The Department of Motor Vehicles may require that the vehicle identification number be on a POA when used in their transactions. Real estate POA's require at least two witnesses to the grantor's signature and a legal description of the property. The POA cannot be used to sign a will or other documents which require the principal's sworn oath (e.g., waiver of Town Tax Affidavits).

6. A POA may become invalid if the grantor becomes disabled or incompetent. To prevent this from occurring, a durable clause can be included. Durable POA's should only be recommended after careful consideration has been given to the circumstances. POA's become invalid upon the grantor's death.

SAMPLE REVOCATION OF POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS, that I, [***insert full name***], **A LEGAL RESIDENT OF THE STATE** of _____, do hereby absolutely revoke, cancel, countermand, annul, and make void a certain general / special power of attorney dated the ___ day of _____, 19__, heretofore executed by me, wherein I did appoint [***insert name of appointee***] my attorney for the purposes in said power set forth.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this ___ day of _____ 19__.

ACKNOWLEDGEMENT

I, [***insert name of judge advocate***], the undersigned officer, do hereby certify that, on this ___ day of _____, 19__, before me personally appeared [***insert full name of servicemember***], whose home address is [***insert full, legal address***], who is known to me to be the identical person who is described herein, whose name is subscribed to, and who signed and executed the foregoing instrument, and having first made known the contents thereof, personally acknowledged to me that it was signed and sealed the same on the date it bears as the true, free, and voluntary act and deed, for uses, purposes, and considerations therein set forth.

/s/_____
Judge Advocate
Navy / Marine Corps Base
City, state, zip code

PART VIII

ADMINISTRATIVE SEPARATIONS AND PERSONNEL LAW

FORTY-THREE	ENLISTED SEPARATIONS
FORTY-FOUR	OFFICER SEPARATIONS
FORTY-FIVE	DETACHMENTS FOR CAUSE
FORTY-SIX	DISABILITY PROCESSING
FORTY-SEVEN	HIV+ ISSUES
FORTY-EIGHT	TRUSTEE APPOINTMENTS

CHAPTER FORTY-THREE

ENLISTED ADMINISTRATIVE SEPARATIONS

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PART VIII

ADMINISTRATIVE SEPARATIONS AND PERSONNEL MATTERS

CHAPTER FORTY-THREE

ENLISTED ADMINISTRATIVE SEPARATIONS

4301 PRIMARY REFERENCES

A. DODINST 1332.14, Subj: ENLISTED ADMINISTRATIVE SEPARATIONS
B. SECNAVINST 1910.4, Subj: ENLISTED ADMINISTRATIVE SEPARATIONS
C. SECNAVINST 1910.1, Subj: ADMINISTRATIVE SEPARATION PROCEDURES
D. SECNAVINST 1050.1, Subj: LEAVE FOR MEMBERS AWAITING REVIEW OF PUNITIVE OR ADMINISTRATIVE SEPARATION
E. SECNAVINST 5300.28, Subj: MILITARY ALCOHOL AND DRUG ABUSE PREVENTION AND CONTROL
F. SECNAVINST 1730.8, Subj: ACCOMMODATION OF RELIGIOUS PRACTICES
G. SECNAVINST 5300.26, Subj: DEPARTMENT OF THE NAVY POLICY ON SEXUAL HARASSMENT
H. SECNAVINST 1752.3, Subj: FAMILY ADVOCACY PROGRAM
I. DOD DIR 6490.1, Subj: MENTAL HEALTH COUNSELING (14 Sep 93)
J. Navy

1. MILPERSMAN, ch. 36
2. OPNAVINST 5350.4, Subj: ALCOHOL AND DRUG ABUSE PREVENTION AND CONTROL
3. OPNAVINST 5370.2, Subj: NAVY FRATERNIZATION POLICY
4. BUPERSINST 1001.39, Subj: ADMINISTRATIVE PROCEDURES FOR NAVAL RESERVISTS ON INACTIVE DUTY

Best advice: If any doubt, call separation authority

-- BUPERS: DSN 224-8245 / 8266 commercial (703) 614-8245
-- Status of unfavorable separation cases (Pers-832): 224-8245 / 8266 / 8222 / 8246
-- Advice (Pers-83): 224-8269 / 8192 / 8191
-- Favorable separations (Pers-254E): 224-1285 / 1286
-- Medical / limited duty branch (including physical disability) (Pers-275): 224-1412 / 4205
-- Conscientious objectors (Pers-254E): 224-1285 / 1286
-- CHNAVRES SJA DSN 948-5303 / commercial (508) 363-5303
-- Family Advocacy: 224-5892
-- Reservists on Inactive Duty (Pers-913): 288-8658 / commercial (202) 433-8658

K. Marines

1. MARCORSEPMAN, chs. 1 and 6
2. MCO P5300.12, Alcohol and Drug Abuse Prevention and Control
3. MCO 1740.13, Establishment of Child Care Plans for Dual-Service Parents and Single Parents with Custody of their Children

Best advice:

-- GCM Authority SJA for CMC: DSN 224-4250 / 4197
-- Disability / medical: 224-2091
-- Reserves: 224-9100
-- MMSR (Separation and Retirement): 224-1735 / 1737 / 1288 / 3288

L. HIV and AIDS Policy

1. Reference
   -- SECNAVINST 5300.30, Subj: MANAGEMENT OF HUMAN IMMUNODEFICIENCY VIRUS-1 (HIV-1) INFECTION IN THE NAVY AND MARINE CORPS
2. Policy (Pers-203C) -- DSN 224-5562 / 5552
3. Marines CMC (MHH) -- DSN 226-1174 commercial: 703-696-1174 (Drug, Alcohol, and Health Affairs)
4. Penalties -- 10 U.S.C. § 1002

M. Disability retirement

1. SECNAVINST 1850.4, Subj: DEPARTMENT OF THE NAVY DISABILITY EVALUATION
2. MILPERSMAN, arts. 3860340 - 3860400
3. MARCORSEPMAN, ch. 8
4. COMDTINST M1850.2, CG PERSMAN, CH-17

N. Retirement / separation

1. SECNAVINST 1811.3, Subj: VOLUNTARY RETIREMENT AND TRANSFER TO THE FLEET RESERVE OF MEMBERS OF THE NAVY AND MARINE CORPS SERVING ON ACTIVE DUTY
2. SECNAVINST 1420.1, Subj: PROMOTION AND SELECTIVE EARLY RETIREMENT OF COMMISSIONED OFFICERS ON THE ACTIVE-DUTY LISTS OF THE NAVY AND MARINE CORPS
3. SECNAVINST 1900.7, Subj: SEPARATION PAY FOR INVOLUNTARY SEPARATION FROM ACTIVE DUTY
4. MILPERSMAN, arts. 3860100 - 3860600
5. MARCORSEPMAN, chs. 2-5

4302 TYPES OF ADMINISTRATIVE SEPARATIONS

There are two types of separations given in the armed forces to enlisted servicemembers: punitive discharges and administrative separations. Enlisted personnel may be administratively separated with a characterization of service or description of separation (uncharacterized) as warranted by the facts of the particular case. Characterized separations are either honorable, general (under honorable conditions), or under other than honorable conditions (OTH). Uncharacterized separations include the Entry Level Separation (ELS) and the Order of Release (OOR).

A. Honorable. This separation 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.

1. Navy. To qualify for an honorable discharge, a sailor must have 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. A member whose marks do not otherwise qualify may nevertheless receive an honorable separation if he / she was awarded certain personal decorations (e.g., Medal of Honor, Combat

Action Ribbon) during the period of service *or* prior service. MILPERSMAN, art. 3610300.3a.

2. Marine Corps. Marines in paygrade E-4 and below having overall conduct marks for the current enlistment averaging 4.0 and proficiency marks averaging 3.0 are prima facie qualifications. The Marine Corps places great weight on the CO's recommendation of appropriate characterization. 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. MARCORSEPMAN, paras. 1004.3a, 6107, 6305, and Table 1-1.

B. General (under honorable conditions). This type of separation 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 most veterans' benefits; however, the member will not normally be allowed to reenlist. Conduct in the civilian community of a member of a Reserve component who is not on active duty may form the basis for a characterization as general under honorable conditions if such conduct has an adverse impact on the overall effectiveness of the naval service, including military morale and efficiency. MILPERSMAN, arts. 3610300.3b, 3610300.4c; MARCORSEPMAN, paras. 1004.3b, 6107, 6305.

C. Under other than honorable conditions (OTH). This characterization 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. 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 than honorable conditions only if such conduct directly affects the performance of military duties. MILPERSMAN, arts. 3610300.3c, 3610300.4c; MARCORSEPMAN, paras. 1004.3c, 6107, 6305.

D. Entry Level Separation (ELS). A member in an entry level status (generally, the first 180 days on active duty) will ordinarily be separated with an ELS. A member in an entry level status may also be separated with an OTH if the facts of the case warrant (e.g., separation for commission of a serious offense). 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 SECNAV. MILPERSMAN, art. 3610300.5a; MARCORSEPMAN, para. 6205.

E. Order of Release (OOR). A member whose enlistment or induction is void will be separated with an OOR from custody and control of the Navy or Marine Corps. For example, a member would receive this type of uncharacterized separation

if the member was under age 17 when processed for a minority separation. MILPERSMAN, art. 3610300.5b; MARCORSEPMAN, para. 6107.3b.

4303 COUNSELING

In some cases, members must be counseled concerning their behavior before they may be processed for separation. Counseling is intended to give the member an opportunity to improve by identifying specific, undesirable behaviors which the member has the ability to alter or cease. The counseling warning is a commitment to the member that potential for further service exists and correction of identified deficiencies will result in continuation on active duty. Once counseled, the member may not be processed for separation without first violating the counseling warning. Counseling must be documented in the service record of the member; only one entry is required. If more than one entry is made, the last entry applies (i.e., it must be violated prior to initiating administrative separation processing).

A. For Navy personnel, the counseling is documented by a NAVPERS 1070/613 Administrative Remarks (page 13) entry form. The counseling must be accomplished by the member's parent command (i.e., the member's command when separation processing begins) and ***must*** be made during the member's current enlistment. For Marine Corps personnel, the counseling is documented by a page 11 entry. The counseling requirement can be accomplished at any command to which the Marine was assigned during the current enlistment. MILPERSMAN, art. 3610260.5; MARCORSEPMAN, para. 6105.

B. Counseling and rehabilitation efforts are ***required*** before the initiation of separation processing for the following: convenience of the government due to parenthood, personality disorder and obesity; entry level performance and conduct; weight control failure; unsatisfactory performance; and misconduct due to minor disciplinary infractions or misconduct due to pattern of misconduct. Sample counseling entries appear at the end of this chapter at appendix A.

C. The command's counseling efforts must be documented in the member's service record and ***must*** include the following information:

1. Written notification concerning deficiencies or impairments (the counseling warning given to the member must clearly inform the member of what is undesirable);

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;

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

5. the counseling warning must be dated and signed by the member. If the member refuses to sign, a notation to that effect is to be made on the counseling form and is then signed and dated by an officer.

4304 BOARD RIGHTS

The discussion of the specific bases for separation below will refer to the method of processing: either notification procedure or administrative board procedure. In that connection, bear in mind that members have a right to an administrative board only if:

A. The member has more than six years' total active and Reserve service;

B. the command seeks to separate the member with an OTH; ***or***

C. the member is being administratively processed for homosexuality.

4305 BASES FOR SEPARATING ENLISTED PERSONNEL

This section describes the various bases for administrative separation with the emphasis on those frequently encountered by the SJA. In most cases, the paragraph will indicate the characterizations available for the particular basis, whether counseling is required, and the applicable separation procedure (notification or administrative board).

A. Expiration of enlistment or fulfillment of service obligation. The member receives an honorable, general, or ELS. MILPERSMAN, art. 3620150; MARCORSEPMAN, para. 1005.

B. Selected change in service obligation. This basis is used for general demobilization, reduction in strength, and other "early-outs." The member receives an honorable, general, or ELS. MILPERSMAN, art. 3620100; MARCORSEPMAN, para. 6202.

C. Convenience of the government. The notification procedure is used, resulting in an honorable, general, or ELS. Convenience of the government separations are "voluntary" and "involuntary." Voluntary separations are requested by the member; involuntary separations are initiated by the CO. The bases in subparagraphs 1 through 5 below are voluntary. If the basis is voluntary, counseling is not required.

1. Dependency or hardship. Some members will encounter hardships while on active duty that are not normally encountered by naval personnel. The member who faces these difficulties may request a separation if they can show the following:

a. Genuine dependency or undue hardship;

b. the hardship affects the member's immediate family;

c. the hardship is not temporary in nature;

d. the hardship arose or has been aggravated since the member's entry into service;

e. every reasonable effort has been made to eliminate the hardship;

f. that no other means are available; and

g. a discharge will in fact alleviate the hardship. MILPERSMAN, art. 3620210; MARCORSEPMAN, para. 6407.

> [*The Marine Corps provides for a three-member advisory board to be convened by the officer exercising special court-martial jurisdiction—or a higher authority—to hear the member's case if the circumstances of the case warrant such review in order to study and evaluate the case and make recommendations.*]

2. Pregnancy or childbirth. This is initiated upon written request by the female servicemember. Upon medical officer certification of pregnancy, Marines are required to notify their CO's of their desire for separation or continuation of service; if they do not, the Marine's case is evaluated for disposition. 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. 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. 3620200.1e, 1860120; MARCORSEPMAN, para. 6409; MCO 1306.16.

4. Surviving family member. MILPERSMAN, art. 3620240; MARCORSEPMAN, para. 6410; MCO 1300.8.

5. Alien. This is a voluntary request initiated upon the written request of the servicemember who is neither a natural born nor a naturalized citizen of the United States and no longer wishes to serve in the U.S. Navy. 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. MILPERSMAN, art. 3620200.1h, 3620250. The Marine Corps has no such basis for separation.

6. Nondisability physical or mental conditions. These are involuntary separations resulting in honorable, general, or ELS separations. Physical conditions which may warrant separation include motion / air sickness, enuresis (bed-wetting), somnambulism (sleepwalking), and allergies. The Navy and Marine Corps process these cases only when the condition has been confirmed by a medical officer and interferes with a member's performance of duty or poses a threat to his / her safety or well-being and may further render a member incompatible with further service. MILPERSMAN, art. 3620200.1g; MARCORSEPMAN, para. 6203.2.

7. Personality disorder. Separation processing is discretionary with the member's CO, provided a two-part test is satisfied. First, a psychiatrist or psychologist must diagnose the member as having a personality disorder which renders them incapable of serving adequately. The member must then be counseled. Factors showing the interference with performance of duty must be documented. (For members who are a danger to themselves or others, however, counseling is ***not*** required before separation processing.) The member may be processed for separation after violating the counseling warning by documented conduct which interferes with the member's performance of duty or indicates a failure to take corrective action after a reasonable time. The member's personality disorder does not shield him / her from dual processing for any misconduct. Separation under this basis is not appropriate where any other basis applies. Also, ensure the visit for the mental health evaluation complies with the service requirements of DOD Directive 6490.1 (14 Sep 1993). MILPERSMAN, arts. 3620200.1g, 3620200.4, 3620225; MARCORSEPMAN, para. 6203.3.

8. Parenthood. When, as a result of parental duties, a member is unable to perform official duties satisfactorily or is unavailable for worldwide assignment, the member may be involuntarily separated under this basis.

Counseling is required. Per MILPERSMAN, art. 3810190, and MCO 1740.13, military parents, single or married, must provide a plan for dependent care arrangements. Navy members must complete an OPNAV Form 1740/1 which is maintained in the service record. Marines provide a power of attorney for the alternate caretaker. After counseling, a CO may give a parent up to 60 days to present an adequate plan. Noncompliance requires processing for parenthood. MILPERSMAN, arts. 3620200.1b, 3620200.4, and 3620215; MARCORSEPMAN, para. 6203.1.

D. Weight control failure

1. Navy members may be separated when they fail to achieve prescribed physical readiness standards outlined in OPNAVINST 6110.1; MILPERSMAN, art. 3420440; and NAVADMIN 071/93 (29 Apr 93). Members who fail any three of the official biannual physical readiness tests (PRT) in any four-year period must be processed. A failure occurs when a member either fails the PRT or is determined to be outside of the weight control standards. Medical documentation of obesity is not required. Official measurements of the PRT coordinator are used to determine if the members are within the standards. MILPERSMAN, art. 3620260.

2. Marines may be separated for failing to conform to Marine Corps weight control standards. There are four types of separations available to Marines in this category:

a. Marines determined to be obese due to a pathological disorder, which is not a physical or mental disability, will be separated for obesity;

b. Marines who demonstrate some effort to conform to weight control standards, yet fail to conform, will be separated for weight control failure;

c. Marines who exert little or no effort to conform to weight control standards will be processed for unsatisfactory performance; and

d. Marines who refuse to comply with orders or directives to follow their command assistance program may be separated for misconduct due to violations of direct or general orders. ALMAR 57-93; MCO 6100.10; MARCORSEPMAN, paras. 6203.2a(1) and 6206.1.

E. Disability. A member may be separated for disability per the *Disability Evaluation Manual*, SECNAVINST 1850.4 and SECNAVINST 1770.3 (for reservists). A medical board must determine that a member is unable to perform the duties of his / her rate in such a manner as to fulfill reasonably the purpose of his / her employment on active duty. The member will receive an honorable, general, or ELS. MILPERSMAN, art. 3620270; MARCORSEPMAN, ch. 8.

F. Defective enlistment and induction

1. Minority. A member may be separated for enlisting without proper parental consent prior to reaching the age of majority (18). The type of uncharacterized separation is governed by the member's age when separation processing is commenced / completed. If the member is under age 17 when the defect is discovered, the enlistment is void and the member will be separated with an OOR. If the member is age 17, the member will be separated with an ELS only if the member's parent or guardian so requests within 90 days of the member's enlistment. If the member reaches age 18 before the defect is discovered, separation is not warranted; the member has effected a constructive enlistment. MILPERSMAN, art. 3620285; MARCORSEPMAN, para. 6204.1.

2. Erroneous enlistment. 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. Notification procedures are used and the member may receive an honorable, ELS, or OOR. MILPERSMAN, art. 3620280; MARCORSEPMAN, para. 6204.2.

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

a. A member may be separated for fraudulent entry for any knowingly false representation or deliberate concealment pertaining to a qualification of military service. The misrepresentation need not relate to a matter which would bar enlistment; the fraud is material if a waiver would have been necessary had the matter been disclosed. If the false representation of a Navy member relates solely to age, process for minority.

b. Depending on the circumstances, the member may be separated with an honorable, general, OTH, ELS, or OOR. Notification procedures are used unless the member is entitled to a board (i.e., an OTH is sought for concealing a discharge from another service which was not honorable, or the misrepresentation includes preservice homosexuality). Processing is unnecessary where the CO opts to retain and the defect is no longer present, or the defect is waivable and the waiver is obtained from the Chief of Naval Personnel (CHNAVPERS) or Commandant of the Marine Corps (CMC), as appropriate. Processing is mandatory where the conduct concealed, if done on active duty, could subject a member to an OTH separation. MILPERSMAN, art. 3630100; MARCORSEPMAN, para. 6204.3.

5. Other defective enlistment. MILPERSMAN, art. 3620283; MARCORSEPMAN, para. 6402. A member may be separated on this basis with an honorable, ELS, or OOR if:

a. The member was induced to enlist or reenlist for a program for which the member was not qualified as the result of a material misrepresentation by recruiting personnel upon which the member reasonably relied;

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

c. the enlistment was involuntary.

G. Entry level performance and conduct. Members in an entry level status (generally the first 180 days) may be separated under this basis if they are 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. Counseling is required. Notification procedures are used and the member will receive an ELS. This is not the exclusive means for separating members in an entry level status, but this basis will be used where "unsatisfactory performance" or "minor disciplinary infractions" would be the appropriate basis for separation of members with more than six months on active duty. MILPERSMAN, art. 3630200; MARCORSEPMAN, para. 6205.

H. Unsatisfactory performance. MILPERSMAN, art. 3630300; MARCORSEPMAN, para. 6206. Members separated under this basis receive an honorable or general discharge. Counseling is required. Unsatisfactory performance is not demonstrated 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 (nonpathological) as examples of unsatisfactory performance. Members may be separated for unsatisfactory performance if:

1. Their performance of assigned tasks and duties does not contribute to unit readiness and / or mission accomplishment as documented in service records; ***or***

2. they have failed to maintain required proficiency in rate as demonstrated by:

a. Below-average evaluations (Marine Corps); or

b. one or more enlisted performance evaluations, either regular or special, with unsatisfactory marks for professional factors of 2.6 or below in either military or rating knowledge and performance, or with overall evaluation of 2.6 or below. A NAVPERS 1070/613, administrative remarks (page 13) counseling and warning (*see* MILPERSMAN, art. 3610260.5) must have been issued by the parent command prior to the latest qualifying enlisted evaluation, and must address the specific unsatisfactory performance.

I. Homosexual conduct. MILPERSMAN, art. 3630400; MARCORSEPMAN, para. 6207. A member may be administratively separated from the naval service on the basis of homosexual conduct or statements. Commanders who receive apparently reliable information indicating that a member of the unit has committed homosexual conduct shall inquire thoroughly into the matter to determine all the facts and circumstances of the case.

1. Administrative discharge processing must be initiated if the commander has probable cause to believe:

a. The member has committed, attempted, or solicited a homosexual act;

b. the member credibly admits being a homosexual; *or*

c. the member has married or attempted to marry a person of the same sex.

2. If the commander concludes such probable cause does not exist, all action on the case will end. If probable cause exists, board procedures will be followed. In the Navy, if the action is based 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 CHNAVPERS. All members being processed for homosexuality have the right to an administrative separation board hearing. MILPERSMAN, art. 3630400.4a.

3. If the administrative board concludes that one of the three criteria of subparagraph 1 above is shown by a preponderance of the evidence, the member will be separated unless the board further finds:

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

b. such conduct under all the circumstances is unlikely to recur;

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

d. 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

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

4. If a member is separated, the characterization of the discharge will be honorable, general, OTH, or ELS, as warranted by the service record. An OTH may be imposed ***only if*** the board finds 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 age 16;

c. with a subordinate;

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.

J. Drug or alcohol abuse rehabilitation failure. MILPERSMAN, arts. 3630500, 3630550; MARCORSEPMAN, paras. 6208, 6209. A member who has been referred to a formal program of rehabilitation for drug or alcohol abuse (per OPNAVINST 5350.4, MCO 5300.12, or MCO 5370.6) may be separated for failure to complete such a program or its follow-on aftercare.

K. Misconduct, minor disciplinary infractions. This basis is applied differently in the Navy and Marine Corps. Both services require counseling. MILPERSMAN, art. 3630600.1a; MARCORSEPMAN, para. 6210.2.

1. Navy. The Navy permits use of this basis when the member has at least three, but not more than eight, non-drug related violations which were punished at one or two masts during the current enlistment. Since the Navy member will receive a general discharge, notification procedures should always be used for minor disciplinary infractions.

2. Marine Corps. Marines may be processed under this basis if they have three minor UCMJ violations documented in the service record book (SRB) within the current enlistment. The violations need not have been punished at NJP; page 11 entries suffice. The commander may elect to use the notification procedures or the administrative board procedures, depending on whether a general discharge or OTH respectively will be recommended.

3. Do not process members in an entry level status under this basis: use "entry level performance and conduct" instead. If any of the members' offenses carry a punitive discharge in the table of maximum punishments, the proper basis for separation is "misconduct, commission of a serious offense."

L. Misconduct, pattern of misconduct. This basis is used for a pattern of more serious misconduct consisting of two or more discreditable involvements with civilian or military authorities, or two or more instances of conduct prejudicial to good order and discipline within one enlistment. The pattern may include both minor and more serious infractions. In the Navy, the latest offense must have occurred while assigned to the parent command. Counseling is required in both services. A pattern of misconduct includes the following:

1. An established pattern of minor unauthorized absences (UA's);

2. an established pattern of dishonorable failure to pay just debts;

3. 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; and

4. any established pattern of involvement of a discreditable nature with civil or military authorities. The Navy interprets this fourth provision to include: two or more civilian convictions for misdemeanors; three or more punishments under the UCMJ (NJP's or courts-martial); or any combination of three civilian misdemeanor convictions or punishments under the UCMJ. MILPERSMAN, art. 3630600.1b; MARCORSEPMAN, para. 6210.3.

M. Drug abuse. A member must be processed for even a single drug-related incident. OPNAVINST 5350.4 defines a drug-related incident, in pertinent part, as: "Any incident in which drugs are a factor [including] voluntary self-referral, use or possession of drugs or drug paraphernalia, or drug trafficking constitute an incident." Counseling is not required. MILPERSMAN, art. 3630620; MARCORSEPMAN, para. 6210.5.

-- Characterization of discharge. Under most circumstances involving possession, use, or sale, the member will receive an OTH. If evidence of the incident was derived from a urinalysis, the member can receive an OTH only if the urinalysis results would be admissible at a court-martial. If the urinalysis results cannot be used to characterize the discharge, an OTH is not authorized and the command should use the notification procedures unless the member is otherwise entitled to an administrative board. Portable urinalysis kit results may not be used to separate unless the results are confirmed by a DOD laboratory. Unconfirmed results may be used to suspend the member from performing sensitive duties [e.g., personnel reliability program (PRP)] pending confirmation.

N. Misconduct, commission of a serious offense. A member may be separated for commission of a serious military or civilian offense when a punitive discharge would be authorized for the same, or a closely related, offense under the UCMJ. A member must be processed for administrative separation for serious misconduct described in para. O.3 below.

1. Counseling is not required. No conviction is necessary. If the member was convicted of the serious offense at a court-martial, the member may not relitigate the merits at the administrative board (i.e., the board is bound by the judicial findings). Further, if the member could have been awarded a punitive discharge, but was not, the member will be separated with a general discharge unless SECNAV approves an OTH. If the sole basis for Navy processing is a court-martial conviction, forward the case to CHNAVPERS via the court-martial convening authority. MILPERSMAN, arts. 3630600.1c and d, 3610300.4b; MARCORSEPMAN, para. 6210.6.

2. A member may ***not*** be separated on the basis of conduct that has been the subject of federal judicial proceedings resulting in an acquittal on the merits. SECNAV authorization is required before processing in the cases of acquittals in state or foreign courts. Neither rule bars processing where the case is dismissed on a matter not going to the merits (e.g., suppression of evidence). MILPERSMAN, art. 3610260.12.

O. Misconduct, civilian conviction. A member may be separated upon conviction by civilian authorities, foreign or domestic. MILPERSMAN, arts. 3630600.1e and f; MARCORSEPMAN, para. 6210.7.

1. Processing is appropriate when:

a. A punitive discharge would be authorized for the same, or a closely related, offense under the UCMJ; *or*

b. the sentence adjudged includes confinement for six months or more without regard to suspension or probation.

2. A conviction includes any judicial action tantamount to a finding of guilty, regardless of the label (e.g., nolo pleas, *Alford* pleas, juvenile proceedings, etc.). Separation processing may be begun upon conviction, regardless of appeals. Execution of an approved separation, however, 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 approved by SECNAV.

3. In the Navy, certain serious offenses are listed as mandatory processing under commission of a serious offense and civilian conviction.

a. Serious misconduct (i.e., armed robbery, arson, homicide) which resulted in or could have resulted in death or serious bodily injury;

b. sexual perversion (i.e., lewd and lascivious behavior, forcible homosexual or heterosexual acts, child molestation sodomy, indecent acts, exposure, etc.); and

c. first substantiated incident of sexual harassment involving:

(1) threats or attempts to influence another's career or job for sexual favors;

(2) rewards in exchange for sexual favors; or

(3) physical contact of a nature which, if charged under the UCMJ, could receive a punitive discharge.

P. Security. Members may be separated by reason of security when their retention is clearly inconsistent with the interests of national security. The member may receive an honorable, general, OTH, or ELS. Typically, the notification

procedure is used except when an OTH discharge is warranted. MILPERSMAN, art. 3630700; MARCORSEPMAN, para. 6212.

Q. Unsatisfactory participation in the Ready Reserve. A member may be separated by reason of unsatisfactory performance under criteria established in BUPERSINST 1001.39 or MCO P1000R.1. 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. The member may receive an honorable, general, or OTH. The notification procedure is used unless an OTH is warranted. MILPERSMAN, arts. 3610300.4b and c, 3630800; MARCORSEPMAN, para. 6213.

R. Separation in the best interest of the service. SECNAV 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. The member will receive an honorable, general, or ELS. The notification procedure is used; the member has ***no*** right to an administrative board. MILPERSMAN, art. 3630900; MARCORSEPMAN, para. 6214.

4306 MANDATORY PROCESSING

The decision whether or not to process an enlisted member for administrative separation is normally a matter within the discretion of the CO; however, some reasons mandate separation processing. "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 certain circumstances. The reasons mandating separation include:

A. Homosexual conduct;

B. minority under age 17;

C. fraudulent enlistment unless a waiver is obtained from CHNAVPERS;

D. drug abuse;

E. commission of a serious offense or civilian conviction (Navy):

1. Serious misconduct which did or could result in death or serious bodily injury;

2. sexual perversion; and

3. some aggravated sexual harassment cases (*see* MILPERSMAN, art. 3630600).

F. weight control failure; and / or

G. commission of a serious offense or civilian conviction 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. MILPERSMAN, arts. 3610200.2, 3620285.1a; MARCORSEPMAN, paras. 1004, 6204, 6207, 6210. Processing in the Marine Corps under paragraphs E and G above is not made mandatory by the MARCORSEPMAN. Marine SJA's should consult with their cognizant separation authority to ascertain whether there are separate local policies on mandatory separation.

4307 MESSAGE SUBMISSIONS

In the Navy, when a member has waived his / her right to an administrative board, CO's are authorized to submit the case to CHNAVPERS by message for final action. After the message is sent, formal submission of the case by letter of transmittal, with supporting documentation, must be forwarded within 15 working days to CHNAVPERS. Formats for the message submission and letter of transmittal are in MILPERSMAN, art. 3640200.11.

4308 ADMINISTRATIVE BOARDS

A. Convening authority. Per MILPERSMAN, art. 3640350.1b and MARCORSEPMAN, para. 6314, an administrative board may be appointed by:

1. Any Navy special courts-martial convening authority (SPCMA); and

2. any Marine SPCMA when so authorized by the GCMA.

B. Composition. Administrative boards are composed of three or more experienced Regular or Reserve officers or senior enlisted (E-7 or above), senior to the respondent. The majority of the board must be commissioned or warrant officers. At least one of the officers must be a line officer serving in the grade of O-4 (real, not frocked) or higher. In the Navy, if an O-4 line officer is not available at the command, an O-4 staff corps officer may be used. This substitution, however, must

be explained by the CO. MILPERSMAN, art. 3640350.1b; MARCORSEPMAN, para. 6315.1.

1. Active-duty respondent: The senior member must be on the active-duty list. When an active-duty list officer is not available for a Navy board, the convening authority may substitute a USNR-TAR (Training and Administration of Reserves) 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 must be included in the letter of transmittal.

2. Reserve respondent: At least one member of the board shall be a Reserve commissioned officer. All members must be commissioned officers if characterization of service as OTH is sought.

3. An odd number of board members should be appointed to avoid tie votes.

4309 BOARD DECISIONS

MILPERSMAN, art. 3640350.5; MARCORSEPMAN, para. 6319. The board shall determine its findings and recommendations in closed session. A report, using the format set forth in MILPERSMAN, art. 3640350.7, will be prepared and signed by all members and counsel for the respondent. Any dissent will be noted on the report; the specific reasons will be recorded separately. At a minimum, the report will include:

A. Findings of fact related to ***each*** basis for processing;

B. recommendations as to retention or separation;

C. if the board recommends separation, it may recommend that the separation be suspended;

D. if separation is recommended, the basis for, and the character of, the separation, must be stated;

E. 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 (not authorized when the board has recommended separation on the basis of homosexuality, misconduct, drug trafficking, or defective enlistment and induction, or has recommended an OTH);

F. in homosexual cases, either a recommendation for separation or special findings required for retention; and

G. if separation is recommended and the member is eligible for transfer to the Fleet Reserve / retired list, a recommendation as to whether the member should be transferred in the current or the next inferior paygrade must be made.

4310 RECORD OF PROCEEDINGS

The record of proceedings shall be prepared in summarized form unless the convening authority or separation authority directs that a verbatim transcript be kept. Following authentication of the record (by the president in the Navy; by the president and the recorder in the Marine Corps), it is forwarded to the convening authority.

A. Navy. Per MILPERSMAN, arts. 3640350.6 and 7, the record of proceedings shall, as a minimum, contain:

1. A summary of the facts and circumstances—including a summary of all witnesses' testimony;

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 the recorder and members;

5. a verbatim copy of the board's majority findings and recommendations signed by ***all members***;

6. the authenticating signature of the president on the entire record of proceedings or, in his / her 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***: It is 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 CHNAVPERS, provided they receive a copy prior to submission. A statement of deficiencies can be submitted separately via the convening authority to

CHNAVPERS. The Report of Administrative Board must still be signed by the board members and counsel for respondent.]

B. Marine Corps. Per MARCORSEPMAN, para. 6320, the record of proceedings shall contain as a minimum:

1. An authenticated copy of the appointing order;

2. any other communication from the CA;

3. a summary of the testimony of all witnesses—including the respondent—when the testimony is 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 / her counsel;

9. the respondent's signed acknowledgement that he / she was advised of, and fully understood, all of his / her rights before the board; and

10. any minority report.

C. Format. MILPERSMAN, art. 3640350.7 contains the format for the record of proceedings. MILPERSMAN, art. 3640350.8 contains the format for the report of the administrative board. These sections must be followed when submitting the results of an administrative board to the separation authority.

4311 ACTIONS BY THE CONVENING AUTHORITY

A. Navy. If the CO determines that the respondent should be retained, the case may be closed. If processing was mandatory, however, the case must be referred to CHNAVPERS for disposition. MILPERSMAN, art. 3640350.

1. If separation processing is mandatory or the CO decides that separation is warranted, the report is forwarded in a letter of transmittal to CHNAVPERS for action. The convening authority may ***not*** recommend a characterization less favorable than the board's.

2. MILPERSMAN, art. 3610220 authorizes the delegation of separation authority to the SPCMA when the member does not object to the processing for separation and processing is for certain reasons. CHNAVPERS retains separation authority for other listed bases. In particular, CHNAVPERS retains separation authority if the administrative board recommends an OTH, irrespective of the basis for processing; 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. When the SPCMA acts as separation authority, the DD 214 and allied paperwork must be sent to CHNAVPERS after separation has been completed.

B. Marine Corps. 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, typically the GCMA. If the GCMA is the convening authority, the GCMA will, before taking final action, refer the case to the SJA for a written review to determine the sufficiency in fact and law of the processing—including the board's proceedings, record, and report. MARCORSEPMAN, paras. 6305, 6307, 6308.1c.

4312 ACTION BY THE SEPARATION AUTHORITY

Per MILPERSMAN, arts. 3610220 and 3640370, and MARCORSEPMAN, para. 6309.2, the separation authority may take the following actions on the record of the board's proceedings and report:

A. Approve the board's recommendation for retention;

B. disagree with the administrative board's recommendation for retention and refer the entire case to SECNAV for authority to direct a separation under honorable conditions with an honorable, general, ELS, or transfer to the Fleet Reserve / retired list in the current or next inferior paygrade, as appropriate:

C. approve the board's recommendation for separation and characterization;

D. approve the board's recommendation for separation, but upgrade the characterization of service to a more favorable one;

E. approve the board's recommendation for separation, but change the basis when appropriate under the record;

F. disapprove the recommendation for separation and retain the member;

G. disapprove the board's recommendation concerning transfer to the Individual Ready Reserve (IRR);

H. approve the recommendation for separation, but suspend its execution for a period not to exceed 12 months;

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.]

4313 SUSPENSION OF SEPARATION

Except when the reasons 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. 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. MILPERSMAN, arts. 3610260.14, 3630100.4a; 3640350.5d(2); MARCORSEPMAN, para. 6310.

4314 PROCESSING GOALS

Every effort should be taken to meet SECNAV's processing time goals. When board action is not required or is waived, separation action should be completed in 15 working days from the date of notification to the date of separation. If the initiating authority and the separation authority are not located in the same geographical region, the initiating authority gets 10 working days from the date of notification and the separation authority should separate by the 30th working day. In board cases, the initiating command gets 30 working days from the date of notification and the separation authority should separate by the 50th working day. When action is required by the Secretary, final action should be completed in 55 working days. Appendix B contains an administrative discharge checklist to assist the recorder in the proper completion of the administrative separation process. Appendix C contains an example of a conditional waiver request currently authorized for use only by the Marine Corps. MILPERSMAN, art. 3610100.6; MARCORSEPMAN, para. 6102.

APPENDIX A
SAMPLE LETTER OF COUNSELING / WARNING FORMAT

Marine Corps: sample form in MARCORSEPMAN, para. 6105.3d

[***Date***]. Counseled this date concerning deficiencies [***list deficiencies***]; specific recommendations for corrective action; assistance available; and advised that failure to take corrective action may result in administrative separation or judicial proceedings. I have been afforded the opportunity to make a statement IAW U.S. Navy Regs, Art. 1110, and, if I make a written statement, it will be forwarded to CMC (Code MSRB-20) for inclusion in my Official Military Personnel File. I ***(do) (do not)*** desire to make a statement. [***Statement (if any) is filed on the document side of the service record.***]

_____ _____

(Signature of Marine) (Signature of Commanding Officer)

Navy: MILPERSMAN, art. 3610260.5

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 action.

_____ _____

(Signature of Sailor) (Signature of Witness) / (Date)

APPENDIX B

ADMINISTRATIVE DISCHARGE CHECKLIST

The following checklist will assist you in preparing the documents needed for processing a servicemember for discharge under the notification procedure or the administrative board procedure, whichever is appropriate under the circumstances. Examples are also provided for the documents needed under both methods. You should consult MILPERSMAN, chapter 36, and MARCORSEPMAN, chapters I & IV.

1. Prepare the Notice of Proposed Action with the First Endorsement and the Statement of Awareness and Request for Privileges. Be sure to use the examples for the proper procedure (notification procedure or administrative board procedure), as the examples are different.

2. Deliver the Notice of Proposed Action to the member. Briefly explain what the options are for the member to ensure his / her understanding.

3. If member knows at this time which rights he / she wishes to elect, have him / her complete and sign the Statement of Awareness and Request for Privileges. Be sure to have the member waive the two-day waiting period.

4. If member needs time to think about which rights he / she desires, explain the two-day waiting period and inform him / her when the response is required.

5. If member wishes to consult with counsel prior to electing his / her rights, contact the NLSO or LSSS, make arrangements for counsel, and inform the member of the time and date of the appointment.

6. Have member or escort take his / her service record, a copy of the Letter of Notification, the Statement of Awareness, and any investigative reports to his / her counsel. [*Note*: It is suggested that these documents be placed in a sealed envelope with a return envelope enclosed. The member should be directed not to open the package, and the defense counsel should be asked to reseal the documents in the return envelope. This helps to prevent the "loss" of documents or pages from the service record while in transit. Another approach would be to deliver the documents early or to place them in the custody of the duty driver.]

7. If member is not eligible or does not elect an administrative discharge board, consult the Manuals to see if the command can act as separation authority. (If member has elected an administrative discharge board, go to number 10 below.) If the command is authorized to act as separation authority, coordinate with the administrative department to have separation paperwork complete. Be sure that servicemember signs a document (in addition to notification and statement of awareness paperwork) agreeing to be separated and not objecting to characterization of service. Upon separation of servicemember, send a message to CHNAVPERS—followed by the Letter of Transmittal and all pertinent documents.

8. If the command is not authorized to act as separation authority, complete the Letter of Transmittal asking CHNAVPERS to separate. Consult the MILPERSMAN to determine when message requests are required or desired. When complete, make sufficient copies to place one in the member's service record, one for the respondent, one for the office files, and whatever number is required for the administrative officer for command correspondence files.

9. Upon receipt of discharge authority, arrange with personnel or PSD for final out-processing.

10. If member has elected an administrative discharge board, an appointing letter for the members of the board must be prepared and signed by the CO. You should change member's military identification card to a 90-day card.

11. Distribute a copy of the appointing letter to each member, counsel for the respondent, the recorder (if someone other than yourself), and retain a copy for your files.

12. It is suggested that an administrative discharge board package be prepared for each member. These packages consist of copies of the Administrative Discharge Board Guide and MILPERSMAN, arts. 3640300 through 3640350, or MARCORSEPMAN, chapters I & VI and those sections that pertain to the grounds for processing. This will ensure that the members are familiar with the procedures prior to the start of the board.

13. Arrange for a time and place for the board to be held and inform all parties.

14. If the proceedings are to be recorded on a tape player, ensure that there are enough tapes for the proceeding. (This is not required, but may be helpful in preparing the results of the proceedings.)

15. Prepare a findings worksheet for the members and Privacy Act statement for the respondent.

16. Mark and copy any exhibits you will need as recorder prior to the board.

17. Obtain a list of witnesses from the counsel for the respondent and arrange for their presence at the hearing. Requests for out-of-area witnesses are handled much like E&M witness requests.

18. After the board is completed, collect all exhibits and materials. Have board members and counsel for respondent sign findings worksheet.

19. Prepare the report of the administrative board proceedings for the senior member to authenticate.

20. Forward these to the counsel for the respondent for review and / or comment if requested.

21. Prepare the Letter of Transmittal to CHNAVPERS for the CO's signature. It must be signed by the CO or acting CO—not "by direction."

22. Make sufficient copies of the transmittal letter, the report of the administrative board and the findings for the member's service record, for the respondent, for the office files, and as needed for the command's correspondence files.

23. Upon notification of retention or discharge from CHNAVPERS, file a copy in the service record and in the office file and give one copy to the member.

24. If member has been retained, normally a warning will be required by CHNAVPERS. This must be completed and filed in member's record.

25. If member has been discharged, contact personnel or PSD for final out-processing.

APPENDIX C

CONDITIONAL WAIVER FORMAT
(*USMC ONLY*)

Rate, Name, SSN
Activity
Date

I, _____, the respondent, being considered for an Administrative Board proceeding, do hereby certify that:

a. Provided I am recommended for a general discharge, I waive the Administrative Board to which I am entitled and have elected.

b. I understand if this agreement is accepted, and the Commanding General [***Separation Authority***] authorizes my discharge, such discharge shall be a general discharge.

c. I understand that a general discharge may deprive me of certain veterans' benefits based upon my current period of active service and that I may expect to encounter substantial prejudice in civilian life in situations wherein the type of service rendered in any branch of the Armed Forces, or the characterization of discharge received may have a bearing.

d. My qualified counsel has fully advised me of the meaning and effect of this conditional waiver and I fully understand and comprehend the meaning thereof and all of its attendant effects and consequences. I am satisfied with my counsel. This offer to waive my right to an Administrative Board originated with me and my lawyer counsel. I enter into this conditional waiver free from duress or other promises of any kind. I have asked my counsel to witness my signature.

e. [***If applicable, add the following statement***] In view of the above, I no longer desire to submit a statement.

/s/_____
(Signature of respondent)

/s/_____
Witnessed by
(Signature of counsel, state licensed)

CHAPTER FORTY-FOUR

ADMINISTRATIVE SEPARATION OF OFFICERS

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CHAPTER FORTY-FOUR

ADMINISTRATIVE SEPARATION OF OFFICERS

4401 REFERENCES

A. SECNAVINST 1920.6, Subj: ADMINISTRATIVE SEPARATION OF OFFICERS

B. MILPERSMAN, art. 3830160

C. MARCORSEPMAN, ch. 4

4402 INTRODUCTION

Officers may be administratively separated for a wide variety of reasons involving performance or conduct identified not more than five (5) years prior to the *initiation of processing.* This chapter discusses separation bases, notification and administrative board procedures, and appropriate characterizations of service. Administrative separations in lieu of trial by court-martial are discussed in the military justice portion of this Deskbook.

4403 BASES FOR SEPARATION

This section lists the bases or specific reasons for involuntary separation of officers for cause as discussed SECNAVINST 1920.6, encl. (3) and MARCORSEPMAN, chapter 4. An officer may be processed for separation for any reason or combination of the reasons specified below.

A. Substandard performance of duty. This ground for separation refers to an officer's inability to maintain adequate levels of performance or conduct. The characterization must be Honorable when this is the sole basis. Substandard performance is indicated by any of the following:

1. Failure to demonstrate acceptable qualities of leadership 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;

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 of an officer as evidenced by one or more of the following reasons:

1. Commission of a serious 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. The characterization must be honorable in legitimate self-referral cases.

3. Homosexuality. The basis for separation may include preservice, 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. The criteria for retention and characterization are the same as for enlisted members.

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 satisfactorily complete 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 or 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, for an incident which would amount to an offense under the UCMJ.

C. 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. SECNAVINST 5510.30, Subj: DEPARTMENT OF THE NAVY PERSONNEL SECURITY PROGRAM. An officer considered for separation under the provisions of SECNAVINST 5510.30 will be afforded all the rights provided in this chapter.

D. 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 with an honorable discharge.

E. 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.

F. 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. SECNAVINST 1920.6, encl. (4), para. 8.

4404 LIMITATIONS ON MULTIPLE PROCESSING

Officers who are processed for separation because of substandard performance of duty or parenthood, but are retained, may not again be processed for separation for the same reasons within the one-year period beginning on the date of that determination. By contrast, officers who are processed for separation for misconduct, moral or professional dereliction, or in the interest of national security, but are retained, may again be required to show cause for retention at any time. No officer, however, may again be processed for separation 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.

4405 CHARACTERIZATION OF SERVICE

Separations are characterized as either honorable, general (under honorable conditions), or under other than honorable (OTH) conditions.

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.

"

B. General (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 include: commission of a serious offense; 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; or acts or omissions that adversely affect the ability of the military unit to maintain discipline, good order, and morale or endanger national security.

D. Limitations

1. Reserve officers. Conduct in the civilian community by a Reserve member 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 an OTH ***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. 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 considered in recommending the 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. Service must be characterized as honorable when the grounds for separation are based ***solely*** on preservice activities.

4406 NOTIFICATION PROCEDURES

A. Applicability. 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 or for parenthood;

2. a temporary limited duty officer (LDO) or temporary warrant officer (WO) 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 (an officer whose temporary appointment is terminated reverts to his / her permanent status as a warrant officer or enlisted member);

3. an officer is processed for separation for misconduct, or moral or professional dereliction, retention not consistent with national security, or parenthood and a separation with an honorable or general characterization of service is recommended by Chief of Naval Personnel (CHNAVPERS) or Deputy Chief of Staff for Manpower and Reserve Affairs [DC/S (M & RA)] 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 CO shall notify the officer concerned in writing of the following:

1. The reasons 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 CHNAVPERS or DC/S (M & RA)];

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;

6. that the officer, upon request, will be provided copies of the papers to be forwarded to SECNAV 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 except when the commander determines that the needs of the service require expeditious processing and access to qualified counsel is not anticipated for at least the next five days because the command is overseas or distant from judge advocate resources. Nonlawyer counsel shall be appointed whenever qualified counsel is not available. The respondent may also consult with a civilian counsel at no expense to the government.

D. Response. The respondent shall be provided a reasonable period of time—normally five working days, but more if in the judgment of the CO additional time is necessary—to act on the notice. An extension may be granted by the CO upon a timely showing of good cause by the officer. Failure to elect desired rights, even if notice is provided by mail as authorized for the Reserves, constitutes a waiver of rights and an appropriate notation will be made in the case file. If the respondent elects one or more rights, but declines to sign the appropriate notification statement, note the rights elected and the refusal to sign.

E. Submission to SECNAV. The commander forwards the case file with the letter of notification and response, supporting documentation, and any tendered resignation to SECNAV via CHNAVPERS, DC/S (M & RA), or CMC, as appropriate. SECNAV determines whether sufficient evidence exists to support 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. if SECNAV determines that the recommended honorable or general characterization of service is inappropriate, the case may then be referred directly to a board of inquiry.

4407 ADMINISTRATIVE BOARD PROCEDURES

A. Three-tiered system. The administrative board procedure refers to a three-tiered system consisting of a show-cause authority, board of inquiry, and board of review, which must be used to remove certain Regular commissioned officers (not retired or commissioned warrant officers) from active duty for cause. Officers may be entitled to the three-tiered review because of the adverse characterization of their separation or their years of commissioned service. The following officers are so entitled:

1. Any Regular officer being processed for misconduct, or moral or professional dereliction, national security or any other basis which might result in an OTH; and

2. a nonprobationary officer (i.e., generally a Regular officer having at least five years commissioned service) being processed for one or more reasons contained in paragraph 1 (separations for cause) or paragraph 6 (parenthood) of SECNAVINST 1920.6, encl. (3).

B. Show-cause authority

1. Convening. CHNAVPERS or DC/S (M & RA) shall review and evaluate the records of officers referred by the Secretary, or when they receive information of incidents involving officers whose performance or conduct is such that processing for separation is considered appropriate. The show-cause authority reviews the officer's record to determine whether the officer should be required to show cause for retention on active duty.

2. Show-cause authority decision and findings. The show-cause authority, after deliberations, shall determine the following:

a. That the record contains sufficient information that the respondent should be required to show cause for retention for one or more of the reasons specified before a board of inquiry—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 reasons are supported by sufficient information of record to require the officer to show cause for retention or to warrant referral to a board of inquiry and close the case.

3. Action after show-cause authority findings

a. If the show-cause authority closes the case, all proceedings shall cease.

b. If the show-cause authority determines that referral of the case to a board of inquiry is appropriate, the show-cause authority shall convene, or direct to be convened, a board of inquiry under this enclosure. A statement of the reason for making such a determination shall be provided to the officer in writing.

c. If the show-cause authority recommends that a probationary officer be separated with an honorable or general discharge, the show-cause authority shall initiate or direct the initiation of the notification procedure outlined in encl. (7) to SECNAVINST 1920.6.

C. Board of inquiry

1. Convening. The show-cause authority shall convene a board of inquiry, or direct that one be convened, to give the officer a full and impartial hearing at which he / she may respond to, and rebut, the allegations which form the basis for separation for cause and / or retirement in an inferior paygrade, and present matters favorable to his / her case on the issues of separation and / or characterization of service.

2. Board membership. Boards of inquiry shall consist of not less than three officers in the same armed force as the respondent.

a. 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 grade O-6 or above and senior in grade to the respondent.

b. In the case of Reserve, temporary LDO's, and WO's, the members shall be senior to the respondent; if the respondent is a reservist, at least one member of the board shall be a Reserve officer unless SECNAV directs otherwise.

c. At least one member shall be an unrestricted line officer. This officer will have command experience whenever possible. One member shall be in the respondent's competitive category; 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 requirement. If that is not possible, an unrestricted line officer shall be used. CHNAVPERS, DC/S (M & RA), or CMC may waive each of these requirements on a case-by-case basis when compliance would result in undue delay.

d. When sufficient highly qualified and experienced officers on the active-duty list are not available, the convening authority shall complete board membership with available officers who have been retired for less than two (2) years and otherwise meet the criteria set forth above. The convening authority may select qualified board members from outside the command.

e. 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.

f. The senior member of a 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, evidence, and challenges—except challenges to him / herself.

3. Other participants. The convening authority ***shall*** appoint a nonvoting recorder to perform such duties as appropriate. The convening authority ***may*** appoint a nonvoting legal advisor to perform such duties as the board desires. Neither the recorder nor the legal advisor shall participate in closed sessions of any board. The convening authority shall rule finally on all challenges for cause against the legal advisor.

4. Notification and respondent rights. At least 30 days before the board of inquiry hearing, the respondent shall be notified in writing of the reasons why the respondent is being required to show cause for retention in the naval service and the least favorable characterization of service authorized. The respondent must also be notified of their rights at the board of inquiry, which are akin to those held by enlisted members before an administrative discharge board. Failure to respond after being afforded a reasonable opportunity to consult with counsel constitutes a waiver of those rights.

5. 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 reasons for separation specified, based on the preponderance of evidence;

b. a recommendation for separation of the respondent from the naval service for specified reasons with a recommended characterization of service (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 closed; or

d. a recommendation, in the case of a retirement-eligible officer, for retirement in the current grade or, if the officer has not satisfactorily served in that grade, the next inferior grade.

6. Board report. The board report, signed by all members (including any separate, minority reports), shall include a verbatim transcript of the board's proceedings for Regular commissioned officers; a summarized transcript can be prepared for all other cases unless a verbatim record is directed by the convening authority. The transcript shall be provided to the respondent for examination prior to signature by the board members. The transcript will note that the opportunity was afforded; any deficiencies identified 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 given a copy of the report of proceedings and the findings and recommendations of the board and given an opportunity to submit written comments for consideration by the board of review.)

7. Action on the report. The report of the board shall be submitted via the convening authority to CHNAVPERS, DC/S (M & RA), or CMC for termination of proceedings or further action, as appropriate. Further action may include:

a. In the case of Reserve officers, LDO's, and WO's recommended for separation, review and endorsement of the case to SECNAV 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 the appropriate retired grade, review and endorsement of the case to SECNAV.

D. Board of review

1. Convening. Boards of review are convened by CHNAVPERS, DC/S (M & RA), or CMC 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. Board membership and other participants. Boards of review shall be composed in the same manner as boards of inquiry convened for regular officers. The convening authority shall appoint a nonvoting recorder and may appoint a nonvoting legal advisor.

3. 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.

4. Board's review and report. The board report shall be signed by all members including any separate, minority reports. 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 should be retained on active duty and the case is, therefore, closed; or

b. a finding that the respondent has failed to show cause for retention 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.)

5. Action on the board's report. The board of review's report which recommends separation shall be delivered with any desired recommendations by the CHNAVPERS, DC/S (M & RA), or CMC to SECNAV, who may direct:

a. Retention; or

b. discharge with a characterization of service not less favorable than that recommended by the board of inquiry.

E. 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 served satisfactorily as determined by the Secretary under the guidelines of 10 U.S.C. § 1370.

1. Enclosure (6) to SECNAVINST 1920.6 allows the Secretary to reduce an officer only one grade for not serving "satisfactorily," even if he meets the time-in-grade requirements.

2. 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.

OTHER OFFICER PERSONNEL MATTERS

4408 INTRODUCTION

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, which includes the Defense Officer Personnel Management Act (DOPMA). The transition provisions of DOPMA can be found in small print immediately following 10 U.S.C. § 611.

4409 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. The Secretarial regulations on initial appointment in the various staff corps or as judge advocates include the following:

1. Chaplain Corps - SECNAVINST 1120.4;

2. Judge Advocate General's Corps (JAGC) - SECNAVINST 1120.5 (direct commissions and JAGC student program - prior commissioned service credit plus law school time while not in a commissioned status) and SECNAVINST 1520.7 (Law Education Program - prior commissioned service credit only);

3. Nurse Corps - SECNAVINST 1120.6;

4. Civil Engineer Corps - SECNAVINST 1120.7;

5. Medical Service Corps - SECNAVINST 1120.8; and

6. Marine judge advocates - SECNAVINST 1120.9 (credit for prior commissioned service, plus constructive service credit for time in law school while not in a commissioned status);

7. Medical Corps - SECNAVINST 1120.12;

8. Dental Corps - SECNAVINST 1120.13;

9. Supply Corps - SECNAVINST 1120.14.

B. Placement on the active-duty list. The active-duty list is used for determining eligibility for consideration for promotion by an active-duty promotion board and for determining precedence. Rules for position on the list are set forth in SECNAVINST 1427.2. While position is generally fixed by grade and date of rank, a Reserve officer recalled to active duty after a break in active service of more than six months may have the date of rank in grade adjusted to a later date of rank (more junior) to give them more time to compensate for their break in active service before consideration by an active-duty promotion board.

4410 PROMOTIONS

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. The basic reference for promotions is SECNAVINST 1420.1.

A. 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). The communication must arrive by the date the board's convenes.

B. Reserve officer deferrals. A Reserve officer recalled to active duty and placed on the active-duty list may request deferral of consideration for promotion by an active-duty promotion board for up to one year from the date the officer enters on active duty.

C. Promotion boards. A precept signed by the SECNAV convenes each selection board and furnishes it with pertinent statutory, regulatory, and policy guidelines. The membership of selection boards is constituted in accordance with 10 U.S.C. § 612 and SECNAVINST 1401.3. Each officer selected by a board must be fully qualified, and the best qualified for promotion within each competitive category, to meet the needs of the Navy or Marine Corps. The report of the promotion board, including the list of eligible officers and selectees, is forwarded to the SECDEF for approval and subsequent publication of the selectees' names by message. Officers in grades below O-6, who are in or above the promotion zone and are considered but not selected for promotion, will be considered to have failed of selection for promotion to the next higher grade. Counseling of failed-of-select officers is required by paragraph 6 of SECNAVINST 1420.1 and MILPERSMAN, art. 2220210.

D. Delay of promotions. The promotion of an officer on the active-duty list may be delayed under certain circumstances. The officer must be given written notice of the delay and an opportunity to submit a statement. In appropriate cases, SECNAV or the President can remove the officer's name from the promotion list for cause. Grounds for delay include:

1. Sworn charges against the officer have been received by the officer's GCM convening authority and the charges have not been disposed of;

2. an investigation is being conducted to determine whether disciplinary action of any kind should be brought against the officer;

3. processing for separation for cause has been initiated;

4. a criminal proceeding in a Federal or state court is pending against the officer; or

5. there is cause to believe that the officer is mentally, physically, morally, or professionally unqualified.

E. Special selection boards. 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. This instruction applies only to errors or omissions which occurred after 15 September 1981. There is no provision in law for special selection boards for Reserve inactive-duty promotions.

1. Grounds. SECNAV ***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, SECNAV ***may*** convene a special promotion-selection board when an officer who was in-zone 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.

2. Procedure. 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.

4411 RESIGNATIONS

SECNAV may accept an officer's resignation which satisfies the criteria in SECNAVINST 1920.6, encl. (2), 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.

4412 VOLUNTARY RETIREMENTS

The policy guidelines concerning consideration of voluntary retirement requests are set forth in SECNAVINST 1811.3, Subj: VOLUNTARY RETIREMENT AND TRANSFER TO THE FLEET RESERVE OF MEMBERS OF THE NAVY AND THE MARINE CORPS SERVING ON ACTIVE DUTY. *See also* MILPERSMAN, arts. 3860100, 3860120, 3860160-3860300; MARCORSEPMAN, paras. 2003-2004.

4413 INVOLUNTARY RETIREMENT

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 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*

* *See* DOPMA, § 624(a) for special rules regarding computation of active commissioned service for pre-DOPMA officers.

B. General 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. If later selected for promotion to a higher grade or continuation on active duty by a board convened under DOPMA, those officers become subject to the DOPMA involuntary-retirement provisions.

C. Additional savings provisions. SECNAVINST 1920.6, encl. (3), para. 3., contains savings provisions 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.

CHAPTER FORTY-FIVE

DETACHMENT FOR CAUSE

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CHAPTER FORTY-FIVE

DETACHMENT FOR CAUSE

4501 REFERENCES

A. MILPERSMAN, art. 3410105

B. BUPERSINST 1611.17, Subj: NAVY OFFICER FITNESS REPORT (FITREP) MANUAL

4502 INTRODUCTION

"Detachment for cause" (DFC) refers to the administrative removal of a Navy officer from their current assignment; it is ***not*** an administrative separation from the Navy. The DFC is one of the most serious administrative measures that can be taken against an officer. It is equivalent to being "fired" from a civilian job and reassigned to less-demanding duties. The DFC is filed in an officer's official record and has significant adverse effect on the officer's future naval career—particularly with regard to promotions, duty assignments, selection for schools, and special assignments. The Marine Corps has no counterpart to the DFC process. Reassignments are handled by a "Request for Transfer" specified in paragraph 2209 of MCO P1000.6 (ACTMAN).

4503 BASIS

-- Four bases exist for a DFC. They are as follows:

1. Misconduct. Any act of misconduct, civil or military, can form the basis for a DFC. Only in unusual circumstances will a DFC request by reason of misconduct be approved without prior disciplinary action. If no disciplinary action was taken, a statement explaining why it was not warranted must be made in the DFC request.

2. Unsatisfactory performance involving one or more significant events resulting from gross negligence or where complete disregard of duty is involved. It is the officer's performance during the significant event which forms the

basis for this DFC request. For example, the navigator's performance, which resulted in the grounding of his / her ship, may serve as a basis for a DFC.

3. Unsatisfactory performance of duty over an extended period of time. There is no fixed time period for this basis. Corrective actions—such as letters of instruction (LOI), command counseling, nonpunitive letters of caution (NPLOC)—are required prior to requesting a DFC under this basis. Failure to document command action can seriously undermine the request.

4. Loss of confidence in an officer in command. Because of the unique position of command, it is imperative that immediate superiors have full confidence in a commanding officer's judgment and ability to command. An articulate, fact-supported loss of confidence by the immediate superior, concurred in by a flag officer in the chain of command, is a sufficient basis upon which to detach an officer in command.

4504 COUNSELING

For an officer to be detached for unsatisfactory performance over an extended period of time, counseling is required. Various methods are available, but LOI's serve to document the counseling. If, after a reasonable period of time, the officer has not achieved a satisfactory level of performance, the LOI's can serve as supporting enclosures to a DFC request.

4505 DOCUMENTATION

All factual allegations of misconduct or unsatisfactory or marginal performance of duty should be adequately documented (e.g., fitness reports, criminal investigations). Fitness reports may comment on LOI's, but not NPLOC's.

4506 CONTENTS OF THE REQUEST

The request shall contain a reasonably detailed statement of the specific incidents of misconduct or performance; corrective action taken to improve inadequate performance—including counseling and any disciplinary action taken, in progress, or contemplated. All allegations must be adequately supported by appropriate inquiry or documentation. Additionally, it must be specifically stated why reassignment within the command is not a reasonable alternative. Chronologies of events are helpful. Special fitness reports are no longer submitted in conjunction with DFC requests per BUPERSINST 1611.17. A sample DFC request with an acknowledgement letter follows this chapter.

4507 SUBMISSION OF THE DFC

A. Requests from commanders. DFC requests from commanders should make the first via addressee the officer, if on board, or his current commander if temporarily assigned elsewhere, followed by the officer concerned. The officer shall be afforded a reasonable period of time, normally 10 working days, in which to prepare a statement *or* signify that the officer read the request, had a chance to respond, and did not desire to make a statement.

B. Routing. After the officer concerned, the next via addressee is the requesting officer, giving the commander an opportunity to comment on any statement by the officer. The commander then forwards the request via the administrative chain of command, to the first flag officer, who then sends it to CHNAVPERS. Each endorsing command has five (5) working days to endorse a DFC request; local force regulations may also have routing instructions.

C. Flag officer requests. DFC requests from flag officers should be made by letter to CHNAVPERS with copies to the administrative chain of command. Send a copy to the operational commander if he / she is not in the administrative chain of command; send an advance copy to Pers-82.

D. Handling. The DFC request is forwarded in double envelopes marked "For Official Use Only." Requests can be submitted by "Personal For" message in exigent circumstances. The message must be confirmed by the standard written report.

E. DFC by reason of misconduct

1. IAW NAVADMIN 111/94 (R 281442Z JUN 94), the NJP report required by MILPERSMAN, art. 341100 has been expanded to require recommendations on the following three issues:

a. Whether the officer should be transferred from the command;

b. whether the officer's misconduct warrants promotion delay or removal (if on the promotion list); and / or

c. whether the officer should be required to show cause for retention.

In cases of trial by court-martial, where a dismissal has not been awarded, the command must provide a cover letter to the court-martial order that addresses the

three issues stated above. The court-martial order is then routed to PERS-82 as required by JAGINST 5800.7C section 0152 concerning post-trial matters.

2. If any recommendation on the above three issues is negative, the NJP report or the court-martial cover letter must be routed via the officer for comment. After the officer has submitted his / her comment, the package is returned to the command for a second endorsement. The command must then forward the package via the chain of command for a flag endorsement. BUPERS only requires one flag endorsement; however, fleet or type commanders may require packages to be forwarded via their chain of command. Expeditious processing and forwarding of these reports is essential since the officer is in a holding status awaiting completion of administrative actions. These changes contained in NAVADMIN 111/94 will be incorporated into future changes to MILPERSMAN, arts. 3410105 and 341100.

4508 ACTION FOLLOWING THE SUBMISSION

Following the DFC request, the officer can be assigned TAD to another command. The DFC request cannot be mentioned in fitness reports, but the commander can always comment on the underlying performance.

4509 ENLISTED PERSONNEL

Per MILPERSMAN, art. 3420260, the DFC can be used for enlisted personnel in paygrades E-7 through E-9—and any member E-6 and below who is the only sailor in the rating specialty on board. The basis for the request is the same as for officers. Similarly, the command must exhaust lesser alternatives such as reassignment within the command. If reassignment is unsuccessful, send the DFC request to Pers-831 marked "Enlisted Performance, For Official Use Only."

APPENDIX A

SAMPLE DFC REQUEST

From: Requesting Command
To: Chief of Naval Personnel (Pers-82)
Via: (1) [*Officer concerned*]
(2) [*Requesting command—if officer still present*]
(3) [*Administrative chain of command to first flag officer*]

Subj: DETACHMENT FOR CAUSE ICO [*Fully identify the officer concerned*]

Ref: (a) MILPERSMAN, art. 3410105
(b) [*As necessary*]

Encl: (1) Fitness reports
(2) Letters of Instruction
(3) Documented counseling and guidance
(4) Supervisor statements
(5) Logs, records, or other relevant documents
(6) NJP reports
(7) Court-martial orders
(8) Records of civil convictions
(9) Officer's acknowledgment form

1. Per reference (a), I request that [*officer concerned*] be detached for cause from [*command*] by reason of [*(misconduct) (unsatisfactory performance of duty involving a significant event) (unsatisfactory performance of duty over an extended period of time) (my loss of confidence in [officer concerned's] ability to command) (other as warranted)*].

2. [*Officer concerned*] has been assigned to this command since [*date*] and has been performing duties as [*billet to which assigned or duty involved*] since [*date*].

3. [*Include the factual support for the reasons specified in paragraph 1 and justification for the request citing appropriate enclosures.*]

4. [*Use the next paragraphs to discuss any relevant and appropriate matter (e.g., reassignment feasibility, status or results of any disciplinary action, etc.)*]

5. I have given a copy of this request to [*officer concerned*] on this date and, by enclosure (9), have informed [*(him)(her)*] that: the request may be filed in [*(his)(her)*] official record; that [*(he)(she)*] has a right to submit a written statement; and has [*(10 days within which)(until [date])*] to do so.

CO SIGNATURE

Copy to:
[*Officer concerned*]
[*Other as required*]

APPENDIX B

SAMPLE ACKNOWLEDGMENT LETTER

[This letter is required unless the officer is under medical care under circumstances where the physician opines that referral of this matter would have adverse medical consequences or when referral cannot be made without the unauthorized disclosure of classified information]

Date

I have received the letter requesting my detachment for cause and I understand that the request may be filed in my official record.

I am aware of the contents of Article 5010110 of the NAVPERS 15560A, *Naval Military Personnel Manual*, and I ***(do) (do not)*** desire to make a written statement.

I further understand that I have ***(10 calendar days) (until [date])*** to submit my statement if I made that election and that failure to submit a statement in that period of time will be treated as a waiver of that right. I understand that any statement I make must be couched in temperate language; be confined to the pertinent facts; and not impugn the motives of others or make countercharges.

Signature
TYPED NAME OF OFFICER

[If the officer refuses to acknowledge the DFC, explain the DFC process to the officer (i.e., that the DFC may be included in the officer's official record and the officer has a right to submit a written statement concerning it). If the officer refuses to sign, add the following entry.]

[Officer concerned] was advised of the detachment for cause process and refused to acknowledge it.

Signature
TYPED NAME OF COMMAND REP

CHAPTER FORTY-SIX

DISABILITY EVALUATION SYSTEM

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CHAPTER FORTY-SIX

DISABILITY EVALUATION SYSTEM

4601 REFERENCES

The statutory basis for the Disability Evaluation System (DES) is 10 U.S.C. §§ 1201-1221. The implementing instructions are DOD Directive 1332.18, Subj: SEPARATION FROM THE MILITARY SERVICE BY REASON OF PHYSICAL DISABILITY and SECNAVINST 1850.4 (and its enclosure), *The Disability Evaluation Manual*. *See also* MARCORSEPMAN, ch. 8; MILPERSMAN, arts. 3860340-3860400; and NAVMED P-117. The President of the Physical Evaluation Board (PEB) is responsible for the operation of the PEB. The PEB is one of three boards that make up the Navy Council of Personnel Boards (NCPB). The NCPB is part of the office of SECNAV, falling under Manpower and Reserve Affairs (M & RA). This chapter outlines the process.

4602 INITIAL EVALUATION

Servicemembers whose physical qualifications to continue on full duty are in doubt, or whose physical limitations preclude their return to full duty within a reasonable time, should have a medical board dictated by their attending physician. The servicemember is given an opportunity to view the completed medical board dictation, and is allowed to submit a statement in rebuttal which is included in the medical board package. If the servicemember submits a statement of rebuttal, the physician submitting the medical board must address the points raised in the rebuttal in his / her surrebuttal—which is also included in the medical board package.

If a period of limited duty is recommended to allow the servicemember to recover full physical qualifications, it can be granted at the medical facility (for enlisted members and only up to 12 months) or the medical board will be forwarded to the appropriate department for review (BUPERS-281 / CMC MMSR-4).

If the member's physical condition suggests that he /she may be unable to continue on full duty, the case is forwarded to the President, PEB, for a determination of fitness.

4603 MENTAL COMPETENCY

If the member's ability to manage his / her personal affairs is doubtful, a medical board must be held to determine competency. The board is composed of three physicians, one of whom is a psychiatrist. The three-member medical board is not required if the member is not expected to live more than 96 hours after the preparation of the board. In times of war, if a member is not expected to live, a casualty report may be substituted for a medical board—provided it contains the member's diagnosis, prognosis, and current mental status.

4604 THE PHYSICAL EVALUATION BOARD (PEB)

The PEB is composed of the Record Review Panel (RRP) and three hearing panels. Each panel is made up of one medical officer, one Navy line officer, and one Marine Corps officer. If the case being evaluated is that of a reservist, at least one of the panel members must be a Reserve commissioned officer.

4605 DISABILITY EVALUATION

Disability evaluation requires a determination whether a member is fit or unfit. If the member is unfit, the PEB must determine whether the condition was due to the member's misconduct and the disability must be rated. The referral to the PEB enters the case into the DES. The RRP reviews the findings of the medical board, any line of duty / misconduct determinations, and any other available information concerning the case. Command line of duty / misconduct opinions, however, are not binding on the PEB.

4606 RATING DISABILITIES

After a Physical Evaluation Board considers a member unfit, it will normally award a servicemember a disability rating. These ratings are based on the Veterans' Administration Schedule of Rating Disabilities found in 38 C.F.R. § 4.1 *et seq.*, as modified by DOD Directive 1332.18.

A. Rating standard. The standard for rating disabilities is the member's civilian employability. The individual ratings can be from 0% to 100% in increments of 10%. In the case of multiple disabilities, the percentages are combined and rounded to the nearest 10% increment. Disabilities which render a member totally unemployable will be rated at 100%.

B. Separation and retirement. A servicemember who has less than 20 years of active duty and is awarded a disability ***less than*** 30% will be separated from the service with disability severance pay. A servicemember, regardless of length of active-duty service, awarded a disability of 30% or more will be medically retired either on the temporary disability retired list (TDRL) or the permanent disability retired list (PDRL)—depending on the condition stability. Those servicemembers placed on the TDRL will be given a medical examination at least once every eighteen months for the first five years of retirement until their condition has stabilized. At the end of the five-year period, all members still unfit will be permanently retired. Members later found fit for duty may be returned to active duty per 10 U.S.C. § 1211 or separated.

C. Exclusions

1. Pre-service conditions. Any member who incurs a disability prior to being entitled to receive basic pay is ineligible for disability compensation. If the disease or injury is aggravated by military service, an offset will be applied to that portion of the disability deemed not service-connected. This rule is waived for all members awarded a disability rating of 100%. Members who have eight years of continuous active service on the day their medical board is received by the PEB will not have their disability percentage reduced even though their medical condition existed prior to entry. Midshipmen are not considered servicemembers within this disability system.

2. Misconduct and neglect. Another exclusion applies if the disability was incurred due to the member's intentional misconduct (gross negligence) or willful neglect. Misconduct cases involving intoxication follow the same rules as for line of duty / misconduct determinations. The typical case of willful neglect involves the servicemember who refuses to comply with a physician's order to refrain from smoking or to lose weight.

3. Unauthorized absence (UA). The other major exclusion involves those cases in which the disability was incurred while in a UA status. Unlike the requirements of the *JAG Manual*, ***no*** showing of material interference with assigned duties is required to find a servicemember in a UA status for disability purposes.

4607 NOTIFICATION OF FINDINGS

The findings of the RRP are forwarded to the Disability Evaluation Counselor nearest the member. The counselor informs the member of the findings and explains their meaning via registered letter / return receipt requested.

A. Members found fit. If found fit for duty, the member has 15 days to request reconsideration. There is no right to a hearing, but Director NCPB may grant a request for one.

B. Members found unfit. If the member is found unfit, the member may accept the findings; CHNAVPERS or CMC will either separate or retire the member. Alternately, the member has 15 days to demand a hearing before a PEB hearing panel. Failure to respond within 15 days constitutes acceptance of the findings.

C. Incompetent members. Members in the DES who have been determined to be mentally incompetent, per chapter 15 of the *JAG Manual*, may not accept findings of the PEB. The President of the PEB will appoint counsel to represent the member, and the case is referred to a hearing panel following action by the RRP. If, however, the next-of-kin accepts the finding of the RRP and appointed counsel concurs, the hearing may be waived and the findings of the PEB accepted.

4608 HEARINGS

A member granted a hearing will receive orders to a PEB hearing panel. The hearing panels are located in the Naval Hospitals at Bethesda, Maryland, and San Diego, California. The panel is composed of two line officers and a medical corps officer (different officers *from those sitting* on the RRP). The member is entitled to judge advocate representation at the hearing panel. Civilian counsel, retained at no expense to the government, or individual military counsel, regardless of legal qualifications, may also represent the member. Transportation and lodging are provided at government expense. The member and any desired witnesses may testify at this hearing. After hearing the testimony, the panel will close for deliberation. Although the hearing panel may advise the member of its findings at the conclusion of the hearing, the President reviews the record and issues the final findings of the PEB.

4609 APPEAL

The findings of the PEB are final unless the member petitions the Director NCPB within 15 days of notification of findings. The Director may deny the petition or substitute his / her own findings for that of the PEB. Petitions for relief must be based on the grounds of newly discovered evidence, fraud, misrepresentation, or other misconduct or mistake of law. The petition must be filed before separation from the naval service. Once separated, only BCNR may change the final action of the PEB.

4610 RESERVE DISABILITY BENEFITS

On January 8, 1990, SECNAV signed SECNAVINST 1770.3, Subj: MANAGEMENT AND DISPOSITION OF DISABILITIES AND DISABILITY BENEFITS FOR NAVY AND MARINE CORPS RESERVE COMPONENTS. This instruction, the first major revision since 1973, promulgates procedures for administering disabilities and disability benefits for members of the Navy and Marine Corps Reserves.

A. Notice of eligibility (NOE). In the case of reservists called to active duty for less than two weeks, the medical board should be accompanied by an NOE. The NOE is a statement from the respective service indicating that the reservist was injured while serving on active duty. The NOE authorizes benefits provided under 10 U.S.C. § 1074a and 37 U.S.C. § 204 for any condition incurred during or aggravated by service requiring medical care that extends beyond termination of a period of duty. Without an NOE, a reservist serving less than two weeks may be found unfit, but denied disability benefits.

B. Processing. Authority to issue an NOE has been delegated to Commander, Naval Reserve Force (003) for the Naval Reserve and the CMC (RAM-3) for the Marine Corps Reserve. If the Reserve member is deemed eligible, the case is processed in a similar fashion to the active-duty servicemember. JAG (Code 32) acts on all appeals of denials of NOE's.

4611 REVIEW

The Judge Advocate General reviews all cases involving the retirement of officers; mental incompetency; misconduct if the member has not accepted the PEB findings; all reservists and "special interest" cases. One Attorney Advisor is assigned to the Retirement Law Branch. He / she may be contacted at (202) 325-9752, DSN 221-9752.

CHAPTER FORTY-SEVEN

HIV+ PERSONNEL ISSUES

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CHAPTER FORTY-SEVEN

HIV+ PERSONNEL ISSUES

4701 POLICY

A. REFERENCES

1. SECNAVINST 5300.30, Subj: MANAGEMENT OF HUMAN IMMUNODEFICIENCY VIRUS-1 (HIV-1) INFECTION IN THE NAVY AND MARINE CORPS

2. SECNAVINST 12792.4, Subj: HUMAN IMMUNODEFICIENCY VIRUS AND ACQUIRED IMMUNE DEFICIENCY SYNDROME IN THE DEPARTMENT OF THE NAVY CIVILIAN WORKFORCE

B. Pre-service. Applicants who are Human Immunodeficiency Virus positive (HIV+) are not eligible for entry into the naval service. Accessions, for active-duty or Reserve programs in initial military training, who are determined to be HIV+ as a result of serologic testing are not eligible for military service and will be separated by reason of erroneous enlistment. Enlisted HIV-1 infected members are not eligible for commissioning programs ("commissioning" is viewed as a "new" accession for enlisted members).

C. Testing. Military personnel (active and Reserve) shall be tested for the presence of HIV-1 antibodies to maintain the health of the force and to develop scientifically based information on the natural history and transmission of HIV-1, Acquired Immune Deficiency Syndrome (AIDS). Family members of active-duty personnel and DOD civilian employees entitled to military medical care, on a ***voluntary*** basis, shall be tested as resources permit. Mandatory testing of civilians for serologic evidence of HIV-1 infection is not authorized except pursuant to valid requirements by a host country. A surveillance program will be conducted for active-duty and Reserve Component members, other than accessions in initial military training, to determine if HIV-1 infection exists. Active-duty personnel serving in overseas and deployable units, and all active-duty health care providers, shall be tested on an annual basis. All other personnel shall be tested in conjunction with routinely scheduled medical examinations.

D. Retention. Active-duty members who are HIV+, but who demonstrate no evidence of immunologic deficiency, neurologic involvement, decreased capacity to respond to infection, or clinical indication of disease associated with HIV+, shall be retained in the naval service.

E. Assignment limitations. Personnel who are HIV+ can only be assigned to shore units within CONUS and within a 300-mile radius of certain naval Medical Treatment Facilities (MTF). The CNO and CMC may, on a case-by-case basis, establish further limitations on assignment of such members to operational units or specific duties when deemed necessary to protect the health and safety of HIV+ members and of other military personnel (and for no other reason). SECNAV shall be advised 30 days in advance of each type of limitation in assignment or duties and the specific reasons.

F. Involuntary separation. Military personnel who are HIV+, who demonstrate unfitting conditions of immunologic deficiency, neurologic involvement, or clinical indication of disease associated with HIV-1 infection, will be processed through the Disability Retirement System under 10 U.S.C. Chapter 61 as implemented by SECNAVINST 1850.4, Subj: DEPARTMENT OF THE NAVY DISABILITY EVALUATION. Military personnel retained on duty, but who are found not to have complied with the directives given during lawfully ordered preventive medicine procedures, are subject to appropriate administrative and disciplinary actions *including separation for cause.*

G. Voluntary separation. A member who is HIV+ and retained on active duty may request voluntary separation under the following guidelines:

1. Active-duty members testing positive for the HIV-1 antibody may apply for separation within 90 days after initial medical evaluation and classification is completed. The 90-day period begins the day the medical board report of HIV-1 positivity is signed by the member. Personnel requesting separation after the 90-day period has expired will be considered on a case-by-case basis (usually granted). Separation may be delayed up to 180 days after initial evaluation in order to minimize manning shortfalls and to provide for continuity of functions. Members who volunteer for separation will be processed for convenience of the government due to compelling personal need. Members can use MILPERSMAN, art. 3620220 as a guide for the separation procedure (substituting HIV+ infection in lieu of pregnancy). The discharge shall be characterized as type warranted by service record. Members who elect separation will not be allowed re-entry into the service at any later date. Members requesting separation are liable for money spent on schooling.

2. The CNO and CMC will normally deny the request if the member:

a. Is serving in a field which is experiencing a significant personnel shortage that justifies retention;

b. has not competed obligated service incurred for DON training or education; or

c. was notified of HIV+ and later executed orders or entered a program requiring obligated service.

3. The command must counsel the individual on the potential for lost benefits resulting from a voluntary separation. The member's request for separation must document lack of pressure or coercion, implied or otherwise.

4. Members voluntarily separated from the active force by reason of HIV-1 positivity who have a remaining military obligation will be transferred to the Standby Reserve Inactive unless there are other medical reasons why the member would not be available to meet mobilization requirements. Also, HIV-1 infected members can be eligible for voluntary separation incentive (VSI) or special separation benefit (SSB) programs.

H. Confidentiality and disclosure. HIV+ test results must be treated with the highest degree of confidentiality and released to no one without a demonstrated need to know. Strict compliance with the provisions of SECNAVINST 5211.5, Subj: DEPARTMENT OF THE NAVY PRIVACY ACT (PA) PROGRAM, is required. All command and medical personnel with access to such information must ensure careful, limited distribution within the specific guidelines of paras. 12c, 14, and 15 of SECNAVINST 5300.30 to affirmatively combat unfounded innuendo and speculation about the meaning of the information.

I. Adverse action. Servicemembers may not be processed for separation nor have UCMJ action taken based solely on an HIV+ blood test or the epidemiological assessment interview which is conducted by the MTF. Administrative separation processing for drug abuse or homosexuality, or any action under the UCMJ, must be based on independent evidence. Test results cannot be reflected in fitness reports or enlisted evaluations; HIV-1 positivity does not affect promotions. *United States v. Morris*, 25 M.J. 579 (A.C.M.R. 1987), *remanded*, 26 M.J. 46 (C.M.A. 1988) (blood test inadmissible as a matter of policy in government's case-in-chief); *United States v. Womack*, 29 M.J. 88 (C.M.A. 1989) (safe-sex order held lawful); *United States v. Johnson*, 27 M.J. 798 (A.F.C.M.R. 1988), *aff'd*, 30 M.J. 53 (C.M.A. 1990) (unsafe sex after counseling supported conviction for aggravated assault, despite failure to warn of possible disciplinary consequences); *United States v. Stewart*, No. 87-02932 (A.C.M.R. 9 Sept. 1988) (accused pled to assault with a

means likely to cause death or serious injury for intercourse without warnings). Similarly, the presence of AIDS or the HIV-1 antibody will ***not***, by itself, be the basis for any adverse personnel action against a civilian employee.

J. Protective orders. Members who are HIV+ may be ordered, for example, not to have unprotected sex and to inform future sexual partners of their condition. Violation of these orders is punishable by court-martial under article 92. *United States v. Woods*, 28 M.J. 318 (C.M.A. 1989) (legal sufficiency of safe-sex order). A sample order appears at the end of this chapter.

K. Medical interview information. The term epidemiologic-assessment interview means that part of the medical assessment of an HIV+ member where the questioning of the member is for the direct purpose of obtaining epidemiologic or statistical information regarding the occurrence, source, and potential spread of the infection. The epidemiologic-assessment interview will be conducted by the interviewing health care professional during the medical evaluation used to determine the possible mode of transmission and the status of potential infection.

1. Information obtained from a servicemember during or as a result of an epidemiologic-assessment interview may ***not*** be used against the member in the government's case-in-chief in a court-martial; nonjudicial punishment; involuntary separation (other than for medical reasons); administrative or disciplinary reduction *in grade*; denial of promotion; an unfavorable entry in a personnel record; bar to reenlistment; and any other action considered by SECNAV to be an adverse personnel action.

2. The limitations above do not apply to the introduction of evidence for impeachment for rebuttal purposes in any proceeding in which the evidence of drug abuse or relevant sexual activity (or lack thereof) has been first introduced by the member; or, nonadverse personnel actions such as reassignment, disqualification (temporary or permanent) from a personnel reliability program, denial, suspension or revocation of a security clearance, and duties requiring a high degree of stability or alertness (such as flight status, air traffic controllers, explosive ordinance disposal, or deep-sea diving). Nonadverse personnel actions which are supported by serologic evidence of HIV-1 infection shall be accomplished under governing naval regulations, considering all relevant factors on a case-by-case basis.

3. While not prohibited by the letter of SECNAVINST 5300.30, use of interview information against ***another*** servicemember would probably violate its spirit. The rule exists to promote candor in the interview; collateral use would likely have a chilling effect on the willingness of members to provide this information.

L. Points of contact. Navy Assignment Personnel policy: Pers-203C, DSN 224-5562; Navy Medical policy: MED-245, DSN 295-65692; Marine Corps: CMC(HH), DSN 226-1174.

PREVENTIVE MEDICINE ORDERS FOR HIV-POSITIVE PERSONNEL

This command has been advised that you were counseled by Preventive Medicine personnel concerning your diagnosis of HIV positivity, the risk this condition poses to your health, as well as the risk you pose to others. In the counseling, you were advised by medical personnel as to necessary precautions you should take to minimize the health risk to others as a result of your condition. This command has great concern for the health, welfare, and morale of you and other military personnel in this command. For these reasons, I am imposing the following restrictions described to you in your medical counseling on your conduct:

1. Prior to engaging in sexual activity, or any activity in which your bodily fluids may be transmitted to another person, you must verbally advise any prospective sexual partner of your HIV positivity and the risk of possible infection.

2. If your partner consents to sexual relations, you shall not engage in sexual activities without the use of a condom.

3. You must advise your potential partner that the use of a condom does not guarantee that the virus will not be transmitted.

4. You shall not donate blood, sperm, body tissue, organs, or other body fluids.

5. In the event that you require emergency care, you are ordered to inform personnel responding to your emergency that you are HIV-positive, conditions permitting (e.g., unconscious).

6. When you seek medical or dental care, you must inform health care providers that you are HIV-positive before treatment is initiated.

Important: Your failure to comply with these orders may subject you to disciplinary action under the UCMJ and / or administrative separation.

I acknowledge understanding of the above orders.

/s/ Member's signature
Member's name / rate / service / SSN / date

Orders transmitted and member's signature witnessed by:

Signature: ***Name, rank, service, SSN, and date***
Printed Rank, Name, Service, SSN, and Date

Distribution:
Mail Original to: BUPERS (Pers 203C), Department of the Navy, Washington, DC 20350-5000
Certified Copy to: Member and Commanding Officer's file

CHAPTER FORTY-EIGHT

TRUSTEESHIPS FOR INCOMPETENT MEMBERS

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CHAPTER FORTY-EIGHT

TRUSTEESHIPS FOR INCOMPETENT MEMBERS

4801 INTRODUCTION

Per 37 U.S.C. §§ 601-604, SECNAV has delegated authority to the JAG to administer the Navy trustee program. *JAG Manual*, chapter XIV, explains the trustee program. The trustee program includes members of the Navy or Marine Corps on active duty (other than for training) or on the retired list of the Navy or Marine Corps and members of the Fleet Reserve or Fleet Marine Corps Reserve.

4802 BACKGROUND

Each year, many servicemembers become mentally incompetent due to injury or disease. A member is declared incompetent by a competency board convened by a naval medical facility or a Department of Veterans Affairs Medical Center. The competency board consists of three physicians, one of whom must be a psychiatrist. Trustees are appointed to administer the military pay of members who have been judged mentally incapable of managing their financial affairs. The member's pay becomes an immediate issue, especially if the member has dependents.

4803 TRUSTEE SELECTION

On receipt of the report of the competency board, the JAG may direct any Navy or Marine Corps activity to appoint an officer to interview prospective trustees, provided no notice of appointment of a committee, guardian, or other competent legal representative has been received by JAG. The interviewing officer is provided complete instructions pertaining to the interview including forms required to be completed by the prospective trustee that will be returned by the interviewing officer to JAG. A copy of the letter (with enclosures) providing instruction to the interviewing officer follows this chapter. Also, the general instructions provided to the trustees is appended.

4804 INTERVIEWING OFFICER DUTIES

The interviewing officer's duties include:

A. Determining whether the prospective trustee can obtain an appropriate bond

B. assisting the prospective trustee in obtaining the surety bond required under 37 U.S.C. § 602(f);

C. ascertaining that the prospective trustee is willing to execute an affidavit acknowledging that all monies will be used for the benefit of the member and his legal dependents—and that no fee, commission, or charge for any service performed by the trustee (except for payment of the surety bond) will be paid from federal monies received by the trustee; and

D. forwarding recommendations regarding the suitability of the prospective trustee to the Judge Advocate General for appropriate action.

4805 POINT OF CONTACT

The point of contact for the trustee program is OJAG, Civil Affairs Division (Code 32), at (703) 325-9752 or DSN 221-9752.

APPENDIX A

SAMPLE FIELD INTERVIEW OFFICER REQUEST

From: Judge Advocate General
To: Commanding Officer of Navy / Marine Corps Activity

Subj: MEMBER'S NAME, SSN, PROSPECTIVE TRUSTEE'S NAME, ADDRESS, AND TELEPHONE NUMBER(S)

Ref: (a) JAGMAN, Chapter XIV

Encl: (1) NAVJAG Form 5800/24, Affidavit Form
(2) DD Form 462, Surety Bond Form
(3) Privacy Act Statement, Interview
(4) Privacy Act Statement, Surety Bond
(5) Privacy Act Statement, Annual Accounting Report
(6) NAVJAG Form 5800/13 and 13A, Sample Accounting Form

1. Per reference (a), please designate an officer to interview the subject prospective trustee and recommend whether that person is suitable to be appointed trustee to receive the military pay of subject member who has been declared mentally incapable of managing his or her affairs.

2. The interviewing officer should ascertain to what extent any person is legally dependent upon the member for support, and whether a legal guardian, conservator, or committee has been or is to be appointed by a state court of competent jurisdiction. In the event a legal representative has been appointed, the officer should obtain a certified copy of the court appointment and send it to this office (Code 32) using the address shown in the letterhead. After the certified copy has been mailed, no further action is required by the interviewing officer as in most cases no trusteeship is necessary in these circumstances.

3. If the interviewing officer considers the prospective trustee unsatisfactory for any reason, interview and recommend any other relative of subject member in the area and considered qualified as a prospective trustee. If the new prospective trustee is not within the interviewing officer's locality, the interviewing officer should furnish us the name, relationship, and address of the new prospective trustee in order that we may then order an interview with such person. Return this letter and enclosures with the recommendation.

4. The interviewing officer should also report: (a) name, relationship, ages if available, and addresses of all immediate relatives including spouse, children (show dates of birth), parents, brothers, and sisters of subject member; and (b) extent to

which any person is legally dependent upon subject member for support. In the event a parent claims dependency, provide the date from which dependency is claimed along with the amount of allotment the member registered in behalf of the claimed dependent parent.

5. If the recommendation is favorable and a legal guardian has not or will not be appointed, the interviewing officer should advise the prospective trustee that it is necessary to execute the enclosed affidavit, enclosure (1), and to secure a corporate surety using the enclosed bond form, enclosure (2). The interviewing officer should assist the prospective trustee in obtaining a corporate surety by first suggesting that the prospective trustee contact his or her personal insurance agent for information about obtaining the required surety bond. If the prospective trustee does not have a personal insurance agent, the interviewing officer should continue to assist the prospective trustee in obtaining the surety bond. The bond should be executed by both the prospective trustee and the corporate surety. The corporate seal should be affixed along with the name and complete address of both the corporate surety and its agent. Advise the prospective trustee that the surety bond is required by law and cannot be waived. Also, advise the prospective trustee that the bond can only be released by the Judge Advocate General and that the trustee is responsible for paying the annual premium and sending the receipt for the annual premium to this office with the annual accounting report. The premium for this bond is reimbursable from the monies received under the trusteeship and is not reimbursed directly by the Department of the Navy. The executed surety bond and affidavit should then be forwarded to this office together with the interviewing officer's report and recommendation. Advise the prospective trustee further that detailed instructions will be issued upon appointment, that these instructions must be followed very carefully, and that the trustee may seek assistance from this office at any time.

6. Provide the prospective trustee with a Privacy Act statement at the beginning of the interview in the form of enclosure (3), and explain the statement in detail. If the interviewing officer's recommendation with respect to the prospective trustee is favorable, advise the prospective trustee that the bond form (DD Form 462), enclosure (2), is subject to the Privacy Act. The interviewing officer shall provide the prospective trustee Privacy Act statements, enclosures (4) and (5), for retention prior to requesting completion of enclosures (1) and (2). Enclosure (6), a sample copy of the accounting forms, is for the prospective trustee's information at this time and is also subject to the provisions of the Privacy Act. Upon appointment of the trustee, we will provide a supply of accounting forms along with a due date for the first annual accounting report.

7. Please complete the prospective trustee interview and return a report and completed enclosures (1) and (2) to this office within 20 working days from receipt of this request.

8. Our point of contact is the Head, Fiduciary Affairs Branch, Civil Affairs Division, telephone (703) 325-9752, DSN 221-9752. The interviewing officer may call this office prior to conducting the interview for additional information or instruction.

By direction

APPENDIX B

SAMPLE AFFIDAVIT FORM
(NAVJAG Form 5800 / 24)

COUNTY OF _____) SS
STATE OF _____)

_____, now residing at _____
_____, being first duly sworn, deposes and says:

That, pursuant to the Act of September 7, 1962, Public Law 87-649, 76 Stat. 483 (37 USC 601-604), and regulations promulgated by the Secretary of the Navy for the administration thereof, affiant contemplates being appointed trustee to receive from the United States Government any active duty pay and allowances, or any amounts due for accumulated or accrued leave, or any retired pay, otherwise payable to _____, a mentally incompetent member of the uniformed services.

That any monies henceforth received by virtue of such appointment as trustee will be applied to the use and benefit of said incompetent, and that no fee, commission or charge will be demanded by affiant, or in any manner accepted, for any service or services rendered in connection with such appointment as trustee.

That affiant will file annually with the Fiduciary Affairs Branch, Office of the Judge Advocate General, 200 Stovall Street, Alexandria, VA 22332, and at such other times as directed an accounting report, which shall show all funds received in behalf of said incompetent, all expenditures made in behalf of said incompetent, including living expenses of the dependent spouse and minor children (and only such other dependents of said incompetent as approved by the Judge Advocate General), accompanied by receipts or vouchers as instructed covering each expenditure, and a statement of the condition of the trust account at time of submission of the accounting report to the Judge Advocate General.

That affiant will request permission from the Judge Advocate General to make expenditures over and above amounts fixed by the Judge Advocate General, or expenditures of an unusual nature, and that no improper use will be made of the monies received in behalf of the incompetent.

Affiant further deposes that he / she will faithfully comply with the applicable provisions of said Act of September 7, 1962, the said regulations promulgated by the Secretary of the Navy, any other acts as directed by the Judge Advocate General, 200 Stovall Street, Alexandria, VA 22332; and do all acts in the manner required by affiant as trustee.

_____ *(SEAL)*

Subscribed and sworn to before me this ___ day of _____, 19___

_____
Notary Public in and for the
County of _____
State of _____

My commission expires: _____

NAVJAG 5800/24 (Rev. 11-80)

APPENDIX C

BOND OF PERSON DESIGNATED TO ACT ON BEHALF OF INCOMPETENT MEMBER OR FORMER MEMBER OF THE UNIFORMED SERVICES

DATA REQUIRED BY THE PRIVACY ACT OF 1974

AUTHORITY:	Title 37 USC Sec 602.
PRINCIPAL PURPOSE:	To provide a suitable bond by a designated trustee in instances where payments to a mentally incompetent member or former member of the uniformed services are to be made to that trustee.
ROUTINE USES:	To recoup liability incurred by trustee if bond is forfeited.
DISCLOSURE:	Disclosure is voluntary; however, appointment as trustee would be denied if subject information is not provided.

Know all men by these presents, that we, _____ _____ of _____ in the county of _____, state of _____, as principal and _____ _____ as surety, are held and firmly bound unto the United States of America, hereinafter called the Government, for the use and benefit of _____, an incompetent, in the penal sum of _____ dollars, for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The condition of this obligation is such, that, whereas, under the provisions of (37 USC 601-604) the Secretary _____, on _____, designated the principal to receive from the Government any active duty pay and allowances, or any amounts due for accumulated or accrued leave, or any retired or retainer pay, otherwise payable to _____, a mentally incompetent member of the uniformed services.

Now therefore, if the principal, in accordance with regulations prescribed by the Secretary _____, shall apply the amounts so received to the use and benefit of such incompetent member, shall faithfully execute and discharge all duties imposed upon him, shall honestly account for all amounts so received without fraud or delay, and, upon termination of his designation, shall deliver any balance to the person entitled to receive it, then this obligation to be void; otherwise to remain in full force and virtue.

Upon application of the principal or surety to the Secretary _____, and upon rendering of a complete and satisfactory accounting by the principal herein, including evidence of actual possession of the assets of the beneficiary and the supplying of a new bond acceptable to said Secretary _____, if any be required, the surety herein may be released from liability for subsequent occurrences upon such terms and conditions as said Secretary _____ may prescribe.

In witness whereof, the parties hereto have executed this instrument under their several seals this _____ day of _____ 19__, the name and corporate seal of the corporate surety being hereto affixed, and these presents duly signed by its undersigned representative pursuant to authority of its governing body.

In presence of

_____ _____ [*SEAL*]
INDIVIDUAL PRINCIPAL

_____ _____
ADDRESS — STREET NO. CITY STATE

Attest:

_____
CORPORATE SURETY

_____
STREET NO. CITY STATE

By _____ [*Affix Corporate Seal*]

ATTORNEY-IN-FACT OR AGENT AUTHORIZED TO SIGN	ADDRESS (No., Street, City, State, ZIP Code)

DD FORM 462 1 JUL 77 REPLACES EDITION OF 1 SEP 64, AND DD FORM 462, PRIVACY ACT STATEMENT, 26 SEP 75, WHICH ARE OBSOLETE.

APPENDIX D

SAMPLE PRIVACY ACT STATEMENT / INTERVIEW

PROSPECTIVE TRUSTEE INTERVIEW

1. AUTHORITY: 37 U.S.C. §§ 601-604 (1988)

2. PRINCIPLE PURPOSE(S): To determine the need for and suitability of the prospective trustee to serve as the financial manager for a particular member or former member of the naval service medically determined to be mentally incapable of managing his / her financial affairs and to identify persons dependent upon the member for support.

3. ROUTINE USES: Information provided in the interview is used in connection with the administration of payments to a trustee for an incompetent member or former member of the naval service and may be furnished to the Department of Justice for litigation to recoup liability incurred by the trustee and / or surety and for prosecution for malfeasance. Additionally, it may be furnished to the Department of Veteran Affairs, where appropriate, in connection with the administration of programs administered by that agency.

4. DISCLOSURE MANDATORY / VOLUNTARY CONSEQUENCES OF REFUSAL TO DISCLOSE: Disclosure is voluntary, but designation of an individual as trustee will be precluded if the necessary information is not provided.

/s/ Signature of Prospective Trustee

APPENDIX E

SAMPLE PRIVACY ACT STATEMENT / SURETY BOND

BOND OF PERSON DESIGNATED TO ACT ON BEHALF OF INCOMPETENT MEMBER OR FORMER MEMBER OF THE NAVAL SERVICE

1. AUTHORITY: 37 U.S.C. §§ 601-604 (1988)

2. PRINCIPAL PURPOSE(S): To provide surety bond for an individual designated as trustee to receive payments to an incompetent member or former member of the naval service.

3. ROUTINE USES: Information provided in the interview is used in connection with the administration of payments to a trustee for an incompetent member or former member of the naval service and may be furnished to the Department of Justice for litigation to recoup liability incurred by the trustee and / or surety and for prosecution for malfeasance. Additionally, it may be furnished to the Department of Veteran Affairs, where appropriate, in connection with the administration of programs administered by that agency.

4. DISCLOSURE MANDATORY / VOLUNTARY CONSEQUENCES OF REFUSAL TO DISCLOSE: Disclosure is voluntary, but designation of an individual as trustee will be precluded if the necessary information is not provided.

/s/ Signature of Prospective Trustee

APPENDIX F

SAMPLE PRIVACY ACT STATEMENT (NAVJAG Form 5800/13)

ANNUAL OR FINAL ACCOUNTING REPORT

1. AUTHORITY: 37 U.S.C. §§ 601-604 (1988)

2. PRINCIPAL PURPOSE(S): To determine compliance with the terms of the appointment as trustee to serve as the financial manager for a particular military member or former member of the naval service medically determined to be mentally incapable of managing his / her financial affairs.

3. ROUTINE USES: Information provided in the interview is used in connection with the administration of payments to a trustee for an incompetent member or former member of the naval service and may be furnished to the Department of Justice for litigation to recoup liability incurred by the trustee and / or surety and for prosecution for malfeasance, to the bonding company for the purpose of recouping liability incurred by the trustee, and to the Department of Veteran Affairs, where appropriate, in connection with the administration of programs administered by that agency.

4. DISCLOSURE MANDATORY / VOLUNTARY CONSEQUENCES OF REFUSAL TO DISCLOSE: Disclosure is mandatory.

/s/ Signature of Prospective Trustee

APPENDIX G

ANNUAL OR FINAL ACCOUNTING REPORT BY TRUSTEE OF INCOMPETENT NAVAL PERSONNEL

NAVJAG 5800/13 (Rev. 1-89)

Form Approved OMB No. 0703-0027
REPORT SYMBOL JAG 5800-5

NAME OF INCOMPETENT	ADDRESS	REPORT NO.	REPORTING PERIOD: FROM: TO:

DATE	EXPLANATION	RECEIVED	WITHDRAWAL	BALANCE

PAGE ___ OF ___

THE FOLLOWING INFORMATION IS PROVIDED IN ACCORDANCE WITH THE PRIVACY ACT OF 1974, P.L. 93-579:

THE INFORMATION REQUIRED ON NAVJAG 5800/13A (Rev. 8-76) IS REQUIRED BY 37 UNITED STATES CODE 601-604 AND WILL BE USED TO ENSURE THAT NAVY RETIREMENT FUNDS ARE BEING EXPENDED PROPERLY IN COMPLIANCE WITH THE AFOREMENTIONED LAW. THE INFORMATION WILL BE ROUTINELY USED TO IDENTIFY THE RETIRED PERSON AND THE AMOUNT OF HIS PAY. THE DISCLOSURE OF THE INFORMATION IS MANDATORY.

Public reporting burden for this collection of information is estimated to average 10 minutes per response including time for reviewing instructions and gathering and maintaining data needed. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate of Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302 and to the Office of Management and Budget, Washington, DC 20503.

Form Approved
OMB No. 0703-0027

APPENDIX H

SUPPLEMENTAL REPORT TO THE ANNUAL OR FINAL ACCOUNTING REPORT BY TRUSTEE OF INCOMPETENT NAVAL PERSONNEL

NAVJAG 5800/13A (Rev. 1-89) REPORT SYMBOL JAG 5800-5A

NAME OF INCOMPETENT	REPORTING PERIOD
PART I - CHECKING	
CHECKING ACCOUNT NUMBER	NAME OF BANK
ADDRESS OF BANK	
PART II - SAVINGS	
SAVINGS ACCOUNT NUMBER	NAME OF SAVINGS INSTITUTION
ADDRESS OF SAVINGS INSTITUTION	
AMOUNT OF SAVINGS	AS OF (DATE)
PART III - OTHER INCOME	
AMOUNT OF MONEY RECEIVED FROM OTHER SOURCES DURING THE PERIOD	PERIOD: FROM: TO:

THE FOLLOWING INFORMATION IS PROVIDED IN ACCORDANCE WITH THE PRIVACY ACT OF 1974, P.L. 93-579:

THE INFORMATION REQUIRED ON NAVJAG 5800/13A (8-76) IS REQUIRED BY 37 UNITED STATES CODE 601-604 AND WILL BE USED TO ENSURE THAT NAVY RETIREMENT FUNDS ARE BEING EXPENDED PROPERLY IN COMPLIANCE WITH THE AFOREMENTIONED LAW. THE INFORMATION WILL BE ROUTINELY USED TO IDENTIFY THE RETIRED PERSON AND THE AMOUNT OF HIS PAY, THE DISCLOSURE OF THE INFORMATION IS MANDATORY.

Public reporting burden for this collection of information is estimated to average 10 minutes per response including time for reviewing instructions and gathering and maintaining data needed. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate of Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302 and to the Office of Management and Budget, Washington, DC 20503.

APPENDIX I

COPY OF JAG GENERAL INSTRUCTION TO TRUSTEES

The Office of the Judge Advocate General (Civil Affairs Division) administers the trustee program for the Navy and Marine Corps. Any questions pertaining to the trustee program should be directed to that office. The following information is provided to help you in the performance of your duties and to advise you of your responsibilities as trustee:

1. FIDUCIARY RESPONSIBILITIES AND DUTIES

a. You have been appointed trustee in accordance with an Act of Congress, 37 U.S.C. §§ 601-604 (1988), and regulations issued pursuant to that Act. You are being entrusted with pay or allowances due a member or former member of the naval service who has been determined to be incompetent to manage his / her own financial affairs. Your appointment as trustee by the Department of the Navy does not authorize you to act as trustee or guardian for any income or benefits from any other source except interest or dividends received from trustee bank accounts opened with funds received from the Department of the Navy. A trusteeship regarding such other funds would have to be authorized by another federal or state agency or a court of competent jurisdiction.

b. You are personally accountable for all funds paid to you by the Department of the Navy on behalf of the incompetent member or former member of the naval service. Your duty is to manage and conserve monies received on behalf of the member. Accordingly, it is extremely important that you comply with these instructions and all other instructions issued by said office.

c. You are expected to perform faithfully your duties as trustee. If you fail to comply with all instructions issued you by this office, it may become necessary to suspend further payments to you, terminate your trusteeship, and take action to recover from you any monies used improperly. Federal law requires that you serve without fee or charge for services rendered in connection with your trusteeship. Except for the premium on your surety bond, you are not authorized to use trustee funds to pay any fee or commission for any legal or other service rendered in connection with the establishment or administration of the trusteeship.

d. Your trusteeship authorizes you to receive only monies paid by the Department of the Navy for all active-duty pay and allowances, amounts due for accrued or accumulated leave, or retired pay due or to become due the member. Disbursements made by you from these monies must be for the sole use and benefit of the member, the lawful spouse and minor children, if any. Determination of

dependency of other family members will be made in advance by the Judge Advocate General, Department of the Navy, 200 Stovall Street, Alexandria, VA 22332-2400.

e. As trustee, you are required by law to submit an accounting report annually and at such other times as directed by said office. Your accounting report should be mailed to the Office of the Judge Advocate General (Code 32), Department of the Navy, 200 Stovall Street, Alexandria, VA 22332-2400. Your accounting report must be signed and expenditures must be substantiated by receipts or canceled checks for every expense exceeding $200.00. Additionally, the most recent trustee bank statements showing the name and address of the bank, the name in which the account is maintained, and the balance of the account at the end of the accounting period must accompany the accounting report. A receipt showing that the annual surety bond premium has been paid must be submitted with the annual accounting report. Upon your appointment as trustee, accounting forms are provided and a due date established when the first accounting report is required. Timely submission of accounting reports is your responsibility. We do not send notices of accounting due dates. Failure to submit your accounting report by the due date may result in suspension of further trustee payments to you until a proper accounting report is received by the Judge Advocate General.

2. INCOME AND EXPENSES

a. Upon receipt of your first check from the Navy or Marine Corps Finance Center, you should open a trustee checking account in a federally insured bank in your name as trustee for the member (e.g., Mary Jones, trustee for John A. Jones). A copy of your initial deposit slip must be forwarded to said office at this time. Trustee funds should not be deposited in your own personal bank account and should not be combined with any other monies. Investment of trustee funds in any account other than a checking and / or saving account in a federally insured bank must receive prior written approval from said office.

b. Federal law requires that you obtain and execute a surety bond. The initial cost and annual premium renewal of your corporate surety bond are authorized expenditures. You should obtain a paid receipt for this expenditure each time payment is made and forward the receipt to said office with your annual accounting report.

c. Limited sums of money ($200.00 or less) may be held in cash. Receipts are not required for each expenditure under $200.00 made in the interest of the member or his / her legal dependents. Except for day-to-day living expenses for food, minor household needs, and small purchases such as medical supplies, newspapers, magazines, postage, entertainment, tobacco products and other sundries, paid receipts should be requested and retained by you in support of all trustee funds spent in behalf of the member and his legal dependents. All other expenses such as

mortgage or rent payments, insurance, the cost of the premium on your surety bond (which is authorized to be paid from the trustee account), medical or dental bills, utility bills and other major expenses and bills should be paid by check. If paid in cash, a signed receipt must be obtained for payment.

d. If the member is hospitalized in a Department of Veteran Affairs medical facility, you may be required to provide funds for his / her personal needs. The amount required will be specified by the Director of the medical facility. You are authorized to expend trustee funds for this purpose.

e. You are prohibited from using or obligating trustee funds for expenditures in excess of $200.00 for such items as jewelry, furniture, clothing, household appliances, or for the purchase of an automobile, house or lot, or farm equipment without prior approval of the Judge Advocate General.

f. Church donations on behalf of the member should not exceed five percent (5%) of the trustee funds received.

g. Loans may not be made from trustee funds to anyone for any reason.

h. Trustee funds may not be spent for gifts for anyone other than the lawful spouse and legally dependent children without prior approval of the Judge Advocate General.

i. Purchase of new life insurance must have prior approval. House, property, and automobile insurance not in effect prior to your trustee appointment must also receive prior approval of the Judge Advocate General.

j. Reasonable allowances will be authorized from trustee funds for travel expenses incurred by you in execution of your trustee duties. These expenses must have prior approval from this office and must be included in the accounting report.

k. Your accounting report should be maintained up-to-date to expedite the timely submission of the annual accounting to this office. Your trusteeship records are subject to audit at all times by this office. In any event, your accounting report—together with paid receipts or cancelled checks or other evidence of purchase—should be readily available for review at all times. All accounting records will be returned to you.

3. MISCELLANEOUS

a. The Office of the Judge Advocate General, Department of the Navy, 200 Stovall Street, Alexandria, VA 22332-2400, must be notified immediately of any change in the status affecting the trusteeship such as the death or disappearance of

the member; appointment of a legal guardian, committee, or conservator by a state court; divorce or legal separation of the member; death of dependents; change of status of dependents, including minor children becoming of age; change of address of member and / or trustee; inability of trustee to perform his / her duties; death of trustee. You must also advise the Judge Advocate General when the military pay has been waived in order to receive VA compensation.

b. Your trustee records are subject to audit at all times by the Judge Advocate General to insure that the best interests of the member are being fulfilled. In any event, your accounting report—together with paid receipts, sales slips, and cancelled checks—should be readily available for review if requested. All records will be returned to you upon completion of any audit.