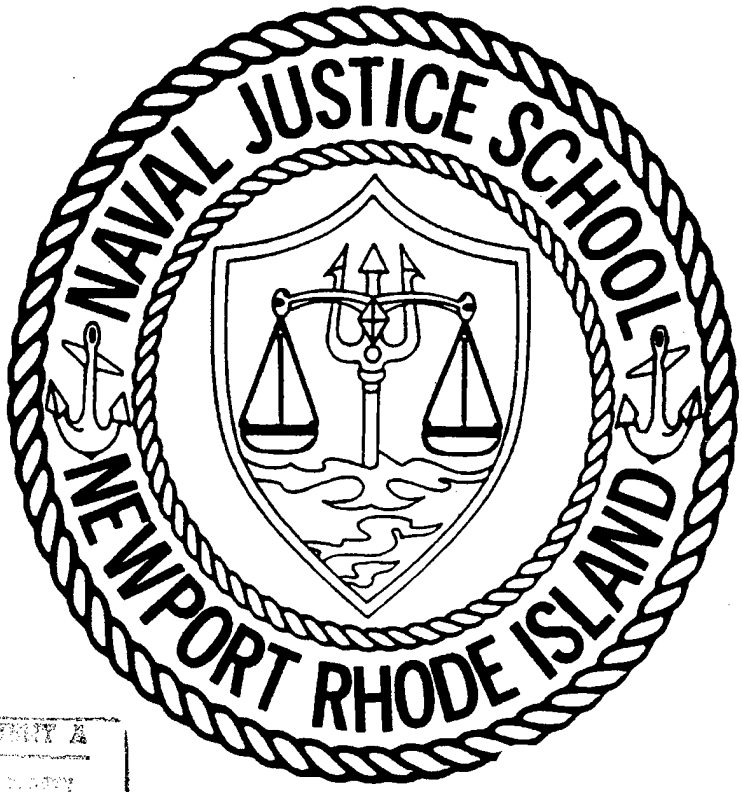
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STUDY GUIDE

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Admin Law
Study Guide
Rev. 8/97

PREFACE

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

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

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ADMIN LAW STUDY GUIDE

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CHAPTER I

ADMINISTRATIVE INVESTIGATIONS

PART A - INVESTIGATIONS - GENERALLY

0101 BACKGROUND. Almost every naval officer will have some type of contact with an administrative investigation (commonly referred to as a "JAGMAN" investigation) during their military career, either as an investigating officer or as a convening authority. The basic regulations governing such investigations are contained in the *Manual of the Judge Advocate General* (JAGMAN). The primary purpose of an administrative investigation is to provide the convening authority and reviewing authorities with adequate information regarding a specific incident which occurs in the Department of the Navy. These officials will then make decisions and take appropriate action based upon the information developed. As the name denotes, these investigations are purely administrative in nature—not judicial. The investigation is advisory only; the opinions are not final determinations or legal judgments, nor are the recommendations made by the investigating officer binding upon the convening or reviewing authorities.

0102 FUNCTION. The primary function of an administrative investigation is to search out, develop, assemble, analyze, and record all available information relative to the incident under investigation. The findings of fact, opinions and recommendations developed through the investigatory process may provide the basis for various actions designed to improve command management and administration, resolve claims for or against the government, publish "lessons learned" to the fleet (particularly pertaining to safety), and allow for fully informed administrative determinations concerning personnel (i.e., whether a servicemember's injury was incurred while in the "line of duty"). There are four types of administrative investigations described in Chapter II of the JAGMAN: courts of inquiry, boards of inquiry, command investigations, and litigation report investigations.

0103 COURT OF INQUIRY. The court of inquiry is the traditional means by which the most serious military incidents are investigated. Originally adopted by the British Army, it has remained in its present form with only slight modifications since the adoption of the Articles of War of 1786. A court of inquiry is not a court in the sense the term is used today; rather, it is a board of senior officers charged with searching out, developing, assembling, analyzing, and recording all available information concerning the incident under

investigation. When directed by the convening authority, the court will offer opinions and recommendations about an incident. JAGINST 5830.1.

A. ***Principal characteristics***. The principal characteristics of a court of inquiry are listed below.

1. The court is convened by any person authorized to convene a general court-martial or by any person designated by the Secretary of the Navy. JAGMAN, § 0211b(1); Article 135(a), UCMJ; JAGINST 5830.1, encl. (1), para. 2.

2. It 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. JAGMAN, § 0211b(2); Article 135(b), UCMJ; JAGINST 5830.1, encl. (1), para. 3a.

3. Legal counsel, certified under Article 27(b) and sworn under Article 42(a), UCMJ, is appointed for the court and such counsel acts under the direct supervision of the president of the court, assisting in all matters of law, presenting evidence, and in keeping and preparing the record. Counsel does not perform as a prosecutor, but must ensure that all the evidence is presented to the court. JAGMAN, § 0211b(2); JAGINST 5830.1, encl. (1), para. 2b(3).

4. The court is convened by written appointing order. The required contents, along with an example, can be found in JAGINST 5830.1, encl. (1), para. 4, and encl. (3).

5. The court ***must*** designate as a "party" to the investigation any person(s) subject to the UCMJ whose conduct is "subject to inquiry" and / or any other Department of Defense employee(s) who has a "direct interest" in the subject under inquiry where such an employee has requested to be so designated. Designation as a "party" affords that individual an opportunity to participate in the hearing as to possible adverse information concerning him or her. JAGMAN, § 0211b(5),(b); JAGINST 5830.1.

a. ***Subject to inquiry***. A person's conduct or performance is "subject to inquiry" when that person is involved in the incident under investigation in such a way that disciplinary action may follow, that rights or privileges may be adversely affected, or that personal reputation or professional standing may be jeopardized. JAGMAN, Appendix A-2-b.

b. ***Direct interest***. A person has a "direct interest" in the subject of inquiry when:

(1) the findings, opinions, or recommendations may, in view of the person's relation to the incident or circumstances under investigation, reflect questionable or unsatisfactory conduct or performance of duty; or

(2) the findings, opinions, or recommendations may relate to a matter over which the person has a duty or right to exercise control. JAGMAN, Appendix A-2-b.

6. The court uses a formal hearing procedure.

a. All testimony is under oath (except for a person designated as a party who may make an unsworn statement) and transcribed verbatim (except arguments of counsel). JAGMAN, § 0211b(4); Article 135(f), UCMJ; JAGINST 5830.1, encl. (1), paras. 10e(1) and 14.

b. Witnesses and evidence are presented in the following order after opening statements are made: counsel for the court; a party; counsel for the court in rebuttal; and, subsequently, as requested by the court. After testimony and statements by the parties, if any, counsel for the court and counsel for the parties may present argument. JAGINST 5830.1, encl. (1), para. 10.

c. ***Rights of a party.*** A person designated as a party has the following rights (JAGMAN, appendix A-2-b):

(1) to be given due notice of such designation;

(2) to be present during the proceedings, except when the investigation is cleared for deliberations;

(3) to be represented by counsel;

– Only a "party" is entitled to be represented by counsel. Military parties and, in very limited circumstances, civilians who are designated as parties will be appointed Article 27(b), UCMJ, certified military counsel; however, any party may be represented by civilian counsel at his / her own expense.

(4) to be informed of the purpose of the investigation and be provided with a copy of the appointing order. JAGINST 5830.1, encl. (1), para. 9d(4); encl. (2), para. 9d(4);

(5) to examine and object to the introduction of physical and documentary evidence and written statements;

(6) to object to the testimony of witnesses and to cross-examine adverse witnesses;

(7) to request that the court of inquiry or investigation obtain documents and testimony of witnesses, or pursue additional areas of inquiry. JAGINST 5830.1, encl. (1), para. 9d(7); encl. (2), para. 9d(7);

(8) to introduce evidence;

(9) to testify at his / her own request, but not be called as a witness. JAGINST 5830.1, encl. (1), para. 9d(9); encl. (2), para. 9d(9);

(10) to refuse to incriminate oneself and, if accused or suspected of an offense, to be informed of the nature of the accusation and advised that no statement regarding the offense of which he is accused or suspected is required, and that any statement made by him may be used as evidence against him in a trial by court-martial;

(11) to make a voluntary statement, oral or written, sworn or unsworn, to be included in the record of proceedings. JAGINST 5830.1, encl. (1), para. 9d(11); encl. (2), para. 9d(11);

(12) to make an argument at the conclusion of presentation of evidence;

(13) to be properly advised concerning the Privacy Act of 1974; and

(14) to challenge members.

d. Although a court of inquiry uses a formal hearing procedure, it is administrative not judicial. Therefore, as in any other administrative investigation, the Military Rules of Evidence (Mil. R. Evid.) will not be followed, except for:

(1) Mil. R. Evid. 301, self-incrimination;

(2) Mil. R. Evid. 302, mental examination;

(3) Mil. R. Evid. 303, degrading questions;

(4) Mil. R. Evid. 501-504, dealing with privileges;

(5) Mil. R. Evid. 505, classified information;

(6) Mil. R. Evid. 506, government information other than classified information;

(7) Mil. R. Evid. 507, informants.

JAGINST 5830.1, encl. (1), para. 11.

7. A court of inquiry has the ***power to subpoena*** civilian witnesses, who may be summoned to appear and testify before the court the same as at trial by court-martial. JAGMAN, § 0211b(7); R.C.M. 703(e)(2); JAGINST 5830.1, encl. (1), para. 12.

B. ***Use of the Record of the Court of Inquiry***

1. ***Nonjudicial punishment (NJP)***

a. If an individual is accorded the rights of a party with respect to the act or omission under investigation, punishment may be imposed without further proceedings. The individual may, however, submit any matter in defense, extenuation, or mitigation. JAGMAN, §§ 0110d; JAGINST 5830.1, encl. (1), para. 9d(1).

b. If an individual has not been accorded the rights of a party, a hearing conducted in accordance with paragraph 4 of Part V, MCM, 1984, must be conducted before punishment is imposed. JAGMAN, §§ 0110d; JAGINST 5830.1, encl. (1), para. 9d(1).

2. ***General court-martial (GCM).*** In cases where a GCM is contemplated, it is sometimes possible to use the record of a court of inquiry in lieu of a formal pretrial investigation of the offenses. As a practical matter, it is difficult to substitute a court of inquiry for an Article 32 pretrial investigation because of Article 32(c) of the UCMJ; if a court of inquiry is used in place of an Article 32 investigation, the accused is given additional rights to demand recall of witnesses for further cross-examination and to offer new evidence. Normally, the convening of a separate Article 32 investigation is the most efficient method for bringing an accused before a GCM. JAGINST 5830.1, encl. (1), para. 9d(3); Article 32(c), UCMJ; R.C.M. 405(b).

3. ***Use of testimony.*** Sworn testimony contained in the record of proceedings of a court of inquiry before which an accused was not designated as a party may not be received in evidence against the accused unless that testimony is admissible independently of the provisions of Article 50, UCMJ, and Mil. R. Evid. 804. JAGINST 5830.1, encl. (1), para. 9d(4).

4. ***Right to copy of the record.*** A party is entitled to a copy of the record of an Article 32 pretrial investigation where trial by GCM has been ordered, subject to the regulations applicable to classified material. R.C.M. 405(j)(3). The same right may presume to exist as to a court of inquiry record where so used in place of the Article 32 investigation.

If a letter of censure or other NJP is imposed, the party upon whom it was imposed has a right to have access to a copy of the record in order to appeal.

0104 BOARD OF INQUIRY. A board of inquiry is intended to be an intermediate step between a court of inquiry and a command investigation. 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 investigating officer is necessary to conduct the hearing. JAGINST 5830.1.

A. ***Principal characteristics.*** The principal characteristics of a board of inquiry are listed below:

1. The board is convened by any person authorized to convene a general court-martial. JAGMAN, § 0211c(1); JAGINST 5830.1, encl. (2), para. 2.

2. It consists of one or more commissioned officers. JAGMAN, § 0211c(2).

a. The board should normally be composed of a single officer; however, if multiple members are considered desirable, a court of inquiry should be considered. JAGINST 5830.1, encl. (2), para. 3.

(1) ***One-officer board.*** Normally, it consists of one commissioned officer, but a Department of the Navy (DON) civilian employee may be used if appropriate. The investigating officer (IO) should be senior to any designated party and at least an O-4 or GS-13. JAGINST 5830.1, encl. (2), para. 3a.

(2) ***Multiple membership.*** A board may consist of two or more commissioned officers with the senior member, who will be the president of the board, at least an O-4. If appropriate, warrant officers, senior enlisted, or DON civilian employees may be assigned as members, in addition to at least one commissioned officer. No member of the board should be junior in rank to any person whose conduct or performance of duty is subject to inquiry. JAGINST 5830.1, encl. (2), para. 3b.

3. Legal counsel should be appointed for the proceedings, with duties and requirements identical to those for a court of inquiry (see sec. 0103 A.3, above). JAGMAN, § 0211c(2); JAGINST 5830.1, encl. (2), para. 3c.

4. The investigation is convened by written appointing order. The required contents, along with an example, can be found in JAGINST 5830.1, encl. (2), para. 4, and encl. (4).

5. The convening authority ***may*** designate any person(s) whose conduct is subject to inquiry, or who has a direct interest in the subject of inquiry a "party" in the convening order. The convening authority may also authorize the board to designate parties during the proceedings. JAGMAN, §§ 0211c(3), 0205; JAGINST 5830.1, encl. (2), para. 3d(6), 9.

a. The definitions and rights afforded a "party" at a Board are identical to that applied to a Court of Inquiry (see sec. 0103, A.5, above).

6. A formal hearing procedure, similar to the court of inquiry, is used (see sec. 0103, A.6, above). JAGMAN, § 0211c(4); JAGINST 5830.1, encl. (1), para. 10.

7. Unless convened to investigate a claim under Article 139, UCMJ, and JAGMAN, Chapter IV, the board ***does not*** possess the power to subpoena civilian witnesses. JAGMAN, § 0211c(5); JAGINST 5830.1, encl. (2), para. 12(a).

B. ***Use of the Record of the Board of Inquiry.*** The record of the Board of Inquiry may be used in ways similar to that of Courts of Inquiry (see sec. 0103, B, above; JAGINST 5830.1, encl. (2), para. 9).

0105 COMMAND INVESTIGATION. By far the most common administrative fact-finding body is the command investigation (known under previous versions of the JAGMAN as "informal investigations," or "investigations not requiring a hearing.") As with the court or board of inquiry, the primary function of the command investigation is to gather information. In contrast to the court or board of inquiry, the command investigation does ***not*** utilize a hearing procedure and thus is much more flexible in the manner in which information is collected and recorded. Because the command investigation does not perform the collateral function of providing a hearing, there is no authority to designate "parties" to the investigation.

A. ***Principle characteristics.*** The principle characteristics of a command investigation are listed below.

1. Such an investigation may be convened by any officer in command (including an officer-in-charge). JAGMAN, § 0209c(1).

2. The investigation is conducted by one or more persons assigned from within the Department of the Navy. Most command investigations will be conducted by a commissioned officer, although warrant officers, senior enlisted personnel, or civilian employees may also be used when considered appropriate. JAGMAN, §§ 0209e(1)(b), 0213a.

3. Legal counsel is not normally assigned to assist in the investigation, although legal assistance or other forms of administrative and / or technical support may be assigned in the discretion of the convening authority and as resources allow. JAGMAN, § 0213b.

4. The investigation is convened by written appointing order (oral or message orders initiating command investigations must be followed up with written and signed confirmation). JAGMAN, §§ 0209e(1)(a), 0212a.

5. The investigation does not involve formal hearings. JAGMAN, § 0209e(1)(e).

6. The investigating officer collects evidence by personal interview, written correspondence, telephone inquiry, or other means deemed appropriate, and may, but is not required to, obtain sworn statements signed by witnesses. JAGMAN, §§ 0209e(1)(c), 0209e(1)(f), 0209e(2).

7. The investigative report is documented in writing in the manner prescribed by the convening authority in the convening order. JAGMAN, § 0209e(1)(d).

B. ***Method of investigation and format of report.*** Further guidance on conducting a command investigation, and a sample report, is contained in Chapter II.

0106 LITIGATION - REPORT INVESTIGATION. The fourth, and most recently created, JAGMAN administrative investigation is the litigation-report investigation. Such a fact-finding body is appropriate whenever the ***primary purpose*** of the investigation is to prepare and defend the legal interests of the Navy in claims proceedings or civil litigation. While closely resembling the command investigation in method of evidence collection and report preparation, there are special rules for the litigation-report investigation, the most important being that a judge advocate ***must*** be personally involved in directing and supervising the investigatory effort. With such involvement, the Navy may more forcefully assert the attorney work product privilege in trying to prevent unnecessary disclosure of the investigation, or certain portions thereof, to individuals whose litigation interests may be adverse to the interests of the United States.

A. ***Principal characteristics.*** The principle characteristics of a litigation-report investigation are listed below.

1. The investigation may be convened by an officer in command ***but only after*** the officer in command has consulted with the "cognizant" judge advocate. JAGMAN, §§ 0210b(1)(a), 0210e(1), appendix A-2-a, para. 3.

– The "cognizant judge advocate" is that individual who is responsible for providing legal advice to the convening authority. This will often be a station or staff judge advocate, but may also include a command services or claims officer at the servicing Naval Legal Services Office. JAGMAN, appendix A-2-a.

2. The investigation is conducted by one or more persons assigned from within the Department of the Navy, under the direction and supervision of the cognizant judge advocate. While responsible for supervising the investigation, this does ***not*** mean the cognizant judge advocate necessarily becomes the investigating officer. Most litigation-report investigations will be conducted by a commissioned officer, however, when considered appropriate, warrant officers, senior enlisted personnel, or civilian employees may also be used. JAGMAN, §§ 0210b(1)(b), 0210c(1), 0210e(1)(b), 0213a.

3. The investigation is convened by written appointing order that is specifically tailored to ensure appropriate procedure. JAGMAN, §§ 0210d, 0210e(1)(a), appendix A-2-d.

4. The investigation does not involve formal hearings, but instead collects evidence by personal interview, written correspondence, telephone inquiry, or other means deemed appropriate. Signed witness statements shall ***not*** normally be obtained. JAGMAN, §§ 0210e(1)(d).

5. The investigative report is documented in writing in the manner prescribed by the cognizant judge advocate. JAGMAN, § 0210e(1)(d).

B. ***Method of investigation and format of report.*** Further guidance on conducting a litigation-report investigation is contained in Chapter II.

PART B - DECIDING WHEN ADMINISTRATIVE INVESTIGATIONS ARE REQUIRED

0107 INVESTIGATIONS REQUIRED BY THE JAGMAN

A. ***General.*** Whenever an officer in command desires to obtain additional information regarding any incident occurring within, or involving personnel of his / her command, an administrative investigation may be convened. However, as a matter of practice, administrative fact-finding bodies are typically reserved for only those incidents which are ***required*** to be formally investigated as directed by the JAGMAN or other Navy or Marine Corps instructions. This approach is due, at least in part, to the significant amount of time and effort required of both the investigating officer and the command in ensuring the administrative investigation is ***properly*** conducted, formatted, and endorsed.

B. ***Incidents which require JAGMAN investigations.*** The following are examples of incidents for which administrative investigations governed by the JAGMAN are required:

1. ***Aircraft accidents.*** Serious aircraft mishaps, those resulting in death or serious injury, extensive damage to government property, or where the possibility of a claim exists for or against the Government, require a JAGMAN investigation. JAGMAN, § 0242.

2. ***Motor vehicle accidents.*** Except for the most minor of accidents ($5,000.00 or less of property damage, and / or involving only minor personal injury, in which case completion of a SF 91 may be satisfactory), all accidents involving government motor vehicles must be investigated with a JAGMAN administrative investigation. JAGMAN, § 0243.

3. ***Explosions.*** JAGMAN, § 0245.

4. ***Ship stranding.*** JAGMAN, § 0246.

5. ***Collisions.*** Collision cases, including collisions with another vessel or any shore structure, fish net or trap, buoy or similar foreign object, where property damage or personal injury results, require an investigation. Be aware of the claims aspect in any such cases—consult Chapter XII of the JAGMAN regarding "admiralty claims" and the OJAG notification requirement. JAGMAN, §§ 0247, 1201 *et seq.*

6. ***Flooding of a ship.*** Whether intentional or accidental, "significant" flooding incidents require an administrative investigation. JAGMAN, § 0248.

7. ***Fires.*** Where "significant," a JAGMAN investigation is required. JAGMAN, § 0249.

8. ***Loss of excess of government funds or property.*** Except for minor losses, which can be adequately investigated and documented through use of supply reporting procedures, JAGMAN investigations are required for losses of public funds and public property. JAGMAN, § 0250.

9. ***Claims for or against the government.*** JAGMAN, § 0251; JAGMAN, Chapter IV; JAGINST 5890.1.

10. ***Health care incidents.*** Where claims are filed as a result of a health care incident, or when there is a death or potentially compensable event potentially attributable to inadequate health care rendered by Government employees or provided in a military treatment facility, a JAGMAN investigation is required. JAGMAN, § 0252.

11. ***Reservists.*** An investigation is required if a reservist is injured or killed while performing active duty or training for a period of 30 days or less, or while performing inactive-duty training (drill), or while traveling directly to or from such duty. JAGMAN, § 0253.

12. ***Firearm accidents.*** Incidents involving accidental or apparently self-inflicted gunshot wounds must be documented in an administrative investigation. JAGMAN, § 0254.

13. ***Pollution incidents.*** Significant incidents of pollution, such as oil or hazardous material / waste spills, may require the convening of an administrative investigation, particularly where assessment of a fire or penalty from a regulatory agency may be anticipated. JAGMAN, § 0255a; OPNAVINST 5090.1.

14. ***Security violations.*** Where there has been a compromise of classified information and either: (1) the probability of harm to national security cannot be discounted; (2) significant command security weaknesses have been revealed; or (3) punitive disciplinary action is contemplated, a JAGMAN investigation must be convened. JAGMAN, § 0255c; OPNAVINST 5510.1.

15. ***Postal violations.*** JAGMAN, § 0255d; OPNAVINST 5112.6.

16. ***Injuries or diseases incurred by servicemembers.*** Administrative investigations will normally be convened whenever there is evidence to suggest that an injury or disease sustained by a servicemember may have been incurred while "not in the line of duty." JAGMAN, § 0230; *see also* Chapter III, *infra*.

C. ***Death Cases.*** JAGMAN investigations are not normally conducted where the death of a servicemember was the result of a previously known medical condition or the result of enemy action. JAGMAN, § 0235b.

2. Investigations must be conducted where:

(a) Civilian or other non-naval personnel are found dead on a naval installation under peculiar or doubtful circumstances;

(b) the circumstances surrounding the death places the adequacy of military medical care reasonably at issue;

(c) a probable nexus between the naval service and the circumstances of the death of a servicemember exists (other than as a result of enemy action); or

(d) the death resulted from a possible "friendly-fire" incident JAGMAN, § 0235c.

3. ***Limited Investigations***. Where the death of a servicemember occurred at a location within the U.S. and not under military control, while the member was off-duty, and there is no discernable nexus between the circumstances of the death and the naval service, the command need only obtain a copy of the police investigation and retain it as an internal report. JAGMAN, § 0235d.

Additional rules and considerations in death cases are discussed in Chapter II, Part C, *infra*.

0108 INVESTIGATIONS REQUIRED BY OTHER DIRECTIVES

A. ***General***. The JAGMAN does not govern the entire universe of administrative investigations. Fact-finding bodies may be required by other instructions, directives, or regulations, which in turn describe and control the purpose, method, and reporting of the investigation, separate and apart from the JAGMAN. Some incidents involve conducting an inquiry for several different purposes which can be handled by one administrative investigation; others may not. Perhaps the best example of the latter situation involves aircraft mishaps. When an aircraft mishap results in death or serious injury, extensive damage to government property, or when the possibility of a claim exists, one of the administrative investigations described in the JAGMAN is required. In addition, an "aircraft accident safety investigation" will be conducted, separate and apart from the JAGMAN investigation, for the independent purpose of safety and accident prevention analysis. One must be careful to determine why an administrative investigation is being conducted, under what authority, what instructions pertain, and whether the investigation will satisfy all Navy informational requirements or only a portion of them. Examples of investigations required by other authorities include:

1. ***Situation reports (SITREPs / OPREPs)***. U.S. Navy Regulations, 1990, Articles 0831 and 0851; OPNAVINST 3100.6.

2. ***Inspector General (IG) investigations***. SECNAVINST 5430.57.

3. ***Aircraft mishaps***. For the sole purpose of safety and accident prevention, OPNAVINST 3750.6 provides specific direction for the conduct, analysis, and review of aircraft mishaps. Such fact-finding bodies are known as "aircraft accident safety investigations," and their conclusions are contained within "aircraft mishap investigation reports" (AMIRs). To encourage complete, open, and forthright information, opinions, and recommendations regarding a mishap, much of the AMIR is privileged information. Assurances of confidentiality allow personnel to be as honest as possible when providing statements, thus ensuring complete and candid information which is vital for safety purposes. OPNAVINST 3750.6; MCO 3750.1.

4. ***Safety and mishap investigations.*** The same principles discussed above as to AMIR's apply to safety investigations into non-aviation mishaps. OPNAVINST 5100.19, 5102.1; MCO 5101.8, P5102.1.

5. ***Security violations.*** There are instances of loss or compromise of classified information that do not rise to the level where a JAGMAN investigation is required; however, other reporting requirements may still apply. OPNAVINST 5510.1.

6. ***Naval Criminal Investigative Service investigations.*** SECNAVINST 5520.3.

7. ***Investigations against senior DON officials.*** SECNAVINST 5800.12.

8. ***UCMJ investigations.*** R.C.M. 303, MCM, 1984; Article 32, UCMJ, R.C.M. 405, MCM, 1984.

9. ***Admiralty incidents.*** JAGMAN, Chapter XII; JAGINST 5880.1.

10. ***Missing, lost, stolen, or recovered (MLSR) property reports.*** SECNAVINST 5500.4.

B. ***Coordination of different investigations.*** Incidents may occur within the Navy which require the convening of two different fact-finding bodies (For example, with a significant aircraft mishap, both a JAGMAN investigation and an aircraft accident safety investigation will be ordered). When the investigations have different purposes, conducting both may be appropriate. There are special considerations, however.

1. If the only basis for an investigation is to determine whether disciplinary action is appropriate, inquiries under R.C.M. 303, MCM, 1984, or investigations under Article 32, UCMJ, and R.C.M. 405, MCM, 1984, should be conducted ***without*** separate investigations under the JAGMAN. JAGMAN, § 0202b.

2. To avoid interfering with law enforcement, a JAGMAN investigation should not normally proceed if the same incident is under investigation by NCIS, the FBI, or local civilian law enforcement agencies, unless concurrence of that agency is first obtained. If NCIS objects to a concurrent JAGMAN investigation, the investigation should be suspended and the matter referred to the chain-of-command for resolution. JAGMAN, § 0204c.

3. In all incidents where concurrent safety investigations are being conducted, including aircraft accident safety investigations, there are specific limitations which restrict the interaction and integration between JAGMAN and mishap investigations. While both investigative bodies have equal access to evidence and witnesses, the privileges and assurances of confidentiality associated with safety investigations prevent cooperative

investigatory efforts or the sharing of information. This relationship between the JAGMAN investigation and safety investigations must be thoroughly understood by all persons involved with investigating any accident or mishap. JAGMAN, §§ 0242b; 0244b; OPNAVINST 3750.6, 5102.1.

PART C - SELECTING THE APPROPRIATE TYPE OF ADMINISTRATIVE INVESTIGATION

0109 BASIC CONSIDERATIONS. The type of fact-finding body to be convened is determined by the purpose(s) of the investigation, the seriousness of the issues involved, the resources available and time allotted for completion of the investigation, and the nature and extent of the powers required to conduct a thorough investigation. The most common administrative fact-finding body will be the command investigation; however, "major incidents" will require a more formal investigation which affords hearings or possess subpoena power. Litigation-report investigations will be reserved for those incidents where the ***primary purpose*** of the investigation revolves around the claims issue. Incidents which require investigation often possess a claims element (in our litigious society, claims may be reasonably anticipated for most incidents where injury is incurred). Just because a claim may be anticipated does ***not*** automatically mean a Litigation-Report Investigation must result; where there are also significant command interests to be addressed (i.e., causes of an aircraft crash, injury determinations, etc.), Command Investigations will likely remain the most appropriate investigating body.

0110 PRELIMINARY INQUIRIES. The preliminary inquiry (PI) is a quick and somewhat informal investigative tool that can be used to determine initially whether a particular incident is serious enough to warrant some form of JAGMAN investigation. A PI is not necessarily required, however, it is "advised" for all incidents potentially warranting an investigation.

A. ***Method of inquiry.*** A convening authority may conduct a PI personally or appoint a member of the command to do so. The PI is strictly informal; there are no requirements nor restrictions governing how the inquiry is to be accomplished. Generally, the PI should not take any longer than three (3) working days. If more time is required, it means that the inquiry officer is attempting to do too much or has not been sufficiently instructed as to what issue(s) is to be addressed. Upon completion of the PI, a report is tendered to the convening authority. The PI report need not be in writing, but some form of limited documentation is advisable (see JAGMAN, appendix A-2-h). JAGMAN, § 0204.

B. ***Command options.*** Upon reviewing the results of the PI, a convening authority may take one of the following actions:

1. ***Take no further action.*** Where further investigation would serve no useful purpose, a decision may be made not to convene a JAGMAN investigation. This is especially appropriate where the PI reveals that the incident is likely to be of little interest to anyone outside the immediate command or that the event will be adequately investigated under some other procedure (i.e., NCIS investigation, MLSR / survey procedure, etc.). JAGMAN, §§ 0205a(2)(a), 0207. As a matter of practice, documentation of the PI and command decision is advisable.

2. ***Conduct a command investigation.*** JAGMAN, § 0205a(2)(b). *See* section 0105, *supra*.

3. ***Convene a litigation-report investigation.*** Consultation with the cognizant judge advocate is required. JAGMAN, § 0205a(2)(c). *See* section 0106, *supra*.

4. ***Convene a court or board of inquiry.*** If the convening authority is not a GCMCA, and therefore not empowered to convene a court or board, the convening authority may request, via the chain-of-command, that an officer with such authority convene the court or board. JAGMAN, § 0205a(2)(d). *See* sections 0103 and 0104, *supra*.

It is always appropriate for a convening authority to consult with a cognizant judge advocate before deciding on how to proceed. JAGMAN, § 0206.

C. ***Reporting the results of PIs.*** After deciding which of the command options to exercise, the convening authority is to report that decision to his / her immediate superior in the chain-of-command. This does ***not*** require a special, stand-alone report; command decisions on PIs are relayed in the context of existing situational reporting systems.

D. ***Review of command decision.*** The initial determination of which option to exercise is a matter of command discretion. Superiors in the chain-of-command may direct that an option be reconsidered or that a particular course of action be taken. For example, a superior may feel that a litigation-report investigation may be the preferred method of investigating and documenting a particular incident and direct that a subordinate convene such an investigation rather than a command investigation. JAGMAN, §§ 0204i and 0205b.

0111 "MAJOR INCIDENTS." For those situations determined to be "major incidents," a court of inquiry ***shall*** be convened unless the convening authority determines such type of administrative investigation is otherwise unwarranted ***and*** the next superior in the chain-of-command concurs in the decision not to convene a court.

A. ***Major incidents defined.*** Appendix A-2-a of the JAGMAN describes a major incident as "[a]n 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

Note: "If at any time during the course of a court or board of inquiry, it appears . . . that the intentional acts of a deceased servicemember were a contributing cause to the incident," JAG will be notified and the appropriate safeguards will be implemented to ensure a fair hearing regarding the deceased member's actions. JAGMAN, § 0238b.

2. Substantial property loss

– Substantial property loss is that which greatly exceeds what is normally encountered in the course of day-to-day operations.

3. Substantial harm to the environment

– Substantial harm is that which greatly exceeds what is normally encountered in the course of day-to-day operations.

These cases are often accompanied by national public/press interest and significant congressional attention, as well as having the potential of undermining public confidence in the naval service. It may be apparent when first reported that the case is a major incident, or it may emerge as additional facts become known.

B. ***Death cases***. Notwithstanding 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 the convening of a court or board of inquiry as the appropriate means of investigating the incident. JAGMAN, § 0238a.

C. ***Cognizance over major incidents***. The first flag or general officer exercising general court-martial convening authority over the command involved, or the first flag or general officer in the chain-of-command, or any superior flag or general officer, will take immediate control over the case as the convening authority. JAGMAN, §§ 0204d(2), 0211e.

D. ***Preliminary investigation of major incidents***. While the Flag or General officer is required to assume investigative responsibility as the convening authority in any event that appears to meet the "major incident" criteria, that does ***not*** mean a court of inquiry is immediately appointed. Investigation of major incidents is sometimes complicated by premature appointment of a court of inquiry. Normally, it is advisable for the Flag or General officer to appoint an officer to immediately conduct a PI. The information developed and evidence prepared through the PI can then be used by the Flag or General

officer to decide the appropriate type of administrative investigation and assist the court of inquiry, if one is convened. JAGMAN, § 0204g.

E. ***Reporting the results of PIs.*** If the Flag or General officer who has assumed cognizance of the "major incident" determines that the incident does fit within the definition of that term, or concludes that a court of inquiry is not warranted by the circumstances, those conclusions must be reported to the next superior in the chain-of-command before any other type of investigation is convened. JAGMAN, § 0204h(1).

PART D - RULES ON WHO CONVENES ADMINISTRATIVE INVESTIGATIONS

0112 AUTHORITY TO CONVENE. Any officer in command (including officer-in-charge) may convene a command investigation or litigation report investigation. Courts and boards of inquiry may only be convened by those authorized to convene general courts-martial. As discussed in section 0111, *supra,* only Flag or General officers may act as convening authorities in "major incidents," regardless of which type of administrative investigation ultimately results.

0113 RESPONSIBILITY TO CONVENE. An officer in command is responsible for initiating investigations of incidents occurring within his / her command or involving his / her personnel. If an officer in command feels that investigation of an incident by the command is impracticable, another command can be requested to conduct an investigation. JAGMAN, § 0209c(1).

A. ***Incidents distant from location of command.*** If an incident requiring the convening of an investigation occurs at a place geographically distant from the command, or if pending deployment or other military exigency will prevent the command from conducting a thorough investigation, another command can be requested to conduct the investigation. Such requests should be directed to the superiors in the chain-of-command. JAGMAN, §§ 0209c(2), 0210c(2).

B. ***Incidents involving more than one command.*** A single investigation should be conducted into an incident involving more than one command. Such an investigation may be convened by an officer in command of any of the activities involved. If difficulties arise in reaching agreement over who shall convene the investigation, the common superior of all commands involved will determine who the convening authority will be. If the conduct or performance of one of the officers in command may be subject to inquiry (as in the case of a collision between ships), the area coordinator or common superior shall convene the investigation. JAGMAN, §§ 0209c(3), 0210c(3).

C. ***Incidents involving Marine Corps personnel***

1. Where a Marine(s) suffers serious injury or death as a result of a training or operational incident, the senior commander in the chain-of-command to the organization involved will consider convening the investigation at that level. No member of the organization suffering the incident, nor any member of the staff of a range or other training facility involved in the incident, shall be appointed to conduct the investigation without the concurrence of the next senior command. JAGMAN, § 0208c(5)(a).

2. If an investigation is required into an incident involving Marine Corps personnel occurring in an area geographically removed from the Marine's parent command, the commanding officer shall request investigative assistance from a Marine commander authorized to convene general courts-martial in the immediate area where the incident occurred or, if no such officer is present, from Commanding General, Marine Reserve Forces. JAGMAN, § 0209c(5)(b).

CHAPTER II

CONDUCTING A COMMAND INVESTIGATION OR LITIGATION-REPORT INVESTIGATION

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CHAPTER II

CONDUCTING A COMMAND INVESTIGATION OR LITIGATION-REPORT INVESTIGATION

PART A - COMMAND INVESTIGATIONS

0201 THE INVESTIGATORY BODY

A. ***Composition.*** A command investigation is most frequently composed of a single investigator. JAGMAN, § 0209e.

1. The investigating officer should normally be a commissioned officer, but may be of a warrant officer, senior enlisted, or a civilian employee, when appropriate. JAGMAN, § 0213a.

2. Investigating officers must be those who are best qualified for the duty by reason of age, education, training, experience, length of service, and temperament. JAGMAN, § 0213a.

B. ***Seniority principle.*** Whenever practicable, the investigating officer should be senior to any person whose conduct or performance of duty will be subject to inquiry. JAGMAN, § 0213a.

C. ***Assistance and technical support.*** Experts, reporters, interpreters, or other assistants may be appointed to assist the investigating officer in timely completion of the report. The report should make clear any such participation. JAGMAN, § 0213b.

D. ***Counsel.*** Ordinarily, counsel is not appointed for a command investigation, although a judge advocate is often available to assist the investigating officer with any legal problems or questions that may arise.

0202 CONVENING ORDER

A. ***General***

1. A command investigation is initiated by a written order called a convening order. The "officer in command" responsible for convening the investigation issues this order.

2. A convening order must be in official letter form, addressed to the investigating officer. *See* JAGMAN, Appendix A-2-c for a sample convening order. When circumstances warrant, an investigation may be convened on oral or message orders. The

investigating officer must include signed, written confirmation of oral or message orders in the investigative report. JAGMAN, § 0212a.

3. A convening authority may amend a convening order at any time to change the investigating officer or to enlarge, restrict, or otherwise modify the scope of the investigation. JAGMAN, § 0212b.

B. ***Contents***. The written convening order for a command investigation will contain:

1. Example 1 - subject line:

> Subj: COMMAND INVESTIGATION OF THE MOTOR VEHICLE ACCIDENT INVOLVING, AND INJURIES SUSTAINED BY, YNSN JANE E. DOE, USN, 111-11-1111, NAVAL JUSTICE SCHOOL, WHICH OCCURRED IN WESTMINSTER, MASSACHUSETTS, ON 28 DECEMBER 19_.

a. The subject line must be done in accordance with OPNAVNOTE 5211, as in example 1.

b. Command investigations are likely to be archived by calendar year groupings, by surname of individual, bureau number of aircraft, name of ship, hull number of unnamed water craft, or vehicle number of Government vehicle.

2. Example 2 - appointment statement, purpose and scope of the investigation, direction to pertinent portions of the JAGMAN:

> 1. Pursuant to reference (a), and under Chapter II, Part C of reference (b), you are appointed to inquire, as soon as practical, into the circumstances surrounding the motor vehicle accident and injuries sustained by YNSN Jane E. Doe, which occurred in Westminster, Massachusetts, on 28 December 19_.

> 2. You are to investigate all facts and circumstances surrounding the motor vehicle accident. You must investigate the cause of the motor vehicle accident, resulting injuries and damages, potential claims for or against the government, and any fault, neglect, or responsibility therefore. You must express your 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 within 15 days from the date of this letter, unless an extension is granted. In particular, your attention is directed to sections 0209, 0215-0217, 0221-0227, 0233, 0243, and appendixes A-2-c, A-2-e, and A-2-g.

a. The paragraphs in example 2 serve several purposes: they recite the specific purpose(s) of the investigation, give explicit instructions as to the scope of the inquiry, and direct the investigating officer to the required witness warnings and checklists of information that are required for a proper and thorough investigation.

(1) These instructions help the investigating officer accomplish all of the objectives of the investigation, not just the convening authority's immediate objectives. For example, the following case of a vehicle accident involving a member of the naval service may give rise to various concerns:

(a) The convening authority who orders the investigation may be concerned whether local procedures regarding the use of government vehicles should be changed and whether disciplinary action may be warranted;

(b) The physical evaluation board reviewing the servicemember's injury may be concerned with the line of duty / misconduct determination; and

(c) the cognizant NLSO claims office will be concerned with potential claims for or against the Government.

(2) A properly completed investigation requires the investigating officer to satisfy the special requirements for each of these different determinations.

b. All fact-finding bodies are required, as directed in paragraph 2 of example 2, to make findings of fact.

– In the typical command investigation, the convening order directs the investigating officer to conduct a thorough investigation into all the circumstances connected with the subject incident and to report findings of fact, opinions, and recommendations as to any:

(a) Resulting damage;

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

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

(d) responsibility for the incident under investigation, including recommended administrative or disciplinary action;

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

(f) other specific investigative requirements that are relevant, such as those contained in JAGMAN, Chapter II, Part G: Investigations of Specific Types of Incidents.

c. Paragraph 2 of example 2 also directs the investigating officer to report opinions and recommendations. Unless specifically directed by the convening order, opinions or recommendations are not made. The convening authority may require recommendations in general, or in limited subject areas. JAGMAN, §§ 0209d, 0217e, 0217f.

d. The convening order may direct that testimony or statements of some or all witnesses be taken under oath, and may direct that testimony of some or all witnesses be recorded verbatim. When a fact-finding body takes testimony or statements of witnesses under oath, it should use the oaths prescribed in JAGMAN, § 0214b(3).

3. ***Witness warnings***. Paragraph 2 of example 2 directs compliance with the Privacy Act [JAGMAN, § 0216], Article 31(b) of the UCMJ [JAGMAN, § 0215d(2)], and injury / disease warning [JAGMAN, § 0215d(4)]. It also directs the investigating officer to other applicable JAGMAN sections.

a. Witness warnings:

(1) ***Privacy Act***. The Privacy Act of 1974 (5 U.S.C. § 552a) requires that a Privacy Act statement be given to anyone who is requested to supply "personal information" (as defined in JAGMAN, appendix A-2-a) in the course of a command investigation when that information will be included in a "system of records" (as defined in JAGMAN, appendix A-2-a). Note that witnesses will rarely provide personal information that will be retrievable by the witness' name or other personal identifier. Since such "retrievability" is the cornerstone of the definition of "system of records," in most cases, the Privacy Act will not require warning anyone unless the investigation may eventually be filed under that individual's name. JAGMAN, § 0216a.

– Social security numbers should ***not*** be included in command investigation reports unless they are necessary to precisely identify the individuals involved, such as in death or serious injury cases. If a servicemember or civilian employee is asked to voluntarily provide social security numbers for the investigation, a Privacy Act statement ***must*** be provided. If the number is obtained from other sources (alpha rosters, etc. . .), the individual does not need to be provided with a Privacy Act statement. The fact that social security numbers were obtained from other sources should be noted in the preliminary statement of the investigation. JAGMAN, § 0216b.

(2) ***Article 31, UCMJ***. A servicemember suspected of an

offense must first be warned under Article 31(b), UCMJ, before a statement is taken. If prosecution for the suspected offense appears likely, refer to JAGMAN, § 0215d(2) and appendix A-1-m of the JAGMAN. Ordinarily, the investigating officer should collect all relevant information from all available sources—other than from those persons suspected of offenses, misconduct, or improper performance of duty—before interviewing the suspect.

(3) ***Injury / disease warning***. A member of the armed forces, prior to being asked to sign any statement relating to the origin, incurrence, or aggravation of any disease or injury suffered, shall be advised of his / her statutory right (10 U.S.C. § 1219) not to sign such a statement and, therefore, the member is not required to do so. The spirit of this section is violated if, in the course of a command investigation, an investigating officer obtains the injured member's oral statements and reduces them to writing without the above advice having first been given. JAGMAN, § 0221b. Compliance with the injury-disease warning notification requirement must be documented. Appendix A-2-g of the JAGMAN contains a proper warning form.

b. As example 2 illustrates, all sections of the JAGMAN which may apply to the particular incident under investigation should be listed, along with any applicable chain of command directives. It is particularly important that information checklists be referenced for the investigating officer.

4. ***Time limits***. Paragraph 2 of example 2 directs completion of the investigating officer's report within fifteen days of the date of the convening order. JAGMAN, § 0209 establishes the following time limits:

a. The convening authority prescribes the time limit the investigating officer has to submit the investigation. ***This period should not normally exceed 30 days from the date of the convening order***; however, this period may be extended for good cause. Requests and authorizations for extensions must be memorialized in the preliminary statement. JAGMAN, § 0209f.

b. Giving the investigating officer a shorter time period, such as fifteen days (as in paragraph 2 of example 2), allows the convening authority to review the investigation, return it to the investigating officer for further work if needed, and still comply with the thirty-day time goal.

5. Example 3 - administrative support:

> 3. By copy of this appointing order, Administrative Officer, Naval Justice School, is directed to furnish any necessary clerical assistance. Social security numbers of military personnel should be obtained through PSD or other official channels.

a. Example 3 directs the administrative officer of the command to

provide clerical support to the investigating officer although, in most cases, it will be the command's legal officer who will be tasked with providing support. It is extremely important to designate who provides that support in order for the investigating officer to obtain assistance in typing the investigation and producing the necessary number of copies.

b. Example 3 also addresses the issue of social security numbers. As discussed in section 0202B.3.a(1), above, social security numbers should ***not*** be solicited from a witness, but should be obtained from official sources.

6. Example 4 - the following combines examples 1-3 into the required letter format and is the typical convening order:

DEPARTMENT OF THE NAVY
Naval Justice School
Newport, Rhode Island 02841-1523

5830
Ser OO/333
1 Jan _

From: Commanding Officer, Naval Justice School
To: Lieutenant L. O. Neophyte, USNR, 000-00-0000/1105

Subj: COMMAND INVESTIGATION OF THE MOTOR VEHICLE ACCIDENT INVOLVING, AND INJURIES SUSTAINED BY, YNSN JANE E. DOE, USN, 111-11-1111, NAVAL JUSTICE SCHOOL, WHICH OCCURRED IN WESTMINSTER, MASSACHUSETTS, ON 28 DECEMBER 19_.

Ref: (a) Oral appointing order at 0500 hours, 29 December 19_
(b) JAG Manual

1. Pursuant to reference (a), and under Chapter II, Part C of reference (b), you are appointed to inquire, as soon as practical, into the circumstances surrounding the motor vehicle accident and injuries sustained by YNSN Jane E. Doe, which occurred in Westminster, Massachusetts, on 28 December 19_.

2. You are to investigate all facts and circumstances surrounding the motor vehicle accident. You must investigate the cause of the motor vehicle accident, resulting injuries and damages, potential claims for or against the government, and any fault, neglect, or responsibility therefore. You must express your 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 within 15 days from the date of this letter, unless an extension is granted. In particular, your attention is directed to sections 0209, 0215-0217, 0221-0227, 0233, 0243, and appendixes A-2-c, A-2-e, and A-2-g.

3. By copy of this appointing order, Administrative Officer, Naval Justice School, is directed to furnish any necessary clerical assistance. Social security numbers of military personnel should be obtained through PSD or other official channels.

B. R. SIMPSON

Copy to:
Administrative Officer, NJS

7. *See* JAGMAN, § 0212 and appendix A-2-c for assistance with convening orders.

0203 THE INVESTIGATION

A. ***Preliminary steps***. Upon first appointment as an investigating officer, the universal question is, "Where do I begin?" The officer should examine the convening order to determine the specific purpose and scope of the inquiry, remembering that the general goal is to find out who, what, when, where, how, and why an incident occurred. The officer should decide exactly which procedures to follow and become fully acquainted with the specific sections of the JAGMAN listed in the convening order. Most importantly, however, the investigating officer should begin work on the investigation immediately upon notification of appointment, whether or not a formal convening order has been received. The investigation should commence as soon as possible after the incident has occurred, since:

1. Witnesses may be required to leave the scene;

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

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

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

B. ***Conducting the investigation***. The circumstances surrounding the particular incident under investigation will dictate the most effective method of conducting the investigation. For example, an investigation of an automobile accident, in which injuries were incurred, would involve: interviews at the hospital with the injured persons; collection of hospital records and police records; eyewitness accounts; vehicle damage estimates; mechanical evaluation; inspection of the scene; and other matters required by JAGMAN §§ 0221-0228, 0233, & 0243. On the other hand, an investigation of a shipboard casualty or the loss of a piece of equipment could involve merely the calling and examination of material witnesses. Checklists of possible sources of information, depending on the nature of the incident, are contained in the appendix to this chapter.

C. ***Investigative method***. The officer appointed to conduct the investigation may use any method of investigation he / she finds most efficient and effective. Relevant information may be obtained from witnesses by personal interview, correspondence, telephone inquiry, or other means. One of the principal advantages of the command investigation is that the interviewing of witnesses may be done at different times and places, rather than at a formal hearing. JAGMAN, § 0209.

D. ***Rules of evidence***. The investigating officer is ***not*** bound by formal rules of evidence and may collect, consider, and include in the record any matter relevant to the inquiry that a person of average caution would consider to be believable or authentic. Authenticate real and documentary items and enclose legible reproductions in the investigative report, with certification of correctness of copies or statements of authenticity. The investigating officer ***may not speculate on the causes*** of an incident; however, inferences may be drawn from the evidence gathered to determine the likely course of conduct or chain of events that occurred. In most cases, it is ***inappropriate for the investigating officer to speculate on the thought processes of an individual*** that resulted in a certain course of conduct. JAGMAN, §§ 0215a & 0215b(3).

– ***Combinability***: As stated above, the investigating officer is not bound by the formal rules of evidence; however, there are certain things that ***cannot*** be combined with an investigative report.

a. ***NCIS investigations***. An NCIS investigation consists of a narrative summary portion (called the Report of Investigation, where the participating agents detail the steps taken in the investigation) and enclosures. The investigating officer is forbidden from including the narrative summary portion of the NCIS investigation in the command investigation; however, the enclosures, which frequently comprise the bulk of an NCIS investigation, can be used. The command investigation should not interfere with the completion of the NCIS investigation; therefore, it is advisable that the investigating officer work closely and coordinate with the NCIS agent as to obtaining a copy of statements gathered by NCIS. JAGMAN, § 0217h(2).

b. ***Aircraft mishap investigation reports (AMIR)***. As noted in section 0108, *supra*, much of the AMIR, including statements provided to the Aircraft Mishap Board, is privileged information and may only be used for safety purposes. Therefore, information contained within the AMIR will not be available to the JAGMAN investigating officer. The JAGMAN investigating officer will be afforded equal access to all real evidence and have separate opportunities to question and obtain statements from all witnesses. JAGMAN, § 0242b; OPNAVINST 3750.b.

c. ***Other mishap investigation reports***. For the reasons enumerated above, these mishap investigation reports also cannot be included in JAGMAN investigations. OPNAVINST 5102.1.

d. ***Inspector General reports*** (cannot be included).

e. ***Polygraph examinations***. Neither polygraph reports nor their results should be included in the investigative report; however, if essential for a complete understanding of the incident, the location of the polygraph report may be cross-referenced in the report. JAGMAN, § 0217h(2).

f. ***Medical quality assurance investigations***. A Naval Hospital will conduct its own investigation of incidents where the sufficiency of medical service is called into question (much the same as the AMIR). Confidentiality is essential here also; therefore, statements obtained in a medical quality assurance investigation cannot be used in a command investigation. JAGMAN, § 0252b; NAVMEDCOMINST 6320.

E. ***Types of evidence***. Photographs, records, operating logs, pertinent directives, watch lists, and pieces of damaged equipment are examples of evidence which the investigating officer may have to identify, accumulate, and evaluate. To the extent consistent with mission requirements, the convening authority must ensure that all evidence is properly preserved and safeguarded until the investigation is complete and all relevant actions have been taken. JAGMAN § 0215c(1).

1. ***Photographs and videotapes***. Photographs and videotapes which have sufficient clarity to depict actual conditions are invaluable as evidence. Color photos may present the best pictorial description, but they are more difficult to reproduce and normally require more time to develop; therefore, it may be more prudent to utilize black-and-white film. Polaroid prints offer instant review to ensure that the desired picture is obtained, but are difficult to reproduce or enlarge. Photographs and videos should be taken from two or more angles, using a scale or ruler to show dimensions. The investigative report must include the negatives plus complete technical details relating to the camera used (e.g., type, settings, film, lighting conditions, time of day, persons depicted, and name and address of photographer). In cases of personal injury or death, photographs and videos that portray the results of bodily injury should be included only if they contribute to the usefulness of the investigation. Graphic or gory photographs and videos that serve no useful purpose should not be taken. JAGMAN, §§ 0215c(2), 0215c(4), 0217h(4).

2. ***Sketches***. Sketches in lieu of, or in conjunction with, photographs or videos provide valuable additional information. Insignificant items can be omitted in sketching, providing a more uncluttered view of the scene. Where dimensions are critical but may be distorted by camera perspective (e.g., portraying skid marks or other phenomenon), accurate sketches can be more valuable. Sketches should be drawn to scale, preferably on graph paper. They can also be used as a layout to orient numerous photos and measurements.

3. ***Real evidence***. Carefully handle pieces or parts of equipment and material to ensure that this physical evidence is not destroyed. If attaching real evidence to the report is inappropriate, preserve it in a safe place under proper chain of custody—reflecting its location in the report of investigation. Tag each item with a full description of its relationship to the accident. If it is to be sent to a laboratory for analysis, package it with care. Accompany the item(s) with a photo or sketch depicting the "as found" location and condition.

4. ***Documents, logs, and records***. Make verbatim copies of relevant

operating logs, records, directives, memos, medical reports, police or shore patrol reports, motor vehicle accident reports, and other similar documents. To ensure exactness, reproduce by mechanical or photographic means if at all possible. Check copies for clarity and legibility, and examine closely for obvious erasures and mark-overs which might not show up when reproduced.

5. ***Personal observations***. If the investigating officer observes an item and gains relevant sense impressions (e.g., noise, texture, smells, or any other impression not adequately portrayed by photograph, sketch, map, etc.), those impressions should be recorded and included as an enclosure to the report. JAGMAN § 0215c(2).

F. ***Witnesses***. The best method for examining a witness depends on the witness and the complexity of the incident. The most common method used by investigating officers is the informal interview. Whatever method is employed, however, the witness' statement should be reduced to writing and signed by the witness wherever possible. Sworn statements may be taken, unless the convening order directs otherwise. A sworn statement is considered more desirable than an unsworn statement since it adds to the reliability of the statement and can expedite subsequent action (***caution***: sworn statements are ***not*** to be collected in litigation-report investigations; *see* section 0209, *infra*). The statement should be dated and should properly identify the person making the statement: a servicemember by full name, grade, service, and duty station; a civilian by full name, title, business or profession, and residence. If necessary, the investigating officer can certify that the statement is an accurate summary, or verbatim transcript, of oral statements made by the witness.

1. To ensure all relevant information is obtained when examining a witness, the investigating officer should use the convening order and the requirements in the JAGMAN, Chapter II, Part G, Investigations of Specific Types of Incidents, as a checklist. In addition to covering the full scope of the investigative requirements, witness statements should be as factual in content as possible. Vague opinions (such as "pretty drunk," "a few beers," and "pretty fast") are of little value to the reviewing authority who is trying to evaluate the record. The investigating officer should be able to separate conclusions from observations; therefore, when a witness makes a vague statement, try to pin down the actual facts. For example, instead of accepting the witness' opinion that a person was "pretty drunk," the investigating officer should ask the kind of questions that go to supporting that kind of opinion. For example:

a. How long did you observe the person?

b. Describe the clarity of speech.

c. Did you observe him walk?

d. What was the condition of his eyes, etc.?

e. What was he drinking?

f. How much?

g. Over what period of time?

2. In many instances, limitations on availability of witnesses will prevent the investigating officer from obtaining a written, signed statement in the above manner. When this happens, an investigating officer may take testimony or collect evidence in any fair manner he chooses. Unavailable witnesses may be examined by mail or by telephone. If the telephone inquiry method is used, the investigating officer should prepare a written memorandum of the call, identifying the person by name, rank, armed force, and duty station (if a servicemember) or by name, address, and occupation (if a civilian). The memorandum should set forth the substance of the conversation, the time and date it took place, and any rights or warnings provided.

0204 COMMUNICATIONS WITH THE CONVENING AUTHORITY. If at any time during the investigation it should appear, from the evidence adduced or otherwise, that the convening authority might consider it advisable to enlarge, restrict, or otherwise modify the scope of the inquiry or to change in any respect any instruction provided in the convening order, an oral or written report should be made to the convening authority. The convening authority may take any action on this report deemed appropriate. There is no requirement that such communications with the convening authority be included in the report or the record of the investigation. JAGMAN, § 0212b.

0205 INVESTIGATIVE REPORT

A. ***General.*** JAGMAN, § 0217. The investigative report, submitted in letter form, shall typically consist of:

1. A list of enclosures;

2. a preliminary statement;

3. findings of fact;

4. opinions;

5. recommendations; and

6. enclosures.

B. Example 5 - list of enclosures:

Encl:	(1)	CO, Naval Justice School, appointing order, ltr 5830 Ser 00/333 dtd 1 Jan CY
	(2)	Commonwealth of Massachusetts police report dtd 28 Dec 19_
	(3)	Statement of YNSN Jane E. Doe, USN, 111-11-1111, Naval Justice School, Newport, RI, dtd 7 Jan 19_, with signed Privacy Act statement and JAGMAN § 0221.b warning attached
	(4)	Chronological record of medical care with medical board attached
	(5)	NAVCOMPT 3065 (Leave Authorization) ICO SNM

1. ***List of enclosures***. As in example 5, the first enclosure is the signed, written appointing order and any modifications, or the signed, written confirmation of an oral or message appointing order. JAGMAN, § 0217h(1).

2. JAGMAN, § 0233a requires the investigating officer to properly identify all persons involved in the incident under investigation (complete name, grade or title, service or occupation, and station or residence). The list of enclosures is a suggested place for ensuring compliance with that section (e.g., encl. (3) in example 5).

3. Enclosures should be listed in the order in which they are cited in the investigation. JAGMAN, § 0217h(1).

4. Separately number and completely identify each enclosure (make each statement, affidavit, transcript of testimony, photograph, map, chart, document, or other exhibit a separate enclosure).

5. If the investigating officer's personal observations provide the basis for any finding of fact, a signed memorandum detailing those observations must be attached as an enclosure.

6. Enclose a Privacy Act statement for each party or witness from whom personal information was obtained as an attachment to the individual's statement.

7. The signature of the investigating officer on the investigative report letter serves to authenticate all of the enclosures. JAGMAN, § 0217h(3).

C. Example 6 - preliminary statement:

PRELIMINARY STATEMENT

1. Pursuant to enclosure (1), and in accordance with reference (a), a command investigation was conducted to inquire into the circumstances surrounding the motor vehicle accident involving, and the injuries suffered by, YNSN Jane E. Doe, which occurred on 28 December 19__ in Westminster, Massachusetts. All reasonably available relevant evidence was collected. There were no difficulties encountered during the conduct of this investigation.

a. While certain minor conflicts appear in the evidence, none was of sufficient degree or materiality to warrant comment.

2. All documentary evidence included herein is certified to be either the original or a copy which is a true and accurate representation of the original document represented.

3. All social security numbers were obtained from official sources and not solicited from individual servicemembers.

4. LCDR Al Bundy, JAGC, USN, was consulted on the possibility of claims for or against the government as a result of the vehicle accident.

1. ***Preliminary statement.*** JAGMAN, § 0217c.

a. The purpose of the preliminary statement is to inform the convening and reviewing authorities that all reasonably available evidence was collected and that the directives of the convening authority have been met.

b. The preliminary statement should refer to the convening order and set forth:

(1) The nature of the investigation;

(2) any limited participation by a member and / or the name of any individual who assisted and the name and organization of any judge advocate consulted;

(3) any difficulties encountered in the investigation;

(4) any requests and authorizations for extensions;

(5) if the evidence in the enclosures is in any way contradictory, notation of such in the preliminary statement and a factual determination in

the findings-of-fact section (notation and explanation should be reserved for material conflicts);

(6) any failure to advise individuals of their rights;

(7) the fact that all social security numbers were obtained from official sources;

(8) any other information necessary for a complete understanding of the case.

c. Do not include a synopsis of facts, recommendations, or opinions in the preliminary statement. These should appear in the pertinent sections of the investigative report.

d. It is ***not necessary*** for the investigating officer to provide an outline of the method used to obtain the evidence contained in the report. JAGMAN, § 0217c(1).

e. A preliminary statement does not eliminate the necessity for making findings of fact. Even though the subject line and preliminary statement may talk about the death of a person in an aircraft mishap, findings of fact must describe the aircraft, time, place of accident, identity of the person, and other relevant information. JAGMAN, § 0217c(3).

D. ***The "ROYAL RUMBLE."*** The investigating officer must be able to distinguish the difference between the terms "fact," "opinion," and "recommendation." The following may be helpful in making that distinction:

1. A "fact" is ***something that is or happens*** (e.g., "the truck's brakes were nonfunctional at the time of the accident");

2. an "opinion" is a ***value judgment on a fact*** (e.g., "the nonfunctioning of the truck's brakes was the primary cause of the accident"); and

3. a "recommendation" is a ***proposal*** made on the basis of an opinion (e.g., "the command should issue an instruction to ensure that no truck be allowed to operate without functional brakes").

E. Example 7 - findings of fact:

FINDINGS OF FACT

1. On 28 December 19_, YNSN Jane E. Doe, USN, 111-11-1111, age 21, was on authorized annual leave from the Naval Justice School, Newport, Rhode Island, where she was assigned [encl. (5)].

2. At approximately 0015, 28 December 19_, a motor vehicle accident occurred on Common Road, Westminster, Massachusetts [encl. (2)].

3. At the time of the motor vehicle accident, the vehicles involved were being driven by Ms. Paula Roche of 165 Center Lane, South Ashburnham, Massachusetts, and Mr. Gary S. Driggs of Vino Street, New Braintree, Massachusetts [encl. (2)].

4. The vehicle driven by Ms. Roche was a 1989 Chevrolet pickup truck, Massachusetts registration #A/D 22-222 [encl. (2)].

1. ***Findings of fact.*** Findings of fact must be as specific as possible as to times, places, persons, and events. ***Each fact shall be made a separate finding.*** JAGMAN, § 0217d.

2. Each fact must be supported by testimony of a witness, statement of the investigating officer, documentary evidence, or real evidence attached to the investigative report as an enclosure and ***each enclosure on which it is based must be referenced.*** For example, the investigating officer may not state: "The car ran over Seaman Smith's foot," without a supporting enclosure. He may, however, have Smith execute a statement stating: "The car ran over my foot." Include this statement as encl. (10) and, in the findings of fact, state: "The car ran over Seaman Smith's foot," referencing encl. (10) as in example 7. When read together, the findings of fact should tell the whole story of the incident without requiring reference back to the enclosures. Thus, organization of the findings of fact is imperative if the story is to be readable. Telling the story chronologically is often the best method.

3. ***Standards of proof***

a. ***Preponderance of the evidence.*** The investigating officer may only make findings of fact that are supported by a preponderance of the evidence. A preponderance is created when the evidence as a whole shows that the fact sought to be proved is more probable than not. Weight of evidence in establishing a particular fact is not to be determined by the sheer number of witnesses or volume of evidence, but depends upon the effect of the evidence in inducing belief that a particular fact is true. JAGMAN, § 0215b.

b. ***Clear and convincing.*** In certain instances, findings of fact may only be based upon a showing of clear and convincing evidence.

(1) Where line of duty / misconduct determinations must be made (see Chapter III), the servicemember is entitled to several presumptions: that the injury or disease was incurred while in the line of duty; that the servicemember is mentally responsible for his / her actions, and; if the injury or disease was incurred while the servicemember was in a period of unauthorized absence which is less than 24 hours, it is presumed that such absence did not materially interfere with the member's military duty. These presumptions are rebuttable. To make findings of fact contrary to the initial presumption, clear and convincing proof is required. JAGMAN, § 0215b(2).

(2) In order to find that the acts of a deceased member may have caused harm and / or loss of life, including his / her own life, through intentional acts, findings of fact relating to those issues must be established by clear and convincing evidence. JAGMAN, § 0215b(2)(d).

"Clear and convincing" means a degree of proof which should leave no serious or substantial doubt as to the correctness of the conclusion in the mind of objective persons after considering all the facts. It is a degree of proof that is intermediate, being more than a preponderance, but not reaching the extent of certainty as beyond any reasonable doubt. JAGMAN, appendix A-2-a.

4. ***Checklists.*** To ensure complete findings of fact, the investigating officer should use the convening order and the specific requirements set out in the JAGMAN as checklists. If the investigation covers more than one area, the investigation must satisfy the requirements for each separate area. For example, an investigation of an automobile accident between a Navy vehicle and a civilian vehicle, resulting in injury to the Navy driver, would involve the following sections of the JAGMAN and the special requirements of each would have to be satisfied:

a. Section 0233, injuries to servicemembers;

b. section 0243, vehicular accidents; and

c. section 0251 and Chapter VIII, claims for or against the government.

5. ***Evidentiary conflicts.*** If the evidence is in any way contradictory, the investigating officer still must make a factual determination in the findings of fact section. The following problem should make this clear:

a. ***Problem.*** The enclosures in an investigation reveal the following information. Mr. ***A*** states: he had seen a vehicle speeding by him at 90 mph; he was

almost hit by the car; he does not own a car, is 80 years old, and has not driven since 1945 [encl. (4)]. Mr. ***B***, an off-duty police officer, states that, as the car passed him, he glanced at his speedometer and he was traveling 35 mph; he estimates the speed of the other car at 45 mph [encl. (5)]. The police report reveals that the car left only seven (7) feet of skid marks on dry, smooth, asphalt pavement before stopping [encl. (6)]. How should the investigating officer record this information?

b. ***Solution***. The investigating officer should note the conflicting accounts in the preliminary statement as follows: "Two conflicting accounts of the speed of the vehicle in question appear in witness statements [encls. (4) and (5)], but only encl. (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 (7) 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)]"; and "that the speed of the vehicle was 45 mph at the time brakes were applied [encl. (5)]."

c. In some situations, it may not 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 investigating officer, the evidence does not support any particular fact, this difficulty should be properly noted in the preliminary statement: "The evidence gathered in the forms on encls. (4) and (7) does not support a finding of fact as to the . . ., and, hence, none is expressed."

d. ***Only rarely*** will the conflict in evidence or the absence of it prevent the investigating officer from making a finding of fact in a particular area. Thus, this should not be used as a way for the investigating officer—who is either unwilling to evaluate the facts or too lazy to gather the necessary evidence—to avoid making the required findings of fact.

F. Example 8 - opinions:

OPINIONS

1. The voluntary intoxication of Ms. Roche was the proximate cause of the accident [FOF (11), (15), and (17)].

2. Excessive speed played a significant role in causing the accident [FOF (15), (16), (17), and (20)].

3. YNSN Doe used poor judgment in allowing Ms. Roche to drive from the VFW Club, but available evidence indicates that YNSN Doe attempted to get Ms. Roche to stop and allow her to drive—or, in the very least, to slow down—and was unsuccessful [FOF (11), (14), (15), and (16)].

4. YNSN Jane E. Doe's personal injuries were incurred in the line of duty and not due to her own misconduct [FOF (1), (7), (8), (16), (19), (20), (21), (22), and (30)].

– ***Opinions.*** Opinions are reasonable evaluations, inferences, or conclusions based on the facts. ***Each opinion must reference the findings of fact supporting it.*** In certain types of investigations, the convening authority will require the investigating officer to make certain opinions. Opinion 4 in example 8 is an illustration of a specific opinion required to be made in investigations concerning injuries to servicemembers. This line of duty / misconduct opinion will be discussed in Chapter III. JAGMAN, § 0217e.

G. Example 9 - recommendations:

RECOMMENDATIONS

1. That a claim be pursued for the injuries sustained by YNSN Doe under the Medical Care Recovery Act.

2. That no administrative or disciplinary action be taken against YNSN Doe.

1. ***Recommendations.*** Recommendations are proposals derived from the opinions expressed, made when directed by the convening authority, and may be specific or general in nature. If corrective action is recommended, the recommendation should be as specific as possible. JAGMAN, § 0217f.

2. Disciplinary action is an area commonly addressed by the recommendations.

a. Unless specifically directed by proper authority, an investigating

officer should not prefer or notify an accused of recommended charges. JAGMAN, § 0217f.

b. If a punitive letter of reprimand or admonition is recommended, prepare a draft of the recommended letter and submit it as an endorsement to the investigative report. JAGMAN, § 0218.

c. If a nonpunitive letter is recommended, a draft is ***not*** included in the investigation, but should be forwarded to the appropriate commander for issuance. JAGMAN, § 0218.

H. Example 10, following, is an example of a completed command investigative report (without enclosures). JAGMAN, app. A-2-c also contains a sample report.

5830
[Code]
12 Jan CY

From: Lieutenant L. O. Neophyte, USNR, 000-00-0000/1105
To: Commanding Officer, Naval Justice School, Newport, RI 02841-1523

Subj: COMMAND INVESTIGATION OF THE MOTOR VEHICLE ACCIDENT INVOLVING, AND INJURIES SUSTAINED BY, YNSN JANE E. DOE, USN, 111-11-1111, NAVAL JUSTICE SCHOOL, WHICH OCCURRED IN WESTMINSTER, MASSACHUSETTS, ON 28 DECEMBER 19_

Ref: (a) JAG Manual

Encl: (1) CO, NJS, appointing order, ltr 5830 Ser 00/333 dtd 1 Jan 1991
(2) Commonwealth of Massachusetts police report dtd 28 Dec 19_
(3) Statement of YNSN Jane E. Doe, USN, 111-11-1111, Naval Justice School, Newport, RI, dtd 7 Jan 19_, with signed Privacy Act statement and JAGMAN, § 0221 warning attached
(4) Chronological record of medical care with medical board attached
(5) NAVCOMPT 3065 (Leave Authorization) ICO SNM

PRELIMINARY STATEMENT

1. Pursuant to enclosure (1), and in accordance with reference (a), a command investigation was conducted to inquire into the circumstances surrounding the motor vehicle accident involving, and the injuries suffered by, YNSN Jane E. Doe which occurred on 28 December 19__ in Westminster, Massachusetts. All reasonably available relevant evidence was collected. There were no difficulties encountered during the conduct of this investigation.

a. While certain minor conflicts appear in the evidence, none was of sufficient degree or materiality to warrant comment.

2. All documentary evidence included herein is certified to be either the original or a copy which is a true and accurate representation of the original document represented.

3. All social security numbers were obtained from official sources and not solicited from individual servicemembers.

4. LCDR Al Bundy, JAGC, USN, was consulted on the possibility of claims for or against the government as a result of the vehicle accident.

Subj: COMMAND INVESTIGATION OF THE MOTOR VEHICLE ACCIDENT INVOLVING, AND INJURIES SUSTAINED BY, YNSN JANE E. DOE, USN, 111-11-1111, NAVAL JUSTICE SCHOOL, WHICH OCCURRED IN WESTMINSTER, MASSACHUSETTS, ON 28 DECEMBER 19_

FINDINGS OF FACT

1. On 28 December 19_, YNSN Jane E. Doe, USN, 111-11-1111, age 21, was on authorized annual leave from the Naval Justice School, Newport, Rhode Island, where she was assigned [encl. (5)].

2. At approximately 0015, 28 December 19_, a motor vehicle accident occurred on Common Road, Westminster, Massachusetts [encl. (2)].

3. At the time of the motor vehicle accident, the vehicles involved were being driven by Ms. Paula Roche of 165 Center Lane, South Ashburnham, Massachusetts, and Mr. Gary S. Driggs of Vino Street, New Braintree, Massachusetts [encl. (2)].

4. The vehicle driven by Ms. Roche was a 1989 Chevrolet pickup truck, Massachusetts registration #A/D 22-222 [encl. (2)].

5. The vehicle driven by Ms. Roche was registered to Mr. Yves G. Doe of 3 Oak Road, Westminster, Massachusetts [encl. (2)].

6. The vehicle driven by Ms. Roche was the property of Mr. Yves G. Doe, YNSN Doe's father [encls. (2) and (3)].

7. YNSN Jane E. Doe, USN, was a passenger in the vehicle driven by Ms. Roche [encls. (2) and (3)].

8. YNSN Jane E. Doe, USN, and Ms. Roche were both wearing seatbelts at the time of the accident [encls. (2) and (3)].

9. The vehicle driven by Mr. Driggs was a 1986 Chrysler sedan, Massachusetts registration #999-ACI [encl. (2)].

10. Early in the evening of 27 December 19_, YNSN Doe and Ms. Roche went to the VFW Club in Westminster, Massachusetts [encl. (2)].

11. Over the course of several hours at the VFW Club, Ms. Roche consumed approximately seven beers and YNSN Doe drank one mixed drink and several sodas [encls. (2) and (3)].

Subj: COMMAND INVESTIGATION OF THE MOTOR VEHICLE ACCIDENT INVOLVING, AND INJURIES SUSTAINED BY, YNSN JANE E. DOE, USN, 111-11-1111, NAVAL JUSTICE SCHOOL, WHICH OCCURRED IN WESTMINSTER, MASSACHUSETTS, ON 28 DECEMBER 19_

12. Ms. Roche and YNSN Doe left the VFW Club at approximately 1150 on 27 December 19_ [encls. (2) and (3)].

13. Upon leaving the VFW Club, Ms. Roche drove the truck away from the Club [encl. (3)].

14. Upon entering her father's truck, and "without thinking," YNSN Doe permitted Ms. Roche to drive the truck [encl. (3)].

15. After leaving the Club, entering the truck, and driving away, Ms. Roche proceeded down the road at an "excessively high speed" for the road conditions [encl. (3)].

16. YNSN Doe attempted to get Ms. Roche to pull over and allow her to drive, or to at least slow down, but Ms. Roche failed to comply with the request [encls. (2) and (3)].

17. The roads were covered with ice and packed snow [encls. (2) and (3)].

18. Ms. Roche turned north onto Common Road and began to slide into the southbound lane of Common Road, Westminster, Massachusetts [encls. (2) and (3)].

19. Upon going into the southbound lane of Common Road, Ms. Roche lost control of the vehicle and struck the oncoming vehicle driven by Mr. Driggs [encls. (2) and (3)].

20. The speed of Ms. Roche's vehicle at the time of the accident was 40-50 mph [encls. (2) and (3)].

21. As a result of the collision, YNSN Doe sustained injuries to her pelvic area and right sacroiliac (lower back) and suffered a mild concussion [encl. (4)].

22. As a result of YNSN Doe's injuries, she was transported to the Henry Heygood Memorial Hospital, Gardner, Massachusetts, on 28 December 19_ [encls. (2) and (4)].

23. On 28 December 19_, after admission to the hospital, YNSN Doe underwent surgery to remove her spleen [encl. (4)].

Subj: COMMAND INVESTIGATION OF THE MOTOR VEHICLE ACCIDENT INVOLVING, AND INJURIES SUSTAINED BY, YNSN JANE E. DOE, USN, 111-11-1111, NAVAL JUSTICE SCHOOL, WHICH OCCURRED IN WESTMINSTER, MASSACHUSETTS, ON 28 DECEMBER 19_

24. YNSN Doe was transferred to the Naval Hospital, Newport, Rhode Island, on 8 January 19CY [encl. (4)].

25. YNSN Doe was hospitalized from 28 December 19_ to 8 January 19_, a period of 12 days [encl. (4)].

26. The cost of civilian hospitalization was $10,345.00 [encl. (4)].

27. The attending physicians were Dr. S. T. Bones, of Henry Heygood Memorial Hospital, Gardner, Massachusetts, and LCDR M. D. Slasher, MC, USNR, Naval Hospital, Newport, Rhode Island [encl. (4)].

28. YNSN Doe's prognosis is permanent disability, and no outpatient treatment is expected [encl. (4)].

29. YNSN Doe is presently on limited duty attached to the Naval Justice School, Newport, Rhode Island, subsequent to the findings rendered by a medical board convened at Naval Hospital, Newport, Rhode Island [encl. (4)].

30. Ms. Roche was arrested and cited for driving under the influence on 28 December 19_ [encl. (2)].

OPINIONS

1. The voluntary intoxication of Ms. Roche was the proximate cause of the accident. [FOF (11), (15), and (17)].

2. Excessive speed played a significant role in causing the accident [FOF (15), (16), (17), and (20)].

3. YNSN Doe used poor judgment in allowing Ms. Roche to drive from the VFW Club, but available evidence indicates that YNSN Doe attempted to get Ms. Roche to stop and allow her to drive—or, in the very least, to slow down—and was unsuccessful [FOF (11), (14), (15), and (16)].

4. YNSN Jane E. Doe's personal injuries were incurred in the line of duty and not due to her own misconduct [FOF (1), (7), (8), (16), (19), (20), (21), (22), and (30)].

Subj: COMMAND INVESTIGATION OF THE MOTOR VEHICLE ACCIDENT INVOLVING, AND INJURIES SUSTAINED BY, YNSN JANE E. DOE, USN, 111-11-111, NAVAL JUSTICE SCHOOL, WHICH OCCURRED IN WESTMINSTER, MASSACHUSETTS, ON 28 DECEMBER 19_

RECOMMENDATIONS

1. That a claim be pursued for the injuries sustained by YNSN Doe under the Medical Care Recovery Act.

2. That no administrative or disciplinary action be taken against YNSN Doe.

/s/ L. O. Neophyte

I. ***Classification of report.*** Because of the wide circulation of JAGMAN investigative reports, classified information should be omitted unless inclusion is essential. When included, however, the investigative report is assigned the classification of the highest subject matter contained therein. Encrypted versions of messages are not included or attached to investigative reports where the content or substance of such message is divulged. To facilitate the processing of requests for release of investigations (such as Freedom of Information Act requests which require "declassification" review) and to simplify handling and storage, declassify enclosures whenever possible. If the information in question cannot be declassified, but contributes nothing to the report, consider removing the enclosure from the investigation with notification in the forwarding endorsement. JAGMAN, § 0217b.

0206 ACTION BY CONVENING AND REVIEWING AUTHORITIES

A. ***Review and forwarding.*** JAGMAN, §§ 0209, 0219. Upon completing the investigative report, the investigating officer submits the report to the convening authority, who reviews it and takes one of the following actions:

1. Returns the report for further inquiry or corrective action, noting any incomplete, ambiguous, or erroneous action of the investigating officer;

2. Determines that the investigation is of no interest to anyone outside the command and chooses to file the investigation, without further forwarding, as an internal report;

3. Transmits the report by endorsement to the next appropriate superior officer, typically to the officer exercising general court-martial convening authority (GCMCA) over the convening authority. The convening authority's endorsement will set forth appropriate comments, recording approval or disapproval in whole or in part, of the investigation's proceedings, findings, opinions, and recommendations. In line of duty / misconduct investigations, the convening authority is required to specifically approve or disapprove the line of duty / misconduct opinion. This is accomplished in paragraph 2 of the following example.

B. Example 11 - first endorsement on a command investigation:

DEPARTMENT OF THE NAVY
NAVAL JUSTICE SCHOOL
NEWPORT, RI 02841-5030

5830
Ser 00/357
14 Jan CY

FIRST ENDORSEMENT on LT L. O. Neophyte, USNR, 000-00-0000/1105, 5800 [Code] ltr of 12 Jan 91

From: Commanding Officer, Naval Justice School
To: Commander, Naval Education and Training Center, Newport

Subj: COMMAND INVESTIGATION OF THE MOTOR VEHICLE ACCIDENT INVOLVING, AND INJURIES SUSTAINED BY, YNSN JANE E. DOE, USN, 111-11-1111, NAVAL JUSTICE SCHOOL, WHICH OCCURRED IN WESTMINSTER, MASSACHUSETTS, ON 28 DECEMBER 19___

1. Readdressed and forwarded.

2. The opinion that YNSN Doe's injuries were incurred in the line of duty and not as a result of her misconduct is approved.

3. By copy of this endorsement, the Commanding Officer, Naval Legal Service Office, Newport, Rhode Island, is requested to assert the claim against Ms. Paula Roche, to recover the reasonable costs of medical care provided by the Navy to YNSN Doe.

4. The basic proceedings, findings of fact, opinions and recommendations of the investigating officer are approved.

/s/B. R. SIMPSON

Copy to:
CO NAVLEGSVCOFF Newport
LT Neophyte

1. If the convening authority corrects, adds, or disapproves findings of fact, opinions, or recommendations, the following language would be added in the endorsement;

Example 12 - sample endorsement language:

* The findings of fact are hereby modified as follows: * The following additional findings of fact are added: (numbers start after the last findings of fact in the basic investigation). * Opinion ___ in the basic correspondence is not substantiated by the findings of fact because _____ and is therefore disapproved (modified to read as follows: _____). * The following additional opinions are added: (numbers start after the last opinions in the basic investigation). * Recommendation ___ is not appropriate for action at this command; however, a copy of this investigation is being furnished to _____ for such action as deemed appropriate. * Additional recommendations: (numbers start after the last recommendation in the basic investigation). * The action recommended in recommendation ___ has been accomplished by _____ (has been forwarded to _____ for action; etc.).

2. If corrective action had been taken on the investigation, paragraph 4 in example 11 would read:

Example 13 - corrective action taken endorsement:

4. Subject to the foregoing remarks, the basic proceedings, findings of fact, opinions, and recommendations of the investigating officer are approved.

3. The endorsement must also state where original evidence, if any, is preserved, what arrangements have been made for its safekeeping, and provide the name and telephone number of the responsible official. JAGMAN, §§ 0209g(1), 0215c(1)(b).

C. ***Corrective action.*** The convening authority's endorsement must specifically indicate what corrective action, if any, is warranted and has been or will be taken. Whenever punitive or nonpunitive disciplinary action is contemplated or taken as the result of the incident under inquiry, such action should be noted in the endorsement. JAGMAN, §§ 0209g(1), 0218. Convening authorities can expect superior commanders to require subsequent reports on how lessons learned have been implemented; if administrative

investigations are to be effective tools, "tenacious follow-up action is required." JAGMAN, § 0203.

1. Punitive letters, or copies of recommended drafts, shall be included as enclosures. Nonpunitive letters are ***not*** to be mentioned in endorsements or included as enclosures. JAGMAN, § 0218.

D. ***Routing the investigation***

1. Upon completion of the endorsement, the convening authority forwards the original investigative report through the chain-of-command, to the GCMCA over the convening authority. ***It is no longer appropriate to list the Judge Advocate General as the ultimate addressee; command investigations are not routinely forwarded to JAG.*** JAGMAN, § 0209h(1). The subject matter and facts found will dictate the exact routing of the report; for example, area coordinators may be included as via addresses if the investigation relates to an issue affecting their area coordination responsibilities.

2. One complete copy of the investigation should be forwarded with the original for each intermediate reviewing authority (additional copies are required in death cases). JAGMAN, § 0219a.

3. Advance copies of the report of investigation shall be forwarded by the convening authority in the following cases:

(a) For command investigations involving injuries and deaths of naval personnel, or material damage to a ship, submarine, or Government property (excluding aircraft), advance copies are sent to Commander, Naval Safety Center. In aircraft mishap cases, copies of investigations are sent to the Naval Safety Center only upon request. JAGMAN, § 0219b.

(b) Where the adequacy of medical care is reasonably in issue and which involve significant potential claims, permanent disability, or death, advance copies are sent to the Naval Inspector General, Chief, Bureau of Medicine and Surgery (two copies); and the local NLSO. JAGMAN, §§ 0209g(2)(a), 0219c.

(c) Advance copies are to be provided to servicing NLSOs in cases involving potential claims or civil lawsuits. JAGMAN, § 0219b.

E. ***Review of command investigations***

1. ***General.*** Any command investigation that is forwarded must ultimately be reviewed by at least one GCMCA superior to the convening authority. There may be situations where the first reviewer in the chain-of-command is not a GCMCA (i.e., where a command investigation is convened by an officer in charge, then forwarded to the unit

commanding officer). Such intermediate reviewing authorities endorse the report similar to the original convening authority, including any information known—or reasonably ascertainable—at the time of the review concerning action taken or being taken in the case, but not already contained in the record or previous endorsement. Upon the GCMCA's receipt of the investigation, the report and endorsements will be reviewed and either retained at that level or endorsed and forwarded up the chain-of-command if higher review is deemed necessary (thus, even though a Carrier Group Commander may be a GCMCA, he / she may elect to forward a command investigation to the Fleet Commander where the report is thought to be of particular interest). The command investigation is deemed "final" when the last reviewing authority determines that further endorsement is not necessary. JAGMAN, § 0209h.

2. ***Copies***. Separate from the endorsement review process, copies of the investigation report should be made available to all superior commanders who have a direct official interest in the incident. Copies need not be provided to CNO or to CMC ***unless*** involving:

a. Incidents that may result in extensive media exposure;

b. training incidents causing death or serious injury;

c. operational incidents causing death or serious injury;

d. incidents involving significant fraud, waste, abuse, or significant shortages of public funds;

e. incidents involving lost, missing, damaged, or destroyed property of significant value;

f. incidents involving officer misconduct;

g. incidents required to be reported to headquarters under other directives or regulations;

h. incidents that may require action by CNO or CMC; and

i. cases involving significant postal losses or offenses.

JAGMAN, § 0209h(4).

F. ***Retention of command investigations***. The original convening authority is required to maintain a copy of all command investigations for a minimum of two years. Further, the GCMCA or the last commander to whom a command investigation is routed for review must retain such records for a period of two years from the time they area received.

After two years, the records should be archived in accordance with SECNAVINST 5212.5 series. JAGMAN, §§ 0209g(2), 0209h(5).

G. ***Release of command investigations.*** Persons outside of the Department of the Navy may seek release of command investigations, typically under the Freedom of Information Act (see SECNAVINST 5720.4) and / or the Privacy Act (see SECNAVINST 5211.5). Release may only be made by the proper releasing authority. JAGMAN, § 0220.

1. As a general rule, no command investigation may be released until it is deemed "final"—all endorsements and review is complete.

2. CNO (N09N) retains release authority for command investigations involving actual or possible loss or compromise of classified information.

3. For all other command investigations, the GCMCA to whom the report is ultimately forwarded is the proper release authority.

PART B - LITIGATION-REPORT INVESTIGATIONS

0207 THE INVESTIGATORY BODY. Like a command investigation, a litigation-report investigation is most frequently composed of a single investigator (officer, senior enlisted, or civilian employee) who is best qualified for the assignment and, where practical, senior to any individual whose conduct is subject to inquiry. JAGMAN, § 0213. Litigation-report investigations are unique in one significant aspect: the investigating officer ***must*** conduct his / her investigation under the direction and supervision of a judge advocate. JAGMAN, § 0210c(1).

0208 CONVENING ORDER

A. ***General***

1. A litigation-report investigation may be convened ***only after*** the convening authority has consulted with the "cognizant judge advocate." JAGMAN, § 0210b(1)(a).

a. The "cognizant judge advocate" is that individual who is responsible for providing legal advice to the convening authority. This will often be a station or staff judge advocate, but may also include a command services or claims officer at the servicing Naval Legal Service Office. JAGMAN, appendix A-2-a.

2. A litigation-report investigation must be convened in writing. JAGMAN, § 0210e(1)(a).

3. While resembling the convening order used for command investigations, a litigation-report investigation convening order differs as follows:

(a) The convening order must specifically identify by name the judge advocate under whose direction and supervision the investigation is to be conducted;

(b) opinions and recommendations will ***not*** be requested;

(c) the convening order ***must*** include an attorney work product statement;

(d) the investigating officer will be cautioned to discuss the conduct and results of the investigation only with those personnel who have an official need to know.

JAGMAN, § 0210d.

B. ***Contents***

1. Example 14

DEPARTMENT OF THE NAVY
NAVAL HOSPITAL
NEWPORT, RI 02841

5830
Ser 00/334
2 Jan __

From: Commanding Officer, Naval Hospital, Newport
To: LCDR M. P. Neoplasm, MSC, USN, 000-01-0000/0000

Subj: LITIGATION-REPORT INVESTIGATION OF THE COMPLICATIONS IN TREATMENT, WITH RESULTING BRAIN DAMAGE, IN THE CASE OF MARY THUMBTACK, DEPENDENT SPOUSE, WHICH OCCURRED AT NAVAL HOSPITAL, NEWPORT, ON OR ABOUT DECEMBER 30, 19__.

Ref: (a) JAG MANUAL

1. Per reference (a), you are hereby appointed to investigate the circumstances surrounding the complications in treatment in the case involving Mary Thumbtack,

dependent spouse, which occurred at Naval Hospital, Newport, on or about December 30, 19__, and to prepare the related litigation-report.

2. During the investigation, you will be under the direction and supervision of LCDR Al Bundy, JAGC, USN. Consult LCDR Bundy before beginning your inquiry or collecting any evidence. If you have not already done so, you should read Chapter II of reference (a), paying particular attention to section 0252, before consulting LCDR Bundy.

3. This investigation is being convened and your 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. As such it is privileged and should be discussed only with personnel who have an official need to know of its progress or results. If you have any doubt about the propriety of discussing the investigation with any particular individual, then you should seek guidance from LCDR Bundy before doing so.

4. Investigate all facts and circumstances surrounding the complications in treatment, including the potential or probable causes, resulting injuries and damages, and any fault, neglect, or responsibility therefore. Report your findings to LCDR Bundy by 20 January 19__, unless an extension of time is granted. Do not express any opinions or recommendations unless LCDR Bundy directs you to do so. Label your report "FOR OFFICIAL USE ONLY: ATTORNEY WORKPRODUCT," and take appropriate measures to safeguard it.

/s/R. U. SMITHERS

2. *See* JAGMAN, § 0212 and appendix A-2-d for assistance with convening orders for litigation-report investigations.

0209 THE INVESTIGATION

A. ***General.*** In conducting the investigation, the rules and considerations set forth for command investigations in section 0203, above, apply generally to litigation-report investigations.

B. ***Considerations unique to litigation-report investigations***

1. While free to collect, consider and include any relevant evidence regarding the incident under investigation, the investigating officer ***must*** ensure that the

supervising judge advocate is kept informed, and approves, of the method and nature of evidence collected.

2. When deemed necessary to obtain evidence such as expert analyses, outside consultant reports, and so forth, the supervisory judge advocate should sign the necessary requests. JAGMAN, § 0210e(2).

3. With regard to witnesses, in most cases the investigating officer will summarize the results of interviews rather than take written and / or signed statements from the witness. If there is reason why a witness should be asked to sign a statement (i.e., a witness with adverse interests to the Government is willing to provide a statement clearly beneficial to the Government's interest), the supervisory judge advocate should be consulted first. JAGMAN, § 0215d(1)(b).

0210 INVESTIGATIVE REPORT

A. ***General***. In writing the investigation report, the rules and considerations set forth for command investigations in section 0205, above, apply generally to litigation-report investigations.

B. ***Considerations unique to litigation-report investigations***

1. The preliminary statement must contain an attorney work product statement. JAGMAN, §§ 0210d(2), 0217c(2).

2. Opinions and recommendations will ***not*** be made by the investigating officer unless directed by the supervisory judge advocate. The supervisory judge advocate may choose to write the opinions and / or recommendations. JAGMAN, §§ 0210d(1), 0217e,f.

3. The report should be signed by both the investigating officer and the supervisory judge advocate. JAGMAN, §§ 0210e(3), 0217g.

4. The report shall be marked "FOR OFFICIAL USE ONLY: LITIGATION / ATTORNEY WORK PRODUCT." JAGMAN, § 0210e(3).

0211 ACTION BY CONVENING AND REVIEWING AUTHORITIES

A. ***Review and forwarding.*** Upon receiving the litigation-report investigation, the convening authority reviews the document and takes one of the following actions:

1. Return the investigation to the supervisory judge advocate for further inquiry;

2. Endorse and forward the report in writing.

JAGMAN, § 0210g(1).

B. ***First endorsement on a litigation-report investigation.*** Unlike the endorsement of a command investigation, the convening authority may only make limited comments in endorsing litigation-report investigations.

1. The convening authority may comment on those aspects of the report which bear on the administration or management of the command, including any corrective action taken. JAGMAN, § 0210g(1).

2. The convening authority shall ***not*** normally approve or disapprove of the findings of fact. JAGMAN, § 0210g(1).

3. The convening authorities endorsement must be marked "FOR OFFICIAL USE ONLY: LITIGATION / ATTORNEY WORK PRODUCT."

C. ***Routing the investigation***

1. Upon completion of the endorsement, the convening authority forwards the original investigative report to the Judge Advocate General (Code 33), via the Staff Judge Advocate of the GCMCA in the chain of command. JAGMAN, § 0210g(2).

2. One complete copy of the investigation should be forwarded with the original for the GCMCA. JAGMAN, § 0219a.

3. Copies of the report are to be provided to superiors in the chain of command and to other commands which have a direct need to know, including the servicing Naval Legal Service Office. Dissemination of the report ***shall not*** otherwise be made without first consulting a judge advocate. JAGMAN, § 0210g(2).

D. ***Review of litigation-report investigations***

1. Superiors in the chain of command who receive a copy of the litigation-report may, but are not required to, comment on the investigation. They will ***not*** normally

approve or disapprove findings of fact. JAGMAN, § 0210h(1).

2. The Staff Judge Advocate to whom the litigation-report investigation is sent is to review the investigation for accuracy and thoroughness. The report is then forwarded to JAG. Formal endorsement is not required. JAGMAN, § 0210h(2).

E. ***Retention of litigation-report investigations***

1. The original convening authority is required to retain a copy of the litigation-report investigation, kept in a file marked "FOR OFFICIAL USE ONLY: LITIGATION / ATTORNEY WORK PRODUCT" and safeguarded against improper disclosure. JAGMAN, § 0210g(2). The JAGMAN does not prescribe a time period for retention; before destroying, consultation with a judge advocate or OJAG (Code 33) is advisable.

2. Any copies of litigation-report investigations maintained by superiors, including the reviewing GCMCA, must be filed in specially marked files and safeguarded against improper disclosure. Consultation with a judge advocate or OJAG (Code 33) is advisable before ordering destruction of a litigation-report investigation.

F. ***Release of litigation-report investigation.*** For all litigation-report investigations, the Judge Advocate General retains release authority. Convening and reviewing authorities are ***not authorized*** to release litigation-report investigations or their contents. JAGMAN, § 0220c.

PART C - SPECIAL CONSIDERATIONS IN DEATH CASES

0212 SPECIAL NATURE OF DEATH CASES

A. ***Release of death investigations to family members.*** By law, reports pertaining to the death of military members are released to family members. Since the deceased cannot contribute to the investigative process, special considerations and sensitivity must prevail. JAGMAN, § 0234.

B. ***Status reports.*** To ensure proper and timely investigation, Navy commands must submit investigation progress reports every 14 days. The requirement for this status report ceases once the investigation has been forwarded to the next higher level of review. MILPERSMAN, Article 4210100.

1. Completion of a death investigation should not be delayed pending completion of associated documents (i.e., autopsy reports, death certificates), unless inclusion of such documents is absolutely essential. JAGMAN, § 0236b.

2. Unavailability of documents should simply be noted in the investigation and endorsement, and supplemented by separate correspondence as such documents are obtained. JAGMAN, § 0236b.

0213 SPECIAL RULES IN DEATH CASES

A. *Line of duty / misconduct determinations prohibited*

1. No survivor benefits administered by the Navy are conditioned upon a line of duty / misconduct determination. The Veteran's Administration also does not desire such an opinion. JAGMAN, § 0237b.

2. Administrative investigations shall ***not***, therefore, contain the ultimate, written opinion concerning a deceased member's line of duty status, nor shall misconduct be attributed. JAGMAN, § 0237a.

3. Where such an opinion is mistakenly recorded, the reviewing authorities may correct such by noting the error and its lack of validity in the endorsement. JAGMAN, § 0237a.

B. *Independent reviews*

1. Even though prohibited from rendering the ultimate line of duty / misconduct opinion, an investigation may uncover evidence which calls into question the propriety of a deceased individual's conduct. In a fair and impartial manner, such facts must be documented in the investigation.

– To find that the acts of a deceased servicemember may have caused harm or loss of life, including the member's own, through intentional acts, findings of fact must be established through clear and convincing evidence. JAGMAN, § 0240.

2. Prior to endorsement of an investigation which calls into question the deceased's conduct, the convening authority may wish the report to be reviewed to ensure thoroughness, accuracy of the findings, and fairness to the deceased member.

3. The individual selected to conduct this review shall have no previous connection to the investigative process and must be outside the convening authorities immediate chain of command. To the extent possible, the reviewer should possess training, experience, and background sufficient to allow critical analysis of the factual circumstances. JAGMAN, § 0239b.

4. The reviewer is not to act as the deceased's representative, but rather provide critical analysis from the perspective of the deceased, tempered by the reviewer's

own experience, training, and education. JAGMAN, § 0239c.

5. If the reviewer believes comments are warranted, such comments shall be completed and provided to the convening authority within 10 working days of the report's delivery to the reviewer. JAGMAN, § 0239c.

6. The convening authority is to consider any comments submitted by the reviewer and take any action deemed appropriate. The comments shall be appended to the investigative report. JAGMAN, § 0239d.

C. ***Routing instructions***

1. The GCMCA shall provide the Echelon II Commander with an advance copy of all death investigations (excepting limited investigations). Such action is to be noted in any forwarding endorsement. JAGMAN, § 0241a.

2. Graphic photographs should only be included in investigative reports where necessary. Special handling for such materials is required. JAGMAN, § 0241b.

APPENDIX A

CHECKLIST FOR INVESTIGATING OFFICERS CONDUCTING COMMAND INVESTIGATIONS*

I. INITIAL ACTION

___ A. Begin work on the investigation immediately upon hearing that you are to be appointed investigating officer, whether or not you have received a formal convening order.

___ B. Examine the convening order carefully to determine the scope of your investigation.

___ C. Review all relevant instructions on your investigation, including:

___ 1. The convening order.

___ – Is the scope of inquiry defined, including sections in the JAGMAN outlining special investigative requirements? Are there any special chain of command requirements?

___ 2. Chapters II and VIII of the JAGMAN.

___ D. Decide when your investigation must be completed and submitted to the convening authority.

___ E. Decide the exact purpose and methodology of your investigation.

___ F. Contact command being investigated and ask that all relevant logs, documents and other evidence be safeguarded.

* ***For litigation-report investigations, ensure the supervising judge advocate is informed of your proposed method and actions.***

II. GATHERING AND RECORDING OF INFORMATION

A. Interviewing Witnesses

___ 1. Draw up a list of all possible witnesses, to be supplemented as the investigation proceeds;

___ 2. Determine if witnesses are transferring, going on leave, hospitalized, or otherwise subject to circumstances which might make them inaccessible before review of the investigation is completed; and

___ 3. Inform the convening authority, orally, with confirmation in writing, immediately upon learning that a material witness might leave the area or otherwise become inaccessible before review of the investigation is completed.

Note: In some cases, the convening authority may wish to take appropriate action to prevent the witness from leaving pending review of the investigation.

___ 4. Determine which witnesses may be suspected of an offense under the UCMJ and advise them of their rights against self-incrimination and the right to counsel, using the form found in Appendix A-1-m of the JAGMAN.

___ 5. Advise each witness, who may have been injured as a result of the incident being investigated, of the right not to make a statement with regard to the injury in accordance with JAGMAN, § 0221.

___ 6. Conduct an intensive interview of each witness on the incident being investigated, covering full knowledge of:

___ a. Names, places, dates, and events relevant to the incident investigated; and

___ b. other sources of information on the incident investigated.

___ 7. 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. The SSN should be obtained from official records, if needed. The source of the SSN should be stated in the preliminary statement.)

___ 8. Record the interview of each witness with detailed notes or by

mechanical means.

___ 9. Reduce each witness' statement to a complete and accurate narrative statement.

___ 10. Obtain the signature of each witness, under oath and witnessed, on the narrative statement of the interview (but ***not*** for litigation-report investigations).

___ 11. Review your list of possible witnesses carefully, as supplemented, to ensure that you have interviewed all who are personally available to you.

___ 12. Attempt to obtain statements from possible witnesses who are not personally available by message, mail, telephone interview, or other means.

B. Collection of Documents

___ 1. Draw up a list, to be supplemented as the investigation proceeds, of all possible documents, including as applicable:

___ a. Copies of relevant rules and regulations;

___ b. relevant correspondence and messages;

___ c. personnel records;

___ d. medical records (clinical and hospital records, death certificates, etc. . .);

___ e. official reports (investigative reports, military police reports, etc. . .); and

___ f. required forms, such as:

___ (1) Personnel injury forms for persons injured, obviously not as a result of their own misconduct;

___ (2) vehicle accident report forms; and

___ (3) personnel claims forms.

___ 2. Examine your list of possible documents carefully, as supplemented, to ensure that you have personally obtained all that are available.

___ 3. Attempt to obtain documents which are not personally available to you by other means (e.g., by requesting that they be supplied to you by message, telephone, fax, or mail).

___ 4. Obtain originals or certified true copies of all documents to the maximum extent possible.

C. Collection of other Information

___ 1. 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. For example:

___ a. Real objects (firearms, bullets, etc. . .); and

___ b. physical locations (accident sites, etc. . .).

___ 2. Examine your list of such information, as supplemented, to ensure that you have obtained all such information, personally available to you.

___ 3. Attempt to obtain information not personally available to you in other ways (e.g., by requesting that it be supplied to you by message, phone, fax, or mail).

___ 4. Reduce all such information to a form which can be conveniently included in your investigative report (e.g., photographs or sketches).

___ 5. Ensure that any evidence gathered, but not used as an enclosure to the investigative report, is kept in an identified place – safe from tampering, loss, theft, and damage—pending review of the investigation.

III. PREPARATION OF THE INVESTIGATIVE REPORT

A. Preliminary Statement

1. Include statements detailing:

___ a. 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 and authorization for any delays;

___ e. failure to advise individuals of Article 31(b), Privacy Act, injury / disease rights;

___ f. assistance received in conducting the investigation;

___ g. efforts to obtain possible statements of witnesses, documents, and other evidence which you were unable to obtain;

___ h. efforts to preserve evidence pending review of the investigation; and

___ i. methods of obtaining social security numbers contained in the report.

B. Findings of Fact

___ 1. Distinguish in your own mind the differences among the terms "fact," "opinion," and "recommendation."

Note: The following may be helpful:

a. A "fact" is ***something that is or happens*** (e.g., "the truck's brakes were nonfunctional at the time of the accident").

b. An "opinion" is a ***value judgment on a fact*** (e.g., "the nonfunctioning of the truck's brakes was the primary cause of the accident").

c. A "recommendation" is a ***proposal*** made on the basis of an opinion (e.g., "that the command issue an instruction to ensure that no truck be allowed to operate without functional brakes").

___ 2. Conduct an evaluation of evidence or lack of evidence (negative finding of fact).

___ 3. Compare with the special fact-finding requirements pertaining to specific incidents addressed in the JAGMAN.

___ 4. Be specific as to times, places, and events.

___ 5. Identify person(s) connected with the incident by grade or rate, service number, organization, occupation or business, and residence.

___ 6. Make appropriate findings of fact for all relevant facts considered when preparing the report.

Note: Your personal observations are not, in and of themselves, sufficient to support a finding of fact. If you have made relevant "personal observations," reduce them to a statement signed and sworn to by yourself and include the statement as an enclosure.

___ 7. After each finding of fact, reference the enclosures to the report which support the finding of fact.

___ 8. Ensure that every enclosure is used in support of at least one finding of fact. (Delete any enclosure which is not.)

___ 9. Ensure that, when read together, the findings of fact ***tell the whole story*** of the incident investigated without a reading of the enclosures.

C. Opinions

___ 1. Ensure that each of your opinions is an opinion and not a finding of fact or recommendation.

___ 2. Ensure that each opinion references the finding(s) of fact that support it.

___ 3. Ensure that you have rendered those opinions required by the convening order or the JAGMAN as well as any others you might feel are appropriate.

Note: In cases involving the death of a servicemember, it is forbidden to render any opinion concerning line of duty. Also, misconduct (as defined in the JAGMAN) shall not be attributed to the deceased servicemember.

In litigation-report investigations, opinions and recommendations may only be made when directed by the supervising judge advocate.

D. Recommendations

___ 1. Ensure that each of your recommendations is a recommendation and not a finding of fact or opinion.

___ 2. Ensure that each recommendation is logical and consistent with the findings of fact and opinions.

___ 3. Address those recommendations specifically required by the convening order or the JAGMAN and any others considered appropriate.

___ 4. Recommend any appropriate corrective, disciplinary, or administrative action.

E. Enclosures

– Include the following documents as enclosures to the investigative report:

___ a. Convening order;

___ b. doctor's statement and/or copies of medical records as to the extent of the injuries;

___ c. copies of private medical bills, if reimbursement may be claimed;

___ d. autopsy report and, where available, autopsy protocol (in death cases);

___ e. report of coroner's inquest or medical examiner's report (in death cases);

___ f. laboratory reports, if any;

___ g. reservists' orders, if applicable;

___ h. statements or affidavits of witnesses or others;

___ i. statement of investigating officer, if applicable;

___ j. necessary photographs and / or diagrams, properly identified and labeled;

___ k. local regulations, if applicable;

___ l. exhibit material to support investigating officer's findings and opinions; and

___ m. signed original Privacy Act statements.

IV. CONCLUDING ACTION

___ A. Have you stretched your imagination to the utmost in gathering and recording all possible information on the incident investigated?

___ B. Have you checked and double-checked to ensure that your findings of fact, opinions, recommendations, and enclosures are in proper order?

___ C. Have you carefully proofread your investigative report to guard against embarrassing clerical errors?

CHAPTER III

LINE OF DUTY / MISCONDUCT DETERMINATIONS

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CHAPTER III

LINE OF DUTY / MISCONDUCT DETERMINATIONS

0301 GENERAL. To assist in the administration of naval personnel issues, the commanding officer is required to inquire into certain cases of injury, disease, or death incurred by members of his or her command. When these inquiries are conducted, the commanding officer is required to make what are referred to as line of duty (LOD) / misconduct determinations. As in most matters, the type of inquiry and the degree of formality of the report will depend upon the circumstances of each case.

0302 WHY LOD / MISCONDUCT DETERMINATIONS ARE REQUIRED. Assume the following scenario:

> Fireman Sam Speed has been drinking beer at a local tavern for several hours; he has imbibed to the point where he is now legally intoxicated. Fireman Speed leaves the bar, starts his car, and drives onto the public road. In a hurry to get home, our hero exceeds the posted speed limit by over 30 mph, despite the fact that the weather conditions have made the roads wet and blanketed the area in fog. Fireman Speed passes several other motorists, who are both shocked and scared by his driving. As he rounds a corner, Speed loses control of the vehicle and, because he did not secure his seat belt (contrary to both state law and Navy regulation), is thrown from the vehicle. Speed is lucky to be alive; he suffered significant injury that caused him to miss three (3) months of military duty and may have incurred a permanent disability.
>
> Assume that Fireman Speed is physically able to return to duty: should the three months he was absent from duty count towards fulfillment of his four (4) year enlistment contract? Should the missed time count for retirement purposes, or longevity pay purposes?
>
> Assume that Fireman Speed is *not* physically able to return to duty and will be medically discharged: should the Navy provide Speed with either severance pay and / or a disability retirement?

As implied in the above hypothetical, the results of the inquiry and the subsequent LOD / misconduct determination can affect several benefits and / or rights administered by the Department of the Navy to which the injured party may be entitled, including, inter alia:

1. extension of enlistment;

2. longevity and retirement multiplier;

3. forfeiture of pay; and

4. disability retirement and severance pay.

This report may also be made available to the Department of Veterans' Affairs to assist them in making determinations concerning Veterans' Administration benefits.

0303 WHEN LOD / MISCONDUCT DETERMINATIONS ARE REQUIRED

A. ***Injury or disease***. Findings concerning LOD / misconduct must be made in every case in which a member of the naval service incurs a ***disease or injury*** that:

1. ***Might*** result in permanent disability; ***or***

2. results in the physical inability to perform duty for a period ***exceeding*** 24 hours (as distinguished from a period of hospitalization for evaluation or observation). JAGMAN, § 0221.

B. ***Death***. Opinions concerning line of duty ***are prohibited*** in death cases. Misconduct, as defined in JAGMAN, § 0224, shall not be attributed to a deceased member. If such an opinion has been made or recorded after the incurrence of an injury, but before death, the convening or reviewing authority will note the error and its lack of validity in the endorsement. JAGMAN, § 0237a.

C. ***Reservists***. Incidents involving injury or death occurring during a period of annual training or inactive duty training (drill), or those occurring while traveling directly to or from places where members are performing or have performed such duty, or any case involving a question of whether a disease or injury was incurred during a period of annual training, inactive duty training (drill), or travel, shall be investigated. JAGMAN, § 0232.

0304 GENERAL TERMS

A. ***"Active service"***. This term, as it is used in the general rules concerning LOD / misconduct below, includes "full-time duty in the naval service, extended active duty, active duty for training, leave or liberty from any of the foregoing, and inactive duty training." JAGMAN, § 0223b.

B. ***Burden of proof***

1. ***Preponderance.*** Findings of fact must be supported by a preponderance of the evidence which is created when there is more credible and convincing evidence offered in support of a proposition than opposed to it. JAGMAN, § 0213b(1).

2. ***Clear and convincing.*** To rebut either the presumption that an injury or disease was incurred in the line of duty or the presumption of mental responsibility, clear and convincing evidence is required. Clear and convincing means a degree of proof beyond the preponderance of evidence discussed above, that should leave no serious or substantial doubt in the minds of objective persons considering the facts. It is an intermediate degree of proof, being more than a preponderance, but not reaching the extent of certainty as beyond any reasonable doubt. JAGMAN, §§ 0224b, 0226b, appendix A-2-a.

0305 WHAT CONSTITUTES LINE OF DUTY

– ***Presumption.*** Sections 0221a and 0223a of the ***JAG Manual*** state that 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. as a result of the member's own misconduct, as defined in JAGMAN, § 0224;

2. while avoiding duty by deserting the service;

3. while absent without leave, and such absence materially interfered with the performance of required military duties;

a. ***Special unauthorized absence (UA) rule.*** Whether absence without leave "materially interferes" with the performance of required military duties necessarily depends upon the facts of each situation applying a standard of reality and common sense. No definite rule can be formulated as to what constitutes "material interference."

(1) Generally speaking, absence ***in excess of twenty-four hours*** constitutes a material interference unless there is evidence to establish the contrary.

(2) An absence ***less than twenty-four hours*** will not be considered a material interference without clear and convincing evidence to establish the contrary.

A statement of the individual's commanding officer, division officer, or other responsible official, and any other available evidence to indicate whether the absence constituted a material interference with the performance of required military duties, should be included in the record whenever appropriate. JAGMAN, § 0223c(1).

b. It should be noted that, under 10 U.S.C. § 1207 (1982), a member is ineligible for physical-disability retirement or severance benefits from the armed forces if disability was incurred during a UA period, regardless of the length of such absence and regardless of whether such absence constituted a material interference with the performance of his required military duties. JAGMAN, § 0223c(2).

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

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

0306 WHAT CONSTITUTES MISCONDUCT

A. ***Presumption***. Sections 0221a and 0224b of the ***JAG Manual*** state that an injury or disease suffered by a member of the naval service is presumed not to be the result of misconduct ***unless*** there is clear and convincing evidence that:

1. The injury was intentionally incurred; or

2. the injury was the result of willful neglect which demonstrates a reckless disregard for the foreseeable and likely consequences.

a. Foreseeability: A person of ordinary intelligence and prudence should reasonably have anticipated the danger created by the negligent act. Injury or disease from a course of conduct is foreseeable if, according to ordinary and usual experience, injury or disease is the probable result of that conduct.

b. Willful neglect: A conscious and voluntary act, or omission, which is likely to result in grave injury of which the member is aware. It involves a willful, wanton, or reckless disregard for the life, safety, and well-being of self or others. Simple or ordinary negligence, or carelessness, standing alone, does not constitute misconduct.

c. The fact that the conduct violated a law, regulation, or order, or was engaged in while intoxicated, does not, of itself, constitute a basis for a determination of misconduct. JAGMAN, § 0224a.

B. ***Military duty and misconduct.*** "Misconduct" can never be "in line of duty." Thus, a finding that an injury was the result of the member's own "misconduct" must be accompanied by a finding that the injury was incurred "not in line of duty." Accordingly, if a servicemember is properly performing his military duty and is injured as a result of that duty, a "misconduct" finding would be erroneous since no military duty can require a servicemember to commit an act which would constitute "misconduct."

C. ***Special rules***

1. ***Intoxication*** - JAGMAN, § 0227. Intoxication (impairment) is a factor in many of the injuries in which misconduct is found and is often coupled with evidence of recklessness or disorderly conduct.

a. Intoxication may be produced by alcohol, drugs, or inhalation of fumes, gas, or vapor.

b. In order for intoxication alone to be the basis for a misconduct finding, there must be a showing, by clear and convincing evidence, that:

(1) The member's physical or mental faculties were impaired due to intoxication at the time of the injury; and

(2) the impairment was the proximate cause of the injury.

– Proximate cause is that conduct which, in a natural and continuous sequence unbroken by any efficient intervening cause, produces injury, and without which the result would not have occurred.

c. ***Presumption.*** Where a member has a blood-alcohol content (BAC) of .10 percent by volume or greater, it is presumed that mental or physical faculties are impaired. This presumption is rebuttable; even where not rebutted, the proximate cause issue must be addressed. Intoxication may also be found where no BAC is available or it measures less than .10. In such cases, the investigation should include a description of the servicemember's general appearance, along with information regarding whether the member staggered or otherwise displayed a lack of coordination, was belligerent or incoherent, or displayed slow reflexes or slurred speech. JAGMAN, § 0227b.

2. ***Alcohol and drug-induced disease.*** Inability to perform duty resulting from a disease that is directly attributable to a specific, prior, proximate, and related intemperate use of alcohol or habit-forming drugs is the result of misconduct and, therefore, not in the line of duty. JAGMAN, § 0227c.

3. ***Refusal of medical or dental treatment.*** If a member unreasonably refuses to submit to medical, surgical, 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, § 0228.

D. ***Mental responsibility***. A member may not be held responsible for acts and their foreseeable consequences if, as the result of a mental defect, disease, or derangement, the member was unable to comprehend the nature of such acts or to control his or her actions. In the absence of evidence to the contrary, it is presumed that all persons are mentally responsible for their acts. JAGMAN, §§ 0226 a and b.

1. Because of this presumption, it is not necessary to present evidence of mental responsibility unless:

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

b. the question is raised by the nature of the incident itself.

2. If either (a) or (b) above is present, the presumption of mental responsibility ceases to exist and the investigation must clearly and convincingly establish the member's mental responsibility before an adverse determination can be made.

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

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

4. ***Suicide attempts***. Because of the strong instinct for self-preservation, an unsuccessful, but bona fide, attempt to kill oneself creates a strong inference of lack of mental responsibility. JAGMAN, § 0226c.

– In all cases of attempted suicide, evidence bearing on the mental condition of the injured person shall be obtained. This includes all available evidence as to social background, actions, and moods immediately prior to the attempt, any troubles that

might have motivated the incident, and any pertinent examination or counseling session. JAGMAN, § 0233i.

5. ***Suicidal gestures and malingering.*** Self-inflicted injury not prompted by a serious intent to die is, at most, a suicidal gesture and such injury, unless lack of mental responsibility is otherwise shown, is deemed to be incurred as a result of the member's own misconduct. The mere act alone does not raise a question of mental responsibility because there is no intent to take one's own life, the intent was to achieve some secondary gain (e.g., a Marine cutting off his trigger finger to avoid combat). JAGMAN, § 0226c.

0307 RELATIONSHIP BETWEEN MISCONDUCT AND LINE OF DUTY

A. ***Determinations.*** There are ***only three*** possible determinations. JAGMAN, § 0225b.

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

2. ***Not in line of duty, not due to member's own misconduct (NLOD / NDOM).***

a. This determination would occur when misconduct is not involved, but an injury or disease is contracted by a servicemember which falls within one of four other exceptions to the LOD presumption (desertion; UA; confinement as a result of a civilian conviction; or confinement pursuant to sentence by a general court-martial that included an unremitted dishonorable discharge).

b. ***Example***: A servicemember has been UA for 8 months and is injured while lawfully crossing a street. The injuries were not the result of negligence.

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

B. ***Disciplinary action.*** An adverse determination as to misconduct or line of duty is not a punitive measure. Disciplinary action, if warranted, shall be taken independently of any such determination. A favorable determination as to LOD / misconduct does not preclude separate disciplinary action, nor is such a finding binding on any issue of guilt or innocence in any disciplinary proceeding. The loss of rights or benefits resulting from an adverse determination may be relevant and, at the request of the accused, admissible as a matter in extenuation and mitigation in a disciplinary proceeding. JAGMAN, § 0229.

0308 RECORDING LOD / MISCONDUCT DETERMINATIONS

A. *General*

1. Each inquiry or disease requiring LOD / Misconduct determinations ***must*** be reviewed through use of a preliminary inquiry (*see* Chapter I, section 0110). JAGMAN, § 0230a.

2. Upon completion of the preliminary inquiry, the command is to report the results to the GCMCA through use of the Personnel Casualty Report system. JAGMAN, § 0230b, MILPERSMAN 4210100. A copy of the preliminary inquiry report is delivered to the appropriate medical department for inclusion in the health or dental record.

3. If the medical officer and the commanding officer are of the opinion that the inquiry or disease was incurred "in line of duty" and "not as a result of the member's own misconduct," then appropriate entries stating such are entered in the health record. ***No further investigation*** is required, unless directed by the GCMCA. JAGMAN, § 0230c.

B. *Command Investigations*

1. As noted above, use of the preliminary inquiry and health record entries will provide sufficient documentation where injuries or disease are found to have occurred while in the line of duty, not due to misconduct.

2. Command investigations are only required when:

a. the injury or disease was incurred in such a way that suggests a finding of "misconduct" or "not in line of duty" might result (JAGMAN, §§ 0230d(1), (2));

b. there is a reasonable chance of permanent disability and the convening authority considers an investigation essential to ensuring an adequate official record;

c. the injury involves a Naval or Marine Reservist and the convening authority considers an investigation essential to ensuring an adequate official record.

3. In endorsing a command investigation, the convening authority must specifically comment on the LOD / misconduct opinion and take one of the following actions:

a. If the convening authority concludes that the injury or disease was incurred "in line of duty" and "not due to member's own misconduct", that shall be

expressed (regardless of whether it differs from or concurs with the investigating officer's opinion). JAGMAN, § 0231a(1).

b. If, upon review of the report or record, the convening (or higher) authority believes the injury or disease was incurred ***not*** "in line of duty" or due to the member's own misconduct, the member ***must*** be informed of the preliminary determination and afforded an opportunity, not to exceed 10 days, to submit any desired information. JAGMAN, § 0231a(2).

(1). The member shall be advised that:

(a) No statement relating to the origin, incurrence, or aggravation of any disease or injury suffered need be made (JAGMAN, § 0221); and

(b) if the member is suspected of having committed an offense, the member shall be so advised, as required by Article 31(b), UCMJ JAGMAN, § 0231a(2)(b).

(2) The member may be permitted to review the investigation report before providing any desired information. JAGMAN, § 0231a(2)(c).

(3) If the member decides to present information, it shall be considered by the convening authority and appended to the record. If the member elects not to provide information, or the 10 day period lapses without submission, then such shall be noted in the endorsement. JAGMAN, §§ 0231a(2)(d) & (e).

4. The command investigation is forwarded to a GCMCA with an assigned judge advocate. The GCMCA may take any action that could have been taken by the convening authority. JAGMAN, § 0231b(1).

5. The GCMCA shall indicate approval, disapproval or modification of conclusions concerning misconduct and line of duty. A copy of such action will be returned to the convening authority so that appropriate entries may be made in the member's service and medical records. JAGMAN, § 0231b(1).

6. The original convening authority must ensure that appropriate service and medical record entries are made. JAGMAN, § 0231c.

0309 INVESTIGATIVE REQUIREMENTS FOR SPECIFIC INCIDENTS. The investigating officer should be aware of particular problem areas in LOD / misconduct investigations. Examples of situations commonly encountered are listed below, along with a listing of various factors that should be included in investigative reports. The examples

are not intended to be comprehensive, nor do the listed factors purport to cover every fact situation that may arise.

A. ***Speeding***. It is impossible to state categorically when excessive speed becomes willful neglect and requires a finding of misconduct. The investigative report should contain information concerning the type and condition of the road; the number and width of the lanes; the type of area (densely populated or rural); any hills or curves that played a part in the accident; the traffic conditions; the time of day and weather conditions; the posted speed limit in the area; the mechanical condition of the car (particularly the brakes and tires); and the prior driving experience of the member. The speed of the vehicle is also important; however, estimates of speed based solely upon physical evidence at the scene of the crash, such as skid marks and damage to the vehicle, are somewhat conjectural unless corroborated by other evidence. Therefore, attempts should be made to secure estimates of speed from witnesses, passengers, and drivers. In this way, the post-accident estimates of the police may be corroborated.

B. ***Falling asleep at the wheel***. Falling asleep at the wheel is one of the most common causes of accidents, but is one of the most difficult situations in which to establish misconduct. The act of falling asleep, in itself, does not constitute willful neglect; however, the act of driving while in a condition of such extreme fatigue or drowsiness that the driver must have been aware of the danger of falling asleep at the wheel may amount to such a reckless disregard of the consequences as to warrant a finding of misconduct. Before a finding of misconduct can be made, there must be clear and convincing evidence showing that the servicemember experienced premonitory symptoms of drowsiness that should have put the driver on notice of the imminent danger of falling asleep. This information should include how long the servicemember had been driving and how many miles the member had driven prior to the accident; the amount of sleep had by the member before commencing the trip; the member's activities for the 24 hours prior to the injury; whether any momentary periods of drowsiness were experienced before finally falling asleep; and any evidence of drinking or intoxication.

C. ***Passenger misconduct***. If a passenger knows or should know that the driver is unlikely to drive safely because of negligence, lack of sleep, recklessness, or intoxication, the passenger is guilty of misconduct upon voluntarily exposing himself or herself to the danger. The investigation should contain information showing whether the servicemember had an opportunity to leave the vehicle after the driver's condition became apparent; whether the driver and passenger had been drinking together and how much each had to drink; and what action, if any, was taken by the passenger to have the driver drive more carefully. Also determine the operator's driving experience; any signs of intoxication; whether the passenger noticed the driver was tired or exhibited any other symptoms; whether the passenger took any action to have the driver rest or to personally assume the driving responsibilities.

D. ***Disorderly conduct and fighting.*** Injuries incurred by a servicemember while voluntarily and wrongfully engaged in a fight or similar encounter, whether or not weapons were involved, are due to misconduct where they might reasonably have been expected to result directly from the affray and the servicemember is at least equally culpable with the adversary in starting or continuing the affair.

1. Not all injuries resulting from fighting necessarily must be determined to have resulted from the member's misconduct. For example, if an adversary employs unexpectedly violent methods or means, such as a dangerous weapon, a conclusion that the resulting injuries were not due to the member's own misconduct could be appropriate.

2. In investigating such incidents, determine:

a Who instigated or provoked the fight and/or struck the first blow;

b. any history of prior altercations between the participants;

c. whether either participant was armed (gun, knife, blow gun, club, bottles, etc. . .);

d. whether either participant attempted to terminate the affray;

e. the relative sizes and capabilities of the participants; and

f. the part that drinking, if any, played in the altercation.

3. If there are inconsistent statements from witnesses about the incident, the investigating officer should indicate in the report which witnesses the officer chooses to believe in making the findings of fact and opinions.

E. ***Intentionally self-inflicted injuries.*** Include any medical reports and opinions in the investigation report when the investigation concerns an intentionally self-inflicted injury. In these cases, the investigating officer should primarily look for evidence, or lack thereof, of a bona fide suicide intent. The investigative report should contain information concerning:

1. Whether the methods used to cause injury were likely to cause death under the circumstances;

2. the servicemember's expressed reasons for attempting suicide;

3. whether the servicemember took action to avoid being found prior to the injury as opposed to being certain he would be discovered and treated quickly;

4. whether the servicemember had threatened suicide prior to the incident under investigation; and

5. statements of shipmates and friends concerning the member's apparent state of mind on the date of the act.

F. ***Accidentally self-inflicted injuries; gunshot wounds.*** A health record entry should not be used when an injury results from an accidental self-inflicted gunshot wound because of the strict, high standard of care required in the use of firearms or other dangerous weapons. In cases of this kind, mere failure to take proper precautions to prevent a casualty normally constitutes simple negligence or carelessness and, therefore, does not justify a finding of misconduct. However, in the event the record clearly and convincingly shows that the servicemember has displayed a lack of care that amounts to willful neglect, taking into account the higher standard of care required of persons using and handling dangerous weapons, a finding of misconduct is appropriate. The investigating officer's report should include information concerning:

1. Whether the subject member was familiar with guns in general and with the gun in question (or other dangerous weapons, as appropriate);

2. whether the member was aware of the weapon's safety features;

3. whether there were any defects in the weapon and whether the member knew of such defects;

4. whether the member knew the gun was loaded or had checked the chamber for its possible loaded condition;

5. whether the member had cocked the weapon;

6. how the weapon was positioned in relation to the servicemember's body and why it was placed in that position;

7. the possible cause of the weapon's discharge;

8. the mental attitude of the handler, including any alcohol or drug involvement; and

9. any intervening factors.

CHAPTER IV

CLAIMS

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CHAPTER IV

CLAIMS

0401 CHAPTER OVERVIEW

A. ***Purpose of the chapter.*** Claims involving the United States Government and its military activities are governed by a complex system of statutes, regulations, and procedures. This chapter is not a substitute for the official departmental claims regulations published in the *JAG Manual* and JAGINST 5890.1, Subj: ADMINISTRATIVE PROCESSING AND CONSIDERATION OF CLAIMS ON BEHALF OF AND AGAINST THE UNITED STATES. It is, however, a useful starting point for research into claims problems.

B. ***Summary of chapter contents.*** This chapter is organized to reflect the various claims statutes and their respective functions in the claims system. Claims involving the Federal Government are of two types:

1. Claims in which the Federal Government is a claimant seeking compensation; or

2. claims against the government for which a claimant seeks compensation. These can be further divided into two functional categories:

a. General claims statutes, such as the Federal Tort Claims Act and Military Claims Act, which provide for payment of claims arising out of a broad range of incidents and situations; and

b. specialized claims statutes, such as the Military Personnel and Civilian Employees' Claims Act and the Foreign Claims Act, which provide for payment of claims arising out of specific types of incidents or to only specific classes of claimants.

PART A - CLAIMS AGAINST THE GOVERNMENT: GENERAL CLAIMS STATUTES

0402 FEDERAL TORT CLAIMS ACT

A. ***Overview.*** The Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671, 2672 and 2674-2680 (1982) (FTCA) was a product of many years of congressional deliberations and considerations. Before 1946, if a person was wrongfully injured by a Federal employee

who had acted within the scope of his Federal employment, the doctrine of "sovereign immunity" barred that injured party from suing the government for compensation. This doctrine often had the effect of denying fair compensation to persons with meritorious claims. At that time, the only available form of redress was the "private bill"—a system whereby the injured party could be compensated for his injury by a special act of Congress. This system was cumbersome and resulted in thousands of private bills annually. The system was also unfair to those who lacked sufficient influence to have a representative introduce a private bill on their behalf. The FTCA was enacted with the intent of providing a more equitable, comprehensive system. The Act provides for compensation for personal injury, death, and property damage caused by the negligent or wrongful act or omission of Federal employees acting within the scope of Federal employment. It also covers certain intentional, wrongful acts. There are, however, three general types of exceptions from government liability under FTCA. First, the government is protected from liability arising out of certain types of governmental actions. Second, FTCA will not provide compensation when one of the specialized claims statutes (discussed in part B of this chapter) covers the claim. Third, certain classes of claimants, such as active-duty military personnel, are precluded from recovering under FTCA, although they may be compensated under other statutes.

B. ***Statutory authority.*** The scope of the government's liability under FTCA is limited to money damages for injury, death, or property damage caused by the negligent or wrongful act or omission of any government employee while acting within the scope of his office or employment. Specifically, governmental liability is described in the following two statutes:

> Section 1346. United States as defendant.
>
> . . . .
>
> (b) . . . [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. . . .

> Section 2674. Liability of the United States.
>
> The United States shall be liable . . . in the same manner and to the same extent as a private

> individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages. . . .

Historically, guidance regarding claims adjudication was contained in the *JAG Manual*. In the 1990 revision, however, only generic comments were included in Chapter VIII. Detailed explanations concerning most claims are now in JAGINST 5890.1; however, admiralty Claims (Chapter XII), Foreign Claims Act (Chapter VIII), and Article 139 claims (Chapter IV) are still in the *JAG Manual*.

C. ***Scope of liability***

1. ***Negligent conduct***

a. ***"Negligence" defined.*** The law defines "negligence" as the failure to exercise the degree of care, skill, or diligence that a reasonable person would exercise under the same circumstances. Negligent conduct can arise either from an act or a failure to act. It can be either acting in a careless manner or failing to do those things that a reasonable person would do in the same situation. Jurisdiction over claims that have as their basis a theory of liability other than negligence (implied warranty or strict liability) does not lie under the FTCA. *Laird v. Nelms*, 406 U.S. 797 (1972); *Dalehite v. United States*, 346 U.S. 15 (1952).

b. ***Applicable law.*** Whether certain conduct was negligent—and, therefore, whether the government is liable—will be determined by the tort law of the place where the conduct occurred. Questions such as whether the violation of a local law, by itself, constitutes negligence will be answered by applying local tort law.

(1) ***Example***: Seaman Jones, while performing his duties in Virginia, injures Mr. Smith. Under Virginia law, Jones' conduct is not negligence. Therefore, Mr. Smith's FTCA claim will be denied.

(2) ***Example***: Seaman Jones, while performing his duties in North Carolina, engages in ***exactly the same conduct*** that injured Mr. Smith in the previous example. This time, Jones injures Mr. Johnson. Under North Carolina law, Jones' acts constitute negligence. Mr. Johnson's FTCA claim will be paid.

2. ***Limited range of intentional torts.*** The FTCA will compensate for intentional wrongful acts under very limited circumstances. On or after 16 March 1974, FTCA applies to any claim arising out of the following intentional torts committed by Federal law enforcement officers: assault, battery, false imprisonment, false arrest, abuse of process, and malicious prosecution. A Federal law enforcement officer, for purposes of the FTCA, is any officer of the United States empowered by law to execute searches, to seize evidence,

or to make arrests for violations of Federal law. Since Article 7, UCMJ, extends the authority to apprehend to commissioned officers and petty officers, these officers would be considered law enforcement officers for FTCA purposes when they are actually engaged in law enforcement duties. No other intentional tort claims are payable under FTCA. Federal employees have been held ***individually*** liable to the injured party for intentional torts committed while the employees are acting beyond the proper limits of their authority. *See Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). Military personnel are restricted from using the *Bivens* remedy against either their superiors or civilian personnel for violations of constitutional rights arising out of, or in the course of, activity incident to service. In *United States v. Stanley*, 483 U.S. 669 (1987), the Supreme Court turned down a damages action brought by an Army sergeant who was given lysergic acid diethylamide, without his knowledge, as part of a military experiment. The court applied the same rationale expressed in *Chappell v. Wallace*, 462 U.S. 296 (1983), stating that the unique disciplinary structure of the military and congressional action in this area (barring military causes of action) dictates against the claim.

3. ***Government employees***

a. ***Definitions***. Under the FTCA, the government is liable only for the wrongful acts of its employees. The term "government employee" is defined to include the following:

(1) Officers or employees of any Federal agency; or

(2) members of the military or naval forces of the United States; or

(3) persons acting on behalf of a Federal agency in an official capacity, either temporarily or permanently, and either with or without compensation.

The term "Federal agency" includes not only the departments and agencies of the executive, legislative, and judicial branches of the Federal Government, but also independent entities that function primarily as Federal agencies (e.g., U.S. Postal Service, Commodity Credit Corporation).

b. ***Government contractors***. A government contractor and its employees are not usually considered government employees under the FTCA. When, however, the government exercises a high degree of control over the details of the contractor's activities, the courts may find that the government contractor is, in fact, a government employee. The standard personnel qualification and safety standards provisions in government contracts are not enough to turn a government contractor into a government employee. Where the contract requires the contractor to follow extensive, detailed instructions in performing the work, the contractor will usually be considered a government employee and the contractor's employees who work on the Federal job will likewise be

treated as government employees for FTCA purposes. *See, Logue v. United States*, 412 U.S. 521 (1973).

c. ***Nonappropriated fund activities***

(1) ***Defined.*** A nonappropriated fund activity is one that, while operating as part of a military installation, does not depend upon, and is not supported by, funds appropriated by Congress. Examples of nonappropriated fund activities include the Navy Exchange and officers' clubs.

(2) ***Liability.*** A claim arising out of the act or omission of an employee of a nonappropriated fund activity not located in a foreign country acting within the scope of employment is an act or omission committed by a federal employee and will be handled in accordance with FTCA.

4. ***Scope of employment.*** The government is liable under the FTCA for its employees' conduct only when the employees are acting within the scope of their employment. The scope-of-employment requirement is viewed by the courts as "the very heart and substance" of the Act. While scope-of-employment rules vary from state to state, the issue usually turns on the following factors:

a. The degree of control the government exercises over the employee's activities on the job; and

b. the degree to which the government's interests were being served by the employee at the time of the incident.

Whether or not a government employee's acts were within the scope of employment will be determined by the law, including principles of ***respondeat superior***, of the state where the incident occurred. This has led to many different results on the question of applicability of the FTCA involving permanent change of station (PCS) moves and temporary duty (TDY). One must look to state law to determine the proper test or criteria for determining scope of employment based upon the principles of ***respondeat superior***.

(1) ***Example***: Consider the following hypothetical situation. Seaman Baker, the command duty driver, is making an authorized run in the command vehicle. On the way back to the base, he stops at a local bar and drinks himself into a stupor. Barely able to stand, he gets back into the command vehicle and continues on toward the base. In his drunken state, he fails to see a stop sign and crashes into an automobile driven by a civilian. Both Baker and the civilian are seriously injured. For the purposes of the FTCA, Baker could be considered, in at least some jurisdictions, to have been acting within the "scope of his employment" (i.e., he was completing an authorized run when he was involved in the accident).

Accordingly, the claim of the civilian would be cognizable under the FTCA. (Baker's injuries, however, would almost certainly be determined to be the result of his own "misconduct" and, therefore, would not be in the line of duty.)

(2) ***Example***: Seaman Baker, the command duty driver, is making an authorized run in the command sedan. While daydreaming, he becomes inattentive, fails to keep a lookout for pedestrians, and hits Mr. Jones. Seaman Baker's negligence occurred within the scope of his employment.

(3) ***Example***: Seaman Baker, the command duty driver, takes the command sedan after hours on an unauthorized trip to the ball game. After the game, he and some buddies stop at several taverns and all become roaring drunk. Because of his drunken condition, while driving back to the base Baker runs over Mr. Smith. In this case, Baker's negligence occurred outside the scope of his employment. He and his friends were off on a frolic of their own, and their activities were entirely unrelated to the performance of a governmental or military function. Therefore, Mr. Smith will not be able to recover under the FTCA. Since a government vehicle is involved, however, Smith may be entitled to limited compensation under the "nonscope" claims procedures discussed in section 0408, below.

5. ***Territorial limitations***. FTCA applies only to claims arising in the United States or in its territories or possessions (i.e., where a U.S. district court has jurisdiction). Any lawsuit under the FTCA must be brought in the U.S. district court in the district where the claimant resides or where the incident giving rise to the claim occurred.

D. ***Exclusions from liability***. Statutes and case law have established three general categories of exclusions from FTCA liability. The following specific exclusions are encountered frequently in claims practice in the military. A complete list of FTCA exclusions is set forth in JAGINST 5890.1. In each of the following situations, the government will not be liable under FTCA, although it may be liable under some other claims statute.

1. ***Exempted governmental activities***

a. ***Execution of statute or regulation***. The FTCA does not apply to any claim based on an act or omission of a Federal employee who exercises due care while in the performance of a duty or function required by statute or regulation.

b. ***Discretionary governmental function***. The FTCA does not apply to any claim based upon the exercise or performance of, or the failure to exercise or perform, a discretionary governmental function. 28 U.S.C. 2680(a) (1982). The FTCA does not define "discretionary function," and perhaps no single exclusion has generated as much litigation. The key issue will usually be whether the governmental activity involved in the

claim involves an exercise of judgement or choice based on considerations of public policy. *See, Gaubert v. United State,* 499 U.S. 315 (1991); *Berkovitz v. United States,* 486 U.S. 531 (1988). Each case must be decided upon its own set of facts, however, and the discretionary function exception should not be raised in defense of any claim without prior approval of the Judge Advocate General (Code 35).

c. ***Postal claims.*** The FTCA does not apply to claims for the loss, miscarriage, or negligent transmission of letters or postal matters. 28 U.S.C. § 2680(b) (1982). Such claims, under limited circumstances, may be payable under the Military Claims Act.

d. ***Detention of goods.*** The FTCA does not apply to claims arising out of the detention of any goods or merchandise by a Federal law enforcement officer, including customs officials. 28 U.S.C. § 2680(c) (1982). This exception is commonly applied in situations where the claimant seeks compensation for property seized during a search for evidence. This exclusion also prevents compensation under the FTCA for alleged contraband seized by law enforcement officers.

e. ***Combatant activities in time of war.*** 28 U.S.C. § 2680(j) (1982).

(1) The "combatant activities" exclusion has three requirements:

(a) The claim must arise from activities directly involving engagement with the enemy;

(b) conducted by the armed forces; and

(c) during time of war (declared and undeclared). *Rotko v. Abrams,* 338 F. Supp. 46 (D.Conn. 1971); *Morrison v. United States,* 316 F. Supp. 78 (M.D. Ga. 1970).

(2) "Combatant activities" is given a very strict meaning by the courts. It does not include practice or training maneuvers, nor any operations not directly involving engagement with an enemy. *See Johnson v. United States,* 170 F.2d 767, 769-70 (9th Cir. 1948).

f. ***Intentional torts.*** The government is not liable under the FTCA for the following intentional torts: assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. 28 U.S.C. § 2680(h) (1982). This exclusion will not protect the government from liability for assaults, batteries, false imprisonments, false arrests, abuse of process, or malicious prosecution committed by Federal law enforcement officers.

2. ***Claims cognizable under other claims statutes***. Certain claims cannot be paid under the FTCA because they are cognizable under some other claims statute. Although the 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—and therefore not payable under the FTCA—include the following:

a. ***Personnel claims***. Claims by military personnel or civilian Federal employees for damage or loss of personal property incident to service are cognizable under the Military Personnel and Civilian Employees' Claims Act.

b. ***Admiralty claims***. Admiralty claims, arising from incidents such as ship collisions, are usually governed by the Suits in Admiralty Act, 46 U.S.C. §§ 741-752 (1994) and the Public Vessels Act, 46 U.S.C. §§ 781-790 (1994). Admiralty claims against the Navy shall be processed under Chapter XII of the JAGMAN.

c. ***Overseas claims***. Claims arising in a foreign country are not cognizable under the FTCA, but may be allowed under either the Military Claims Act or the Foreign Claims Act. *But see, In Re Paris Air Crash*, 399 F. Supp. 732 (CD CAL 1975) (court allowed an FTCA claim for wrongful death of civilian passengers killed in Turkish airline crash in Paris based upon wrongful certification and inspection by US of the doomed McDonnell Douglas DC-10).

d. ***Injury or death to civilian Federal employees***. Claims arising out of personal injury or death of a civilian Federal employee, while on the job, are usually covered by the Federal Employees' Compensation Act (FECA), 5 U.S.C. §§ 7901-7903, 8101-8193 (1982). Nonappropriated fund activity employees are compensated under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 (1982).

3. ***Excluded claimants***

a. ***Military personnel - The Feres Doctrine***

(1) In *Feres v. United States*, 340 U.S. 135 (1950), the U.S. Supreme Court held that military personnel cannot sue the Federal Government for personal injury or death occurring incident to military service. The Supreme Court reasoned that Congress did not intend the FTCA to apply to military personnel because it had already provided medical care, rehabilitation, and disability benefits for them. Since 1950, the *Feres* Doctrine has been applied consistently by Federal courts at all levels and was reaffirmed by the Supreme Court in *United States v. Johnson*, 481 U.S. 681 (1987). In *Johnson*, the widow of a deceased Coast Guard helicopter pilot was precluded from bringing a wrongful death action under the FTCA. The Supreme Court held that the death of a Coast Guard officer during a rescue mission on the high seas was incident to service and that a suit based

on the alleged negligent action of a civilian Federal air traffic controller was precluded by the *Feres* Doctrine. The Court thereby extended the *Feres* Doctrine to encompass negligent actions on the part of civilian employees of the Federal Government. *See Aviles v. United States*, 696 F. Supp. 217 (E.D.La. 1988), a case in which the *Feres* Doctrine was held to bar an action by a former Coast Guard member who sought to recover damages due to his forced retirement following a positive HIV test. The Court found that *Feres* prohibited judicial inquiry and that the Court therefore lacked subject-matter jurisdiction because the injuries were incident to service. *Feres* was expanded by case law to bar FTCA claims by military personnel for property damage occurring incident to service. *See, e.g., Preferred Insurance Co. v. United States*, 222 F.2d 942 (9th Cir. 1955); *Flowers v. United States*, 764 F.2d 759 (11th Cir. 1985); *United States v. United Services Auto. Ass'n*, 238 F.2d 364 (8th Cir. 1956). Such claims may be payable under the Military Claims Act, the Military Personnel and Civilian Employees' Claims Act, or the nonscope claims statute. A third-party plaintiff may not implead the government in a suit by a *Feres* disqualified plaintiff. The third-party plaintiff gains no additional rights beyond those available if the plaintiff had brought a direct action against the government. *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977).

(a) For an overview on the Feres Doctrine and an in-depth analysis of recent landmark *Feres* cases, *see* Darpino, "Eroding the *Feres* Doctrine - A Critical Analysis of Three Decisions," *The Army Lawyer*, April, 1996.

(2) ***Rationale for Feres.*** The *Feres* Doctrine is supported by:

(a) ***Effect on military discipline.*** The Court noted that there is a special relationship of "soldier to his superiors." Granting to him the right to bring an action would have an adverse effect upon discipline and would result in a judicial intrusion into the general area of military performance.

(b) ***Other available statutory compensation.*** Congress has established a system of uniform compensation for injuries or death of those in the armed services. This system provides adequate and comprehensive benefits for service personnel and compares favorably with workmen's compensation statutes. Individual suits circumvent the statutory veterans' benefits system.

(c) ***No private liability in like circumstances.*** The FTCA makes the United States liable in the same circumstances "as a private person." Under workmen's compensation schemes, a private person does not have a cause of action against an employer; thus, the FTCA does not remove the sovereign immunity bar for active-duty personnel seeking to bring an action under the FTCA.

(d) ***Lack of continuity of local law.*** The Court in *Feres* recognized the relationship existing between the United States and its military personnel as distinctively federal in character, so that it would be inappropriate to apply

local law to that relationship by way of the FTCA. Applying the state law of the area where the injury took place, given the wide variety of local laws, would be unfair to the military member who has no choice as to his or her duty station.

(3) ***The "not incident to service" exception***. A major exception to the *Feres* Doctrine exists when the injury, death, or loss of the military member did ***not*** occur incident to military service. *See, e.g. Brooks v. United States*, 337 U.S. 49 (1949); *Taber v. United States*, 45 F.3d 598 (2nd Cir. 1995). Under such circumstances, the *Feres* Doctrine will not prevent FTCA recovery by a military claimant. The value of benefits received from the government, such as medical care, rehabilitation, and disability payments, however, will be deducted from the compensation paid to the claimant.

(4) ***"Incident to military service" defined***. The central issue in determining whether the *Feres* Doctrine will prevent a military member from recovering under FTCA is whether the injury or loss occurred incident to military service. Courts decide this issue only after considering all the facts and circumstances of each case. As a general rule, however, ***all*** of the following factors must be present for an injury, death, or loss of a military member to be held "***not*** incident to military service":

(a) The member must have been off duty;

(b) the member must not have been aboard a military installation;

(c) the member must not have been engaged in any military duty or mission; and

(d) the member must not have been directly subject to military orders or discipline.

If any of the above four factors are absent, the claim usually will be held by the courts to be incident to military service. *See* 1 L. Jayson, *Handling Federal Tort Claims* 155.02, 155.03, and 155.07 (1979) (extensive discussion of the principles and case law on this point); *But see, Elliot v. United States*, 13 F.3d 1555 (11th Cir. 1994). (Injuries sustained in base housing due to government's negligent maintenance of water heater and vent pipe ***were not*** incident to service while in leave status).

(5) ***Claims by representatives***. The *Feres* Doctrine does not apply to claims by military members who are acting solely in a representative capacity (e.g., guardian, executor of an estate). It will bar FTCA claims by nonmilitary persons acting as legal representatives of injured or deceased military members. The following examples demonstrate these principles:

(a) ***Example***: Johnny Smith, the minor child of LTJG Smith, was the victim of medical malpractice at a military hospital. LTJG Smith presents a $100,000 claim on behalf of Johnny. The *Feres* Doctrine will not apply. LTJG Smith is presenting the claim solely as the parent and legal representative of his minor son and the *Feres* Doctrine does not apply to injuries, death, or loss suffered by a military dependent—only to military members themselves.

(b) ***Example***: While on duty, LTJG Smith was negligently killed by a Marine Corps officer acting within the scope of Federal employment. The executor of LTJG Smith's estate, Mr. Jones, presents an FTCA claim for wrongful death. The *Feres* Doctrine will bar this claim. Although Mr. Jones is a civilian, he is claiming only in his capacity as LTJG Smith's legal representative. Because LTJG Smith's death occurred incident to service the claim will be denied, just as if LTJG Smith had presented it himself.

(6) ***Claims by foreign servicemembers.*** The *Feres* doctrine applies to claims by foreign servicemembers or the representatives of their estates who are injured or killed while conducting multi-national training missions. *See, e.g. Daberkow v. United States*, 581 F.2d 785 (9th Cir. 1978) (West German Air Force pilot killed while conducting joint training mission with U.S. Air Force barred by *Feres* from suing US Government for USAF negligence); *AHMET AKTEPE V. United States*, 725 F.Supp 731 (MDFLA 1996) (during a combined naval forces exercise of NATO countries, the USS SARATOGA inadvertently fired two live missiles at a TURKISH destroyer killing and injuring several Turkish sailors. Lawsuit was dismissed on the grounds that the matter involved non-justiciable political questions as well as *Feres* doctrine principles).

(7) ***The "Genesis Test" and claims by family members.*** Most genesis cases involve claims by family members for injuries resulting from their service member spouse or parent's exposure to adverse conditions while on active duty, i.e. radiation exposure, medical malpractice, etc. The genesis test's intention was to bar dependents "injury" claims that derived from a service-related injury to a service member. Therefore, if the family member's injury has its genesis in an act directed toward the service member, the case is barred because the civilian (spouse / child's) "injury" is derivative of the service-related injury to the service member. Such a bar prohibits a "back door" approach to FTCA litigation. Loss of consortium, wrongful death, and medical malpractice are examples of cases fitting into this category. *See generally, U.S. v. Persons*, 925 F.2d 292 (9th Cir. 1991) (wrongful death action for service member father due to medical malpractice barred and derivative claims of mother and son are *Feres* barred); Estate of *McAllister v. United States*, 942 F.2d 1473 (9th Cir. 1991) (wrongful death action for servicemember father due to negligence of military hospital in treating another service member's mental disorder that resulted in the death of first service member).

(a) Exceptions: ***Prenatal care***. Some courts have rejected the traditional analysis of the genesis test and held that the FTCA claim was not barred. In *Romero v. United States*, 954 F.2d 223 (4th Cir. 1992), both service member parents successfully brought a FTCA claim for improper prenatal treatment resulting in the premature birth and injuries to their infant son, Joshua. The issue was whether Joshua's claim for alleged negligent prenatal care provided to his active duty mother was *Feres* barred. The court found that the genesis test did not apply because the mother suffered no physical injury. The court rejects the proposition that the failure to provide proper care was a breach of care owed to the mother, the health care recipient, and not the child. The court reasoned that the proper treatment would have been directed at preventing injury to Joshua, and concluded that because the purpose of the treatment was to insure the health of a civilian, not a service member, *Feres* does not apply.

(1) *But see, Irwin v. United States*, 845 F.2d 126 (6th Cir. 1988) *cert. denied*, 488 U.S. 975 (1989) (derivative claim barred as child's cause of action arises from negligent prenatal care provided to service member mother; *West v. United States*, 744 F.2d 1317 (7th Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1053 (1985) (claim barred as child's cause of action arose from negligent mistyping of service member's blood); and *Scales v. United States*, 685 F.2d 970 (5th Cir. 1982), *cert. denied*, 460 U.S. 1062 (1983) (FTCA claim barred as child's cause of action was due to negligent act administered to service member mother during prenatal care).

(b) Exceptions: ***Legal Malpractice***. In *Mossow v. United States*, 987 F.2d 1365 (8th Cir. 1993), the child of two service members was born with severe neonatal birth injuries (cerebral palsy, mental retardation, and blindness). The father sought advice from a staff attorney at base legal. The military attorney negligently advised him that his child's medical malpractice claim was *Feres* barred. The improper advice caused the Mossows to exceed the statute of limitations. The Mossows then filed a FTCA claim for damages on behalf of the child, alleging medical and legal malpractice. The court did not *Feres* bar the claim because they found the bad legal advice to the service member regarding the child's cause of action was an *independent* and direct injury to the child, and was not the result of an injury to the service member parents.

(c) Exceptions: ***Independent torts***. In the case of *M.M.H. v. United States*, 966 F.2d 285 (7th Cir. 1992), an active duty soldier tested positive for the HIV virus. M.M.H. subsequently suffered from a variety of aliments, and the Army honorably discharged her. After discharge, she became severely depressed and attempted suicide. However, only six days after M.M.H.'s discharge, the Army learned that the initial blood test was incorrect. Moreover, the Army failed to inform her of the negative result. M.M.H. alleged that the Army negligently inflicted severe emotional distress when it failed to notify her of the second result, and argued that this failure was an "independent" tort. The Government asserted that this was a continuation of the original tort (misdiagnosis). The court held that because the second test result was received ***after*** discharge, the

government's failure to notify was a "separate, independent" post-discharge negligent act. M.M.H. was a civilian at the time of the act, therefore her claim was not *Feres* barred.

(8) ***Legislation***. Both the House and the Senate continue to introduce bills that would amend Chapter 171 of Title 28, United States Code, and allow active-duty members to sue for injuries or death caused by negligent medical care during peacetime. Both the Department of Defense and the Department of Justice oppose the bills based on the impact to discipline and the existing compensation system.

b. ***Civilian Federal employees***. Civilian Federal employees usually cannot recover under the FTCA for injury or death that occurs on the job because of FECA (5 USC 8101 et seq.) compensation benefits.

c. ***Intra-agency claims***. One Federal agency usually may not assert an FTCA claim against another Federal agency. Government property is not owned, for FTCA purposes, by any specific agency of the government. The Federal Government will not normally reimburse itself for the loss of its own property.

E. ***Measure of damages***

1. ***How the amount of compensation is determined***. The phrase "measure of damages" refers to the method by which the amount of a claimant's recovery is determined. In FTCA cases, the measure of damages will be determined by the law of the jurisdiction where the incident occurred. For example, the measure of damages for a claim arising out of a tort that occurred in Maryland will be determined by Maryland law. When the local law conflicts with applicable Federal law, however, the Federal statute will govern.

2. ***Exclusion from claimant's recovery***. The following amounts will be excluded from a claimant's recovery under the FTCA:

a. ***Punitive damages***. Many states permit the plaintiff in a tort action to recover additional money from the defendant beyond the amount required to compensate the plaintiff for his or her loss. Such damages are known as "punitive damages" because they are awarded to punish a defendant who has engaged in conduct that is wanton, malicious, outrageous, or shocking to the court's conscience. Under the FTCA, the government is not liable for any punitive damages which might otherwise be permitted by state law.

b. ***Interest prior to judgment***

c. ***Value of government benefits***. When the government is liable to pay an FTCA claim by a military member, and the claim is not barred by the *Feres* Doctrine, the value of government benefits (such as medical care, rehabilitation, and disability benefits) will be deducted from the military member's recovery.

3. ***No dollar limit on recovery under the FTCA.*** While there is no maximum to the amount of recovery permitted under the FTCA, any FTCA payment in excess of $200,000 requires the prior written approval of the Attorney General of the United States or his or her designee.

F. ***Statute of limitations.*** The FTCA contains several strict time limits.

1. ***Two-year statute of limitations.*** The claimant has two years from the date the claim against the government accrued in which to present a written claim. If the claimant fails to present his or her claim within two years, it will be barred forever. A claim accrues when the act or incident giving rise to the claim occurs, or when the claimant learns or reasonably should have learned about the wrongful nature of the government employee's conduct. Thus, a claim arising out of an automobile accident would normally accrue when the accident occurred. A claim arising out of medical malpractice will not accrue, however, until the claimant learns or reasonably should have learned about the malpractice. *United States v. Kubrick*, 444 U.S. 111 (1979). The fact that the injured person is an infant or incompetent does not toll the running of the statute of limitations.

2. ***Six-month waiting period.*** When a claimant presents an FTCA claim to a Federal agency, the agency has six months in which to act on the claim. During this waiting period, unless the agency has made a final denial, the claimant may not file suit on the claim in Federal court. If, after six months, the agency has not taken final action on the claim, the claimant may then file suit under the FTCA in Federal district court. 28 U.S.C. § 2401(b) (1982).

3. ***Six-month time limit for filing suit.*** After the Federal agency mails written notice of its final denial of the claim, the claimant has six months in which to file suit on the claim in Federal district court. If suit is not filed within six months, the claim will be barred forever. 28 U.S.C. § 2401(b) (1982). However, before this six-month time limit expires, the claimant may request reconsideration of the denial of his or her claim. The agency then has six months in which to reconsider the claim. If the claim is again denied, the claimant has another six months in which to file suit.

G. ***Procedures.*** The procedures discussed below apply not only to FTCA claims, but also, in large part, to claims cognizable under other claims statutes. Significant variations in procedures under other claims acts will be noted in the sections of this chapter dealing with those other statutes.

1. ***Presentment of the claim.*** The first step is usually the "presentment" of the claim to a Federal agency. When a claim is properly presented, the statute of limitations is tolled.

a. ***Defined.*** A claim against the government is "presented" when a Federal agency receives a written claim for money damages.

b. ***Who may present a claim***? A claim may be presented by:

(1) The injured party for personal injury;

(2) the owner of damaged or lost property;

(3) the claimant's personal or legal representative (e.g., parents or guardians of minors; executors or administrators of a deceased person's estate; authorized agents or attorneys-in-fact, such as officers of corporations and persons holding a power of attorney from the claimant); or

(4) a subrogee who assumed the legal rights of another person. (E.g., an insurance company that compensates its policyholder for damages caused by a government employee becomes subrogated to—or assumes—the policyholder's claim against the government. Therefore, the insurer can present a claim against the government to recover the amount it paid its insured.)

c. ***Contents of the claim***

(1) ***Requirements for presentment.*** As discussed above, when a claim is properly presented, the statute of limitations stops running. To be properly presented, the claim must satisfy the following requirements:

(a) ***In writing.*** The claim must be in writing. Standard Form 95, Claim for Damage or Injury, should be used whenever practicable.

(b) ***Signed.*** The claim must be signed by a proper claimant.

(c) ***Claims money damages "in a sum certain."*** The claim must demand a specific dollar amount. The courts have consistently held that a claim is not presented until it states "a sum certain." If the claimant fails to state a "sum certain," the claim does not constitute a claim for purposes of complying with the jurisdictional prerequisites of the FTCA. *See, e.g., Kokaras v. United States*, 980 F.2d 20 (1st Cir. 1992); *Bailey v. United States*, 642 F.2d 344 (9th Cir. 1981); *Allen v. United States*, 517 F.2d 1328 (6th Cir. 1975). Observance of the "sum certain" requirement does not prevent the claimant from recovering more than the amount originally claimed. The claimant may amend the claim at any time prior to final agency action on the claim. Once an action is initiated under the FTCA, the plaintiff is limited to the damage amount specified in the claim presented "except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the agency, or upon allegation and proof of intervening facts, relating to the amount of the claim." 28 U.S.C. § 2675(b) (1982). The plaintiff has the burden of proving the existence of the "newly discovered evidence" or "intervening facts." 28 U.S.C. § 2675(b) (1982).

(d) ***Describe the factual circumstances giving rise to the claim.*** To the maximum extent possible, the claimant must detail the facts and circumstances precipitating the claim.

(e) ***Submitted to a Federal agency.*** The claim is not properly presented until it is submitted to a Federal agency. *See, e.g., Kielwien v. United States,* 540 F.2d 676 (4th Cir. 1976); *Hejl v. United States,* 449 F.2d 124 (5th Cir. 1971). The claim should be submitted to the agency whose activities gave rise to the claim. If the claim is submitted to the wrong Federal agency, that agency must promptly transfer it to the appropriate one. Although submission to any Federal agency will stop the running of the statute of limitations, the six-month waiting period does not begin until the claim is received by the appropriate agency. That the United States is aware of the potential claim or has actual notice does not relieve the claimant of the requirement of presenting the claim to a Federal agency; failure to formally present the claim can result in the dismissal of an action in court. *Avril v. United States,* 461 F.2d 1090 (9th Cir. 1972). Some courts have indicated that they will not allow a "technical defect" in form to defeat the substantive rights of a claimant where the defect does not bear upon the ability of the agency to adjudicate the claim. *Hunter v. United States,* 417 F. Supp. 272 (N.D. Cal. 1976).

(2) ***Information and supporting documentation.*** Although the FTCA itself does not specify what information and supporting documentation are required for validating the claim, administrative regulations promulgated by the Attorney General of the United States and the Judge Advocate General of the Navy require that the claim include information such as:

(a) A reasonably detailed description of the incident on which the claim is based;

(b) the identity of the Federal agencies, employees, or property involved;

(c) a description of the nature and extent of personal injury or property damage; and

(d) documentation of the loss (such as physicians' reports, repair estimates, and receipts).

In some instances, failure to provide the required information may result in a court ruling that the claim was never properly presented. *See, e.g., Corte-Real v. United States,* 949 F.2d 484 (1st Cir. 1991); *Transco Leasing Corp., et al. v. United States,* 896 F.2d 1435 (5th Cir. 1990); *Conn v. United States,* 867 F.2d 916 (6th Cir. 1989); *Bembenista, et al. v. United States,* 866 F.2d 493 (D.C. Cir. 1989).

d. ***Command responsibility when claim presented.*** Prompt action is necessary when a command receives a claim. The following steps must be taken:

(1) Record date of receipt on the claim;

(2) determine which military activity is most directly involved;

(3) when the receiving command is the activity most directly involved, immediately convene an investigation in accordance with chapter II of the *JAG Manual* and, when the investigation is complete, promptly forward the report and the claim to the appropriate claims adjudicating authority;

(4) when the receiving command is not the activity most directly involved, immediately forward the claim to the activity that is most directly involved; and

(5) report to the Judge Advocate General of the Navy if required by the *JAG Manual* or JAGINST 5890.1.

2. ***Investigation***

a. ***When required.*** A *JAG Manual* investigation is required whenever a claim against the Navy is filed or is likely to be filed. Generally, the appropriate type of investigation is a litigation-report investigation. Responsibility for convening and conducting the investigation usually lies with the command most directly involved in the incident upon which the claim is based. When circumstances make it impractical for the most directly involved command to conduct the investigation, responsibility may be assigned to some other command.

b. ***Importance of prompt action.*** A claim involving a command may involve substantial amounts of money. Because the government usually will have only six months in which to investigate and take final action on the claim, the investigation must be done promptly. Witnesses' memories fade quickly and evidence can be lost. Failure to investigate promptly could prejudice the government's ability to defend against the claim. Therefore, when a person is appointed to investigate a claim, the investigation ordinarily shall take priority over all other duties.

c. ***Scope and contents of the investigation.*** The general duties of the claims investigating officer include the following:

(1) Consider all information and evidence already compiled about the incident;

(2) conduct a thorough investigation of all aspects of the incident in a fair, impartial manner (the investigation must not be merely a whitewash job intended to protect the government from paying a just claim.);

(3) interview all witnesses as soon as possible;

(4) inspect property damage and interview injured persons; and

(5) determine the nature, extent, and amount of property damage or personal injury and obtain supporting documentation.

In addition to these general duties, the investigating officer also must make specific findings of fact. Great care must be used to ensure that all relevant, required findings of fact are made. A major purpose of the claims investigation is to preserve evidence for use months, and even years, in the future.

d. ***Action on the report.*** The commanding officer or officer in charge will take action upon completion of the report of investigation. Depending on the circumstances, either the original report or a complete copy, together with all claims received, must be promptly forwarded to the appropriate claims adjudicating authority.

3. ***Adjudication***

a. ***Adjudicating authority.*** An adjudicating authority is an officer designated by the Judge Advocate General to take administrative action (i.e., pay or deny) on a claim. In the Navy and Marine Corps, adjudicating authorities include certain senior officers in the Office of the Judge Advocate General and commanding officers of naval legal service offices.

(1) ***Geographic responsibility.*** Naval legal service offices and certain other commands have been assigned responsibility for adjudicating claims in their respective geographic areas. Claims usually will be forwarded by the command to the adjudicating authority serving the territory in which the claim arose. For example, the Naval Legal Services Office in Groton, Connecticut, is the adjudicating authority for claims arising in the Northeastern United States.

(2) ***Dollar limits on adjudicating authority.*** There is no maximum limit on the amount that can be paid under an FTCA claim. Payments in excess of certain amounts may require prior written approval by the Attorney General or his or her designee. Adjudicating authorities may deny FTCA claims in any amount. Commanding Officers of naval legal service offices may delegate their denial authority to an officer in their command, except this authority may be limited to $100,000 for some bases of denial. Even though a claim may demand more than the payment limits of an adjudicating authority

serving a particular area, the command receiving the claim should forward it to the appropriate local adjudicating authority, who can attempt to compromise the claim for an amount within payment limits.

b. ***Adjudicating authority action***. The adjudicating authority can take the following actions:

(1) Approve the claim, if within the payment limits;

(2) deny the claim;

(3) compromise the claim for an amount within payment limits; or

(4) refer the claim to the Office of the Judge Advocate General if payment is recommended in an amount above the adjudicating authority's payment limits.

c. ***Effect of accepting payment***. When a claimant accepts a payment in settlement of an FTCA claim, the acceptance releases the Federal Government from all further liability to the claimant arising out of the incident on which the claim is based. Any Federal employees who were involved must also be released from any further liability to the claimant. Therefore, if a claimant is not satisfied with the amount the adjudicating authority is willing to pay on an FTCA claim, the entire claim will be denied. The claimant then will have to bring suit in Federal district court to recover on the claim. The courts have held that acceptance of payment for property damage does not preclude a subsequent action for personal injury unless the government can demonstrate that a settlement of all claims was contemplated by the parties. *Macy v. United States*, 557 F.2d 391 (3d Cir. 1977).

4. ***Reconsideration***. Within six months of a final denial of an FTCA claim by an adjudicating authority, the claimant may request reconsideration of the denial.

5. ***Claimant's right to sue***. Within six months after final denial of an FTCA claim by the adjudicating authority, the claimant may bring suit in Federal district court. There is no right to a jury trial in an FTCA case. 28 U.S.C. § 2402 (1982). Although the Department of Justice will represent the Department of the Navy in court, naval judge advocates will assist by preparing litigation reports summarizing the pertinent facts in the case.

a. ***Removal***. Actions under the FTCA may be brought only in Federal district courts and not state courts. If suits are brought personally against a Federal employee in state court, consideration should be given to removing the action to Federal district court. Removal is controlled by statute and is a matter of Federal law. The general

removal statutes are found in 28 U.S.C. §§ 1441-1451 (1982). Section 1442a gives members of the armed forces a right to remove either a civil or a criminal action from state to Federal court if being sued for acting under the "color of such office." Section 1442a has been liberally construed in favor of allowing Federal officer removal. *Willingham v. Morgan*, 395 U.S. 402 (1976). Venue for all removal actions is the Federal district court and division wherein the state action is pending. If the United States is sued in state court, with jurisdiction resting on the FTCA, the action may be removed and dismissed. On removal, the Federal district court acquires only that jurisdiction possessed by the state court. Since the state court has no jurisdiction under FTCA, the Federal district court acquires none.

b. ***The Federal Employees Liability Reform and Tort Compensation Act.*** The Federal Employees Liability Reform and Tort Compensation Act of 1988, amending 28 U.S.C. sections 2679(b) & (d), provides that the exclusive remedy against a federal employee based on a claim arising out of the employee's negligent or wrongful acts or omissions within the scope of employment is an action against the United States under the FTCA. If a federal employee is served with process from a federal or state court, he shall immediately deliver all process and papers to his commanding officer who will promptly notify the Judge Advocate General (Code 34). The Navy will then forward all papers to the U.S. Attorney, where the decision will be made whether to certify that the employee was acting within the scope of his or her employment at the time of the incident out of which the suit arose. The case will then be removed to federal district court if it was brought in state court. Immunity from personal liability does not extend to allegations of constitutional torts nor to allegations of violations of statues specifically authorizing suits against individuals.

c. ***Medical Personnel.*** 10 U.S.C. section 1089 provides that the exclusive remedy for personal injury, including death, caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, paramedic, or other assisting personnel of the armed forces, acting within the scope of employment is against the United States under the FTCA.

d. ***Legal Personnel.*** 10 U.S.C. section 1054 provides that the exclusive remedy for injury or loss of property caused by the negligent or wrongful act or omission of any attorney, paralegal, or other member of a legal staff within the armed forces, acting within the scope of employment is against the United States under the FTCA.

e. ***Venue.*** The term "venue" refers to the place where the judicial power to adjudicate may be exercised. 28 U.S.C. § 1402(b) (1988) provides that an action may be brought only in the "judicial district where the plaintiff resides or wherein the act or omission complained of occurred."

H. ***Examples.*** The following examples demonstrate the operation of legal principles governing FTCA claims.

1. ***Example***

a. ***Facts***. YN3 Daytona, the command's duty driver, was on an authorized run in Honolulu, Hawaii, when he was involved in an auto accident with Mr. DeStroyd, a civilian. The police report clearly indicates that the accident was caused by Daytona's negligent failure to stop at a red light and that there was nothing Mr. DeStroyd could have done to avoid the collision. Mr. DeStroyd has filed, within two years of the accident, an FTCA claim for $75,000 damage—including property damage to his automobile, medical expenses, and punitive damages. Can he collect?

b. ***Solution***. YES (except for the punitive damages). The accident was caused by the negligence of a government employee, YN3 Daytona, who was acting within the scope of his Federal employment. None of the exclusions from liability discussed in section 0402D above, apply. The claim does not arise out of an excluded governmental activity. It is not cognizable under any other claims statute and the claimant is not a member of any excluded class of claimants. Therefore, this claim is cognizable under the FTCA. Punitive damages are excluded from FTCA compensation. Because the claim is for $75,000, it can be paid by a local adjudicating authority (such as a naval legal service office) only if Mr. DeStroyd is willing to accept $50,000 or less in full settlement of his claim. Otherwise, the Office of the Judge Advocate General will adjudicate the claim.

2. ***Example***

a. ***Facts***. Mrs. Smith, the dependent wife of an active-duty naval officer, underwent surgery at Naval Regional Medical Center, San Diego, California. The surgeon, CDR Badknife, negligently severed a nerve in her neck. At first, Mrs. Smith was paralyzed from the neck down but, after five months' treatment and rehabilitation at the NRMC, she regained complete use of her arms, legs, and trunk. She has lost five months' wages from her civilian job, for which she was ineligible for state disability compensation. Also, she suffers from slight residual neurological damage which causes her shoulders to twitch involuntarily. This twitching is permanent. Mrs. Smith has presented an FTCA claim. Can she collect?

b. ***Solution***. YES (from the U.S., but not from Dr. Badknife). The paralysis and lasting damage were caused by the negligent acts of CDR Badknife, a Federal employee acting in the scope of his employment. None of the three general types of exclusions from FTCA liability apply. The *Feres* Doctrine does not apply to this claim because it involves personal injury to a military dependent, not to active-duty military personnel. Therefore, this claim is payable under the FTCA. The value of medical care and rehabilitation services Mrs. Smith received at the NRMC will be deducted from her compensation; however, she will be compensated for all other nongovernmental medical services as well as for the pain and suffering she endured, the wages she has lost already (and likely will lose in the future), and the permanent nature and disfigurement of her injury. Because of 10 U.S.C. § 1089 (1988), no claim will lie against Dr. Badknife individually.

0403 MILITARY CLAIMS ACT

A. ***Overview***

1. ***Similarities to FTCA***. Like the FTCA, the Military Claims Act, 10 U.S.C. § 2733 (1982) (MCA) compensates for personal injury, death, or property damage caused by activities of the Federal Government. MCA claims are limited to two general types:

a. Injury, death, or property damage caused by military personnel or civilian employees acting within the scope of their employment; and

b. injury, death, or property damage caused by noncombat activities of a peculiarly military nature.

2. ***Differences from FTCA***. The MCA provides compensation for certain claims that are not payable under the FTCA. First, its application is worldwide. Second, the claimant has no right to sue the government if his or her MCA claim is denied by the adjudicating authority. Finally, unlike the FTCA, which creates statutory rights for claimants, the MCA is operative only "under such regulations as the Secretary of a military department may prescribe." 10 U.S.C. § 2733(a) (1988). Each service Secretary is required to promulgate regulations stating under what circumstances claims will be paid by his or her department under the MCA. A claimant has no greater rights than what is prescribed by each service's regulations.

B. ***Statutory authority***. The MCA provides in pertinent part:

> a. Under such regulations as the Secretary concerned may prescribe, he, or subject to appeal to him, the Judge Advocate General of an armed force under his jurisdiction, or the Chief Counsel of the Coast Guard, as appropriate, if designated by him, may settle, and pay in an amount not more than $100,000, a claim against the United States for
>
> (1) Damage to or loss of real property, including damage or loss incident to use and occupancy;

(2) Damage to or loss of personal property, including property mailed to the United States and including registered or insured mail damaged, lost or destroyed even if by a criminal act while in the possession of the Army, Navy, Air Force, Marine Corps or Coast Guard, as the case may be; or

(3) Personal injury or death; either caused by a civilian official or employee of that department, or the Coast Guard or a member of the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be, acting within the scope of his employment, or otherwise incident to noncombat activities of that department, or the Coast Guard.

C. ***Scope of liability.*** The MCA is limited to two rather broad categories of claims: those arising from the acts of military employees in the scope of their employment and those incident to noncombat activities of a peculiarly military nature.

1. ***Caused by military member or employee acting within scope of employment.*** The Department of the Navy is liable under the MCA for injury, death, or property damage "caused by" its military members or civilian employees acting within the scope of their employment. Although MCA regulations do not specifically require the claimant to establish governmental negligence to be able to recover damages under the MCA, the Office of the Judge Advocate General has opined informally that the term "caused by" means "***negligently*** caused by." The concept, then, of causation under the MCA is the same as that required under the FTCA. Also, the scope-of-employment concept under MCA is identical to that required under the FTCA claims.

2. ***Noncombat activities of a peculiarly military nature.*** The Department of the Navy also is liable under the MCA for injury, death, or property damage incident to noncombat activities of a peculiarly military nature. Examples include claims such as those arising out of maneuvers, artillery and bombing exercises, naval exhibitions, aircraft and missile operations, and sonic booms. Such activities have little parallel in civilian society or they involve incidents for which the government has traditionally assumed liability for resulting losses. Under this second theory of MCA liability, the claimant need not show that the activities were negligently conducted. In fact, the claimant's losses need not be traced to the conduct of any specific Federal employees. The scope-of-employment concept does not apply.

3. ***No territorial limitations***. The MCA applies worldwide. If a claim arising in a foreign country is cognizable under the Foreign Claims Act, however, it shall be processed under that statute and not as an MCA claim.

4. If the claim is denied, the claimant does not have the right to sue.

D. ***Exclusions from liability***. As with FTCA claims, there are three general categories of exclusions from liability under the MCA: certain exempted activities; claims cognizable under other claims statutes; and certain excluded classes of claimants.

1. ***Exempted governmental activities***. A claim will not be payable under the MCA if it involves an exempted governmental activity. The most frequent examples include the following:

a. Combat activities or enemy action;

b. certain postal activities; and

c. property damage claims based on alleged contract violations by the government.

2. ***Claims cognizable under other claims statutes***. Claims that are governed by one of the following claims statutes are not payable under the MCA:

a. Federal Tort Claims Act;

b. Military Personnel and Civilian Employees' Claims Act;

c. Foreign Claims Act; and

d. certain admiralty claims.

3. ***Excluded classes of claimants***

a. ***Naval personnel.*** Military members and civilian employees of the Department of the Navy may not recover under the MCA for personal injury or death occurring incident to service or employment. Compensation may be recovered for property damage under MCA if it is not covered by another claims statute. As a practical matter, however, when a military member suffers property damage incident to service, it will usually be compensated under the Military Personnel and Civilian Employees' Claims Act.

b. ***Foreign nationals of a country at war with the United States.*** Nationals of an ally of a country at war with the United States, unless the individual claimant is determined to be friendly to the United States, are excluded from MCA coverage.

c. ***Negligent claimants.*** Generally, a claim will not be paid under the MCA if the injury, death, or property damage was caused in whole or in part by the claimant's own negligence or wrongful acts. This "contributory negligence" is a complete bar to tort recovery in many states. However, if the law of the jurisdiction where the claim arose would allow recovery in a lawsuit, even though the claimant was negligent, the MCA claim can be paid. Under such circumstances, the negligent claimant will only recover that amount that local law would permit a negligent claimant to recover in its courts. This partial recovery concept is known as the "comparative negligence" doctrine.

E. ***Measure of damages.*** The rules for determining the amount of a claimant's recovery under the MCA are similar to those governing other claims.

1. ***General rules***

a. ***Property damage.*** The amount of compensation for property damage is based on the estimated cost of restoring the property to its condition before the incident. If the property cannot be repaired economically, the measure of damage will be the replacement cost of the property minus any salvage value. The claimant also may recover compensation for loss of use of the property (e.g., cost of a rental car while the damaged vehicle is being repaired).

b. ***Personal injury or death.*** Compensation under the MCA for personal injury or death will include items such as medical expenses, lost earnings, diminished earning capacity, pain and suffering, and permanent disability. Usually, local standards are applied.

2. ***Amount of recovery***. The Department of the Navy may pay MCA claims up to $100,000. If the Secretary of the Navy considers that a claim in excess of $100,000 is meritorious, a partial payment of $100,000 may be made with the balance referred to the Comptroller General for payment from appropriations provided therefore. 10 U.S.C. § 2733 (1988).

F. ***Statute of limitations***. A claim under the MCA may not be paid unless it is presented in writing within two years after it accrues. The statute of limitations may be suspended during time of armed conflict. The rules governing presentment of the claim are substantially similar to those under the FTCA.

G. ***Procedures***. The investigation and adjudication procedures for MCA claims are substantially similar to those for FTCA claims. In fact, many claims paid under the MCA were initially presented as FTCA claims. The significant procedural differences under MCA are as follows:

1. ***Advance payments***. In limited circumstances, pursuant to 10 U.S.C. § 2736 (1988), the Secretary of the Navy, or a designee, is authorized to make an advance payment not to exceed $100,000 to, or on behalf of, any person suffering injury, death, or property damage resulting from an incident covered by the Military Claims Act. This payment may be made before the claimant presents a written claim. Advance payments may be made only when the claimant or the claimant's family is in immediate need of funds for necessities (such as shelter, clothing, medical care, or burial expenses). Other resources must not be available. An advance payment is not an admission of government liability. The amount of the advance payment shall be deducted from any settlement subsequently authorized.

2. ***Dollar limits on adjudicating authorities***. FTCA adjudicating authorities also adjudicate MCA claims. Dollar limitations are set forth in para. 9, enclosure (2) of JAGINST 5890.1. All adjudicating authorities may make advance payments.

3. ***Claimant's right to appeal***. There is no right to sue under the MCA after an administrative denial of an MCA claim. If an MCA claim is denied, in whole or in part, the claimant may appeal to the Judge Advocate General within 30 days after the denial.

H. ***Examples***

1. ***Example***

a. ***Facts***. A Navy aircraft crashed, utterly demolishing an automobile owned by Mr. Rubble, a civilian. Mr. Rubble has presented an MCA claim for the fair market value of his car. Can he recover?

b. ***Solution***. YES. This claim falls under the second theory of MCA liability—an incident arising out of noncombat activities of a peculiarly military nature. None of the exclusions from liability applies. This incident does not involve an exempted governmental activity. It is not covered by any other claims statute. The FTCA would not apply because the facts do not indicate any negligence by any Federal employee. (If the crash had been caused by the Navy pilot's negligence, it would be compensable under the FTCA.) Mr. Rubble does not belong to an excluded class of claimants. There is no evidence that his actions in any way caused the incident; therefore, Mr. Rubble can recover the value of his car—less any salvage value.

2. ***Example***

a. ***Facts***. While conducting gunnery exercises aboard USS SHOTINTHEDARK, naval personnel miscalculated and accidentally shot a shell into the fleet parking lot. The shell completely destroyed an automobile owned by ENS DeMolish, who was on duty aboard one of the ships tied up at a nearby pier. ENS DeMolish has filed an MCA claim. Is this claim payable under the MCA?

b. ***Solution***. NO. Although this incident involves noncombat activities of a peculiarly military nature ***and*** was also caused by naval personnel acting within the scope of employment, the MCA does not apply. A claim which is "cognizable" under the Military Personnel and Civilian Employees' Claims Act is not payable under the MCA. Because compensation for this motor vehicle loss is available as a "personnel claim," it is not payable under the MCA. Alas, ENS DeMolish's recovery will be limited to the $2000 amount prescribed under the personnel claims regulations and not the greater amounts payable under the MCA.

c. ***Special point***. Perhaps you were thinking that, since the Military Personnel and Civilian Employees' Claims Act limits payments for automobile claims to $2000, the MCA could be used to pay the amount of ENS DeMolish's loss which is in excess of the $2000 limit. No such luck. JAG has interpreted the phrase "***cognizable*** under the Military Personnel and Civilian Employees' Claims Act" to mean "***payable*** under the Military Personnel and Civilian Employees' Claim Act." Accordingly, in this particular situation, the Military Personnel and Civilian Employees' Claims Act is considered to be the exclusive remedy available to pay for the damage

PART B - CLAIMS AGAINST THE GOVERNMENT: SPECIALIZED CLAIMS STATUTES

0404 FUNCTION. The general claims statutes discussed in part A of this chapter cover a broad range of losses and incidents. The specialized claims statutes discussed in part B are limited to certain types of losses suffered by specific classes of claimants occurring under certain specific circumstances. The specialized claims statutes interact with the general claims statutes in two ways. First, they may permit compensation for certain losses, claimants, or incidents not covered by one of the general claims statutes. Some of the specialized statutes were enacted in order to plug "gaps" in the general claims statutes. Second, the specialized claims statutes often act as exclusions from liability under general statutes. For example, a claim that otherwise would be payable under the Federal Tort Claims Act or the Military Claims Act cannot be paid under those statutes if it is also cognizable under the Military Personnel and Civilian Employees' Claims Act.

0405 MILITARY PERSONNEL AND CIVILIAN EMPLOYEES' CLAIMS ACT

A. ***Overview***. The Military Personnel and Civilian Employees' Claims Act of 1964, 31 U.S.C. § 3721 (1988) [hereinafter Personnel Claims Act (PCA)], is intended to maintain morale by compensating servicemembers and other Federal employees for personal property which is lost, damaged, or destroyed incident to service.

B. ***Statutory authority***. Like the Military Claims Act, the Personnel Claims Act contemplates payment of claims "under such regulations as the head of an agency may prescribe." 31 U.S.C. § 241 (1982). Personnel claims regulations in other services are similar to the Department of the Navy's, but are not identical.

C. ***Scope of liability***

1. ***Limited to personal property damage***. The Personnel Claims Act is limited to recovery for personal property damage—including loss, destruction, capture, or abandonment of personal property. Damage to real property (e.g., land, buildings, and permanent fixtures) is not covered, but may be compensable under the Military Claims Act.

2. ***Limited to military personnel and civilian employees***. Only military personnel and civilian employees of the Department of Defense may recover compensation. Military personnel include commissioned officers, warrant officers, enlisted personnel, and other appointed or enrolled military members. Civilian employees include those paid by the Department of the Navy on a contract basis.

3. ***Loss incident to service.*** To be payable under the Personnel Claims Act, the claimant's loss must have occurred incident to military service or employment. Eleven general categories of losses incident to service exist:

a. Property losses in quarters or other authorized places designated by superior authority for storage of the claimant's personal property;

b. transportation losses, such as damage to household goods shipped pursuant to PCS orders;

c. losses caused by marine or aircraft disasters;

d. losses incident to combat or other enemy action;

e. property damaged by being subjected to extraordinary risks;

f. property used for the benefit of the U.S. Government;

g. losses caused by the negligence of a Federal employee acting within the scope of employment;

h. money deposited with authorized personnel for safekeeping, deposit, transmittal, or other authorized disposition;

i. certain noncollision damage to motor vehicles (limited to $2,000, not including the contents of the vehicles);

j. damage to house trailers and contents while on Federal property or while shipped under government contract; and

k. certain thefts aboard military installations from the possession of the claimant.

NOTE: Within each of these eleven categories are numerous specific types of incidents and circumstances. The rules governing each of these eleven areas can be complex and detailed. Therefore, it is absolutely necessary to refer to JAGINST 5890.1 to determine whether a particular personnel claim is covered by one of the eleven categories.

4. ***The "reasonable, useful, or proper" test.*** Not only must the property damage or loss occur incident to service, the claimant's possession and use of the damaged property must have been reasonable, useful, or proper under the circumstances. While the Personnel Claims Act provides broad protection for the military member's personal property, the government has not undertaken to insure all property against any risk. A personnel claim will usually be denied if the claimant's possession or use of damaged property was

unreasonable under the circumstances. Thus, while possession of an inexpensive radio in a locker in the barracks is reasonable under most circumstances, keeping a $5,000 stereo system in the locker usually is not. Whether the possession or use of the property was reasonable, useful, or proper is largely a matter of judgment by the adjudicating authority. Factors that are considered include, but are not limited to, the claimant's living conditions, reasons for possessing or using the property, efforts to safeguard the property, and the foreseeability of the loss or damage that occurred.

5. ***Territorial applicability.*** The Personnel Claims Act applies worldwide.

6. ***Other meritorious claims.*** The Secretary of the Navy and Judge Advocate General may approve meritorious claims within the scope of the Personnel Claims Act that are not specifically designated as payable.

D. ***Exclusions from liability.*** Exclusions from personnel claims liability fall into three general categories:

1. ***Circumstances of loss.*** The two most common examples are:

a. ***Caused by claimant's negligence.*** If the property damage was caused, either in whole or in part, by the claimant's negligence or wrongful acts—or by such conduct by the claimant's agent or employee acting in the scope of employment—the personnel claim will be denied. Such contributory negligence is a complete bar to recovery.

b. ***Collision damage to motor vehicles.*** Damage to motor vehicles is not payable as a personnel claim when it was caused by collision with another motor vehicle. "Motor vehicle" includes automobiles, motorcycles, trucks, recreational vehicles, and any other self-propelled military, industrial, construction, or agricultural equipment. Collision claims may be paid under other claims statutes—most frequently the Federal Tort Claims Act or Military Claims Act—depending on the circumstances.

2. ***Excluded types of property.*** JAGINST 5890.1 limits or prohibits recovery for certain types of property damage. The most common examples are:

a. Currency or jewelry shipped or stored in baggage;

b. losses in unassigned quarters in the United States;

c. enemy property or war trophies;

d. unserviceable or worn-out property;

e. inconvenience or loss of use expenses;

f. items of speculative value;

g. business property;

h. sales tax;

i. appraisal fees;

j. quantities of property not reasonable or useful under the circumstances;

k. intangible property representing ownership or interest in other property (such as bank books, checks, stock certificates, and insurance policies);

l. government property; and

m. contraband (i.e., property acquired, possessed, or transported in violation of law or regulations).

E. ***Measure of damages***

1. ***General rules.*** The rules for calculating the amount the claimant can recover on a personnel claim are not complicated. The provisions of JAGINST 5890.1, encl. (5), for computing the amount of award may be summarized as follows:

a. If the property can be repaired, the claimant will receive reasonable repair costs established either by a paid bill or an estimate from a person in the business of repairing that type of property. Estimate fees may also be recovered under certain circumstances. Deductions may be made for any preexisting damage (i.e., damage or defects which existed prior to the incident which gave rise to the personnel claim) that also would be repaired. If the cost of repairing the property exceeds its depreciated replacement cost, however, the property will be considered not economically repairable.

b. If the property cannot be economically repaired or is destroyed or missing, the claimant will recover the fair market value (FMV) of the item as the measure of the loss. The FMV is equal to the replacement cost minus depreciation. The Judge Advocate General periodically publishes an Allowance List-Depreciation Guide (AL-DG) specifying depreciation rates and maximum payments applicable to categories of property.

c. ***Depreciation.*** A used item that has been lost or destroyed is worth less than a new item of the same type. The price of a new replacement item must be depreciated to award the claimant the FMV of the lost or destroyed item. Replacement costs on items are depreciated by applying either:

1) A set percentage for each year the claimant owned the property, or

2) By using a flat rate percentage.

The AL-DG specifies which method of depreciation to apply to each category of property. However, ***no depreciation of any kind will be applied to an item***:

1) Less than six months old, or

2) During periods of Government authorized storage either for the PCS move which generated the current claim, or for previous periods of Government authorized storage.

Depreciation is not taken for certain expensive items that appreciate in value (e.g., antiques, crystal, fine china, and sterling silver), or for unique items such as original works of art. (To compute the yearly depreciation, use the following rule: 6-17 months old = 1 year, 18-29 months old = 2 years, etc. Do not count the purchase month and the pick-up month in calculating the age of the property). Depreciation is not taken on repair estimates.

2. ***Dollar limits on recovery***. The maximum amount payable for most claims under the Personnel Claims Act is $40,000. Section 1088 of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1088, 110 Stat. 186, 458-459 (1996) (to be codified at 31 U.S.C. § 3721(b) (1)) [hereinafter 1996 Amendment] amended the Personnel Claims Act and allows payments of up to $100,000 if the claim arose from an emergency evacuation or from extraordinary circumstances. The 1996 Amendment applies to claims arising before, on, or after the date of its enactment, which was 10 February 1996.

a. ***Claims previously presented***. The 1996 Amendment covers losses which occurred at any time in the past and were not fully compensated. However, the stature requires that the claimant:

1) Present the claim within two years of the enactment of the legislation, ***and***

2) Prove that they have been paid the maximum amount authorized under the Personnel Claims Act and can substantiate an adjudicated value in excess of the maximum amount payable at the time the claim was filed (e.g., prior to 1988 the maximum amount payable was $25,000; prior to 1982 the maximum was $15,000, and prior to 1974 the maximum was $10,000).

As note above, the maximum amount payable is currently $40,000.

b. ***Extraordinary circumstances.*** The Judge Advocate General has not formally published any guidance on what qualifies as an extraordinary circumstance. However, unusual and / or infrequent occurrences involving total or catastrophic loss of property (e.g. earthquake, volcano, fire, flood) are the types of situations envisioned by the 1996 Amendment.

3. ***"Per item, per claim" recovery limitations.*** In addition to the overall payment cap of $40,000 / $100,000, the Personnel Claims Act further limits the amounts awarded for certain types of property. These limits are published in the AL-DG and will either be a maximum amount per item, and / or a maximum amount per claim, depending on the type of property (e.g., bicycles = $750 per item; telephones and answering machines = $500 per claim; rugs = $2,000 per item / $4,000 per claim; jewelry = $1,000 per item / $4,000 per claim). Waivers of the maximum payment of per claim / per item may be granted or denied ***only*** by the Head, Affirmative and Personnel Claims Branch, Claims and Tort Litigation, Office of the Judge Advocate General (Code 35).

F. ***Statute of limitations.*** The statute of limitations for personnel claims is two years, although it can be suspended during time of armed conflict. In household goods claims, however, the claimant must act relatively promptly. Failure to take exceptions when the goods are delivered by the carrier, or within 70 days, may result in reduced payment. Also, failure to file the claim in time for the Federal Government to recover compensation from the carrier under the carrier's contract with the government may also result in reduced payment. JAGINST 5890.1, encl. (5), para. 8.

G. ***Procedures.*** Personnel claims procedures follow the same general pattern of presentment, investigation, and adjudication discussed with respect to FTCA claims. There are, however, some significant differences. Procedures in household goods shipment claims, which constitute the largest portion of personnel claims, can be complicated. The most notable differences and distinctions are as follows:

1. ***Claim forms.*** Personnel claims are presented on DD Form 1842 (Claim for Personal Property Against the United States), a copy of which is reproduced in appendix 5-1 of JAGINST 5890.1, encl. (5).

2. ***Supporting documentation.*** Supporting documentation in personnel claims can be rather extensive. DD Form 1844 (List of Property) usually is required. A sample DD-1844 is reproduced in appendix 5-2 of JAGINST 5890.1, encl. (5). Also, other documentation (such as copies of orders, bills of lading, inventories, copies of demands on carriers, and written repair estimates) may be required. JAGINST 5890.1 sets forth the extent and type of documentation and supporting evidence required. DD 1840 / 1840R (Notice of Loss / Damage) must be submitted to a personal property office within 70 days of the delivery. Failure to furnish it means the military member will not recover anything for lost or damaged articles (because the government must file with the carrier by 75 days).

3. ***Investigation***. The commanding officer of the military organization responsible for processing the claim will refer the claim to a claims investigating officer. At large commands, the claims investigating officer is often a full-time civilian employee. The claims investigating officer's duties include reviewing the claim and its supporting documentation for completeness and, if necessary, examining the property damage. The claims investigating officer will also prepare and present a concurrent claim on behalf of the Federal Government against any carriers liable for the damage under their government contract.

4. ***Adjudication***

a. ***Adjudicating authorities***. Personnel claims adjudicating authorities and their respective payment limits are listed in paragraph 7 of JAGINST 5890.1, encl. (5). For Marine Corps personnel, personnel claims are adjudicated at Headquarters, Marine Corps.

b. ***Advance payments***. When the claimant's loss is so great that the claimant immediately needs funds to provide fundamental necessities of life, the adjudicating authority may make an advance partial payment—normally one-half of the estimated total payment.

c. ***Reconsideration***. The claimant may request reconsideration of the claim, even though he or she has accepted payment, if the claim was not paid in full. If the adjudicating authority does not resolve the claim to the claimant's satisfaction, the request for reconsideration is forwarded to the next higher adjudicating authority. There is no right under the Personnel Claims Act to sue the government.

5. ***Effect of claimant's insurance***

a. ***Duty to claim against insurance policy***. If the claimant's property is insured in whole or in part, the claimant must file a claim with the insurer as a precondition to recovery under the Personnel Claims Act. The Personnel Claims Act is intended to supplement any insurance the claimant has; it is not intended to be an alternative to that insurance or to allow double recovery. JAGINST 5890.1. encl. (5), para. 19(d).

b. ***Effect of compensation from insurer***. If the claimant receives payment under his or her insurance policy for the claimed property damage, the amount of such payment will be deducted from any payment authorized on the Personnel Claims Act claim. Likewise, if the claimant receives payment on his or her personnel claim, and then is paid for the same loss by an insurance company, the claimant must refund the amount of the insurance payment to the Federal government.

H. ***Examples***

1. ***Example***

a. ***Facts.*** Airman Singe was standing near the hanger when an aircraft crashed while landing. An officer told Singe to jump into a vehicle and go to the crash scene to help out in any way he could. Singe immediately complied. At the scene, Singe assisted an injured crewmember from the wreckage. In doing so, Singe badly ripped his uniform pants on a jagged piece of debris, and the intense heat melted the plastic case of his watch. Singe has presented a personnel claim for his pants and watch. Will he collect?

b. ***Solution.*** YES. Although damage to articles being worn is not usually payable under the Personnel Claims Act, an exception exists when the loss is caused by fire, flood, hurricane, theft or vandalism, or other unusual occurrence. In this case, Airman Singe was performing an official duty in response to an aircraft disaster and suffered property damage while trying to save lives. This situation meets the requirements of unusual occurrence and, therefore, the claim is payable.

2. ***Example***

a. ***Facts.*** While parked in an authorized parking space during working hours, Private Crusht's automobile was destroyed by a runaway government steamroller operated by Mr. Pancake, a civilian Navy employee acting in the scope of his employment. The car, presently valued at $3,800, is a total loss. Alas, Crusht's insurance policy does not cover steamroller accidents, so Crusht has filed a personnel claim for $3,800. Can she collect?

b. ***Solution.*** YES (but not under the Personnel Claims Act). Although this loss appears to be incident to service, collision damage to automobiles is specifically excluded from payment under the Personnel Claims Act. Like many other vehicle collision claims, Crusht's claim is payable under the Military Claims Act because her loss was caused by a Federal employee acting in the scope of employment. This claim in not payable under the FTCA because the *Feres* Doctrine effectively precludes such claims by military members; but, where one act does not cover Crusht's loss, another statute may. The fact that this claim is not payable under the Personnel Claims Act may allow her to recover the entire $3,800. Under the Personnel Claims Act, the maximum amount payable for noncollision vehicle damage is only $2,000.

0406 FOREIGN CLAIMS ACT

A. *Overview*

1. ***Purpose.*** The Foreign Claims Act (FCA), 10 U.S.C. §§ 2734-2736 (1988) (FCA) provides compensation to inhabitants of foreign countries for personal injury, death, or property damage caused by, or incident to noncombat activities of military personnel overseas. Although the U.S. Government's scope of liability under FCA is broad, certain classes of claimants and certain types of claims are excluded from the statute's coverage. Procedures for adjudicating an FCA claim are substantially different from the general procedural pattern for other types of claims against the government.

2. Chapter VIII, Part B, of the *JAG Manual* prescribes the requirements for the investigation and adjudication of FCA claims.

B. ***Statutory authority.*** The FCA provides in pertinent part:

> (a) To promote and maintain friendly relations through the prompt settlement of meritorious claims, the Secretary concerned, or an officer or employee designated by the Secretary, may appoint, under such regulations as the Secretary may prescribe, one or more claims commissions, each composed of one or more officers or employees or combination of officers or employees of the armed forces to settle and pay in an amount not more than $100,000.00, a claim against the United States for -
>
> (1) damage to, or loss of, real property of any foreign country or of any political subdivision or inhabitant of a foreign country, including damage or loss incident to use and occupancy;
>
> (2) damage to, or loss of, personal property of any foreign country or of any political subdivision or inhabitant of a foreign country, including property bailed to the United States; or
>
> (3) personal injury to, or death of, any inhabitant of a foreign country; if the damage, loss, personal injury, or death occurs outside the United States, or the Territories, Commonwealths, or possessions, and is caused by, or is otherwise incident to noncombat activities of, the armed forces under his jurisdiction, or is caused by a member thereof

or by a civilian employee of the military department concerned or the Coast Guard. . . .

C. ***Scope of liability.*** The government's liability under the FCA is somewhat parallel to that under the MCA. Liability is based on two general theories: loss caused by military personnel and loss incident to noncombat military activities. The government's liability under the FCA is generally greater than under the MCA. On the other hand, the FCA is more limited than the MCA in terms of eligible claimants and territorial application.

1. ***Loss caused by military personnel.*** Under the FCA, the government is liable for personal injury, death, and property damage, including both real and personal property, caused by military members or civilian military employees. Unlike the FTCA and the MCA, the scope-of-employment doctrine does not apply except when the civilian employee is a native foreign national (e.g., a Spanish citizen employed by the U.S. Government in Spain who must be acting within the scope of employment for a possible recovery under the FCA). Also, unlike FTCA claims, the acts that caused the loss need not be wrongful or negligent. The government assumes liability for virtually all acts ranging from mere errors in judgment to malicious criminal acts.

2. ***Loss incident to noncombat military activities.*** The second theory of FCA liability is virtually identical to the second basis for liability under the MCA. The government assumes liability for personal injury, death, or property damage, both real and personal property, caused by, or incident to, noncombat military activities. Such activities are peculiarly military, having little parallel in civilian life, and involve situations in which the Federal Government historically has assumed liability. If such a loss incident to noncombat military activities is payable both under the FCA and also under the MCA, it will be paid under the FCA.

3. ***Effect of claimant's negligence.*** A claimant whose negligent or wrongful conduct partially or entirely caused the loss might be precluded from recovery under the FCA. The effect, if any, of the claimant's contributory or comparative negligence will be determined by applying the law of the country where the claim arose. Under such circumstances, the claimant will recover under the FCA only to the extent that his or her own courts would have permitted compensation.

4. ***Territorial application.*** The FCA applies to claims arising outside the United States, its territories, commonwealths, and possessions. The fact that the claim arises in a foreign country, but in an area that is under the temporary or permanent jurisdiction of the United States (e.g., an overseas military base), does not prevent recovery under the FCA.

5. ***Relationship to claims under treaty or executive agreement.*** Certain treaties and executive agreements, such as Article VIII of the NATO Status of Forces Agreement, contain claims provisions that may be inconsistent with the FCA principles and

procedures. When such treaty or executive agreement claims provisions conflict with FCA, the treaty or the executive agreement usually governs. In countries where such treaty or executive agreement provisions are in effect, directives of the cognizant area coordinator should be consulted before processing any claims by foreign nationals.

D. ***Exclusions from liability.*** There are two general categories of exclusions from FCA liability: excluded types of claims and excluded classes of claimants.

1. ***Excluded types of claims.*** The following types of claims are not payable under FCA:

a. Claims that are based solely on contract rights or breach of contract;

b. private contractual and domestic obligations of individual military personnel or civilian employees (e.g., private debt owed to foreign merchant);

c. claims based solely on compassionate grounds;

d. claims for support of children born out of wedlock where paternity is alleged against a servicemember;

e. claims for patent infringements;

f. claims arising directly or indirectly from combat activities; and

g. admiralty claims unless otherwise authorized by the Judge Advocate General.

2. ***Excluded classes of claimants.*** The following types of classes of claimants are excluded from recovering under FCA:

a. Inhabitants of the United States, including military members and dependents stationed in a foreign country and U.S. citizens and resident aliens temporarily visiting the foreign country;

b. enemy aliens, unless the claimant is determined to be friendly to the United States; and

c. insurers and subrogees.

E. ***Measure of damages***

1. ***General rule***. Damages under the FCA are determined by applying the law and local standards of recovery of the country where the incident occurred.

2. ***Dollar limit on recovery***. The maximum amount payable under the FCA is $100,000. In the case of a meritorious claim above that amount, the Secretary of the Navy may pay up to $100,000 and report the excess to the Comptroller General for payment. 10 U.S.C. § 2734 (1988).

F. ***Statute of limitations***. The claim must be presented within two years after the claim accrues. If the claim is presented to a foreign government within this period, pursuant to treaty or executive agreement provisions, the statute-of-limitations requirement will be satisfied.

G. ***Procedures***. Under the FCA, the investigation and adjudication functions are merged in a foreign claims commission which the commanding officer appoints. The foreign claims commission not only conducts an investigation similar to *JAG Manual* a command investigation, but also is empowered to settle the claim within certain dollar limits.

H. ***Example***

1. ***Facts***: USS EXTREMIS was making a goodwill visit to Bug, Yugoslavia. BM3 Wildman went on liberty. Wanting to see as much of the countryside as he could, he hot-wired a car parked near the pier. Later that night, while driving extremely fast, high on marijuana, and being careful not to spill any of his martini, Wildman smashed the car into a tree. The owner, Mr. Bagadonutz, a Yugoslavian citizen, wants to file a claim. Can he collect?

2. ***Solution***: YES. Even though Wildman's acts were not in the scope of his employment, were highly negligent, and involved criminal acts, the claim is payable under the FCA.

0407 ADMIRALTY CLAIMS

A. ***Overview***

1. ***Purpose***. Admiralty is a vast, highly specialized area of law. The purpose of this section is merely to provide a brief introduction to admiralty claims, with specific focus on the command's responsibilities.

2. ***Admiralty law defined.*** Admiralty law involves liability arising out of maritime incidents such as collisions, groundings, and spills. Admiralty claims may be asserted either against, or in favor of, the Federal Government. The Navy's admiralty claims are handled by attorneys in the Admiralty Division of the Office of the Judge Advocate General. Other judge advocates with specialized admiralty training are located in larger naval legal service offices and at certain overseas commands. When admiralty claims result in litigation, attorneys with the Department of Justice, in cooperation with the Admiralty Division, represent the Navy in court. Thus, while the command has little involvement in the adjudication or litigation of admiralty claims, it often has critical investigative responsibilities.

B. ***Statutory authority and references***

1. ***Suits in Admiralty Act, 46 U.S.C. §§ 741-752 (1994).*** The Suits in Admiralty Act provides that a suit in admiralty may be brought against the Federal Government in all circumstances under which an admiralty suit could be brought against a private party or vessel.

2. ***Public Vessels Act, 46 U.S.C. §§ 781-790 (1994).*** The Public Vessels Act supplements the Suits in Admiralty Act and provides for admiralty remedies in cases involving naval or other government owned or controlled vessels.

3. ***10 U.S.C. § 7622 (1994).*** Section 7622 provides for settlement of claims by the government against private parties and vessels.

4. ***JAG Manual.*** Chapter XII of the *JAG Manual* provides guidance regarding the reporting, investigating and adjudicating admiralty claims for and against the federal government.

5. **32 CFR § 752 (1996).** This section provides notice to the public regarding the admiralty - tort claims process for admiralty - tort claims for and against the government.

Scope of liability. The Federal Government has assumed extensive liability for personal injuries, death, and property damage caused by naval or other government owned or controlled vessels incident to governmental maritime activities. Examples of the specific types of losses that give rise to admiralty claims include incidents such as:

1. Collisions;

2. swell wash and wake damage;

3. damage to commercial fishing equipment, beds, or vessels;

4. damage resulting from oil spills, paint spray, or blowing tubes;

5. damages or injuries to third parties resulting from a fire or explosion aboard a naval vessel;

6. damage to commercial cargo carried in a Navy bottom;

7. damage caused by improperly lighted, marked, or placed buoys or navigational aids for which the federal government is responsible; and

8. property damage, personal injury or death of civilians caused by naval or other government owned or controlled vessels.

9. property damage, personal injury or death of federal government employees not in the performance of duties caused by naval or other government owned or controlled vessels.

10. property damage, personal injury or death of military personnel not incident to service while aboard a privately owned vessel caused by naval or other government owned or controlled vessels. (OJAG Code 31 will review all claims filed by military members to determine applicablity of Feres doctrine).

D. ***Exclusions from liability.*** Certain categories of persons are precluded from recovering under an admiralty claim for personal injury or death incurred incident to maritime activities. Such potential claimants maybe compensated under other statutes. For example:

Civil Service employees and seamen aboard Military Sealift Command vessels are limited to compensation under the Federal Employees' Compensation Act, 5 U.S.C. §§ 8101-8150 (1982), for personal injury or death.

E. ***Measure of damages***

1. ***Surveys.*** A survey of damaged property is required in all collisions and any other maritime incidents involving potential liability for property damage. Surveys have been customary in admiralty law and are intended to eliminate burdensome and difficult questions concerning proof of damages. Section 1206 of the *JAG Manual* has an extensive discussion of survey procedures.

2. ***Medical examinations.*** In personal injury cases, medical examinations are required for all injured persons. The function of the medical examination is similar to that of the property damage survey.

3. ***Dollar limits on recovery***. Deputy Assistant Judge Advocate General of the Navy (Admiralty) has been delegated settlement authority up to $100,000.

F. ***Statute of limitations***. Suits in admiralty must be filed within two years after the incident on which the suit is based. Unlike the statute-of-limitations rule under the FTCA, filing an admiralty claim with the Department of the Navy does ***not*** toll the running of this two-year period. Nor can the government administratively waive the statute of limitations in admiralty cases. If the admiralty claim cannot be administratively settled within two years after the incident, the claimant ***must*** file suit against the government in order to prevent the statute of limitations from running.

G. ***Procedures***. The procedures for investigating and adjudicating admiralty claims are explained in sections 1204-1216 of the *JAG Manual*. Significant aspects include:

1. ***Immediate preliminary report***. The most critical command responsibility in admiralty cases is to ***immediately*** notify the Judge Advocate General and an appropriate local judge advocate of ***any*** maritime incident which ***might*** result in an admiralty claim for or against the government. Section 1204 of the *JAG Manual* gives details concerning the requirement for immediate reports. Because of the highly technical factual and legal issues that may be involved in an admiralty case, it is absolutely vital that the Admiralty Division of the Office of the Judge Advocate General be involved in the case from the earliest possible moment.

2. ***Subsequent investigative report***. After initially notifying the Judge Advocate General, the command must promptly begin an investigation of the incident. A *JAG Manual* investigation will usually be required although, in some circumstances, a letter report will be appropriate. Section 1205 of the *JAG Manual* provides guidance for determining the type of investigation that is most appropriate. Chapter II of the *JAG Manual* provides specific investigatory requirements for certain maritime incidents. Also, sections 1207 and 1210 of the *JAG Manual* prescribe requirements and procedures concerning witnesses and documents in admiralty investigations.

H. ***Bibliography***

1. Baer, *Admiralty Law of the Supreme Court* (3d ed. 1978).

2. G. Gilmore & C. Black, *The Law of Admiralty* (2d ed. 1975).

3. M. Norris, *The Law of Maritime Personnel Injuries* (3d ed. 1975).

4. *Knauth's Benedict on Admiralty* (A. Knauth & C. Knauth ed. 7th ed. rev. 1973).

5. M. Norris, *The Law of Seamen* (3d ed. 1970).

0408 NONSCOPE CLAIMS

A. ***Overview.*** 10 U.S.C. § 2737 (1988) and enclosure (4) of JAGINST 5890.1 provide for payment of certain types of claims not cognizable under any other provisions of law. Such claims are known as "nonscope claims" and arise out of either the use of a government vehicle anywhere or the use of government property aboard a Federal installation. The personal injury, death, or property damage must be caused by a Federal military employee, but there is no requirement that the acts be negligent or in the scope of Federal employment (hence the term "nonscope claim").

B. ***Statutory authority.*** The statutory authority for payment of nonscope claims is based on 10 U.S.C. § 2737 (1988), which reads in pertinent part:

> (a) Under such regulations as the Secretary concerned may prescribe, he or his designee may settle and pay, in an amount not more than $1,000, a claim against the United States, not cognizable under any other provision of law, for -
>
> (1) damage to, or loss of, property; or
>
> (2) personal injury or death;
>
> caused by a civilian official or employee of a military department or the Coast Guard, or a member of the armed forces, incident to the use of a vehicle of the United States at any place, or any other property of the United States on a Government installation.

C. ***Scope of liability***

1. ***Claims not cognizable under any other provision of law.*** As a precondition to payment under the nonscope claims provisions, the claim must not be cognizable under some other claims statute.

2. ***Caused by a Federal military employee.*** The resulting personal injury, death, or property damage must be caused by a Federal military employee (either military member or civilian employee of the armed forces or Coast Guard). Acts by employees of nonappropriated fund activities are not covered by the nonscope claims statute.

a. ***Negligence not required.*** Neither the nonscope claims statute nor the Navy's regulations require that the Federal military employee's conduct causing the loss be negligent or otherwise wrongful.

b. ***Scope of employment immaterial.*** The scope-of-employment concept, which is required under the FTCA and for some MCA claims, does not apply to nonscope claims.

3. ***Circumstances giving rise to nonscope claims.*** Nonscope claims are limited to injury, death, or property damage arising out of either of the following circumstances:

a. Incident to the use of a government vehicle anywhere; or

b. incident to use of government property aboard a government installation. ("Government installation" means any Federal Government facility having fixed boundaries and owned or controlled by the Federal Government. It includes both military bases and nonmilitary installations.)

4. ***Worldwide application.*** There are no territorial limitations on nonscope claims.

D. ***Exclusions from liability***

1. ***Effect of claimant's negligence.*** If the loss was caused, in whole or in part, by the claimant's negligence or wrongful acts, or by negligence or wrongful acts by the claimant's agent or employee, the claimant is barred from any recovery under the nonscope claims statute.

2. ***Excluded claimants.*** Subrogees and insurers may not recover subrogated nonscope claims.

E. ***Measure of damages***

1. ***Limitations on recovery***

a. ***Personal injury and death cases.*** For personal injury or death, the claimant may recover no more than actual medical, hospital, or burial expenses not paid or furnished by the Federal Government.

b. ***Indemnifiable claims.*** The claimant may not recover any amount that he or she can recover under an indemnifying law or indemnity contract.

c. ***Dollar limit on recovery.*** The maximum payable as a nonscope claim is $1,000.

F. ***Statute of limitations.*** A nonscope claim must be presented within two years after the claim accrues or it will be forever barred.

G. ***Procedures.*** Notable procedural aspects of nonscope claims include the following:

1. ***Automatic consideration of other claims.*** Claims submitted pursuant to the FTCA or MCA, but which are not payable under those Acts because of scope-of-employment requirements, automatically will be considered for payment as a nonscope claim.

2. ***Adjudicating authority.*** All adjudicating authorities listed in JAGINST 5890.1 are authorized to adjudicate nonscope claims.

3. ***Claimant's rights after denial.*** If a claim submitted solely as a nonscope claim is denied, the claimant may appeal to the Secretary of the Navy (Judge Advocate General) within 30 days of the notice of denial. There is no right to sue under the nonscope claims statute.

H. ***Example***

1. ***Facts.*** BM2 Knasty resolved to kill his archenemy ENS Knice, but he planned to make it look like an accident. He stole a government sedan, drove it off base, and rode around town looking for Knice. When he spotted Knice standing on a corner, Knasty aimed the car at Knice and bore down on him at a high speed. Knice tried to jump out of the way, but not quickly enough to avoid being struck a glancing blow. As a result, Knice suffered extensive injuries which were treated at a military hospital. Also, the clothes he was wearing and the radio he was carrying were destroyed. ENS Knice has filed an FTCA claim for $15,000 ($600 for property damage and $14,400 for personal injury, pain and suffering, and lost wages from his part-time job). How much, if anything, will ENS Knice collect?

2. ***Solution.*** This claim is not payable under the FTCA for several reasons, not counting any possible *Feres* Doctrine problem caused by the claimant being a military member. First, FTCA does not provide compensation for losses caused by intentional torts such as assault and battery. Moreover, BM2 Knasty's act was not within the scope of his Federal employment. Under the FTCA, the government is liable only for acts within the scope of Federal employment. The fact that Knasty's acts were outside the scope of his Federal employment also prevent paying this claim under the MCA. However, under the automatic consideration provisions, this claim may be considered as a nonscope claim. It is not cognizable under another claims statute and the injuries and damage were caused by a Federal employee. Neither negligence nor scope of employment is required. The claim involves the use of a government vehicle. Therefore, Knice can recover under the nonscope claims statute. He will not be compensated for medical expenses which were provided by the U.S. Government. Pain and suffering and lost wages are likewise not compensable under the nonscope claims statute. Therefore, Knice will recover only the $600 property damage loss.

0409 ARTICLE 139, UCMJ, CLAIMS

A. ***Overview***. Article 139 of the Uniform Code of Military Justice provides compensation for private property damage caused by riotous, willful, or wanton acts of members of the naval service not within the scope of their employment or the wrongful taking of property by a member of the naval service. Article 139 claims are unique in that they provide for the checkage of the military pay of members responsible for the property damage. Overseas, these types of damages may be paid for under the Foreign Claims Act. Private citizens in the United States, however, would not otherwise have an effective means by which to be reimbursed for property damage or loss in these situations. Although the individual member, not the Federal Government, is liable for the damage claimed under Article 139, the member's command has significant procedural responsibilities which can be found in Chapter IV of the *JAG Manual*.

B. ***Statutory authority***. Article 139 of the Uniform Code of Military Justice provides:

> (a) Whenever complaint is made to any commanding officer that willful damage has been done to the property of any person or that his property has been wrongfully taken by members of the armed forces, he may, under such regulations as the Secretary concerned may prescribe, convene a board to investigate the complaint. The board shall consist of from one to three commissioned officers and, for the purpose of that investigation, it has power to summon witnesses and examine them upon oath, to receive depositions or other documentary evidence, and to assess the damages sustained against the responsible parties. The assessment of damages made by the board is subject to the approval of the commanding officer, and in the amount approved by him shall be charged against the pay of the offenders. The orders of the commanding officer directing charges herein authorized is conclusive on any disbursing officer for the payment by him to the injured parties of the damages so assessed and approved.
>
> (b) If the offenders cannot be ascertained, but the organization or detachment to which they belong is known, charges totaling the amount of damages assessed and approved may be made in such proportions as may be considered just upon the individual members thereof who are shown to have been present at the scene at the time the damages complained of were inflicted, as determined by the approved findings of the board.

C. ***Scope of liability***

1. ***Limited to property damage***. Article 139 claims are limited to damage, loss, or destruction of real or personal property.

2. ***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.

a. A claim that a Marine accidentally bumped into and broke a mirror in the course of a drunken brawl with a Navy SEAL would be cognizable. Even though the Marine did not specifically intend to break the mirror and you could characterize the act as simple negligence, the Marine's conduct was riotous and damage resulted from it.

b. A claim that a sailor drove a car at 90-miles an hour down the highway and drifted over the center line into an oncoming car would not be cognizable.

3. ***Wrongful taking***. A wrongful taking is essentially theft. 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. Article 139 ***is not*** a way in which an individual can have his debts collected, nor is it to be used to mediate business disputes.

a. A claim that a sailor issues a worthless check would be cognizable if evidence establishes an intent to defraud. Such intent may be inferred when the sailor fails to make good on a bad check within 5 working days of receiving notice of insufficient funds, in the same way that a criminal intent to defraud may be inferred under Article 123a, UCMJ.

b. A claim that a sailor stole a check or credit card and used it to obtain items of value would be cognizable.

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 (i.e., failure to act with the same care that a reasonable person would use under the circumstances);

2. subrogated claims (e.g., by insurers);

3. claims for personal injury or death;

4. claims arising from conduct occurring within the scope of employment; and

5. claims for reimbursement for damage, loss, or destruction of government property;

E. ***Proper claimants.*** Any individual (including both civilians and servicemembers), business entity, state or local government, or charity may submit a claim.

F. ***Measure of damages***

1. ***General rule.*** The amount of recovery is limited to only the direct physical damage caused by the servicemember.

– Servicemembers will not be assessed for damage or property loss due to the acts or omissions of the property owner, his lessee, or agent that were a proximate contributing factor to the loss or damage of said property. In these cases, the standard for determining responsibility will be one of comparative responsibility.

2. ***Charge against pay.*** The maximum amount that may be approved by an officer exercising general court-martial jurisdiction (OEGCMJ) under Article 139 is $5,000 per offender, per incident. Where there is a valid claim for over $5,000, the claim, investigation into the claim, and the commanding officer's recommendation shall be forwarded to the Judge Advocate General (Code 35) or to Headquarters, U.S. Marine Corps (Code JAR), as appropriate, 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 the member's basic pay.

G. ***Statute of limitations.*** The claim must be submitted within 90 days of the incident upon which the claim is based.

H. ***Procedures.*** Article 139 claims involve certain unique procedures:

1. 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 there is more than one complainant from a single incident, each claimant must submit a separate and individual claim.

2. ***Investigation.*** Claims cognizable under Article 139 must be investigated by the alleged offender's command. 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. ***Under no circumstances should the investigation of a claim be delayed because criminal charges are pending.***

a. The investigation will make findings of fact and opinions on whether:

(1) The claim is by a proper claimant (in writing and for a definite sum);

(2) the claim is made within 90 days of the incident that gave rise to it;

(3) the claim is for property belonging to the claimant that was the subject of damage, loss, or destruction by a member or members of the naval service;

(4) the claim specifies the amount of damage suffered by the claimant; and

(5) the claim is meritorious.

b. The investigation shall also make recommendations about the amount to be assessed against the responsible parties. If more than one servicemember is responsible, the investigation must make recommendations concerning the amount to be assessed against each individual.

c. ***Standard of proof.*** A preponderance of the evidence is necessary for pecuniary liability under Article 139.

d. ***Valuation of claimant's loss.*** Normally, the measure of a loss is either the repair cost or the depreciated replacement cost for the same or similar item. Depreciation for most items depends on the age and condition of the item. The Military Allowance List-Depreciation Guide should be used in determining depreciated replacement cost.

3. ***Subsequent action***

a. ***Offenders attached to same command***

(1) If all offenders are attached to the command convening the investigation, the commanding officer shall ensure that the offenders have an opportunity to see the investigative report and are advised that they have 20 days in which to submit a statement or additional information. If the member declines to submit further information, he shall so state, in writing, during the 20-day period.

(2) The commanding officer 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 commanding officer finds that the claim is payable, he shall fix the amount to be assessed against the offender(s).

(3) ***Review.*** The commanding officer's action on the investigation is then forwarded to the OEGCMJ over the command for review and action on the claim. The OEGCMJ will then notify the commanding officer of his determinations, and the commanding officer will take action consistent with that determination.

b. ***Offenders are members of different commands***

(1) ***Action by common superior.*** If the offenders are members of different commands, the investigation will be forwarded to the OEGCMJ over the commands to which the alleged offenders are assigned. The OEGCMJ 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.

(2) The OEGCMJ will review the investigation to determine whether the claim is properly within Article 139 and whether the facts indicate responsibility for the damage on members of his command. If the OEGCMJ determines that the claim is payable, he will fix the amount to be assessed against the offenders and direct their commanding officers to take action accordingly.

4. ***Reconsideration.*** The OEGCMJ may, upon request by either the claimant or the member assessed for the damage, reopen the investigation or take other action he believes is in the interest of justice. If the OEGCMJ anticipates acting favorably on the request, he will give all interested parties notice and an opportunity to respond.

5. ***Appeal.*** If the claim is for $5,000 or less, the claimant or the member against whom pecuniary responsibility has been assessed may appeal the decision to the OEGCMJ within 5 days of receipt of the OEGCMJ's decision. If good cause is shown, the OEGCMJ may extend the appeal time. The appeal is submitted via the OEGCMJ to the Judge Advocate General for review and final action. Imposition of the OEGCMJ's decision will be held in abeyance pending final action by the Judge Advocate General.

I. ***Relationship to court-martial proceedings.*** Article 139 claims procedures are entirely independent of any court-martial or nonjudicial punishment proceedings based on the same incident. Acquittal or conviction at a court-martial may be considered by an Article 139 investigation, but it is not controlling on determining whether a member should be assessed for damages. The Article 139 investigation is required to make its own independent findings.

PART C - CLAIMS ON BEHALF OF THE GOVERNMENT

0410 FEDERAL CLAIMS COLLECTION ACT

A. ***Overview.*** Under the Federal Claims Collection Act, 31 U.S.C. § 3711 (1982) (FCCA), the Federal Government may recover compensation for claims on behalf of the United States for damage to or loss or destruction of government property through negligence or wrongful acts.

B. ***Statutory authority.*** The FCCA provides in pertinent part:

(a) The head of an executive or legislative agency -

(1) shall try to collect a claim of the United States Government for money or property arising out of the activities of, or referred to, the agency;

(2) may compromise a claim of the Government of not more than $20,000 (excluding interest) that has not been referred to another executive or legislative agency for further collection action; and

(3) may suspend or end collection action on a claim referred to in clause (2) of this subsection when it appears that no person liable on the claim has the present or prospective ability to pay a significant amount of the claim or the cost of collecting the claim is likely to be more than the amount recovered.

C. ***Government's rights***

1. ***Determined by local law.*** The extent of any FCCA recovery by the Federal Government is determined by the law where the damage occurred. As a general rule, if a private person would be entitled to compensation under the same circumstances, the Federal Government may recover under the FCCA.

2. ***Liable parties.*** FCCA claims may be pursued against private persons, corporations, associations, and nonfederal governmental entities. An FCCA claim also can

be asserted against any Federal employee responsible for the damage and, if the responsible party is insured, the claim may be presented to the insurer. *See* Federal Drivers' Act, 28 U.S.C. § 2679(b) (1982) (prescribing immunity for Federal drivers). Generally, the government does not seek payment from servicemembers and government employees for damages caused by their simple negligence.

D. ***Measure of damages***. The amount of the government's recovery for an FCCA claim is determined by the measure-of-damages rules of the law where the damage occurred. There is no maximum limit to recovery.

E. ***Statute of limitations***. The government has three years after the damage occurs in which to make a written demand on the responsible party. 28 U.S.C. § 2415(b) (1988).

F. ***Procedures***. Specific procedures and collection policies are promulgated in JAGINST 5890.1. Notable features of FCCA procedures include:

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 the Office of the Judge Advocate General of the Navy and commanding officers of Naval Legal Service Offices, except NLSO's in countries where another service has single service responsibility in accordance with DOD Directive 5515.8. Claims over $20,000 can be terminated or compromised only with permission of the Department of Justice.

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. If such a settlement is in the government's best interest, the commanding officer of the property may accept repair or replacement under conditions described in JAGINST 5890.1.

3. ***Collection problems***. Collecting the full amount claimed under an FCCA claim can often be difficult for a number of reasons. Therefore, the Joint Regulations authorize specific procedures to resolve or overcome collection problems:

a. ***Collection by offset***. The U.S. Government may deduct the amount of the FCCA claim from any pay, compensation, or payment it owes the responsible party.

b. ***Suspension or revocation of Federal license or eligibility***. This can be a strong incentive for an entity desiring to do business with the government to pay a claim.

c. ***Collection in installments***. In cases where the responsible party is unable to make a lump-sum payment, an installment payment schedule may be used.

Terms, conditions, and limitations on installment payment plans are set forth in JAGINST 5890.1. A substantial portion of FCCA claims against individuals are liquidated through installment payments.

d. ***Compromise.*** When the responsible party is unable to pay the full amount of the claim within a reasonable time (usually three years), or when the responsible party refuses to pay and the government is unable to enforce collection within a reasonable time the claim may be compromised.

4. ***Referral to Department of Justice.*** Unsettled claims may be referred to the Department of Justice for litigation. The referral is made by the Office of the Judge Advocate General and not by the local authority directly.

0411 MEDICAL CARE RECOVERY ACT

A. ***Overview.*** The Medical Care Recovery Act (MCRA) provides that, when the government treats or pays for the treatment of a military member, retiree, or dependent, it may recover its expenses from any third party legally liable for the injury or disease. The key to understanding the complexities of the MCRA is to realize that the Federal Government operates one of the largest health-care systems in the world.

B. ***Statutory authority***

1. ***Statutes authorizing medical care by the Federal Government***

a. Active-duty personnel

(1) Military facilities: 10 U.S.C. § 1074 (1982).

(2) Emergency care: 10 U.S.C. § 5203 (1982).

b. Dependents: 10 U.S.C. §§ 1076-1078 (1982).

c. Retirees: 10 U.S.C. § 1074 (1982).

d. CHAMPUS payments: 10 U.S.C. § 1079ff (1982).

2. ***Medical Care Recovery Act.*** The MCRA, 42 U.S.C. § 2651 (1982), provides in part:

> (a) In any case in which the United States is authorized or required by law to furnish hospital, medical, surgical, or dental care and treatment (including prostheses and medical

> appliances) to a person who is injured or suffers a disease, after the effective date of this Act, under circumstances creating a tort liability upon some third person (other than or in addition to the United States and except employers of seamen treated under the provisions of section 249 of this title) to pay damages therefor, the United States shall have a right to recover from said third person the reasonable value of the care and treatment so furnished or to be furnished and shall, as to this right be subrogated to any right or claim that the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors has against such third person to the extent of the reasonable value of the care and treatment so furnished or to be furnished. The head of the department or agency of the United States furnishing such care or treatment may also require the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors, as appropriate, to assign his claim or cause of action against the third person to the extent of that right or claim.

C. ***The government's rights***

1. ***Independent cause of action.*** The MCRA created an independent cause of action for the United States. Its right of recovery ***is not*** dependent upon a third party. The requirement that the United States furnish care to an injured party is merely a condition precedent to the government's independent right of recovery. If the tortfeasor has a procedural attack or defense against the injured party, it will not serve as a bar to a possible recovery by the government.

2. ***Determined by local law.*** The extent of any MCRA recovery by the Federal Government is determined by the law where the injury occurred. The Federal Government enjoys no greater legal rights or remedies than the injured person would under the same circumstances. Thus, if the injured person would be legally entitled to compensation for injuries from the responsible party under the law where the injury occurred, the Federal Government may recover its expenses in treating the injured person.

3. ***Liable parties.*** MCRA claims may be asserted against private individuals, corporations, associations, and nonfederal governmental agencies. They also may be asserted against a Federal employee responsible for the injuries, except that no such claim may be asserted against a servicemember injured as a result of his / her own willful or negligent acts for two reasons. First, the wording of the MCRA, 42 U.S.C. §§ 2651-2653 (1982), is explicit in providing a right of action against third parties. The injured member does not qualify as a third party. Second, to allow such a claim would violate the provisions and spirit of 10 U.S.C. § 1074 (1982), which provides the entitlement of active-duty servicemembers to medical care free of charge (save for certain subsistence costs

chargeable to officers). However, the United States can subrogate against any insurance coverage which the member may have that might cover medical care and treatment as a result of the self-injury.

4. ***Claims against insurers.*** If the party responsible for the injuries is insured, an MCRA claim may be asserted against the insurer. Since a large portion of injuries resulting in MCRA claims involve automobile accidents, assertions against insurance companies are commonplace.

D. ***Measure of damages.*** The Federal Government may recover the reasonable value of medical services it provided, either directly at a U.S. Government hospital or indirectly through the CHAMPUS program.

1. ***Treatment at Federal Government facility.*** The value of treatment at Federal Government facilities is computed on a flat-rate ***per diem*** basis for in-patient care and a per-visit charge for out-patient treatment, rather than the itemized charges used by most civilian hospitals. These rates are promulgated by the Office of Management and Budget (OMB).

2. ***CHAMPUS payments.*** The Federal Government may recover the amount actually paid to, or on behalf of, a military dependent under the CHAMPUS program.

3. ***Other payments.*** The Federal Government may recover amounts it paid to civilian facilities for emergency medical treatment provided active-duty personnel.

E. ***Statute of limitations.*** MCRA claims must be asserted within three years after the injury occurs. 28 U.S.C. § 2415(b).

F. ***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 certain officers in the Office of the Judge Advocate General and commanding officers of most Naval Legal Service Offices. Designees outside of the Office of the Judge Advocate General have been assigned geographic 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. Claims in excess of $40,000 may be compromised, settled, or waived only with the approval of the Department of Justice.

2. ***Initial action.*** JAG designees learn of potential MCRA claims from several sources:

a. ***Investigations***

(1) ***When required.*** When a military member, retiree, or dependent receives, either directly or indirectly, Federal medical care for injuries or disease for which another party may be legally responsible, an investigation will be required. One exception to this requirement is when the in-patient care does not exceed three days or out-patient care does not exceed ten visits.

(2) ***Responsibility for conducting investigation.*** The responsibility for conducting the investigation of a possible MCRA claim normally lies with the commanding officer of the local naval activity most directly concerned, usually the commanding officer of the personnel involved in the incident or of the activity where the incident took place.

(3) ***Scope and contents of investigation.*** An investigation into a possible MCRA claim will be conducted in accordance with the *JAG Manual* and JAGINST 5890.1. An investigation of the same incident that was convened for some other purpose may be used to determine MCRA liability.

(4) ***Copy to JAG designee.*** If any investigation (regardless of its origin or initial purpose) involves a potential MCRA claim, a copy should be forwarded to the cognizant JAG designee.

b. ***Reports of care and treatment.*** The second major way in which the JAG designee learns of a possible MCRA claim is by a report from the facility providing medical care.

(1) ***Military facilities.*** Military health-care facilities are required to report medical treatment they provide when it appears that a third party is legally responsible for the injuries or disease. In the Navy, this reporting requirement is satisfied by submission of NAVJAG Form 5890/12 (Hospital and Medical Care - Third Party Liability Case) to the cognizant JAG designee. A NAVJAG 5890/12 is submitted when it appears that the patient will require more than three days' in-patient care or more than ten out-patient visits. Preliminary, interim, and final reports are prepared as the patient progresses through the treatment. This report is, in essence, a hospital bill because it will reflect the value of the medical care provided to date, computed in accordance with OMB rates. Military health-care facilities in other services use forms similar to NAVJAG 5890/12.

(2) ***CHAMPUS cases.*** Statements of CHAMPUS payments on behalf of the injured person are available from the local CHAMPUS carrier (usually a civilian health-care insurance company that administers the CHAMPUS program under a

government contract). Statements are to be forwarded to JAG designees in cases involving potential third-party liability.

(3) ***Civilian medical care reports.*** District medical officers are required to submit reports to cognizant JAG designees whenever they pay emergency medical expenses incurred by active-duty personnel at a civilian facility and the circumstances indicate possible MCRA liability.

3. ***Injured person's responsibilities.*** The JAG designee will advise the injured person of his / her legal obligations under MCRA. These responsibilities are to:

a. Furnish the JAG designee with any pertinent information concerning the incident;

b. notify the JAG designee of any settlement offer from the liable party or that party's insurers;

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 since the civilian attorney may represent the government as well as the injured person if the claim is litigated in court;

e. refuse to execute a release or settle any claim concerning the injury without the prior approval of 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.

These restrictions and obligations are necessary because the government's rights under the MCRA are largely derivative from the injured person's legal rights. If the injured person makes an independent settlement with the liable party, the government's rights could be prejudiced. Also, if the injured person settles the claim independently and receives compensation for medical expenses, the government is entitled to recover its MCRA claim from the injured person directly—out of the proceeds of the settlement.

4. ***JAG designee action.*** The JAG designee formally asserts the government's MCRA claim by mailing a "notice of claim" to the liable party or insurer with the following information:

a. Reference to the statutory right to collect;

b. a demand for payment or restoration;

c. a description of damage;

d. the date and place of the incident; and

e. the name, phone number, and office address of the claims personnel to contact.

The JAG designee may accept full payment of the claim or may establish an installment payment plan with the liable party. Under appropriate circumstances, the JAG designee may waive or compromise the claim. Waivers or compromises of claims in excess of $40,000 require prior Department of Justice approval. If the claim cannot be collected locally, referral to the Department of Justice for litigation is possible, but this must be done by the Judge Advocate General.

G. ***Medical payments insurance coverage.*** Government claims for medical care normally are directed against the tortfeasor, and recovery is obtained either directly from him or his insurance carrier. There are, however, other potential sources for recovery of medical care expenditures, depending upon the circumstances involved. One such potential source is "medical payments" insurance coverage. Under the provisions of certain automobile insurance policies, an insurer may be obligated to pay the cost of medical care for injuries incurred by the policyholder, his passengers who are riding in the insured vehicle, or a pedestrian who is struck by the insured vehicle. Assuming such coverage exists (and it is the claims officer's responsibility to determine if it does), medical payments clauses apply regardless of who was at fault and the United States may be entitled to recover as the provider of medical care. Recovery has been allowed, based on one of two theories: that the United States is insured under the medical pay provisions of the insurance policy, or that the United States is a third-party beneficiary of the insurance contract. Recovery is not based upon the MCRA, but under the terms of the individual insurance policy. The language of the contract is critical in determining whether the United States is a proper third-party beneficiary. State law controls the status of the United States as a third-party beneficiary. *See, e.g., United States v. Cal. State Auto. Ass'n*, 385 F. Supp. 669 (E.D. Cal. 1974), *aff'd*, 530 F.2d 850 (9th Cir. 1976); *United States v. United States Auto. Ass'n*, 431 F.2d 735 (5th Cir. 1970).

H. ***Uninsured motorist coverage.*** Another potential source of recovery of medical care costs is the "uninsured motorist" coverage provisions of the typical automobile insurance policy. If an injured servicemember has obtained such coverage, and the tortfeasor is uninsured, the typical uninsured motorist coverage clause provides for payment to the policyholder of these sums which he would have been able to recover from the tortfeasor, but for the fact that the tortfeasor was uninsured. Like medical payments insurance coverage, the right of the United States to recover is based upon the terms of the insurance contract and not upon the MCRA. If the term "insured" includes "any person,"

then the courts have generally held that the United States is entitled to recover. *United States v. Geico*, 440 F.2d 1338 (5th Cir. 1971).

I. ***No-fault statutes***. The recovery of the United States under the MCRA in states that have enacted no-fault statutes will be determined by the language of the statute. It is necessary to determine if the United States is within the terms of the statute so as to be entitled to recover for medical care provided. If the state statute eliminates a cause of action against the tortfeasor, the only probable source of recovery is under the injured party's no-fault insurance. If the United States is excluded and has no cause of action, then there may be no recovery in the particular case. *Hohman v. United States*, 628 F.2d 832 (3d Cir. 1980); *United States v. Gov't Employment Ins. Co.*, 605 F.2d 669 (2d Cir. 1979).

J. ***Bibliography***. The following references are helpful in working with MCRA claims:

1. Bernzweig, *Pub. L. No. 87-693: An Analysis and Interpretation of the Federal Medical Care Recovery Act*, 64 Colum. L. Rev. 1257 (1964).

2. Turner, *Hospital Recovery Claims (42 U.S.C. § 2651): The United States as a Subrogee*, 12 A.F. JAG L. Rev. 44, 51 (1970).

3. Long, *Administration of the Federal Medical Care Recovery Act*, 46 Notre Dame L. Rev. 253 (1971).

4. Long, *The Federal Medical Care Recovery Act: A Case Study*, 18 Vill. L. Rev. 353 (1973).

5. SECNAVINST 6320.8, Subj: Uniformed Services Health Benefits Program.

6. BUMEDINST 6320.32, Subj: Non-Naval Medical and Dental Care.

0412 AFFIRMATIVE CLAIMS AGAINST SERVICEMEMBER TORTFEASORS. The United States may not assert an affirmative claim against a servicemember / employee who, ***while in the scope of employment***, damages government property or causes damage or injury for which the United States must pay. *See United States v. Gilman*, 347 U.S. 507 (1953). Consideration, in the case of gross negligence or willful and wanton acts, should be given to whether such actions took the servicemember / employee outside the scope of employment.

CHAPTER V

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CHAPTER V

RELATIONS WITH CIVIL AUTHORITIES

0501 CRIMINAL JURISDICTION OVER SERVICEMEMBERS IN U.S.

A. ***Delivery of personnel.*** Chapter VI, Part A, of the *JAG Manual* and Chapter 8 of the Coast Guard Military Justice Manual deal with the delivery of servicemembers, civilians, and dependents.

1. ***Federal civil authorities.*** Members of the armed forces will be released to the custody of U.S. Federal authorities (FBI, DEA, etc.) upon request by 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. A judge advocate of the Navy or Marine Corps should be consulted before delivery is effected, if reasonably practicable. JAGMAN, § 0608, MJM 8-G-1.

2. ***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 himself through proper credentials but must also display the actual warrant for the servicemember's arrest. Additionally, state, local, and U.S. territory officials must sign a delivery agreement providing for the no-cost return of the servicemember after civilian proceedings have terminated. JAGMAN, §§ 0603, 604 and 607. The state official completing the agreement must show that he is authorized to bind the state to the terms of the agreement. Coast Guard-When delivery of any person in the Coast Guard is requested by a state's civil authorities and such person is within the requesting authorities territorial limits (including waters), COs are authorized to deliver such persons when a proper warrant is presented and the approval of COMDT (G-LML), if necessary has been obtained. CG MJM 8-D. A sample agreement appears in appendix A-6-b of the *JAG Manual*. Subject to these requirements, the following examples illustrate the procedures to be followed:

a. E-3 Jones is stationed ashore or afloat at a command ***within*** the geographical territory of the requesting authority. Generally, after the state official has displayed proper credentials and an arrest warrant and a delivery agreement has been signed, the request will be complied with by the commanding officer. JAGMAN, § 0603, CG MJM 8-D.

b. E-3 Jones is stationed ashore or afloat ***outside*** of the territorial jurisdiction of the requesting authority, ***but not overseas***. Theservicemember must be informed of his right to require extradition. If he does not waive extradition, the requesting authority must complete extradition proceedings before the Navy will release the individual.

In any event, release under these conditions can be made by an officer exercising general court-martial jurisdiction (OEGCMJ), someone designated by him, or any commanding officer after consultation with a judge advocate of the Navy or Marine Corps. JAGMAN, § 0604. If (after consultation with military or civilian legal counsel) the servicemember waives extradition in writing, the servicemember may be released without an extradition order. If the state in which E-3 Jones is located requests delivery of a servicemember wanted by another state (usually based upon a fugitive warrant or other process from authorities of the other state), the OEGCMJ (or other commanding officer discussed above) is authorized to release Jones to the local authorities and normally will do so; however, absent waiver by Jones, he will then have the opportunity to contest extradition within the courts of the local state. JAGMAN, § 0604, CG MJM 8-E.

c. E-3 Jones is stationed ashore overseas or is deployed and is sought by U.S., state, territory, commonwealth, or local authorities. In this case, the request must be by the Department of Justice or the governor of the state addressed to SECNAV (JAG). If received by the command, it must be forwarded to JAG. The request must be allege that the man is charged, or is a fugitive from that state, for an extraditable crime. When all the requirements are met, the Secretary will issue the authorization to transfer the servicemember to the military installation in the United States most convenient to the Department of the Navy, where he will be held until the requesting authority is notified and complies with the provisions of JAGMAN, § 0605.

3. ***Deliveries requiring advance approval of COMDT (G-L)***: The advance approval of COMDT (G-L) is required prior to the delivery of persons in the Coast Guard to federal or state authorities, when:

a. Disciplinary/judicial proceedings involving offenses of the UCMJ are pending.

b. The member is undergoing a court-martial sentence.

c. In the opinion of the CO, it is in the best interest of the CO to refuse delivery, CG MJM 8-H.

d. When making delivery to a state other than the one where the member is located, the member's CO shall, before making such delivery, obtain a written agreement providing for the following:

(1) That the CO will be informed of the outcome of the trial.

(2) That the member will be transported to the requesting state without expense to the member or the U.S.

(3) That the member will be returned to the place of delivery or such place as is mutually agreeable to the COMDT (G-L) and the requesting state, upon disposition of the case, provided the CG shall then desire the member's return. Only the Governor or authorized agent of the requesting state is required to complete the agreement, CG MJM 8-P. A sample agreement appears in enclosure 36 of the MJM.

4. ***Restraint of military offenders for civilian authorities.*** R.C.M. 106, MCM (1984) provides that a servicemember may be placed in restraint by military authorities for civilian offenses upon receipt of a duly-issued warrant for the apprehension of the servicemember or upon receipt of information establishing probable cause that the servicemember committed an offense, and upon reasonable belief that such restraint is necessary (under the circumstances). Such restraint may continue only for such time as is reasonably necessary to effect the delivery. For delivery of a servicemember to foreign authorities, the applicable treaty or status of forces agreement should be consulted. The provision does not allow the military to restrain a servicemember on behalf of civilian authorities pending trial or other disposition. The nature and extent of restraint imposed is strictly limited to that reasonably necessary to effect the delivery. Thus, if the civilian authorities are slow in taking custody, the restraint must cease. An analogous situation is when civilian law enforcement authorities temporarily confine a servicemember, pursuant to a DD-553, pending delivery to, or receipt by, military authorities.

5. ***Circumstances in which delivery is refused***

a. If a servicemember is alleged to have committed several offenses—including major Federal offenses and serious, but purely military, offenses—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 the Judge Advocate General or COMDT (G-L) and to the cognizant OEGCMJ. JAGMAN, §§ 0125 and 0610, MJM 8-H. 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.

b. 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 Department of the Navy, 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 Article 14, UCMJ, is intended, comply with JAGMAN, § 0610d.

c. If a commanding officer considers that extraordinary circumstances exist which indicate that delivery should be denied, then such denial is authorized by JAGMAN, § 0610b(2), MJM 8-H. This provision is rarely invoked.

d. In any case where it is intended that delivery will be refused, the commanding officer shall report the circumstances to the Judge Advocate General and the area coordinator by message (or by telephone if circumstances warrant). The initial report shall be confirmed by letter setting forth a full statement of the facts. JAGMAN, § 0610d, app. A-6-c.

e. Coast Guard reporting requirements: The Commanding Officer concerned shall upon delivery or refusal, forward a letter report - setting for the full statement of the facts to COMDT (G-LMJ), via the chain of command, in the following areas:

(1) when delivery is refused

(2) when personnel are delivered from beyond the territorial limits of the requesting state or,

(3) when the advance approval of COMDT (G-L) was required.

B. ***Recovery of military personnel from civil authorities***

1. ***General rule***. For the most part, civil authorities will be able to arrest and detain servicemembers for criminal misconduct committed within their territorial jurisdiction and proceed to a final disposition of the case without interference from the military. Military authorities have no legal right or power to interfere with the civil proceedings.

a. ***Official duty exception***. The one exception to the general rule is that no state authority may arrest or detain for trial a member of the armed forces for a violation of state law done necessarily in the performance of official duties. This exception arises from the concept that, where the Federal Government is acting within an area of power granted to it by the Constitution, no state government has the right to interfere with

the proper exercise of the Federal Government's authority. It follows that members of the armed forces acting pursuant to lawful orders or otherwise within the scope of their official duties are not subject to state authority. This freedom from interference by the state applies only when the proper performance of a military duty ***requires*** violation of a state law—so that if one is driving a Navy vehicle on state highways on normal government business, the driver ***is*** subject to state traffic laws.

b. Whenever an accused is in the custody of civil authorities charged with a violation of local or state criminal laws as a result of the performance of official duties, the commanding officer should make a request to the nearest U.S. attorney for legal representation. This should be accomplished via the area coordinator, or naval legal service office, if practicable.

c. 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 the Judge Advocate General.

d. Where the U.S. attorney declines or is unable to provide legal services, the Judge Advocate General shall be advised in writing of the circumstances. In those cases in which the date set by the court for answer or appearance is such that time does not permit this communication through the usual methods, the Judge Advocate General shall be contacted immediately by telephone.

2. ***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, staff judge advocate, or similar official.

3. ***Command representatives.*** The command does not owe an accused who is held by civil authorities in the United States legal advice and should not take any action which could be construed as providing legal counsel to represent an accused. The command, however, may send a representative to contact the civil authorities for the purpose of obtaining information for the command. This representative may provide information to the court, prosecutor, or defense counsel concerning the accused's military status, the quality of his service, and any special circumstances that may aid the civil authorities in reaching a just and proper result; however, care must be taken not to violate the Privacy Act. Although more complete guidance is given in chapter 14 of this text, as a general rule, it is improper to release any personal information from the records of the accused (such as NJP results or enlisted performance marks) without either the servicemember's voluntary written consent or an order from the court trying the case.

4. ***Conditions on release of accused to military authorities***

a. If the member is released on his personal recognizance or on bail to guarantee his return for trial, the command may receive the servicemember. The commanding officer, upon verification of the attending facts, date of trial, and approximate length of time that should be covered by leave of absence, should normally grant liberty or leave to permit appearance for trial. JAGMAN, § 0611. CGPERSMAN 7-A22- Personal recognizance is an obligation of record entered into before a court by an accused in which he promises to return to the court at a designated time to answer the charge against him. Bail involves the accused's providing some security beyond his mere promise to appear at the time and place designated and submit himself to the jurisdiction of the court. Service in the armed forces does not release an accused of the duty to conform to the requirements of release on bond or recognizance.

b. There is no authority for accepting an accused subject to any conditions whatsoever. Commands may inform civilian authorities of the Navy's customary policy of granting leave or liberty to permit attendance at civilian trials, but the *JAG Manual* states only that Navy policy is to ***permit*** servicemembers to attend their trials—not to force such attendance. JAGMAN, § 0611. Further, military authorities are without power to place an accused in any sort of pretrial restraint based on the civilian charges.

c. An accused should not be accepted from civil authorities on the condition that disciplinary action will be taken against him. Issues such as accuser concepts or selective prosecutions could stop a command from acting. Evidentiary problems may exist. These matters could prevent disciplinary action, subsequently hurting command / community relationships. If a case is taken, the staff judge advocate and the trial counsel must work closely with the local prosecutor's office.

C. ***Special situations***

1. ***Interrogation by Federal civil authorities.*** Requests to interrogate suspected military personnel by the FBI or other Federal civilian investigative agencies should be promptly honored. Any refusal and the reasons therefor must be reported immediately to the Judge Advocate General. JAGMAN, § 0612 or COMDT (G-L).

2. ***Writs of habeas corpus or temporary restraining orders.*** JAGMAN, § 0615. Upon receipt of a writ of habeas corpus, temporary restraining order or similar process, or notification of a hearing on such, the nearest U.S. attorney should be immediately notified and assistance requested. A message or telephone report of the delivery of the process or notification of the hearing must be made to SECNAV (JAG) or COMDT (G-L) and confirmed by speed letter. *See* Appendix A-5-a, for the appropriate OJAG litigation point of contact. An immediate request for assistance is necessary because such matters frequently require a court appearance with an appropriate response by the government in a very short period of time. When the hearing has been completed and the

court has issued its order in the case, a copy of the order should be promptly forwarded to the Judge Advocate General.

3. ***Consular notification.*** Within the territory of the United States, whenever a foreign national who is a member of the U.S. armed forces is apprehended under circumstances likely to result in confinement or trial by court-martial, or is ordered into arrest or confinement, or is held for trial by court-martial with or without any form of restraint, or when court-martial charges against him are referred for trial, notification to his nearest consular office may be required. When any of the above circumstances occur, the foreign national shall be advised that notification will be given to his consul unless he objects and, in case he does object, the Judge Advocate General will determine whether an applicable international agreement requires notification irrespective of his wishes. SECNAVINST 5820.6 provides guidance and details on consular notification, including specifically the contents of the notice.

0502 FOREIGN CRIMINAL JURISDICTION OVER U.S. SERVICEMEMBERS

A. ***Aboard U.S. warships.*** A warship is considered an instrumentality of a nation in the exercise of its sovereign power. Therefore, a U.S. warship is considered to be an extension of U.S. territory. As such, it is under the exclusive jurisdiction of the United States, and is thus immune from any other nation's jurisdiction during its entry and stay in foreign ports and territorial waters as well as on the high seas. Attachment or libel in admiralty may not be taken or effected against a warship for recovery of possession, for collision damage, or for salvage charges. The commanding officer of a ship shall not permit his ship to be searched by foreign authorities nor shall he allow personnel to be removed from the ship by foreign authorities. If the foreign authorities use force to compel submission, the commanding officer should resist with the utmost of his power. Except as provided by international agreement, the rules for a shore activity are the same. *U.S. Navy Regulations*, 1990, Articles 0822, 0828. In addition, 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.

B. ***Overseas ashore***

1. ***Servicemembers.*** Military personnel visiting or stationed ashore overseas are subject to the civil and criminal laws of the particular foreign state ("territorial jurisdiction"). The United States has negotiated agreements, generally known as status of

forces agreements (SOFA's), with all countries where its forces are stationed. Under most 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. Exclusive jurisdiction exists when the act constitutes an offense against only one of the two states (e.g., unauthorized absence). Those areas constituting violations under both the UCMJ and foreign law are subject to concurrent jurisdiction. This situation raises the question of which state has "primary" jurisdiction. The United States will normally have primary jurisdiction over military personnel for:

a. Offenses solely against the property or security of the United States;

b. offenses arising out of any act or omission done in the performance of official duty; and

c. offenses solely against the person or property of another servicemember, a civilian employee, or a dependent.

The host country will retain the primary right to exercise jurisdiction in all other concurrent jurisdiction situations. If a servicemember commits a crime in which the host country has primary jurisdiction, the accused will be prosecuted under the laws and procedures of that country's criminal justice system and, if convicted, the accused will be punished in accordance with those laws. This rule exists unless the host country waives its primary right to exercise jurisdiction. This is possible because the United States always retains criminal jurisdiction under the UCMJ over all military personnel as an exercise of personal jurisdiction.

2. ***Civilians***. Special privileges and exceptions from the application of foreign local law to U.S. bases overseas are governed by a "Base Rights Agreement" between the two governments. Such agreements may provide for the exercise of police power by the United States within the confines of the base, 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. It is questionable whether any U.S. court has jurisdiction to try U.S. civilians for crimes committed overseas with the exception of crimes committed by civilian personnel while accompanying U.S. military forces into declared war zones.

C. ***U.S. policy***. It is the policy of the United States to maximize its jurisdiction and seek waivers in cases where it does not have primary jurisdiction. SECNAVINST 5820.4, Subj: STATUS OF FORCES POLICIES, PROCEDURES, AND INFORMATION, directs in paragraph 1-4(a) that "[c]onstant efforts will be made to establish relationships and methods of operation with host country authorities which will maximize US jurisdiction to

the extent permitted by applicable agreements." This means that requests for waiver of jurisdiction be made for all serious offenses committed by servicemembers regardless of the claims of exclusive jurisdiction by the host country or the lack of a status of forces agreement.

D. ***Reporting.*** Whenever a servicemember is involved in a serious or unusual incident outside of the United States, it will be reported to the Judge Advocate General, COMDT (G-L). Serious or unusual incidents will include any case in which one or more of the following circumstances exist:

1. Pretrial confinement by foreign authorities;

2. actual or alleged mistreatment by foreign authorities;

3. actual or probable publicity adverse to the United States;

4. congressional, domestic, or foreign public interest is likely to be aroused;

5. a jurisdictional question has arisen;

6. the death of a foreign national is involved; or

7. capital punishment might be imposed.

The reporting provisions of OPNAVINST 3100.6 (OPREP-3 Navy Blue Reports) apply in appropriate circumstances.

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. General rules in this area follow:

ARRESTED BY	PRIMARY JURISDICTION	CUSTODY
U.S. Authorities	U.S.	U.S.
Foreign Authorities	U.S.	Turn over to U.S.
U.S. Authorities	Foreign Country	U.S. custody until officially charged or agreement provides for U.S. custody until criminal proceedings completed
Foreign Authorities	Foreign Country	Host country may maintain custody or turn over to U.S. authorities until criminal proceedings completed

F. ***Authority to deliver.*** 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. Where a U.S. servicemember is in the hands of foreign authorities and is charged with the commission of a crime, regardless of where it took place, the commanding officer should report the matter to the Judge Advocate General, COMDT (G-L) and other higher authorities for guidance. Since expeditious release from foreign incarceration is a matter of utmost interest, delay should be avoided at all cost. To secure the release of U.S. military personnel held by foreign authorities, U.S. military authorities may give assurances that the servicemember will not be removed from the host country except on due notice and adequate opportunity by the foreign authorities to object to that action. In appropriate cases, military authorities may order pretrial restraint of the servicemember in a U.S. facility to ensure his or her presence at trial on foreign charges.

G. ***Procedural safeguards.*** If a servicemember is to be tried for an offense in a foreign court, he is entitled to certain safeguards. The rights guaranteed under the NATO SOFA include the following:

1. A prompt and speedy trial;

2. to be informed in advance of trial of the specific charge or charges made against him;

3. to be confronted with the witnesses against him;

4. to compel the appearance of witnesses in his favor if they are within the jurisdiction of the state;

5. to have legal representation of his own choice;

6. to have the services of a competent interpreter if necessary; and

7. to communicate with representatives of the U.S. Government and, when the rules permit, to have such representatives present at his trial.

These rights are also provided for in most nations where status agreements exist. The in-court observer, a judge advocate, is not a participant in the defense of the servicemember, but rather reports to higher authority as to whether the safeguards guaranteed by the SOFA were followed and whether or not a fair trial was received. Section 1037 of title 10, *United States Code*, authorizes the armed forces to pay counsel fees, bail, court costs, and other related expenses (such as interpreter's fees) for servicemembers tried in foreign courts.

0503 GRANTING OF ASYLUM AND TEMPORARY REFUGE

A. ***References***

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

2. SECNAVINST 5710.22, Subj: PROCEDURES FOR HANDLING REQUESTS FOR POLITICAL ASYLUM AND TEMPORARY REFUGE

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

B. ***Definitions***

1. ***Asylum***: Protection and sanctuary granted to a foreign national who applies for 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***: Protection afforded for humanitarian reasons to a foreign national under conditions of urgency to secure the life or safety of that person against imminent danger.

C. ***Synopsis of provisions***

1. The provisions of the basic references for granting asylum or temporary refuge to foreign nationals depend on where the request is made. Basically, if the request is made either in U.S. territory (the 50 states, Puerto Rico, territories or possessions) or on the high seas, the applicant will be received aboard the naval installation, aircraft, or vessel

where he seeks asylum. If a request for asylum or refuge is made in territory or territorial seas under foreign jurisdiction, the applicant normally will not be received aboard and should be advised to apply in person at the nearest American consulate or Embassy. Under these circumstances, an applicant may be received aboard and given temporary refuge only under extreme or exceptional circumstances where his life or safety is in imminent danger (e.g., where he is being pursued by a mob).

2. Regardless of the location of the unit involved, any action taken upon a request for asylum or refuge must be reported to CNO or CMC, as appropriate, by the fastest available means. Telephone or other voice communication is preferred but, in any case, an immediate precedence message (info: SECSTATE) must be sent confirming the telephone or voice radio report. All requests from foreign governments for release of the applicant will be referred to CNO / CMC and the requesting authorities shall be advised of the referral.

3. In any case, once an applicant has been received aboard an installation, aircraft, or vessel, he will not be turned over to foreign officials without personal permission from the Secretary of the Navy or higher authority, regardless of where the accepting unit is located.

4. Personnel of the Department of the Navy are prohibited from directly or indirectly inviting persons to seek asylum or temporary refuge. No information concerning a request for political asylum or temporary refuge will be released to the public or media without the prior approval of the Assistant Secretary of Defense for Public Affairs.

0504 SERVICE OF PROCESS AND SUBPOENAS

A. ***Service of process***: Part B, of the *JAG Manual* deals with service of process and subpoenas on personnel. Service of process establishes a court's jurisdiction over a person by the delivery of a court order to that person advising him of the subject of the litigation and ordering him 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.

1. ***Overseas***. A servicemember's amenability to service of process issued by a foreign court depends on international agreements (such as the NATO SOFA). Where there is no agreement, guidance should be sought from the Judge Advocate General. JAGMAN, § 0616c). *See* appendix A-5-a.

2. ***Within the United States***

a. ***Within the jurisdiction of the issuing court***. The commanding officer shall permit the service except in unusual cases where he concludes that compliance

with the mandate of the process would seriously prejudice the public interest. Personnel serving on a vessel within the territorial waters of a state are considered within the jurisdiction of that state for the purpose of service of process. Process should not be allowed within the confines of the command until permission of the commanding officer has been obtained. Where practicable, the commanding officer shall require that process be served in his or her presence or in the presence of an officer designated by the commanding officer. Commanding officers are required to ensure that the nature of the process is explained to the member. This can be accomplished by a legal assistance officer. JAGMAN, § 0616a.

b. ***Beyond the jurisdiction of the issuing court.*** Commanding officers will permit the service under the same conditions as within the jurisdiction, but shall ensure that the member is advised that he need not indicate acceptance of service. Furthermore, in most cases, the commanding officer should advise the person concerned to seek legal counsel. When a commanding officer has been forwarded process with the request that it be delivered to a person within the command, it may be delivered if the servicemember voluntarily agrees to accept it. When the servicemember does not voluntarily accept the service, it should be returned with a notation that the named person has refused to accept it. 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, the commanding officer should be notified and provided copies of the process and pleadings. The command shall ascertain the pertinent facts, coordinate with the local NLSO to notify JAG (Code 34) immediately by telephone, and forward the pleadings and process to that office. JAGMAN, § 0616b.

(1) A military member or civilian employee will be advised of the right to remove civil or criminal prosecutions from state court to Federal court when the action stems from an act done under color of office or when authority is claimed under a law of the United States respecting the armed forces. 28 U.S.C. § 1442a (1982). The purpose of this section is to ensure a Federal forum for cases when servicemembers and civilian employees must raise defenses arising out of their official duties.

(2) If a military member or civilian employee is sued in his or her individual capacity, that person may be represented by Justice Department attorneys in state criminal proceedings and in civil and congressional proceedings.

(3) When an military member or civilian employee believes he or she is entitled to representation, a request—together with pleadings and process—must be submitted to the Judge Advocate General via the individual's commanding officer. The commanding officer shall endorse the request and submit all pertinent data as to whether the military member or civilian employee was acting within the scope of employment at the time of the incident out of which the suit arose. If the Justice Department determines that

the military member or civilian employee's actions reasonably appear to have been performed within the scope of employment, and that representation is in the interest of the United States, representation will be provided. JAGMAN, § 0616b.

3. ***Service not allowed.*** In any case where the commanding officer refuses to allow service of process, a report shall be made to SECNAV (JAG) as expeditiously as the circumstances allow or warrant. JAGMAN, § 0616e.

4. ***Leave / liberty.*** In those cases where personnel either are served with process or voluntarily accept service of process, leave or liberty should be granted in order to comply with the process, unless it will prejudice the best interests of the naval service. JAGMAN, § 0616d.

B. ***Subpoenas.*** A subpoena is a court order requiring a person to testify in either a civil or criminal case as a witness. The same considerations exist in this instance as apply in the case of service of process, except for special rules where testimony is required ***on behalf of the United States*** in criminal and civil actions, or where the witness is a prisoner.

1. ***Witness on behalf of the Federal Government.*** Where Department of the Navy interests are involved and departmental personnel are required to testify for the Navy, 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. In the event Department of Navy interests are not involved, the member's command will issue orders and the Navy will be reimbursed by the Federal agency concerned. JAGMAN, § 0618a.

2. ***Witness on behalf of accused in Federal court.*** When naval personnel are served with a subpoena and the appropriate fees and mileage are tendered, commanding officers should issue no-cost permissive orders unless the public interest would be seriously prejudiced by the member's absence from the command. In those cases where fees and mileage are not tendered as required by the Federal Rules of Criminal Procedure, but the person subpoenaed still desires to attend, the commanding officer is authorized to issue permissive orders at no cost to the government. The individual should be advised that an agreement as to reimbursement for any expenses should be effected with the party desiring their attendance and that no reimbursement should be expected from the government. JAGMAN, § 0618b.

3. ***Witness on behalf of party to civil action or state criminal action with no Federal Government interest.*** The commanding officer normally will grant leave or liberty to the person, provided such absence will not prejudice the best interests of the naval service. If the member is being called as a witness for a nongovernmental party only because of performance of official duties, the commanding officer is authorized to issue the member permissive orders at no expense to the government. JAGMAN, § 0618b.

4. ***Witness is a prisoner.*** JAGMAN, § 0619.

a. ***Criminal cases.*** SECNAV (JAG) must be contacted for permission which normally will be granted. Failure to produce the prisoner as a witness may result in a court order requiring such production.

b. ***Civil action.*** The member will not be released to appear regardless of whether it is a Federal or state court making the request. A deposition may be taken at the place of confinement subject to reasonable conditions and limitations imposed by the prisoner's command.

5. ***Pretrial interviews concerning matters arising out of official duties.*** Requests for interviews and / or statements by parties to private litigation must be forwarded to the commanding officer / officer in charge of the cognizant naval legal service office or Marine Corps staff judge advocate. When practicable, arrangements will be made to have all such individuals interviewed at one time by all interested parties. These interviews will be conducted in the presence of an officer designated by the commanding officer / officer in charge, naval legal service office, or Marine Corps staff judge advocate who will ensure that no line of inquiry is permitted which may disclose or compromise classified information or otherwise prejudice the security interests of the United States. These requests will not be granted where the United States is a party to any related litigation or where its interests are involved, including cases where U.S. interests are represented by private counsel by reason of insurance or subrogation arrangements. Where U.S. interests are involved, records and witnesses shall be made available only to Federal Government agencies. JAGMAN, § 0620.

6. ***Release of official information for litigation purposes and testimony by Department of Navy personnel.*** SECNAVINST 5820.8 prescribes what information—testimonial and documentary—is releasable to courts and other government proceedings and the means of obtaining approval for the release of such information.

C. ***Jury duty.*** Active-duty servicemembers are exempted by 28 U.S.C. § 1863(b)(6) (1982) from service on Federal juries. Congress passed a similar exemption for state jury duty in the Defense Authorization Act of 1986 (codified at 10 U.S.C. § 982), but imposed a two-part test. Servicemembers may be excused if mission readiness is affected by the absence or if the absence unreasonably interferes with military job performance. SECNAVINST 5822.2, Subj: SERVICE ON STATE AND LOCAL JURIES BY MEMBERS OF THE NAVAL SERVICE, gives all commanders the authority to invoke the exemption for their personnel. If members do serve on a jury, they shall not be charged leave or lose pay. All fees, with the exception of actual expenses, will be turned over to the U.S. Treasury.

0505 JURISDICTION

A. ***Sovereignty defined.*** Relations between the United and a foreign government are governed by the concept of "sovereignty." Sovereignty is the exercise of governmental power over all persons and things within a defined area. A sovereign nation has the capacity to conduct its relations with other sovereign nations independent of external control (subject to certain rules imposed by international law). In this regard, all sovereign nations are considered to be equals.

B. ***Jurisdiction defined.*** The exercise of this sovereign power is usually expressed in the term "jurisdiction." Jurisdiction may be either territorial or personal. Territorial jurisdiction is that governmental control exercised over all persons and things in a specific geographical area, while personal jurisdiction is that governmental control exercised over certain persons (usually citizens) regardless of their physical location.

C. ***State and Federal Governments.*** Within the United States, there is a system of dual sovereignty where both the state and Federal Governments exercise a certain degree of sovereignty. The Federal Government has the greater authority in most areas in the event of conflict between the two sovereigns. In some areas, the Federal Government is granted exclusive jurisdiction (e.g., matters affecting interstate commerce).

D. ***Federal supremacy.*** As a result of this supremacy of Federal over state law, the armed forces are not subject to many of the restraints imposed by state laws. Likewise, when acting in the performance of official duties, a member of the armed forces may also be free of restraints which would otherwise be imposed by state law. For example, state law has no power to regulate the type of weapons which may be carried by military members while on duty. Military personnel in their private capacity, on the other hand, are generally subject to the laws of the state in which they are located—except for legislatively created exceptions such as the Soldiers' and Sailors' Civil Relief Act.

E. ***International law.*** Since relations with foreign countries is one of the areas reserved for the Federal Government, it follows that relations between U.S. military personnel and foreign governments or authorities are regulated completely between the Federal Government in this country and the authorities in the other countries. These relations are usually in the form of customary relationships or written treaties. Regardless of form, these relations are considered binding on the sovereign states and are known as international law. Since the armed forces are part of the Federal Government, they are subject to this international law as well as Federal and state law.

F. ***Federal jurisdiction over land in the United States***

1. References

a. *U.S. Const.*, Article I, § 8, cl. 17

b. Interdepartmental Committee for the Study of Jurisdiction over Federal Areas within the States, *The Facts and Committee Recommendations*, in Jurisdiction over Federal Areas within the States (Part I 1956)

c. Interdepartmental Committee for the Study of Jurisdiction over Federal Areas within the States, *A Text of the Law of Legislative Jurisdiction*, in Jurisdiction over Federal Areas within the States (Part II 1957)

d. 40 U.S.C. § 255 (1982)

e. Dept. of the Army Pamphlet 27-21, *Military Administrative Law*, ch. 6

2. ***Federal legislative jurisdiction***. Areas of land originally acquired by the United States or, if subsequently acquired, to which a state has made a complete cession of sovereignty to the Federal Government are known as exclusive Federal reservations. As to this land, the Federal Government possesses the exclusive right to ***legislate*** with respect to the particular land area and may enact general municipal laws applying within that area. This "area" concept of Federal jurisdiction must be distinguished from other legislative authority possessed by Congress which is dependent not upon "area" but upon "subject matter" and "purpose" and is predicated upon a specific grant of power to the Federal Government by the Constitution. Federal jurisdiction should be distinguished from Federal ownership of land. Federal jurisdiction is a sovereign power, whereas the ownership of land is a proprietorial action. Thus, it is possible for the United States to exercise jurisdiction over land it does not own.

3. ***Acquisition of jurisdiction***. There are three methods whereby the Federal Government may acquire legislative jurisdiction over land areas within a state. The first is by purchase of the land with the consent of the state. This is specifically provided for in the U.S. Constitution, Article I, § 8, cl. 17. Condemnations by the Federal Government are included in the term "purchase," but land leased by the Federal Government is not. The second method is cession by the state. This method, while not specifically provided for by the Constitution, developed by means of case law. The third method of Federal acquisition occurs when the Federal Government reserves to itself certain jurisdiction when the State is admitted to the union. The Federal Government, in effect, maintains the legislative jurisdiction it held when the state was a territory.

– ***Federal policy***. As a general rule, the Federal Government will not seek Federal jurisdiction over land. Concurrent jurisdiction may only be accepted where it is found necessary that the Federal Government furnish or augment the law enforcement otherwise provided by a state or local government. Exclusive jurisdiction may be accepted in those few instances where the peculiar nature of the military operation

necessitates greater freedom from the state and local law, or where the operation of state or local laws may unduly interfere with the mission of the installation.

G. ***Concurrent, partial, and proprietary jurisdiction***. There are three forms of jurisdiction, other than exclusive Federal jurisdiction, that the Federal Government may exercise over land area: concurrent legislative jurisdiction, partial legislative jurisdiction, and proprietary interest. The type of jurisdiction the Federal Government maintains determines the legislative authority that is exercised over the land area. Concurrent legislative jurisdiction exists when the state grants to the Federal Government the rights of exclusive jurisdiction over the land area, while reserving to itself the same authority it granted to the Federal Government. Due to the supremacy clause of the Constitution, the Federal Government has the superior right to carry out Federal functions without state interference. Nevertheless, state laws may be applicable within a concurrent jurisdiction area. Partial legislative jurisdiction refers to the situation where the state grants a certain measure of legislative authority over the area to the Federal Government, but reserves to itself the right to exercise—either alone or concurrently with the Federal Government—other authority constituting more than the right to serve civil or criminal process in the area. In this instance, each sovereign maintains partial legislative authority. The Federal Government has proprietary interest only in land when it acquires the degree of ownership similar to that of a landowner, but has not attained any portion of the state legislative authority over the area.

1. ***State criminal laws***. State criminal law normally extends throughout land areas in which the United States has only a proprietorial interest, throughout areas under concurrent jurisdiction, and in areas under partial jurisdiction to the extent covered by the retention of state authority under its grant of power.

2. ***Federal criminal laws***. Congress has enacted a comprehensive body of Federal criminal law applicable to lands within the exclusive or concurrent jurisdiction of the United States or the partial jurisdiction of the United States to the extent not precluded by the reservation of state authority. Most major crimes within such areas are covered by individual provisions of title 18, *United States Code*. (Note, however, that many offenses under title 18 are not dependent upon "legislative" jurisdiction.) In addition, the Uniform Code of Military Justice is applicable to military personnel wherever they may be. Many minor Federal offenses are not provided for in specific terms through Federal legislation. Instead, Congress has adopted the provisions of state law as Federal substantive law through the Assimilative Crimes Act, 18 U.S.C. § 13 (1982), *as amended by* 18 U.S.C. 3013 (1987). The overwhelming majority of offenses committed by civilians (employees and dependents) in areas under the exclusive criminal jurisdiction of the United States are misdemeanors (e.g., traffic violations, drunkenness). Since these offenses are not specifically covered by Federal statutory law, the civilian offender can usually be punished by a Federal magistrate or Federal district court under the Assimilative Crimes Act. In the case of civilian employees, applicable civilian personnel regulations should also be consulted. Prosecutions under the Assimilative Crimes Act do not enforce state law as such, but enforce Federal

criminal law, the substance of which has been adopted from state law. With respect to military personnel, the third clause of Article 134, UCMJ, assimilates state criminal law and permits prosecution by court-martial for violations to the extent that state law becomes Federal law of local application to the area under Federal legislative jurisdiction. Inasmuch as it is Federal law which is being enforced within an exclusive Federal reservation, state and municipal police authorities and other local law-enforcement officials generally have no jurisdiction within the particular exclusive Federal reservation. Thus, on such a military base, it is the base police and Federal marshals who have power to arrest offenders. Prosecution of a civilian for any offense is within the cognizance of the United States attorney acting before a United States magistrate or a United States district court. The Assimilative Crimes Act adopts state legislation only where there is no Federal statute defining a certain offense or providing for its punishment. Furthermore, when an offense has been defined and prohibited by Federal law, the Assimilative Crimes Act cannot be applied to redefine and enlarge or narrow the scope of the Federal offense. In general, a state criminal law which is contrary to Federal policy and regulation is not adopted under the Assimilative Crimes Act. Not all Federal regulations, of whatever type, however, will prevent the assimilation of state criminal law. On the other hand, the Assimilative Crimes Act may not necessarily adopt those state administrative or regulatory requirements that are legislative in nature (i.e., a regulatory commission making it a crime to pass a stop sign).

H. ***Federal Magistrates Act.*** Minor offenses committed by individuals within Federal reservations may be tried by Federal magistrates. The Department of Justice is primarily responsible for the prosecution of such offenses. When no representation of that Department is available, qualified Navy and Marine Corps judge advocates—with the approval of the cognizant U.S. Attorney—may serve as Special Assistant U.S. Attorneys and conduct prosecutions of minor offenses committed aboard Navy or Marine Corps installations. SECNAVINST 5822.1(A) addresses the implementation of the Federal Magistrates Act by the Department of the Navy.

0506 POSSE COMITATUS

A. ***References***

1. Posse Comitatus Act, 18 U.S.C. § 1385 (1982).

2. Military Cooperation with Civilian Law Enforcement Officials, 10 U.S.C. §§ 371-380 (1982), as amended.

3. DOD Dir. 5525.5 of 15 Jan 1986, DOD Cooperation with Civilian Law Enforcement Officials.

4. SECNAVINST 5820.7(B), Subj: COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS.

B. ***Statutory authority.*** The Posse Comitatus Act, 18 U.S.C. § 1385 (1982), provides that:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years or both.

C. ***Navy policy.*** Although not expressly applicable to the Navy and Marine Corps, the Act is regarded as a statement of Federal policy which has been adopted by the Department of the Navy in SECNAVINST 5820.7(C).

D. ***Direct participation.*** Military personnel are prohibited from providing the following forms of direct assistance:

1. Interdiction of a vehicle, vessel, aircraft, or other similar activity;

2. a search or seizure;

3. an arrest, stop and frisk, or similar activity;

4. use of military personnel for surveillance or pursuit of individuals, or as informants, undercover agents, investigators, or interrogators; and

5. any other activity which subjects civilians to the exercise of military power that is regulatory, proscriptive, or compulsory in nature.

E. ***"Armed forces" defined.*** The prohibitions are applicable to members of the Navy and Marine Corps acting in an official capacity. Accordingly, it does not apply to:

1. A servicemember off duty, acting in a private capacity, and not under the direction, control, or suggestion of DON authorities;

2. a member of a Reserve component not on active duty or active duty for training; or

3. civilian special agents of the Naval Investigative Service performing assigned duties under SECNAVINST 5520.3(B).

F. ***Exceptions***

1. ***Use of information collected during military operations.*** All information collected during the normal course of military operations which may be relevant

to a violation of Federal or state law shall be forwarded to the local Naval Investigative Service field office or other authorized activity for dissemination to appropriate civilian law-enforcement officials pursuant to SECNAVINST 5520.3(B). The planning and execution of compatible military training and operations may take into account the needs of civilian law-enforcement officials for information when the collection of information is an incidental aspect of training performed for a military purpose. The needs of civilian law-enforcement officials may even be considered in scheduling routine training missions. This does not, however, permit the planning or creation of missions or training for the primary purpose of aiding civilian law-enforcement officials, nor does it permit conducting training or missions for the purpose of routinely collecting information about U.S. citizens.

2. ***Use of equipment and facilities.*** Navy and Marine Corps activities may make available equipment, base facilities, or research facilities to Federal, state, or local civilian law-enforcement officials for law-enforcement purposes when approved by proper authority under SECNAVINST 5820.7(B).

3. ***Use of Department of the Navy personnel***

a. ***Military / foreign affairs purposes.*** Actions that are taken for the primary purpose of furthering a military or foreign affairs function of the United States (e.g., enforcement of the UCMJ, maintenance of law and order on a military installation, protection of classified military information or equipment) are not restricted by the Posse Comitatus Act regardless of incidental benefits to civilian law-enforcement authorities. Any vehicle or aircraft used for transport of drugs and seized for a legitimate military purpose is subject to forfeiture by the Drug Enforcement Administration under 21 U.S.C. § 881(a)(4) (1982).

b. ***Express statutory authority.*** Laws that permit direct military participation in civilian law enforcement include, inter alia, suppression of insurrection or domestic violence [10 U.S.C. §§ 331-334 (1982)], protection of the President, Vice President, and other designated dignitaries [18 U.S.C. § 1751 (1982)], assistance in the case of crimes against members of Congress [18 U.S.C. § 351 (1982)], and foreign officials and other internationally protected persons [18 U.S.C. §§ 112, 1116 (1982)].

c. ***Operation and maintenance of equipment.*** Where the training of non-DOD personnel is infeasible or impractical, Department of the Navy personnel may operate or maintain, or assist in operating or maintaining, equipment made available to civilian law-enforcement authorities. The request for assistance must come from agencies such as the Drug Enforcement Administration, Customs Service, or Immigration and Naturalization Service. Those agencies, in an emergency situation—determined to exist by the Secretary of Defense and the Attorney General—may use Department of the Navy vessels and aircraft outside the land area of the United States as a base of operations to facilitate the enforcement of laws administered by those agencies, so long as such equipment is not used to interdict or interrupt the passage of vessels or aircraft.

d. ***Training and expert advice***. Navy and Marine Corps activities may provide training on a small scale and expert advice to Federal, state, and local civilian law-enforcement officials in the operation and maintenance of equipment.

e. ***Secretarial authorization***. The DON Posse Comitatus Act policy is subject to Secretarial exceptions on a case-by-case basis.

4. ***Reimbursement***. As a general rule, reimbursement is required when equipment or services are provided to agencies outside DOD. When DON resources are used in support of civilian law-enforcement efforts, the costs shall be limited to the incremental or marginal costs incurred by DON.

0507 TERRORISM

A. ***References***

1. Memorandum of Understanding Between Department of Defense, Department of Justice, and the Federal Bureau of Investigation, Subj: USE OF FEDERAL MILITARY FORCE IN DOMESTIC TERRORIST INCIDENTS.

2. DOD Dir. 2000.12 of 12 Feb 1982 and 16 July 1986, Protection of DOD Personnel and Resources Against Terrorist Acts.

3. MCO 3302 of 23 Nov 1984, Subj: COMBATTING TERRORISM.

B. ***Background***. History is replete with examples of individuals, groups, and other national leaders who have employed terror tactics for one reason or another. Intimidation is not a new phenomenon. Robespierre used terror tactics to destroy the French aristocracy in the eighteenth century when an estimated 40,000 people were put to death by one means or another. The Russian Socialist Revolutionaries attempted to use terror tactics to overthrow the Tzar at the beginning of this century only to be thwarted by the Bolsheviks who combined the strategy of mass with terror to succeed where pure terrorism had failed. But pure terrorism has been remarkably successful in the twentieth century. The exploits of the Irgun Zvai Leumi and the Stern Gang in Palestine, the Eoka B Group in Cyprus, and the FLM in Algeria are only some examples of that success. In recent years, terrorism has become a worldwide phenomenon. In international terrorist incidents, the principal target has been the United States, with over one-third of all incidents directed at Americans (both domestically and overseas), including a significant and growing percentage of attacks on American military personnel. Such acts of terrorism directed at naval personnel, activities, or installations have the potential to destroy critical facilities, injure or kill personnel, and impair and delay accomplishment of a command's mission. Significantly, the fact that acts of terrorism may claim innocent bystanders or victims is of little consequence to the pure terrorist who is ideologically or politically motivated and

employs violence or force for effect; in essence, for its dramatic impact on the audience. The phenomenon of terrorism today has been influenced to a large degree by a number of factors, such as: (1) Highly efficient newsprint media and prime-time television; (2) modern global transportation; and (3) technological advances in weaponry. Terrorist tactics include, primarily, bombing (67% of all terrorist incidents) and, secondarily, arson, hijacking, ambush, assassination, kidnapping, and hostage-taking. One Rand Corporation survey shows that terrorists, who use kidnapping and hostage-taking for ransom or political bargaining purposes, have:

1. An 87% probability of seizing hostages;

2. a 79% chance that all members of the terrorist team will escape punishment or death, whether successful in their endeavors or not;

3. a 40% chance that all or some of their demands would be met in operations when something more than just safe passage or exit permission was demanded;

4. a 29% chance of compliance with such demands;

5. an 83% chance of success where safe passage or exit for terrorists or others was the sole demand;

6. a 67% probability that, if the principal demand were rejected, all or nearly all of the terrorist team could still escape by going underground, accepting safe passage in place of their original demands, or surrendering to a sympathetic government; and

7. virtually a 100% probability of gaining major publicity.

The terrorist, then, must be considered a formidable adversary.

C. ***"Terrorism" and "terrorists" defined.*** Terrorism is defined in DOD Dir. 2000.12 of 12 Feb 1982 as the "unlawful use or threatened use of force or violence by a revolutionary organization against individuals or property, with the intention of coercing or intimidating governments or societies, often for political or ideological purposes." Among these "crusaders," there are today minority nationalist groups, Marxist revolutionary groups, anarchist groups, and neo-Fascist and extreme right-wing groups, many of whose operations transcend national boundaries in the carrying out of their acts, the purposes of their acts, or the nationalities of their victims. Frederick J. Hacker, in his book, *Crusaders, Criminals and Crazies*, has grouped terrorists into three distinct groups: (1) The politically or ideologically motivated crusader; (2) the criminal who commits terrorist acts for personal, rather than ideological, gain; and (3) crazies or mentally ill people who commit terrorist acts during a period of psychiatric disturbance. Only the first group falls clearly within the DOD definition of terrorism.

D. ***U.S. policy.*** U.S. policy on terrorism is clear: All terrorist acts are criminal. The U.S. Government will make no concessions to terrorists. Ransom will not be paid, and nations fostering terrorism will be identified and isolated. Defensive measures taken to combat terrorism are referred to as antiterrorism and are used by DOD to reduce the vulnerability of DOD personnel, their dependents, facilities, and equipment to terrorist acts. Counterterrorism, meanwhile, refers to offensive measures taken to respond to a terrorist act, including the gathering of information and threat analysis in support of those measures. Since a consistent objective of terrorists is to achieve maximum publicity, a principal objective of the U.S. Government is to thwart the efforts of terrorists to gain favorable public attention and, in doing so, to clearly identify all terrorist acts as criminal and totally without justification for public support. Further, when U.S. military personnel are identified as victims of terrorism, it is DOD policy to limit release of information concerning the victim, his or her biography, photographs, lists of family members or family friends, or anything else which might create a problem for the victim while in captivity. Withholding such information, which will be made public at a later date, may well be the action that saves the victim from additional abuse or even death. It is a case where protection of the potential victims, operational security considerations, and counterterrorism efforts override standard public affairs procedures.

E. ***Agency responsibilities***

1. ***General.*** In responding to terrorist incidents, the lead agency in the Department of Defense is the Department of the Army. Within the United States, the Department of Justice (FBI) is assigned the role of lead agency for the Federal Government—with the exception of acts that threaten the safety of persons aboard aircraft in flight, which are the responsibility of the Federal Aviation Administration.

2. ***Outside military installations in U.S.*** The use of DOD equipment and personnel to respond to terrorist acts outside military installations is governed generally by the legal restrictions of the Posse Comitatus Act, discussed above. The direct involvement of military personnel in support of disaster relief operations or explosive ordnance disposal is permissible. Moreover, the loan of military equipment, including arms and ammunition, to civilian law-enforcement officials responding to terrorist acts viewed as a form of civil disturbance is also considered permissible, subject to the approval of proper military authority. Under the Memorandum of Understanding (MOU) Between Department of Defense, Department of Justice, and the Federal Bureau of Investigation concerning the use of Federal military forces in domestic terrorist incidents, the use of DOD personnel to respond to terrorist acts outside military installations in the United States is authorized only when directed by the President of the United States. One organization available for such action is the Counter Terrorism Joint Task Force, composed of selected units from all of the armed forces.

3. ***On military installations in U.S.*** When terrorist activities occur on a military installation within the United States, its territories and possessions, the FBI's Senior

Agent in Charge (SAC) for the appropriate region must be promptly notified of the incident. The SAC will exercise jurisdiction if the Attorney General or his designee determines that such an incident is a matter of significant Federal interest. Military assistance in such an event may be requested without Presidential approval, but such assistance must be provided in a manner consistent with the provisions of the MOU, including the requirement that military personnel remain under military command. If the FBI declines to exercise its jurisdiction, the military commander must take appropriate action to protect and maintain security of his command as required by Articles 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 (such as utilizing a Crisis Response Force (OPNAVINST 5530.14)] as may be necessary to protect life or property.

4. ***Outside U.S.*** Outside the United States, its territories and possessions, where U.S. military installations are located, the host country has the overall responsibility for combatting and investigating terrorism. Within the U.S. Government, the Department of State has the primary responsibility for dealing with terrorism involving Americans abroad and for handling foreign relations aspects of domestic terrorist incidents. The planning, coordination, and implementation of precautionary measures to protect against, and respond to, terrorist acts on U.S. military installations remains a local command responsibility. Contingency plans will necessarily have to address the use of installation security forces, other military forces, and host nation resources and must be coordinated with both host country and State Department officials. Outside U.S. military installations located in a foreign country, U.S. military assistance, if any, may be rendered only in accordance with the applicable SOFA after coordination with State Department officials. Applicable international law in this area, in addition to the SOFA and other memorandums of understanding or agreement, include the Tokyo, Hague, and Montreal Conventions on aircraft hijacking, the 1977 European Convention on the Suppression of Terrorism, the U.N. Convention on Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents, the OAS Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion That are of International Significance, and customary international-law norms such as self-help.

F. ***Judge advocate's role.*** The judge advocate's role in combatting terrorism is severalfold. First, he may get involved in the proactive phase of reviewing contingency plans. For example, each command—under physical security regulations—is required to publish an instruction dealing with hostage situation procedures. Second, when a potential terrorist incident arises, the judge advocate may become involved in the reactive phase by providing advice on issues (such as when the FBI must be called in) or "negotiating" with the terrorists or civil law-enforcement authorities in the United States, or the State Department and host country representatives abroad.

CHAPTER VI

STANDARDS OF CONDUCT AND GOVERNMENT ETHICS

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CHAPTER VI

STANDARDS OF CONDUCT AND GOVERNMENT ETHICS

PART A: INTRODUCTION

0601 STANDARDS OF CONDUCT REFERENCES

A. 18 U.S.C. 201, 203, 205, 208, 209

B. 5 C.F.R. Parts 2634, 2635, 2636, 2639, 2640

C. DoD 5500.7-R; Joint Ethics Regulation (JER)

0602 PURPOSE AND SCOPE

A. ***Why do we need "Standards of Conduct"?***

1. The principle purpose of the Standards of Conduct is to ensure that federal employees serve the public good, rather than private or personal interests. The rules we have imposed upon ourselves result from a recognition that the Department of the Navy must have the full faith and confidence of the American public if we are to best carry out the national defense mission. To maintain public support, the American citizen must believe in our institutional integrity. To maintain the institutional integrity of the Navy and Marine Corps, there must be individual integrity at every level in the chain of command.

2. To deter unethical conduct, our ethical rules bar specific wrongful acts, such as bribery. Such rules also prescribe behavior with regard to a broad range of general situations that pose the potential to develop into, or could lead a reasonable person to perceive, either wrongful acts or an abuse of the public trust. At the same time, the rules seek to balance the idea of conflict-free government with the reality of complex human situations, relationships and interactions. This is why the rules seem so detailed and full of exceptions; we attempt to tailor the rules to permit actions that do not seriously implicate the concerns behind the rules.

B. ***Office of Government Ethics (OGE) Regulations.*** Prior to February 1993, each agency within the Executive Branch had its own separate ethical code. In signing Executive Order 12674 (as amended by Executive Order 12731), President Bush directed that the OGE promulgate a "single, comprehensive, and clear set of executive branch standards of conduct that shall be objective, reasonable and enforceable." These regulations are codified at 5 C.F.R. Part 2635 and went into effect on February 3, 1993.

C. ***DoD's Joint Ethics Regulation (JER).*** DoD 5500.7-R was published on August 30, 1993. It implements, and ***further supplements***, the OGE regulations for the military services. The JER should be the starting point for any question or issue regarding governmental ethics and is a ***must*** reference for every Legal Office in the fleet.

0603 APPLICATION. Although the OGE regulations are generally only applicable to commissioned officers and civilian employees, the JER has made the standards of conduct contained in 5 C.F.R. Part 2635 applicable to enlisted personnel, subject to minor exceptions. See JER 1-300. Reservists performing official duties, including while on inactive duty for training or while engaged in any activity related to the performance of official duties, are also considered "DoD Employees" for purposes of the JER. See JER 1-211. Post-government employment restrictions may apply to former or retired officers.

0604 ENFORCEMENT. Supervisors may sanction violations of the Standards of Conduct in a number of ways.

A. ***Administrative sanctions.*** The most common remedy is some form of administrative action such as letters of reprimand, poor evaluation marks, or removal from positions of trust. Those administrative tools provide an immediate means of correcting developing ethics problems.

B. ***Criminal sanctions.*** Although the OGE regulations themselves do not establish criminal sanctions, the underlying statutes do. For example, a person who accepts outside compensation for performing official duties not only violates the Standards of Conduct, but also violates 18 U.S.C. 209 and may be subject to prosecution in federal court.

C. ***Uniform Code of Military Justice.*** Violations of the Standards of Conduct by military personnel may be punishable under the Uniform Code of Military Justice. The JER is a punitive general regulation and applies to all military members without further implementation. DOD Directive 5500.7 § B.2.a. Potential UCMJ violations include:

1. Failure to obey order or regulation (Art. 92)

2. Bribery and graft (Art. 134)

3. Wrongful disposition of government property (Art. 108, 109)

4. Conduct unbecoming an officer (Art. 133)

0605 GENERAL PRINCIPLES

A. The General Principles of the Standards of Conduct, originally declared in Executive Order 12674, 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. Specific ethical rules may be interpreted and applied to permit a wide range of conduct, provided that the activity 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:

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 personal interests in conflict with their official duties.

4. Employees must act impartially in the performance of official duties.

5. Employees must protect and conserve the property and resources entrusted to the federal government by the taxpayers.

6. Employees must disclose fraud, waste, abuse, and corruption to appropriate authorities.

C. ***Catch-All.*** Employees are also required to "avoid any actions creating the appearance that they are violating the law or the ethical standards." This is a test that says "if it looks bad, it is bad." Such a subjective standard may be extremely difficult to apply; the OGE regulations state that in judging an appearance problem, one must use "the perspective of a reasonable person with knowledge of the relevant facts." The rules require an employee, when faced with an ethical conflict, even if only one of appearance, to always err on the side of the public interest.

0606 ETHICS COUNSELORS

A. Because of the complexity of the rules regarding the Standards of Conduct, the regulations establish Ethics Officials in each agency. These Designated Agency Ethics Officials (DAEO's) have established a number of "Ethics Counselors" throughout each agency to provide advice and assistance to employees regarding Standards of Conduct issues.

B. Ethics Counselors for the Department of the Navy include: General Counsel for major Navy activities; Commanding Officers of Navy Legal Service Offices (NLSO's); OIC's of NLSO Detachments, if serving in grade O-4 and above, and; Staff Judge Advocates for officers exercising general court-martial authority. See, DoN General Counsel memorandum, "Designation of Deputy Designated Agency Ethics officials (DAEO's) and Ethics Counselors," dated 25 Jan 96, for a complete listing.

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 counselor, provided the employee made full disclosure of all relevant facts to the counselor. 5 C.F.R. 2635.107(b). This provision does not insulate a person from liability for violations of Title 18, United States Code, but reliance upon the advice of an ethics official is a factor considered by the Department of Justice in deciding whether to prosecute.

D. Disclosures made to an ethics official are **not** protected by the attorney-client privilege. 5 C.F.R. 2635.107; 28 U.S.C. 535. Persons acting as an ethics counselor 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.

0607 TRAINING REQUIREMENTS. All DoD employees must receive initial ethics training within 90 days of entering federal service. JER 11-301. In addition, all employees who are required to file financial disclosure statements, contracting officers, and procurement officials shall receive annual ethics training. JER 11-302. The training must last at least one hour, and must be conducted by a "Qualified Individual." A Qualified Individual 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. 5 C.F.R. 2638.702. The training must review, at a minimum: Part I of Executive Order 12674, Principles of Ethical Conduct for Government Officers and Employees (JER 12-100); 5 C.F.R. Part 2635 (JER 2-100); and, the JER itself.

PART B: GIFTS

0608 GIFTS FROM OUTSIDE SOURCES (5 C.F.R. 2635, Part B)

A. ***General rule.*** Federal employees are forbidden from soliciting or coercing gifts, or accepting gifts given because of the employee's official position. This would be using public office for private gain. Further, employees may not accept gifts given by a "**prohibited source**," is defined as a person or entity that seeks action or does business with the agency, or is affected by the performance of official duties (5 C.F.R. § 2635.20(d)). This limitation as to "prohibited sources," most likely to be defense contractors or those who wish to become defense contractors, is based on concerns over "quid pro quo" – that gifts will be given with the expectation that the employee will remember such kindness at a later time. Even if such conduct does not actually occur, there is a significant appearance problem when federal officials take gifts from those doing business with the government.

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 are specifically excluded from the definition of "gift":

1. *Snacks*: modest items of food (coffee, donuts, etc.), offered other than as part of a meal.

2. *Trinkets*: items with little intrinsic value such as cards, trophies, or plaques.

3. *Widely available benefits*: loans, benefits or discounts generally available to public or all military personnel (e.g., military discounts at local stores, restaurants, apartment complexes).

4. *Prizes*: awards from contests open to the public, unless entry was part of one's official duty.

5. *Government-provided*: items paid for by the government or accepted by the government; see also 41 C.F.R. Part 304-1.

6. *Market value*: anything for which the employee paid market value.

See, 5 C.F.R. 2635.203(b).

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. See, 5 C.F.R. 2635.204. Some of the exceptions include:

1. *De Minimis Exception*: Most employees may accept unsolicited gifts worth $20 or less; procurement officials may accept gifts worth $10.00 or less (FAR 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 a calendar year.

2. *Personal Relationship Exception*: Employees may accept gifts that are in fact based on a personal, unofficial relationship rather than the official position of employee. The exception is very fact-specific; factors such as who paid for the gift and the nature and history of the personal relationship are of particular relevance.

3. *Group Benefits and Discounts*: Non-discriminatory benefits that are available to all employees may be accepted if they are: reduced fees for joining a professional organization; offered to broad segment of population in addition to the government employees, or; offered by a non-prohibited source.

4. *Awards*: Awards of $200 or less may be accepted if they are received subject to an established recognition program for meritorious service, and given by a person or entity other than a prohibited source. An agency ethics official may approve a greater award under certain circumstances.

5. *Employee Moonlighting or Working Spouse Exception*: Federal employees may accept gifts arising from their outside employment activities, or the business activities of their spouses. The gifts must not be related to the Federal employee's official duties, or offered because of one's government status. Any gift must also be of a type customarily provided by employers or prospective employers. With respect to prospective employer gifts, the employee must be disqualified from any future actions involving the outside employer before accepting any gift.

6. *Widely Attended Gathering Exception*: Employees may accept an offer of "free attendance" at a gathering or event from the sponsor of the event, under two circumstances.

a. Speaking. If the employee is assigned to participate or speak at the event as an agency representative; or

b. Agency Interest. If the event will be widely attended by persons

throughout an industry, or representing a range of interests, the employee's supervisor may permit attendance based on a determination that the attendance will further agency programs or operations.

"Free attendance" includes items such as food, entertainment and instruction, or materials furnished to all attendees as an integral part of the event, but does not include transportation, lodging or collateral entertainment.

7. *Social Exception*: Employees may freely attend parties and enjoy food and entertainment provided, so 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 a 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. *Foreign Gifts Exception*: Employees may accept and keep (but never solicit) 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 (currently $225). Even if greater than $225, gifts may be accepted on behalf of the Department of the Navy. All decorations, awards, and gifts from foreign governments to U.S. naval military and civilian personnel, and their spouses and dependents, must be processed under the procedures outlined in chapter 7 of SECNAVINST 1650.1E, Navy and Marine Corps Awards Manual.

10. *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 justified by community relations and approved by one's supervisor.

D. Notwithstanding the foregoing exceptions, federal employees may not accept any gifts in the following specific circumstances (5 C.F.R. 2635.202(c)):

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 Department of the Navy.*** The Department of the Navy may accept gifts given to the Department or to certain commands under specific circumstances outlined in the SECNAVINST 4001.2 series. 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, employees may not solicit gifts, even if for the Navy.

F. ***Disposition of gifts received.*** 5 C.F.R. 2635.205.

1. In some instances, an employee may receive a gift that can't be accepted. In those cases, the employee must either return it, pay for it, or accept it on behalf of the agency (where authorized). If the gift is perishable, 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 can't 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.

0609 GIFTS BETWEEN EMPLOYEES (5 C.F.R. 2635, Part C)

A. ***General.*** The Standards of Conduct generally prohibit employees from giving gifts to superiors or their families, and bar superiors from accepting gifts from subordinates, unless specifically permitted under narrowly defined exceptions.

B. ***Exceptions.*** The exceptions to the general prohibition on gifts between employees of different grades 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. The analysis of whether the exception applies is necessarily fact-specific and may pose additional concerns (i.e., fraternization).

2. *Tokens.* On an occasional basis, employees may give token gifts (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. The exception would not permit such gifts to become routine. Even the giving of token gifts, if made on a frequent, non-occasional basis, would violate the regulations.

3. *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. This exception permits employees to invite the Boss to dinner without forcing service of low-cost fare. It also permits

employees to bring traditional gifts, such as a bottle of wine, if invited to their supervisor's residence. The meals and guest gift, however, must be reasonable and commensurate to the occasion. Extravagant gifts or meals would be viewed as an attempt to give an illegal gift.

4. *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). It is common practice in the Department of the Navy to present departing superiors with a gift given from a collective group (e.g., the wardroom, the chief's mess). Employees are permitted to solicit other employees for **voluntary** contributions of **nominal** amounts (not to exceed $10) for an appropriate gift to be presented to an official superior. However, the senior may not accept any gift from a "donating unit" where the market value of the gift exceeds $300. JER 2-203. This dollar limitation applies regardless of the size of the group. Attempts to circumvent the $300 limit by subdividing the command into separate donating groups (i.e., offices, departments, division, etc.) will in all likelihood fail the reasonableness test. While the intention may be to show a departing senior how much he or she is respected, to interpret these rules "loosely" places the senior in a very awkward and potentially career-degrading position.

PART C: CONFLICTS OF INTEREST

0610 CONFLICTING FINANCIAL INTERESTS (5 C.F.R. 2635, Part D)

A. ***Disqualifying financial matters.*** Employees are prohibited by criminal law from personally and substantially participating in official matters in which they have a private financial interest, actual or imputed, if the official action will have a direct and predictable effect on the private interest. 18 U.S.C. 208(a); 5 C.F.R. 2635.402. Conflicting financial interests are of particular concern to those employees in procurement and contracting functions.

B. ***Definitions.*** Actual definitions, always important in regulations, are particularly important in the ethics area. 5 C.F.R. 2635.402(b).

1. *Personal and substantial.* Direct and significant involvement is required. It includes active supervision of the participation of a subordinate in the particular matter.

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 prospective employment.

3. *Direct and predictable.* Actions have a "direct and predictable effect," for purposes of the regulation, when the effect is closely linked, not based on unrelated matters and not speculative. The actual amount of the direct effect is irrelevant.

C. ***Disqualification.*** Employees faced with a conflict of interest must disqualify themselves from further participation in the matter and provide **written notice of their disqualification** to the appropriate supervisor. JER 2-204. Superiors may remediate conflicts of interest by issuing waivers, reassigning tasks or placing limitations on duties, or by ordering divestiture of the conflicting private interest. 5 C.F.R. 2635.402(d) and (e).

D. ***Financial Disclosure Reports (5 C.F.R. 2634)***

1. *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.

a. 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 file a public disclosure report. JER 7-200.a.; 5 C.F.R. 2634.202.

b. Filing deadline. The report must be filed within thirty days of assuming the covered position. If the report is late, the employee may be required to pay a late filing fee of $200. JER 7-203; 5 C.F.R. 2634.201.

c. Contents. In the report, the employees must generally list their financial interests and holdings over $1000. 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.

d. 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 Ethics Counselor detects conflicts, the employee is notified. The employee may respond by challenging the determination of conflict, or may apply the Ethics Counselor's advice to resolve the conflict of interest. The report is then forwarded to the Agency Ethics Official for review. The report remains 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 - 2634.605.

2. *Confidential Financial Disclosure Reports (SF-450).* The purpose of the confidential financial disclosure report is to uncover actual or potential conflicts of interest involving 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.

a. Those who must file the confidential report include commanding officers/executive officers of Navy shore installations with 500 or more military or DoD civilian personnel, and commanding officers/executive officers of all Marine Corps installations, bases, air stations, or activities. In addition, the report must be filed by other employees who participate personally and substantially in contracting or procurement, auditing 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.

b. *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.

c. *Contents.* In the report, the employees must list their financial interests and holdings over $1000. JER 7-304; 5 C.F.R. 2634.907.

d. *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.

e. *Status reports.* Ethics Counselors are required to file a status report with the Agency Ethics Official not later than 15 December 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. JER 7-309.

0611 IMPARTIALITY IN OFFICIAL DUTIES (5 C.F.R. 2635.502). In order to foster public confidence in the government, the Standards of Conduct prohibit employees from acting in matters where a reasonable person would question the employee's impartiality. Where an employee believes there may be impartiality concerns raised, she must so inform her supervisor and wait until the supervisor has authorized further participation in the matter. Note that this section might prohibit some actions that would not otherwise constitute a "conflict of interest" under 18 U.S.C. 208 for lack of either financial motive or imputed interest.

0612 SEEKING OTHER EMPLOYMENT (5 C.F.R. 2635, Part F)

A. ***General***. A federal official is not permitted to take any official action with regard to a prospective employer with whom the federal employee is seeking employment. 5 C.F.R. 2635.604. It is assumed that there will be at the very least an appearance problem over whether a federal employee may maintain impartiality with regard to a prospective civilian employer.

B. ***Definitions***.

1. "*Seeking Employment.*" An employee becomes subject to this rule where he/she has: directly or indirectly engaged in employment negotiations; made an unsolicited communication to any person regarding possible employment, such as sending a resume to a particular employer (as opposed to a mass resume mailing); or, made a response, other than an outright rejection, to an unsolicited communication from any person regarding employment.

2. An employee is no longer "seeking employment" when either party to the negotiations makes a rejection and discussions have terminated, or when two months after dispatch of a resume there is no sign of interest on the employer's part.

C. ***Disqualification***. When faced with this potential conflict, the member must give the supervisor a **written notice of disqualification**. JER 2-204. As long as the employee provides timely notice and recusal, the employee may accept the interviews, including associated travel, lodging and meals, even if given from a prohibited source. 5 C.F.R. 2635.204(e)(3).

D. ***Additional reporting requirements***. With the National Defense Authorization Act for FY-96, Congress repealed 10 U.S.C. Sec 2397a (which required certain procurement officials to report employment contacts) and amended the Procurement Integrity Act. 41 U.S.C. 423(c) now requires employees involved in procurement actions to report employment contacts with any bidder/offeror in that procurement action. This report must be made in writing to the employee's supervisor, along with disqualification from further personal or substantial participation (unless employment is rejected). Civil penalties for failure to report are expressly provided for.

0613 ASSIGNMENT OF RESERVISTS (JER 5-408). Commanding officers must ensure that reservists performing training are not assigned duties which may give rise to actual or apparent conflicts of interest. Reservists have affirmative obligations to disclose any potential conflicts to superiors and assignment personnel.

PART D: MISUSE OF POSITION

0614 USE OF OFFICIAL POSITION (5 C.F.R. 2635.702). Federal employees may not use public office for private gain. Therefore, employees may not use their official positions to endorse products or services, coerce benefits, help friends, or give any appearance of official "approval" of activities.

0615 MISUSE OF NON-PUBLIC INFORMATION (5 C.F.R. 2635.703). Employees may not use "non-public information" for personal benefit, or allow its improper use by others. "Non-public information" includes: information exempt from release under 5 U.S.C. 552 (FOIA), or otherwise protected by statute, Executive Order or regulation; information designated as confidential; and, information not released to the general public nor authorized for release.

0616 MISUSE OF GOVERNMENT RESOURCES (5 C.F.R. 2635.704, 705)

A. ***General.*** Federal employees shall not misuse government property. Nothing will outrage the taxpayers more than seeing employees utilizing public property for private purposes. 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 or aircraft are clearly improper.

1. One of the most recent cases of the American people perceiving an abuse of government resources involves DoD's use of military aircraft (MILAIR) in support of official travel. After several highly critical media reports intimated that senior military personnel used MILAIR as a means of personal convenience in their official travels, at great expense to the taxpayer, Congressional interest was piqued. After numerous investigations, the end result was a Deputy SECDEF memo, "DoD Policy on the Use of Government Aircraft and Air Travel," dated 01 Oct 95, that specifically addressed the need to "prevent misuse of transportation resources ***as well as the perception*** of their misuse" (emphasis added). In general, MILAIR may not be used if commercial airline or aircraft service is reasonably available, absent highly unusual circumstances.

2. The controversy involving MILAIR is not unique – similar concerns are periodically raised regarding use of government vehicles and gigs/barges. Anything that can be viewed as a "perk" of federal employment is fair game.

3. Government communication systems (telephones, FAX's, e-mail, etc.) are for official use and authorized purposes only, although no-cost, no-interference-with-

duty use for minor, necessary personal business is authorized. JER 2-301 (Note: this section was significantly expanded in Change 2 to the JER).

4. The OGE regulations provides little concrete guidance in what is and what is not misuse of government resources. Much is left to the discretion of command authorities in defining what are appropriate uses for the resource involved. For example, commanding officers can allow certain property to be used in support of non-Federal entities and in support of employee professional development (see, JER 3-211 and 2-301). Care and sound judgment must be exercised to ensure that public confidence is maintained.

B. ***Use of official time***. Federal officials must 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. This rule bars such misuse as ordering junior personnel to trim the lawn of a superior or to provide off-duty taxi service.

PART E: OUTSIDE ACTIVITIES

0617 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 does not conflict with the General Principles (*See 0605*). Specifically, personnel may not engage in outside employment that interferes with official time or duties, involves conflicts of interest, violates regulations, or creates an appearance of impropriety. In addition, military members may be required to obtain 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. 18 U.S.C. 209, JER 5-404 & 405. Second, employees may not act as agents for anyone other than family members, in any matter in which the U.S. government has an substantial interest or is a party. 18 U.S.C. 205, JER 5-403. Certain employees, such as attorneys and physicians, have additional professional restrictions on moonlighting activities.

0618 COMMERCIAL DEALINGS BETWEEN DOD PERSONNEL (JER 5-409). Because of the potential for coercion inherent in the military rank system, seniors shall not solicit or make any sales, either on-duty or off-duty, to personnel who are junior to them. This prohibition includes the solicited selling of insurance, stocks, mutual funds, real estate, cosmetics, household supplies, vitamins or other goods or services. The effect of this rule is that officers and senior enlisted involved in selling networks (e.g., AMWAY distributors) have a very limited audience which they can legally solicit or sell

to. There are two narrow exceptions to this rule. First, where absent of coercion or intimidation, seniors may sell or lease non-commercial personal or real property to junior personnel. Second, they may make sales in a retail store during off-duty employment. Where the spouse or other household member of a DoD employee engages in commercial solicitation of junior personnel or their families, the employee's supervisor **must** consult an Ethics Counselor and advise the employee to avoid such activity where prejudicial to good order, discipline, or morale.

0619 TEACHING, SPEAKING, AND WRITING (5 C.F.R. 2635.807)

A. ***Related to official duties.*** 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 non-public information, the subject deals with the employee's official ongoing duties or those within past year, or the subject relates to any ongoing or announced policy, program, or operation of the agency. Separate and apart from compensation is the issue of whether policy and security reviews may be required before dissemination is made. See SECNAVINST 5720.44 series (Public Affairs Manual).

B. ***Exception for certain courses.*** The rules provide an exception to the foregoing compensation prohibition for persons who engage in teaching at an approved school. Employees may be paid for teaching, even if it relates to official duties, if the course is part of 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 local, state, or Federal government.

C. ***Use of official title.*** 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. ***Honoraria.*** The JER still contains a section regarding the so called "Honoraria Ban" (5 C.F.R. Part 2636). This regulation was initiated in 1989 as a reaction to excessive speaking and writing fees received by some highly placed government officials. The rule sought to prohibit the collection of **any** fee for speaking, appearing, or writing articles **regardless** of the topic. An example of the rule's effect was that it denied the right of a low-level postal worker to collect a fee for a speech or article totally unrelated to his official position (i.e., the Quaker religion). The Honoraria Ban was challenged on First Amendment grounds in *United States v. National Treasury Employees Union*, 513

U.S. 454 (1995). The Supreme Court struck down the ban as it applied to Executive Branch employees in paygrades GS-15 and below (military personnel below flag/general rank), but invited Congress to revisit the issue and set a Constitutionally supportable nexus requirement, if so inclined. Since the ban still applies to high-level employees, this is an area that should be specifically noted and monitored. Note: restrictions on receiving compensation for teaching, speaking, or writing related to one's official duties remain in effect (see paragraph A of this section).

0620 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 Department of Justice and the agency most closely involved in the litigation. If subpoenaed, though, employees are permitted to testify as fact witnesses. *See,* SECNAVINST 5820.8A, concerning the release of information for litigation purposes and testimony by government personnel.

PART F: FUNDRAISING (5 C.F.R. 2635.808)

0621 OFFICIAL SUPPORT. There are so many worthy charitable organizations that it would be impossible for the Department of the Navy to support each one equally. Therefore, the Navy will only officially support those funding drives which are specifically authorized. These typically include the Combined Federal Campaign, Navy-Marine Corps Relief Society, and emergency and disaster appeals approved by the Office of Personnel Management. JER 3-210.

A. Where support for such charities is authorized, on-the-job solicitations of employees may be made. Such solicitation **must** be conducted in such a way that contributions are made **voluntarily**. 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. Coercive practices specifically prohibited include:

1. Solicitation by supervisors;

2. Setting 100 percent participation goals, mandatory personal dollar goals, or quotas;

3. 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

4. Counseling or grading individual service personnel or civilian

employees about their failure to contribute or about the size of their donation.

See 5 C.F.R. 950.108.

B. Unless authorized by the Secretary of the Navy, employees may not solicit contributions for Department of the Navy organizations or augment appropriated funds through outside resources. SECNAVINST 4001.2 series. For example, commands are not permitted to seek donations from local merchants for a command holiday party.

0622 PERSONAL SUPPORT. Employees may engage in fundraising in their private, personal capacity provided that there is no solicitation of subordinates or prohibited sources, and no use of official title, position, or authority is made.

0623 MWR FUNDRAISERS. Fundraising events for specific recreational programs may be supported provided that solicitations: do not conflict with the Combined Federal Campaign or Navy Relief; are not conducted on the job, and; are not performed as an official duty. BUPERSINST 1710.11 series.

PART G: SUPPORT FOR NON-FEDERAL ENTITIES (JER Chapter 3)

0624 NON-FEDERAL ENTITIES. Non-Federal entities include a wide range of organizations that provide charitable, morale, civic, entertainment, and recreation support to servicemembers or the public. Examples include military spouse clubs, the Red Cross, the American Bar Association, Scouting organizations, the Reserve Officer's Association.

0625 OFFICIAL PARTICIPATION. DoD employees may be permitted to attend meetings or other functions of non-Federal entities 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, however, no remuneration is allowed for performance of official duties. In addition, DoD members may be detailed to serve as official liaisons where DoD has a significant and continuing interest that may be served. Liaisons may not serve in a management position with the non-Federal entity and must make clear that any opinions expressed do not bind DoD or DON to any course of action.

0626 PRIVATE 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 which may effect the non-Federal entity (no conflicts of interest or impartiality problems are permitted).

0627 OFFICIAL SUPPORT OF NON-FEDERAL ENTITIES

A. Commands may support non-Federal organizations for a number of proper and ethical reasons, such as supporting the local community, maintaining good public relations, enhancing morale, or assisting worthy charities. There are restrictions imposed on providing support to outside organizations, which are intended to ensure that support is provided in an impartial, equitable and non-discriminatory manner. While the JER contains various rules, those researching issues in this area would be wise to consult public affairs manuals and any specific instructions which may pertain to individual non-federal entities (e.g., BUPERSINST 5760.1, "Navy Wives Club of America"; OPNAVINST 5760.5B, "Navy Support and Assistance to Nationally Organized Youth Groups" - NAVCOMPTMAN 5261, and DoD Inst 1000.15).

1. Actual or implied endorsements of non-Federal entities are prohibited. JER 3-209.

2. A command may co-sponsor a civic or community event only when the activity is not related to a business function of the co-sponsoring non-Federal entity. JER 3-206. Under certain conditions, co-sponsorship of conferences or seminars relevant to the DoN is authorized.

3. The JER authorizes commanding officers to permit use of some Federal resources in support of non-Federal entities. Commands may support, through assignment of speakers, panel participants or, on a limited basis, through use of government facilities or equipment, the events of a non-Federal entity 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. JER 3-211. In no event, however, may Federal employees use clerical or staff personnel to support a non-Federal entity, nor may they allow use of copiers. JER 3-305.

4. Preferential Treatment. Command support must not involve, or create an appearance of, preferential treatment for any non-Federal entity. If one organization is afforded support, the command must be prepared to give similar support to similarly situated organizations.

B. Requests to support fund-raising and membership drives for non-Federal entities must be carefully researched and considered. JER 3-210.

1. Generally, DON cannot officially endorse or appear to endorse membership or fundraising drives for any non-Federal entity.

2. Special exceptions to the above general rule are recognized for the Combined Federal Campaign and Navy-Marine Corps Relief.

3. A further exception provided for in the JER involves supporting fund-raising drives for organizations composed primarily of employees or their dependents, when such fundraising is conducted among their own members for the benefit of welfare funds (i.e., spouse clubs, MWR programs, etc.). Such fundraising activity must be approved by the commanding officer, after consultation with the Ethics Counselor. JER 3-210..

4. Public affairs manuals also authorize official support for limited fundraising events by local, community-wide programs (e.g., volunteer fire departments, rescue units or youth activity funds). See SECNAVINST 5720.44 series.

PART H: MISCELLANEOUS RULES

0628 TRAVEL BENEFITS (JER, Chapter 4)

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 and the Joint Federal Travel Regulations (JFTR's) U7900. Before accepting, an employee is required to receive authorization from the travel approving authority and an Ethics Counselor. Under no circumstances may the employee accept cash payments. JER 4-100.

B. ***Acceptance of incidental benefits***

1. Any benefit, such as frequent flyer miles, that a federal employee receives as a result of official travel becomes government property and may not be used for personal purposes. 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 first class (presumably because of the appearance of impropriety). JFTR U2010.

2. If travel benefits received 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 departed member without violating the regulations. Therefore, the mileage must be declined.

3. Many airlines provide free tickets to persons "bumped" from overbooked flights or who voluntarily surrender their tickets for later, less crowded flights. When a member on official travel receives free tickets for voluntarily 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 any delay is paid for by the member (i.e., the time may **not** be added to the travel claim). If involuntarily delayed, then the tickets become the property of the U.S. government, but the additional time may be added to the employee's final travel claim. JER 4-202, JFTR U2010.

0629 GAMBLING (JER 2-302). Gambling is prohibited for DoD employees on duty or while on federal property. The rule makes an exception for private wagers made in living quarters, based on personal relationships, provided that the wagers don't violate local law. Remember, gambling with subordinates may violate Articles 133 or 134 of the UCMJ (fraternization). In the Navy, the playing of Bingo is specifically authorized where operated by and for a Navy club or recreation program. See, BUPERINST 1710.11 series.

0630 POST-GOVERNMENT EMPLOYMENT RESTRICTIONS (JER, Chapter 9)

A. ***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.

B. ***Restrictions on post-government employment***

1. No former employee may act as an agent for another person or entity and attempt to influence the government with regard to any matter in which the employee participated ***personally*** and ***substantially*** as a government employee. This is a lifetime restriction. 18 U.S.C. 207(a)(1).

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. 18 U.S.C. 207(a)(2).

3. 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. 18 U.S.C. 207(c).

4. For certain former procurement officials, 41 U.S.C. 423 contains restrictions on accepting compensation from certain defense contractors.

5. With the National Defense Authorization Act for FY-96, Congress repealed 10 U.S.C. Sections 2397, 2397a, 2397b, 2397c, and 18 U.S.C. 281. See Public Law 104-106, Section 4304. Additional regulations and restrictions applicable to certain procurement officials are anticipated.

C. This is an area fraught with statutory "traps," particularly for high-ranking officers who have participated in procurement and contracting activities. Many of the restrictions are summarized in Chapter 9 of the JER but, as noted above, there have been significant changes in this area. It is advisable that any DoD employee with questions be referred to the appropriate Ethics Counselor for a formal opinion.

PART I: POLITICAL ACTIVITIES (JER, Chapter 6)

0631 GENERAL RESTRICTIONS. Limitations on the political activities of Executive Branch employees have been in existence since the time of Jefferson. It is in the best interest of the country, indeed essential, that federal service should depend upon meritorious performance rather than political service. It has long been deemed improper for federal employees to try and influence the votes of others or to take part in the business of electioneering.

0632 ACTIVITIES BY CIVIL SERVANTS (5 C.F.R. 734). The Hatch Act Reform Amendments of 1993 liberalized the extent to which civil servants are permitted to engage in off-duty partisan political activities. Chapter 6 of the JER contains the regulations now in effect, which provide a laundry list of permitted and prohibited activities. Even though the new regulations generally allow employees to take a more active part in political activities, including political management and political campaigns, it is advised that an Ethics Counselor be consulted before undertaking involvement in partisan politics.

0633 ACTIVITIES BY SERVICEMEMBERS (DOD DIR 1344.10). While rules regarding civil servant's political activities have been liberalized, the regulations applicable to military members have not. While free to register, vote, make monetary contributions to political organizations, express personal opinions, and attend political meetings as a spectator (not in uniform), military members may not otherwise become involved in partisan politics. Chapter 6 of the JER contains DoD Dir 1344.10, which provides a laundry list of permitted and prohibited activities. As with civil servants, it is

advisable that service members consult with their Ethics Counselor before becoming involved in political activity.

0634 LOGISTICAL SUPPORT FOR POLITICAL ACTIVITIES. In general, commanders may not permit use of DoD facilities to support political activities. This prohibition includes: use of installation facilities for political assemblies, media events or fundraisers; community relations support (bands, color guards, personnel) for political meetings or ceremonies; taping of campaign commercials in front of military equipment on military property; and, inclusion of campaign news, partisan discussions, cartoons, editorials or commentaries regarding political campaigns, candidates or issues in DoD newspapers. See SECDEF WASHINGTON DC 222009Z FEB 96, "Public Affairs Policy Guidance – Election Year 1996."

CHAPTER VII

THE FREEDOM OF INFORMATION AND PRIVACY ACTS AND RELEASE OF OFFICIAL INFORMATION AND TESTIMONY FOR LITIGATION PURPOSES

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CHAPTER VII

THE FREEDOM OF INFORMATION AND PRIVACY ACTS AND RELEASE OF OFFICIAL INFORMATION AND TESTIMONY FOR LITIGATION PURPOSES

0701 GENERAL. The purpose of this chapter is to discuss the basic provisions and policy considerations of the Freedom of Information Act and the Privacy Act. These discussions are of a general nature. Reference to the basic source material is essential to acquire a thorough understanding of these Acts.

A. ***Freedom of Information Act references***

1. ***Statute.*** Freedom of Information Act, 5 U.S.C. § 552 (1982).

2. ***Regulations***

a. DOD Directive 5400.7R, Subj: DOD FREEDOM OF INFORMATION ACT PROGRAM

b. SECNAVINST 5720.42E, Subj: DEPARTMENT OF THE NAVY FREEDOM OF INFORMATION ACT (FOIA) PROGRAM

c. JAGMAN, Chapter V, part A

d. USMC - MCO 5720.56

e. USCG - COMDTINST M5260.2

f. SECNAVINST 5720.45, Subj: INDEXING, PUBLIC INSPECTION, AND FEDERAL REGISTER PUBLICATION OF DEPARTMENT OF THE NAVY DIRECTIVES AND OTHER DOCUMENTS AFFECTING THE PUBLIC

g. *Federal Personnel Manual*, chs. 293, 294, 297, 335, 339, and 713

h. U.S. Navy, *Manual of the Medical Department*, ch. 23-70 through 23-79

i. OPNAVINST 5510.161, Subj: WITHHOLDING OF UNCLASSIFIED TECHNICAL DATA FROM PUBLIC DISCLOSURE

j. SECNAVINST 5720.44, Subj: DEPARTMENT OF THE NAVY PUBLIC AFFAIRS POLICY AND REGULATIONS

k. OPNAVINST 5510.48, Subj: MANUAL FOR THE DISCLOSURE OF CLASSIFIED MILITARY INFORMATION TO FOREIGN GOVERNMENTS AND INTERNATIONAL ORGANIZATIONS

3. FOIA Information - DSN 224-2004 / 2817

B. ***Privacy Act references***

1. ***Statute***. Privacy Act of 1975, 5 U.S.C. § 552a (1982).

2. ***Regulations***

a. DOD Directive 5400.11, Subj: DEPARTMENT OF DEFENSE PRIVACY PROGRAM

b. 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.

c. JAGMAN, Chapter V, part B

d. MCO P5211.2, Subj: THE PRIVACY ACT OF 1974

e. COMDTINST M5260.2

f. 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:

(1) Specific single systems, "umbrella-type systems," and subsystems of personnel records which have been authorized to be maintained under the Privacy Act;

(2) the Office of Personnel Management's government-wide system of records; and

(3) a directory of naval activities maintaining these systems.

g. 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.

PART A - FREEDOM OF INFORMATION ACT

0702 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:

1. Disclosure (the general rule, not the exception);

2. equality of access (all individuals have equal rights of access to government information);

3. justified withholding (the burden is on the government to justify the withholding of information and documents from the general public and individuals); and

4. relief for improper withholding (individuals improperly denied access to documents have the right to seek relief in the judicial system).

0703 PUBLIC NOTICE PROVISIONS OF THE FREEDOM OF INFORMATION ACT

A. ***General provisions / purpose.*** Paragraph 5 of SECNAVINST 5720.42 states, in part: "The Department of the Navy policy is to conduct its activities in an open manner and will make available to any person the maximum information concerning its operations, activities, and administration."

B. ***Public notice***

1. To aid in meeting the objectives of the Freedom of Information Act (i.e., make information maintained by the government known to the public), the Act requires that each agency, including the uniformed services, make available the following types of information that affects the public by publication in the *Federal Register*:

a. Description of central and field organizations, and employees from whom, and methods by which, information can be obtained;

b. statements of the general course and method by which its functions are channeled and determined;

c. procedures and forms available for obtaining information;

d. substantive rules and general policy guidelines; and

e. each amendment, revision, or repeal of the foregoing.

2. The Act also requires each Federal agency, in accordance with its rules, to make the following information not published in the *Federal Register* available for inspection and copying:

a. Final opinions, dissents, and orders made in the adjudication of cases;

b. statements of policy and interpretation adopted by the agency, but not published in the *Federal Register*; and

c. administrative staff manuals and instructions to staff that affect a member of the public—unless the materials are promptly published and offered for sale to members of the public.

0704 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 (such as structures, furniture, paintings, sculpture, three-dimensional models, vehicles, equipment, and parts of wrecked aircraft), whatever their historical or evidentiary value;

2. commercially exploitable resources (including, but not limited to, musical arrangements and compositions, formula, designs, drawings, maps and charts, map compilation manuscripts and map research materials, research data, computer programs, and technical data packages that were not created and are not utilized as primary sources of information about organizations, policies, functions, decisions or procedures of the Department of the Navy);

3. unaltered publications and processed documents (such as regulations, manuals, maps, charts, and related geographical materials) that are available to the public through an established distribution system with or without charges;

4. anything that is an intangible or documentary record (such as an individual's memory or oral communication);

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 at the time of the request in order to be subject to the provisions of SECNAVINST 5720.42E. 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 Department of the Navy records, the request itself must:

1. Be in writing and indicate expressly, or by clear implication, that it is a request under the FOIA, DOD Directive 5400.7, or SECNAVINST 5720.42E;

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 5720.42E;

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.

0705 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 receiving activity shall not release or deny such records without consulting the other naval activity. The receiving activity shall coordinate with that activity before referring the FOIA request and copies of the requested documents for direct response. The requestor shall be notified if the request has been readdressed and forward to the congnizant 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. ***Requests requiring special handling***

a. ***Classified records.*** If the existence or nonexistence of the requested record is classified, the activity shall refuse to confirm or deny its existence or nonexistence. If a request is received for documents made after consultation with the originating authority classified by another agency, send the request to the appropriate agency and notify the requester of such referral. If a request is received for classified records originated by another naval activity for which the head of the activity is not the classifying authority, the request shall be forwarded to the official having classification authority and the requester notified of such referral, unless the existence or nonexistence of the record is in itself classified.

b. ***NCIS reports.*** Requests for reports by the Naval Criminal Investigative Service shall be readdressed and forwarded to the Commander, Naval Criminal Investigative Service Command, Washington, D.C. 20374-5000. Notify the requester of the referral action.

c. ***Naval Inspector General (IG) Reports.*** Requests for investigations and inspections conducted by or at the direction of Naval Inspector General shall be readdressed and forwarded to the Naval Inspector General.

d. ***JAG Manual investigations.*** Requests shall be forwarded to the following release authority depending upon the type of investigation convened: (a) For a command investigation to the GCMCA over the command convening the investigation. (b) For a litigation-report investigation, to the Judge Advocate General, Code 33. (c) For a court or board of inquiry, to the Echelon II commander over the command convening the court or board of inquiry..

e. ***Mishap investigation reports.*** Requests for mishap investigation reports shall be readdressed and forwarded to the Commander, Naval Safety Center, Naval Air Station, Norfolk, VA 23511-5796. Notify the requester of the referral action.

f. ***Naval Audit Service reports.*** Requests for reports by the Naval Audit Service shall be readdressed and forwarded to the Naval Audit Service Headquarters (Code OPS).

g. ***Technical documents controlled by distribution statements.*** A request for a technical document to which "Distribution Statement" is affixed shall be addressed and forwarded to the "controlling DOD office." Notify the requestor of the referral action.

h. ***Records originated by other government agencies.*** Requests for records originated by an agency outside the DON shall be readdressed and forwarded to the cognizant agency and the requester shall be notified of the referral.

i. ***National Security Council (NSC) / White House documents.*** Individuals requesting records from NSC or the White House shall be notified to write directly to the NSC or the White House. DON documents in which NSC or the White House have a concurrent reviewing interest shall be forwarded to the Office of the Assistant Secretary of Defense (Public Affairs) ATTN: Directorate for Freedom of Information and Security Review.

j. ***Naval telecommunications procedures (NTP) publications.*** Requests for NTP publications shall be readdressed and forwarded to Commander, Naval Computer and Telecommunications Command and the requestor notified of the referral.

k. ***Naval nuclear weapons information (NNWI).*** Requests for NNWI require special handling. FOIA requests for nuclear related information shall be processed under OPNAVINST 5510.1. Denial of NNWI is done through the initial denial authority (IDA). No record response is done directly to the requester.

l. ***Naval nuclear propulsion information (NNPI).*** Requests for NNPI shall be forwarded, along with any responsive records, to the Director, Naval Nuclear Propulsion Program.

m. ***Medical quality assurance documents.*** Requests for medical quality assurance shall be readdressed and forwarded to the Chief, Bureau of Medicine and Surgery, and the requester notified of the referral.

n. ***Records of a non-U.S. Government source.*** In requests for a record that was obtained from a non-U.S. Government source, the source of the record or information shall be notified of the request and afforded reasonable time to present any objections concerning release. If the record or information was provided with actual or presumptive knowledge of the non-U.S. Government source and it can be established that it would be made available to the public upon request, there is no obligation to notify the source.

o. ***Government Accounting Office (GAO) documents.*** Requests for GAO documents are not subject to FOIA. All FOIA requests for GAO documents containing DON information will be processed by the DON.

p. ***Mailing lists.*** Requests for home addresses are not releasable without an individual's consent. Lists of names and duty addresses or duty telephone numbers of members who are assigned to units in the continental United States and U.S. territories shall be released regardless of who requests the information. Lists of names and duty addresses / phone numbers will not be released for those units or members who are located outside the continental United States and U.S. territories, units who routinely deploy, or units engaged in sensitive operations.

q. ***Court-Martial Records.*** Requests should be referred to the Office of the Judge Advocate General, and the requestor so notified.

5. ***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 IDA. All officers authorized to convene general courts-martial and the heads of various Navy Department activities listed in paragraph 6(e) of SECNAVINST 5720.42E are designated as IDA's.

6. ***Denial of release***

a. If a local commanding officer receives a request for a copy of, or permission to examine, a record in existence and believes that the requested record, or a nonsegregable portion thereof, is not releasable under the FOIA, or if he feels denial of a fee waiver is appropriate, he must expeditiously refer the request—with all pertinent information and a recommendation—directly to the 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, 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 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. For additional guidance, see ¶ 8 of SECNAVINST 5720.42E.

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.

c. For the purposes of fees, there are four classes of requesters. These are:

(1) Commercial requesters—charged for search, duplication, ***and*** review;

(2) educational and noncommercial scientific institutional or news media representative requesters—charged only for duplication costs, with credit for 100 free pages of copies per request; and

(3) other requesters (includes every requester not covered by (1) or (2) above)—charged only for search and duplication, subject to credit for 2 free hours of search time and 100 free pages of copies.

d. In addition to the mandatory credit and fee waiver, there is also discretionary authority to waive fees where disclosure of the information is in the public interest and not in the commercial interest of the requester.

2. The following is the fee schedule in para. 11, enclosure (3) of SECNAVINST 5720.42E:

Duplication costs

Printed material	$ .02 per page
Office copies	$ .15 per page
Microfiche	$ .25 per page

Manual search and (if chargeable) document review

Clerical (E-9 / GS-8 or below)	$12 per hour
Professional (O-1-O-6 / GS-9-GS-15)	$25 per hour
Executive (O-7, GS / GM-16, ES-1 or above)	$45 per hour

NOTE: Time is billed to the nearest 15 minutes.

Computer search: Bill for all direct costs of the central processing unit, input-output devices, and memory capacity of the computer configuration. The computer search is based on the computer operator / programmer's time in determining how to conduct and subsequently execute the search and is charged at the rate of a manual search.

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 the Secretary of the Navy as appellate authorities. The General Counsel handles contracts, commercial law, and civilian personnel matters, while the Judge Advocate General handles military law, torts, and all other matters not under the cognizance of the General Counsel. Appeals of denials on requests for classified materials present a special problem. Before the Judge Advocate General can make a final determination on any appeal involving classified material, the appellate record must affirmatively establish that the information in question was properly classified, both procedurally and substantively, under the appropriate Executive Order. An appeal from an initial denial, in whole or in part, must be in writing and received by the appellate authority not more than 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, 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 IDA's 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 IDA's 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 5720.42E sets forth detailed instructions and the appropriate format for submitting these reports.

0706 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; 42 U.S.C. § 290 on drug abuse prevention / rehabilitation; 42 U.S.C. § 4582 on alcohol abuse prevention / rehabilitation; and medical quality assurance records and special nuclear material information.

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. Examples include information received in confidence for a contract, bid, proposal, or scientific or manufacturing process.

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 examination is to allow frank and uninhibited discussion during the decision making 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. Before denying such requests, though, since this area of the law is fraught with legal problems, consultation with a judge advocate is recommended. See ¶ 14b(2) of SECNAVINST 5211.5D for personal information releasable under FOIA.

7. ***Investigatory records and information compiled for civil, criminal or military law enforcement:***. This exemption applies only to the extent that the production of such records would:

a. Interfere with enforcement proceedings;

b. deprive a person of a right to a fair trial or an impartial adjudication;

c. constitute an unwarranted invasion of personal privacy;

d. disclose the identity of a confidential source;

e. disclose investigative techniques and procedures; or

f. endanger the life or physical safety of law enforcement personnel.

8. ***Financial institutions***. This exemption applies to matters that are contained in, or related to, examination, operation, or condition reports prepared by, on behalf of, or for the use of, an agency responsible for the regulation or supervision of financial institutions.

9. ***Wells***. This exemption refers to geological and geographical information and data—including maps—concerning wells.

10. ***Non-judicial Punishment Results***. Information on nonjudicial punishment will not normally be disclosed to the public under FOIA. *See* § 0509 of the JAGMAN for further guidance.

PART B - PRIVACY ACT

0707 BACKGROUND. The wave of openness regarding the government's recordkeeping systems gradually matured during the 1960's and culminated in the 1974 amendments to the Freedom of Information Act. This wave of openness, however, was found to be lacking in one important particular—namely, protection of the individual's personal right to privacy in matters concerning the individual. Partly in response to the desire to counter the open flow of information to the detriment of individual rights to privacy, the Privacy Act of 1974 was signed into law by President Ford on 31 December 1974, and was codified as section 552a of title 5, *United States Code*, immediately following the Freedom of Information Act. The Act was subsequently amended in 1982. SECNAVINST 5211.5D contains Department of the Navy policy guidance on the Privacy Act.

0708 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 or her are collected, maintained, used, or disseminated;

2. permit an individual to prevent records pertaining to him or her, that were obtained by such agencies for a particular purpose, from being used or made available for another purpose without his or her consent;

3. permit an individual to gain access to information pertaining to him or 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.

0709 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. The following examples (although not exhaustive) illustrate when exceptions to the general policy are applicable:

1. When there is a need to verify information through a third party (e.g., verifying information for a security clearance);

2. when it would present an exceptional practical difficulty or result in unreasonable cost to obtain the information directly from the individual; or

3. when the information can be obtained only from a third party (e.g., a supervisor's evaluation of an individual).

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."

1. 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 he / she sign the statement. In order to ensure that an individual fully understands the Privacy Act statement, however, it is strongly recommended that he / she 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.

2. If an individual refuses to sign an original Privacy Act statement, the refusal should be noted on the original statement (with an indication that he / she was

provided with a copy) and the document should then be attached to the collected record of information.

3. If oral advice concerning the provisions mentioned above is required to be administered for any reason, a note of the fact that information concerning the Privacy Act requirements was furnished to the individual should be made and attached to the collected information and, if at all possible, a copy of the note should be forwarded to the individual 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.

1. When an individual is requested to disclose his / her SSN, he / she must be informed:

a. Whether such disclosure is mandatory or voluntary;

b. by what statutory or other authority the SSN is solicited; and

c. what uses will be made of it.

2. An activity may request an individual's SSN, even though it is not required by Federal statute or is not for a system of records in existence and operating prior to 1 January 1975. The separate Privacy Act statement for the SSN alone, or a merged Privacy Act statement covering both the SSN and other items of personal information, however, must make clear that disclosure of the number is voluntary. If the individual refuses to disclose his SSN, the activity must be prepared to identify the individual by alternate means.

3. Once a military member or civilian employee of the Department of the Navy has disclosed his / her SSN for purposes of establishing personnel, financial, or

medical records upon entry into naval service or employment, the SSN becomes his / her service or employment identification number. Subsequent provision or verification of this identification number in connection with those records does not require an additional Privacy Act statement.

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 the CIA or 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 section 3056 of title 18, *United States Code*;

d. records required by statute to be maintained and used solely as statistical records;

e. investigatory material compiled solely to determine suitability, eligibility, or qualification for Federal employment or military service, but only to the extent that disclosure would reveal the identity of a confidential source;

f. testing and examination material used solely to determine individual qualification for appointment or promotion in the Federal 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.

0710 PUBLIC NOTICE AND SYSTEMS MANAGEMENT

A. ***General provisions / purposes***. The purposes of the Privacy Act regarding the management of record systems and public notification concerning such record systems are as follows:

1. To allow the public to be informed as to the existence of a system of records, its purposes, and routine uses;

2. to delineate procedures for allowing individuals to gain access to their own personal information; and

3. to prevent misuse of, or improper access to, personal information contained within systems of records.

B. ***Contents of public notice***. In the above regard, no Federal agency may maintain a system of records without public disclosure of the existence of that system. Maintaining an unpublished system of records is a criminal violation. To ensure public knowledge, the Privacy Act requires that a catalog of all such systems of records be published in the *Federal Register*, and that such publication be updated at least annually. Such public notice must include, in an understandable form:

1. The name and location of the system;

2. the categories of individuals covered by the system;

3. the types of records in the system;

4. the routine uses of the information in the system;

5. policies and practices for maintenance of the system;

6. the media in which records are maintained (e.g., file folders, magnetic tape, computer cards, etc.);

7. the manner in which retrieval is accomplished (e.g., name, social security number, fingerprint classification, etc.);

8. general safeguards to prevent unauthorized access;

9. retention and disposal policies;

10. the title and duty address of the official responsible for the system of records (system manager);

11. the agency procedures for individual notification;

12. the agency procedures for granting individual access to, and for requesting amendment to, or contesting the content of, those records;

13. the sources of information in the system; and

14. exemptions claimed.

0711 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 Department of the Navy or the Department of Defense.*** Disclosure is authorized without the consent of the individual concerned, provided that the requesting member has an official need to know the information in the performance of duty and the contemplated use of the information is compatible with the purposes for which the record is maintained. No disclosure accounting is required when

information is released pursuant to this exception. Under this exception, the name, rate, offense(s), and disposition of an offender at captain's mast/ office hours may be published in the plan of the day or on the command bulletin board within a month of the imposition of nonjudicial punishment, or at daily formations or morning quarters. JAGMAN, § 0509.

2. ***FOIA***. If the information is of the type that is required to be released pursuant to the FOIA as implemented by SECNAVINST 5720.42E, it may be released.

– Recall that personal information from personnel, medical, and similar files may be exempt from release under the FOIA when the release would cause a clearly unwarranted invasion of personal privacy. Therefore, the responsible officer must weigh the public's right to know the information against the right to privacy of the individual. Sound, intelligent discretion is obviously necessary in such situations.

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. For example, a routine use for the home address information maintained in the Navy Personnel Records System is the disclosure of such information to the duly appointed command family ombudsman in the performance of their duties.

4. ***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, or when the congressional office, after requesting information, subsequently states that it has received a request for assistance from the individual or has obtained written consent for the disclosure of the information.

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. If the court order itself is not a matter of public record, the concerned activity shall seek to learn when it will be made public. In this situation, an accounting for the disclosure shall be made at the time the activity complies with the order, but neither the identity of the party to whom the disclosure was made nor the purpose of the disclosure shall be made available to the concerned individual unless the court order has become a matter of public record.

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.

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.

0712 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 5211.5D, 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. These provisions are not designed to permit collateral attack upon that which has already been the subject of a judicial or quasi-judicial action. For example, an individual would not be permitted to challenge a court-martial conviction under this instruction, but the individual would be able to challenge the accuracy with which a conviction has been recorded in a record. If amendment is made, all prior recipients of the record must be notified of the amended information.

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.

0713 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.

0714 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 A3 or A4 immediately above because the agency acted in a manner which was intentional or willful, the agency will be assessed actual damages sustained by the individual—but not less than $1,000. The courts are divided as to whether actual damages may include mental injuries. *Compare Johnson v. Commissioner*, 700 F.2d 971 (5th Cir. 1983) (finding physical injury and mental anxiety, neither of which resulted in increased out-of-pocket medical expenses, compensable as actual damages) *and Fitzpatrick v.*

Commissioner, 665 F.2d 327 (11th Cir. 1982) (finding only proven pecuniary losses, not general mental injury, loss of reputation, embarrassment, or other nonquantifiable injuries, compensable as actual damages). The statute of limitations for filing suit is two years from the occurrence of the violation of the Act.

B. ***Criminal sanctions***. Criminal sanctions apply to any officer or employee within the Federal agency who misuses a system of records in the following ways:

1. Knowingly and willfully discloses information protected by the Privacy Act to a person or agency not entitled to receive it;

2. willfully maintains a system of records without meeting the public notice requirements of the Privacy Act; or

3. knowingly and willfully requests, obtains, or discloses any record concerning personal information about another individual from an agency under false pretenses.

The above violations are misdemeanors, and the individual is subject to a fine of up to $5,000 for each file or name disclosed illegally. With regard to the criminal sanctions, all pertain to intentional misdeeds. Therefore, if an individual makes a good faith and honest effort to comply with the provisions of the Privacy Act, he should be protected from criminal liability. Criminal violations of the Privacy Act are ***not*** punishable by incarceration.

0715 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

0716 OBJECTIVES. The purpose of the Part C of the *JAG Manual* and the instructions are to make ***factual*** official information, both testimonial and documentary, reasonably available for use in Federal courts, state courts, 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 5820.8A, Subj: RELEASE

OF OFFICIAL INFORMATION FOR LITIGATION PURPOSES AND TESTIMONY BY DEPARTMENT OF THE NAVY (DON) PERSONNEL.

DON policy favors disclosure of factual matters and does not favor disclosure on expert or opinion matters.

0717 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 authorities and those commands and activities with a judge advocate assigned will act as the determining authorities.

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 (SOFA's); 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.

0718 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).

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).

0719 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.

B. ***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, producing information, including travel expenses and accommodations;

2. in cases in which deposition testimony is sought, a statement of 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, he / she will require the requester to agree to the conditions set forth above.

0720 CONSIDERATIONS IN DETERMINING TO GRANT OR DENY A REQUEST

A. ***General considerations***: In deciding whether to authorize release of official information, or testimony of DON personnel concerning official information, under a request conforming with the requirements as stated above and in SECNAVINST 5820.8A enclosure (4), the determining authority shall consider the following factors:

1. The DON policy concerning factual information or expert or opinion information;

2. whether the request or demand is unduly burdensome or otherwise inappropriate under applicable court rules;

3. whether disclosure, including release ***in camera*** is appropriate under procedural rules governing the case or matter in which the request or demand arose;

4. whether disclosure would violate or conflict with a statute, Executive order, regulation, directive, instruction, or notice;

5. whether disclosure in the absence of a court order or written consent would violate 5 U.S.C. §§ 552, 552a (1988);

6. whether disclosure, including release ***in camera***, is appropriate or necessary under the relevant substantive law concerning privilege;

7. whether disclosure, except when ***in camera*** and necessary to assert a claim of privilege, would reveal information properly classified under the DOD Information Security Program; withholding of unclassified technical data from public disclosure following OPNAVINST 5510.161; privileged Naval Aviation Safety Program information; or other matters exempt from unrestricted disclosure under 5 U.S.C. §§ 552, 552a (1988);

8. whether disclosure would unduly interfere with ongoing law enforcement proceedings, violate constitutional rights, reveal the identity of an intelligence source or source of confidential information, conflict with U.S. obligations under international agreement, or otherwise be inappropriate under the circumstances;

9. whether attendance of the requested witness at deposition or trial will unduly interfere with the military mission of the command; and

10. in a criminal case, whether requiring disclosure by a defendant of detailed information about the relevance of documents or testimony as a condition for release would conflict with the defendant's constitutional rights.

B. ***Specific considerations***

1. Requests for documents, interviews, depositions, testimony, and views where the United States is, or may become, a party shall be forwarded to the Judge Advocate General or the General Counsel.

2. Requests for unclassified documents where the United States is not, and is reasonably not expected to become, a party will be served upon the General Counsel of the Navy—along with the written requests complying with SECNAVINST 5820.8A, enclosure (4). For release of classified information, coordination must be made with the Chief of Naval Operations (OP-09N).

3. Generally, a record in a Privacy Act "system of records" may not be released under a litigation request except with the written consent of the person to whom the record pertains or in response to a court order signed by a judge.

4. For requests for records held by a specific agency, refer to SECNAVINST 5820.8A, enclosure (5).

5. Requests for interviews, depositions, and testimony where the United States is not, and is reasonably not expected to become, a party:

a. Factual matters: DON policy favors disclosure of factual matters when disclosure does not violate the criteria stated in SECNAVINST 5820.8A, enclosure (5).

b. Expert, opinion, or policy matters: DON policy does not favor disclosure of this information. The cognizant official—either DAJAG or the General Counsel—will determine whether the information will be released. The requester must show exceptional need or unique circumstances, and also that the anticipated testimony will not be adverse to the interests of the DOD or the United States.

6. Visits and views where the United States is not, and is reasonably not expected to become, a party are normally factual in nature and should be granted.

7. Requests for disclosure of non-DOD information. The requester must still comply with SECNAVINST 5820.8A to support the contention they are requesting non-DOD information. Determining whether or not official information is at issue is within the purview of the determining authority, not the requester.

0721 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 5820.8A, 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.

0722 RESPONSE TO REQUESTS OR DEMANDS IN CONFLICT WITH DON POLICY. 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.

0723 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 VIII

FREEDOM OF EXPRESSION IN THE MILITARY

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CHAPTER VIII

FREEDOM OF EXPRESSION IN THE MILITARY

0801 INTRODUCTION. The purpose of this chapter is to discuss the right of active-duty servicemembers to exercise First Amendment freedoms and the extent to which a military commander may limit civilians who seek to exercise their freedom of expression in areas over which the military has jurisdiction. We will first briefly consider the constitutional basis for freedom of expression and several doctrines fashioned by the Supreme Court to test the validity of limitations on the exercise of freedom of expression. An appreciation of these doctrines is necessary since the courts will use them as a starting point in reviewing military regulations that limit expression. We will then consider freedom of expression as it is uniquely applied to the armed forces.

PART A - CONSTITUTIONAL BASIS AND SUPREME COURT DOCTRINES

0802 FIRST AMENDMENT

– ***Specific freedoms.*** The First Amendment to the Constitution states:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

There are five freedoms explicitly listed: (1) religion, (2) speech, (3) press, (4) assembly, and (5) petition for redress of grievances. In addition to these five freedoms, other provisions of the Bill of Rights (such as the requirement for due process, the privilege against self-incrimination, and the prohibition against unreasonable search and seizures) are significant elements in maintaining a system of freedom of expression. Nevertheless, the First Amendment is considered the main source of constitutional protection in this area.

0803 SCOPE OF FREEDOM OF EXPRESSION

A. ***Penumbra theory***. The scope of the First Amendment extends beyond the five expressly stated freedoms. The Supreme Court has said that the specific guarantees of the Bill of Rights have penumbras, or fringe areas of protection, that are formed by emanation from the specific guarantees and which help give them life and substance. The right of association is one such right, created in the shadow of the first amendment. This is more than a right to attend a meeting. It includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it, or by other lawful means. Association in this context is a form of expression of opinion and, while it is not expressly included in the first amendment, its existence is necessary in making the express guarantees fully meaningful. In the same manner, the rights of freedom of speech and press include not only the right to utter and to print, but also the rights to distribute, to receive, to read, to inquire, to think, to teach, and to privacy.

B. ***States***. The rights protected against Federal encroachment by the first amendment are entitled to the same protections from infringement by the state. Moreover, the safeguards of the first amendment are not confined to any particular fields of human interest (such as political or religious causes), but rather extend to secular causes. *United Mine Workers v. Illinois State Bar Assoc.*, 389 U.S. 217 (1967).

C. ***Symbolic speech***. The scope of the protection of freedom of expression is further expanded by the recognition that forms of symbolic speech are protected as well. For example, a Texas statute prescribing criminal penalties for desecration of the American flag was held unconstitutional as applied to burning the flag during a political protest. The flag burning was held to be "symbolic speech," akin to "pure speech," and not subject to limitation in the absence of a showing of a sufficient threat to a significant government interest to justify abridgement of freedom of expression. *Texas v. Johnson*, 491 U.S. 397 (1989).

0804 LIMITATION OF FREEDOM OF EXPRESSION

A. ***General***. Freedom of expression is not an unlimited right. The Supreme Court has said that the first amendment embraces two concepts: freedom to believe and freedom to act. The first is absolute; the second cannot be since society must regulate conduct for its own protection. *Cantwell v. Connecticut*, 310 U.S. 296 (1940). There are at least two ways in which constitutionally protected freedom of expression is narrower than a totally unlimited license to talk. First, certain forms of speech, or speech in certain contexts, has been considered outside the scope of constitutional protection. Second, general regulatory statutes not intended to control the content of expression, but incidentally limiting its unfettered exercise, have been found to be justified by valid governmental interests.

B. ***Unprotected speech.*** Examples of types of speech which are not constitutionally protected are:

1. Libelous utterances or "fighting" words—*Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942);

2. obscenity—*Ginsberg v. New York*, 390 U.S. 629, *reh'g denied*, 391 U.S. 971 (1968) (defining what is obscene is a separate problem); and

3. incitement to commit. Such language is a crime if the speech is in fact directed to inciting or producing imminent lawless action and is likely to incite or produce such action, as opposed to an abstract teaching of the moral propriety or even necessity for resorting to force and violence. *Brandenberg v. Ohio*, 395 U.S. 444 (1969) (conviction of a leader of Ku Klux Klan under Ohio criminal syndicalism statute reversed where statute failed to distinguish between actual incitement and abstract advocacy); *see also Bond v. Floyd*, 385 U.S. 116 (1966) (stated opposition to the war in Vietnam and approval of those attempting to avoid the draft held not to be such incitement to crime as will permit a state legislature to bar a duly elected representative from occupying his seat).

C. ***Lawful regulation of free speech.*** Distinguish between expression by pure speech and expression by conduct (such as patrolling, picketing, and marching on streets and highways). Constitutional protection is greater for the former. *Walker v. Birmingham*, 388 U.S. 307, *reh'g denied*, 389 U.S. 894 (1967).

1. ***Trespassing.*** The first amendment will not protect someone who trespasses on another person's property to exercise free speech. In *Adderley v. Florida*, 385 U.S. 39, *reh'g denied*, 385 U.S. 1020 (1966), a statute provided for prosecution of trespass upon property of another committed with a malicious and mischievous intent. Following the arrest of their counterparts, a number of students gathered on jail grounds to protest the arrest and were themselves arrested. The court, in upholding the statute's validity, noted that the students were on part of the jail grounds not open to the public and were blocking a jail driveway.

2. ***Administration of justice.*** Freedom of speech does not include the right to picket a courthouse for the purpose of interfering with judicial action. A state statute prohibiting picketing or parading in or near a courthouse for the purpose of interfering with, obstructing, or impeding the administration of justice or influencing the court was held not to be an unconstitutional infringement of freedom of expression. *Cox v. Louisiana*, 379 U.S. 559, *reh'g denied*, 380 U.S. 926 (1965).

3. ***Televising and broadcasting of trials.*** Freedom of the press may be limited where it conflicts with the maintenance of absolute fairness in the judicial process. *Estes v. Texas*, 381 U.S. 532, *reh'g denied*, 382 U.S. 875 (1965); *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

4. ***Public employment***. In *Goldwasser v. Brown*, 417 F.2d 1169 (D.C. Cir. 1969), the appellant was a civilian employee of the Air Force who served as a language instructor in the Air Force Language School at Lackland Air Force Base, Texas. His duty was to give quick training in basic English to foreign military officers who were in this country on invitational travel orders. He was dismissed for statements he made to his students concerning the Vietnam war and anti-Semitism in the United States. The court held that the dismissal did not violate appellant's right to freedom of speech, since public employment may properly encompass limitations on persons that would not survive constitutional challenge if directed at a private citizen.

5. ***Draft cards***. Freedom of speech does not include the right to burn government property. In *United States v. O'Brien*, 391 U.S. 367, *reh'g denied*, 393 U.S. 900 (1968), a conviction was affirmed for one who had burned his Selective Service registration certificate in violation of a Federal statute making the knowing destruction or mutilation of such a certificate a criminal offense. O'Brien was punished for the "noncommunicative" impact of his conduct on the operation of the Selective Service System. The Court stated that not every kind of conduct can be labeled "speech," and thereby be constitutionally protected, whenever the person engaging in the conduct intends thereby to express an idea. When both "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify an incidental limitation on the speech element. To justify such incidental limitation on the freedom of expression, it is necessary that an important and substantial government interest be involved which is unrelated to the suppression of free expression, and that the incidental limitation on free expression be no greater than absolutely essential in furtherance of the legitimate governmental interest.

6. ***Flag burning***. The Supreme Court has declared unconstitutional a state desecration statute designed to prohibit burning of the U.S. flag. In *Texas v. Johnson*, 491 U.S. 397, 1095 Ct. 2533 (1989), the Supreme Court held that a private citizen's burning of an American flag as part of a public protest in Dallas, Texas was constitutionally protected free speech (the flag had been stolen from a Dallas municipal building). The Defendant had participated in an anti-nuclear war protest including "die-ins", and anti-Reagan Administration protests at the time the Republican National Convention was being held in Dallas. The Defendant had received the flag from another protester who had taken it from a flagpole from a city building. The Defendant, in front of Dallas City Hall, unfurled the American flag, doused it with kerosene, and set it on fire. The protesters chanted: "America, the red, white, and blue, we spit on you." The State of Texas conceded in its argument, that the act of Johnson in burning the flag was "expressive conduct." The Supreme Court, noting that no breach of peace occurred or threatened to occur due to Johnson's act, stated:

> No reasonable onlookers would have regarded Johnson's generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange "fisticuffs." *Texas v. Johnson*, 491 U.S. at 409.

The Supreme Court, thus, held that the State's interest in preventing breaches of the peace does not support the conviction of Johnson for violating the state desecration statute as his conduct did not threaten to disturb the peace, nor does the state's interest in preserving the flag as a symbol of nationhood justify the criminal conviction for engaging in political expression. But compare this to the military case of, *U.S. v. Wilson*, 33 M.J. 797 (A.C.M.R. 1991) where the Army Court of Military Review upheld the special court-martial conviction of an Army private for disobeying a lawful order and dereliction of duty, by blowing his nose into an American flag while he was a member of a flag-raising detail. The private had expressed his opinion that the Army and the U.S. "sucked" and then blew his nose into the flag as he stated "this is what I think." The dereliction of duty charge was based on a custom of the service theory in that he "willfully failed to ensure that the United States flag was treated with proper respect by blowing his nose on the flag when it was his duty as a military policeman on flag call to safeguard and protect the flag." *Wilson*, 33 M.J. at 98. The military judge specifically stated for the record that he "did not punish the accused for the intent of his message conveyed on the morning of 31 December." The military court upheld the conviction as it was designed to punish the accused for his failure to safeguard government property.

0805 PRESUMPTION IN FAVOR OF RIGHTS GUARANTEED BY THE FIRST AMENDMENT. In striking a balance between freedom of expression on the one hand and justifiable governmental limitations on the other, the Supreme Court has stated that first amendment rights are "preferred freedoms" which should be given "the broadest scope that could be construed in an orderly society." *Follett v. Town of McCormick*, 321 U.S. 573, 575 (1944).

> Moreover, the likelihood, however great, that a substantive evil will result [from the exercise of freedom of expression] cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be 'substantial'. . .; it must be 'serious'. . . . And even the expression of "legislative preferences or beliefs" cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression.

Bridges v. California, 314 U.S. 252, 262-63 (1941). An example of the application of this doctrine is found in *Cohen v. California*, 403 U.S. 15, *reh'g denied*, 404 U.S. 876 (1971), where the defendant, while in the corridor of a county courthouse, was wearing a jacket bearing the plainly visible words "Fuck the Draft." On the basis of having done this, he was convicted by a California court for disturbing the peace by offensive conduct. The Supreme Court reversed, stating that, absent a more particularized and compelling reason for its actions, the state could not make the defendant's simple public display of this single four-letter expletive a criminal offense.

0806 TESTS USED TO JUDGE LIMITATIONS ON FREE EXPRESSION

A. ***"Clear and present danger" test***. Throughout its history, the Supreme Court has adopted a number of tests to be used in judging the validity of a governmental limitation on unfettered expression. Under the "clear and present danger" rule, first set forth by Justice Holmes in *Schenck v. United States*, 249 U.S. 47 (1919), freedom of expression may not be limited unless it creates a clear and present danger of bringing about a substantial evil which the state has a right to prevent. Justice Holmes gave the famous example of a person falsely shouting "fire" in a crowded theater as being speech that could be punished because of the time, place, and circumstances in which the words were uttered. An example of the application of this doctrine is found in *Feiner v. New York*, 340 U.S. 315 (1951), where a conviction for disorderly conduct of one who addressed a crowd through a loudspeaker system from a box on a sidewalk was upheld on the ground, among others, that a clear danger of disorder was threatened.

B. ***"Gravity of the evil" test***. At other times, the Court has tested a limitation of expression by asking whether the gravity of the evil, discounted by its probability, justifies such invasion of free speech as is necessary to avoid the danger. Under this approach, where the public interest to be protected is substantial and the limitation on expression is relatively small, a showing of imminent danger—as might be required by the clear and present danger rule—may not be necessary. *Dennis v. United States*, 341 U.S. 494 (1951) (conviction under Smith Act affirmed for conspiracy to organize the Communist Party of the United States as a group and to teach and advocate the overthrow of the government of the United States by force and violence).

C. ***Balancing test***. During a recent period of the Court's history, a five-member majority adopted Justice Frankfurter's "weighing-of-interests" or "balancing" test, in which the public interest sought to be protected was measured against the individual's right to free expression and the infringement thereof. Under this standard, the Court often found a sufficiently compelling governmental interest to justify limited freedom of expression, particularly in the area of subversive activities. *Barenblatt v. United States*, 360 U.S. 109, *reh'g denied*, 361 U.S. 854 (1959) (inquiries by a Subcommittee of the House Committee on Un-American Activities into a witness' membership in the Communist Party found not to offend the first amendment).

D. ***"Absolutist" approach***. Another viewpoint is the so-called "absolutist" approach, propounded by Justice Black, who argued that the first amendment's unequivocal command that there shall be no abridgement of the rights of free speech and assembly shows that the men who drafted the Bill of Rights did all the "balancing" that was to be done in that field, and that the very object of adopting the first amendment was to put the freedoms protected there completely out of the area of any legislative control which might be attempted through the exercise of precisely those powers which were being used to "balance" the Bill of Rights out of existence. *See Konigsberg v. State Bar of California*, 366 U.S. 36, 61, *reh'g denied*, 368 U.S. 869 (1961) (Black, J., dissenting). Under this

approach, the only room left for interpretation is in determining whether particular conduct qualifies as "speech" under the first amendment.

0807 DOCTRINE AGAINST PRIOR RESTRAINTS

A. ***General.*** There are basically two means of limiting freedom of expression. The first is a prior restraint; that is, preventing the expression of ideas before they are in fact expressed. The classic example is censorship. The second means is the punishment of someone after he has expressed his thoughts. An example would be the prosecution of a servicemember for having made statements disloyal to the United States. As regards the former, the imposition of prior restraints on freedom of expression carries a much heavier burden of justification in the courts. The following remarks of one commentator illustrate another reason for this:

> A second major element in the problem is the inherent difficulty of framing limitations on expression. Expression in itself is not normally harmful, and the objective of the limitation is not normally to suppress the communication as such. Those who seek to impose limitation on expression do so ordinarily in order to forestall some anticipated effect of expression in causing or influencing other conduct. It is difficult enough to trace the effect of the expression after the event. But it is even more difficult to calculate in advance what its effect will be. The inevitable result is that the limitation is framed and administered to restrict a much broader area of expression than is necessary to protect against the harmful conduct feared. In other words, limitations of expression are by nature attempts to prevent the possibility of certain events occurring rather than a punishment of the undesired conduct after it has taken place. To accomplish this end, especially because the effect of the expression is so uncertain, the prohibition is bound to cut deeply into the right of expression.

Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877, 889 (1963).

B. ***Immediate and irreparable harm.*** The Supreme Court has made it clear that, to justify a prior restraint, the government must demonstrate that the expression to be restrained will immediately and irreparably cause serious injury to the public welfare. In the Pentagon Papers cases, for example, the Court ruled that the government failed to show that the nation's security would be sufficiently jeopardized by publishing the papers and therefore refused to enjoin their publication. Their refusal to exercise prior restraint by enjoining publication of the papers did not mean, however, that they would disapprove a

prosecution to punish any violations of security laws which might result from such publication. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

C. ***Future publication***. For a state to empower its courts to enjoin the dissemination of future issues of a publication because its past issues have been found offensive is the essence of censorship and hence unconstitutional. *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957).

D. ***Censorship and procedural safeguards***. In *Freedman v. Maryland*, 380 U.S. 51 (1965), the Supreme Court reversed the conviction of a motion picture exhibitor for violation of a film censorship statute. While refusing to condemn all systems of prior restraints of expression, the Court reiterated the principle that there is a heavy presumption against their constitutional validity and held that a system which required submission of a film to a censor would be valid only if it provided procedural safeguards designed to obviate the dangers of censorship. These safeguards are:

1. That the burden of proving that the particular expression involved is not protected by the first amendment must rest on the censor;

2. that, while the state may require advance submission of all films in order to proceed effectively to bar the showing of unprotected films, the requirement of submission could not be administered in such a manner as to give finality to the censor's determination of whether or not a film constituted protected expression; and

3. that the procedure must assure a prompt, final judicial decision.

0808 DOCTRINE AGAINST BROADNESS. Regulatory measures in the area of expression cannot be employed in purpose or effect to broadly stifle, penalize, or curb the exercise of free expression. To be valid the measure must be highly selective, even though the government purpose in regulating the activity is legitimate and substantial, and that purpose cannot be pursued by means which broadly stifle personal liberties when the end can be effectively achieved by "narrow" means. *Shelton v. Tucker*, 364 U.S. 479 (1960) (state statute, requiring teachers in public schools to file affidavits giving names and addresses of all organizations to which they had belonged or contributed within the preceding five years as a prerequisite of employment, held invalid) and cases cited therein. *See also Cox v. Louisiana*, 379 U.S. 559, *reh'g denied*, 380 U.S. 926 (1965) (a state breach-of-the-peace statute which was broad in scope could not constitutionally be employed to limit the rights of free speech and assembly, while another state statute prohibiting picketing in, or near, a courthouse for the purpose of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing the court, was considered not too broad since it was narrowly drawn and appropriate for vindicating the state's interest in assuring justice under law) *and Board of Airport Commissioners of Los Angeles v. Jews for Jesus Inc.*, 482 U.S. 569 (1987) (airport authority resolution declaring central terminal area

not open to first amendment activities struck down as overbroad; court notes that, as drafted, regulation would ban nearly every person who enters area from all first amendment activities—including talking or reading).

0809 "VOID FOR VAGUENESS" DOCTRINE. Regulations infringing on freedom of expression must specifically define the prohibited conduct. Laws vague in any area are constitutionally infirm but, when first amendment rights are involved, the courts are especially stringent in requiring that the regulation clearly define the proscribed conduct. For example, in *Cox v. Louisiana*, 379 U.S. 559, *reh'g denied*, 380 U.S. 926 (1965), dealing with the statutes regulating demonstrations "in or near" the courthouse, the Supreme Court found the term "near" to be vague.

PART B - FREEDOM OF EXPRESSION

0810 INTRODUCTION

A. ***The courts.*** The United States Court of Military Appeals has stated on several occasions that military personnel are entitled to first amendment protections. *See United States v. Gray*, 20 C.M.A. 63, 42 C.M.R. 255 (1970); *United States v. Howe*, 17 C.M.A. 165, 37 C.M.R. 429 (1967); *Reid v. Covert*, 354 U.S. 1, 39 (1957); *United States v. Voorhees*, 4 C.M.A. 509, 16 C.M.R. 83 (1954). But the protection afforded is not absolute. It must accommodate the requirement for an effective military force. This latter requirement creates substantial legitimate government interests that are not present in the civilian context for, as the Supreme Court has stated, there are: "inherent differences in values and attitudes that separate the military establishment from civilian society. In the military, by necessity, emphasis must be on the security and order of the group rather than on the value and integrity of the individual." *Reid v. Covert, supra.* Justice Douglas, in criticizing the military justice system in the majority opinion in *O'Callahan v. Parker*, 395 U.S. 258 (1969), stated that the commander should exert the least possible power necessary to accomplish his mission and maintain good order and discipline within his command—thereby impliedly recognizing the legitimate interests that justify limitations on free expression in the military service.

B. ***Department of Defense.*** The balance between the servicemember's right of expression and the needs of national security is the subject of DOD Directive 1325.6 (with change 1) of 12 September 1969, Subj: GUIDELINES FOR HANDLING DISSIDENT AND PROTEST ACTIVITIES AMONG MEMBERS OF THE ARMED FORCES (transmitted by OPNAVINST 1620.1 and MCO 5370.4) [hereinafter DOD Directive 1325.6], which states:

> It is the mission of the Department of Defense to safeguard the security of the United States. The service member's right of

> expression should be preserved to the maximum extent possible, consistent with good order and discipline and the national security. On the other hand, no commander should be indifferent to conduct which, if allowed to proceed unchecked, would destroy the effectiveness of his unit. The proper balancing of these interests will depend largely upon the calm and prudent judgment of the responsible commander.

This directive provides ***general guidance***, significant portions of which have withstood judicial scrutiny by the Supreme Court. *See, e.g., Brown v. Glines*, 444 U.S. 348 (1980); *Secretary of the Navy v. Huff*, 444 U.S. 453 (1980); *Greer v. Spock*, 424 U.S. 828 (1976). OPNAVINST 1620.1A of 27 April 1977 implements the DOD Directive into the Navy.

C. ***Criminal sanctions***. A particular exercise of expression could bring a servicemember within the prohibition of a criminal statute. Statutory provisions that could apply include:

1. Uniform Code of Military Justice [10 U.S.C. §§ 877-934]:

a. Attempt to commit an offense (UCMJ, Article 80);

b. conspiracy to commit an offense (UCMJ, Article 81);

c. soliciting desertion, mutiny, sedition, etc. (UCMJ, Article 82);

d. any commissioned officer using contemptuous words against the President, Vice President, Congress, Secretary of Defense, Secretary of a military department, Secretary of the Treasury, or the governor or legislature of the state, territory, commonwealth, or possession in which the officer is present (UCMJ, Article 88);

e. disrespect toward a superior commissioned officer (UCMJ, Article 89);

f. willfully disobeying a lawful command of a superior commissioned officer (UCMJ, Article 90);

g. disrespect toward a warrant officer, noncommissioned officer, or petty officer (UCMJ, Article 91);

h. failure to obey a lawful order or regulation (UCMJ, Article 92);

i. mutiny or sedition (UCMJ, Article 94);

j. betrayal of a countersign (UCMJ, Article 101);

k. corresponding with the enemy (UCMJ, Article 104);

l. causing or participating in a riot or breach of peace (UCMJ, Article 116);

m. provoking speeches or gestures (UCMJ, Article 117);

n. extortion (UCMJ, Article 127);

o. use of writing knowing it to contain false statements (UCMJ, Article 132);

p. conduct unbecoming an officer (UCMJ, Article 133); and

q. conduct undermining good order, discipline, and loyalty (e.g., bomb threat or hoax, disloyal statements) (UCMJ, Article 134).

2. Federal criminal code (18 U.S.C.):

a. Polling armed forces in connection with political activities (§ 596);

b. enticing desertion or harboring deserters (§ 1381);

c. assisting or engaging in rebellion or insurrection (§ 2383);

d. two or more persons engaging in seditious conspiracy (§ 2384);

e. advocating overthrow of the government by force or violence (§ 2385);

f. interference with morale, discipline, or loyalty of the armed forces (§ 2387);

g. interference with armed forces during war (§ 2388);

h. counseling evasion of the draft [50 U.S.C. app. 462];

i. mailing writings or other publications containing matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States (§ 1717); and

j. organizing a "military labor organization" or participating as part of such an organization in a strike or other concerted labor activity against the Federal Government [10 U.S.C. § 976].

0811 FREEDOM OF SPEECH AND PRESS

A. *Speech*

1. ***Prior restraints***. The prior restraint of speech is not provided for in DOD Directive 1325.6; however, sections 401 and 404 of SECNAVINST 5720.44, Subj: DEPARTMENT OF THE NAVY PUBLIC AFFAIRS POLICY AND REGULATIONS, provide for "policy review" of certain public statements, whether oral or written, pertaining to foreign or military policy. For example, an order not to talk to or speak with any men in a company concerning an investigation has been held to be an impermissible prior restraint on the freedom of speech. In *United States v. Wysong*, 9 C.M.A. 249, 26 C.M.R. 29 (1958), the accused attempted to persuade other servicemembers not to give information in an official investigation concerning alleged misconduct involving the accused's wife and minor stepdaughter and several members of his company. The accused's company commander became aware of these efforts and gave the accused a direct order "not to talk to or speak with any of the men in the company concerned with this investigation except in line of duty," thereby imposing a prior restraint on the accused's freedom of speech. The accused again tried to persuade members of the company not to relate information concerning his stepdaughter. The accused was then convicted under Article 92 of the Uniform Code of Military Justice for failure to obey the lawful order of his company commander, and he appealed. The Court of Military Appeals reversed the conviction, holding that the order was illegal even though in furtherance of a valid purpose (e.g., protecting the official investigation) because it was both too broad (the Court said that "a literal reading could be interpreted to prohibit the simple exchange of pleasantries between the accused and those 'concerned' with the investigation") and void for vagueness (the Court pointed out that everyone in the company was in some way "concerned" with the investigation since the incidents which gave rise to the investigation had become a matter of common knowledge in the company).

2. ***Subsequent punishment***. There are several cases in which servicemembers have been prosecuted for violation of a criminal statute when they exercised what they regarded as their right to freedom of speech. The Court of Military Appeals, like the Supreme Court, prefers subsequent punishment over prior restraints. It is far easier for the Court to scrutinize a case dealing with a subsequent criminal prosecution with the facts, circumstances, and effects of the free expression clearly defined.

a. In *United States v. Howe*, 17 C.M.A. 165, 37 C.M.R. 429 (1967), the accused was a second lieutenant stationed at Fort Bliss, Texas, who participated in a peaceful antiwar demonstration in El Paso, while off duty and out of uniform, by

carrying a placard that read, "LET'S HAVE MORE THAN A CHOICE BETWEEN PETTY IGNORANT FASCISTS [sic] in 1968," on one side, and "END JOHNSON'S FASCIST [sic] AGGRESSION IN VIETNAM" on the other. He was convicted of using contemptuous words against the President, under Article 88 of the Uniform Code of Military Justice, and of conduct unbecoming an officer under Article 133 of the Uniform Code of Military Justice. In affirming the convictions, the Court of Military Appeals held that neither Article 88 nor Article 133 affronted first amendment freedoms. One point of interest in the decision was the standard used by the court in weighing the limitation on expression imposed by Article 88: "That in the present times and circumstances such conduct by an officer constitutes a clear and present danger to discipline within our armed services, under the precedents established by the Supreme Court, seems to require no argument." *Id.* at 174, 37 C.M.R. at 438. [NOTE: The current test in the military is the "clear danger" test. DOD Directive 1325.6.III.A.]

b. In *United States v. Gray*, 20 C.M.A. 63, 42 C.M.R. 255 (1970), the accused was assigned to the Crash Crew section at Marine Corps Air Station, Kaneohe Bay, Hawaii. One evening he absented himself without authority, after first writing the following message in the "rough" log kept in the Crash Crew office:

> *Dear fellow member's of crash crew*
>
> *As I write this I have but a few hours left on this island. Surely you know why, but where did I go? I'm not to [sic] sure right now but I have hopes of Canada, than on to Sweden, Turkey, or India.*
>
> *It sounds silly to you? Let me ask you this: do you like the Marine Corps? The American policy or foreign affairs. [sic]*
>
> *Have you ever read the constitution of the United States? IT'S A FARCE. Everything that is printed there is contradicted by 'amendments'. is [sic] this fair [to] the U.S. people? I believe not. Why sit [sic] back and take these unjust Rules and do nothing about it. If you do nothing will change.*
>
> *This is what I'm doing, A Struggle for Humanity. But it takes more than myself. We must all fight.*
>
> */s/ Mr. Gray*

The accused later surfaced at a church near the University of Hawaii, where he and ten others made speeches and handed out a leaflet generally derogatory of the Marine Corps and the war in Vietnam. The accused was thereafter convicted under Article 134 of the Uniform Code of Military Justice of having made statements disloyal to the United States. The Court of Military Appeals upheld the conviction insofar as it pertained to the entry in the Crash Crew log, but set aside the conviction based on the leaflet handed out at the

church. In reply to the accused's assertion of his right to freedom of speech, the Court stated:

> [The] public making of a statement disloyal to the United States, with the intent to promote disloyalty and disaffection among persons in the armed forces and under circumstances to the prejudice of good order and discipline, is not speech protected by the First Amendment and is conduct in violation of Article 134. . . .

Id. at 66, 42 C.M.R. at 258.

c. In *United States v. Daniels*, 19 C.M.A. 529, 42 C.M.R. 131 (1970), the accused was convicted at trial for interference with the morale, discipline, or loyalty of members of the armed forces in violation of 18 U.S.C. § 2387 (1970) when he exhorted other Marines to refuse orders to Vietnam. The conviction was reversed by the Court of Military Appeals due to the failure of the military judge to instruct the members of the court that they must find beyond a reasonable doubt that the accused's statements had created a clear and present danger of impairing the loyalty, morale, or discipline of the servicemembers involved before they could reach a finding as such. Again, the court adopted the "clear and present danger" rule. The court did, however, affirm a conviction for a lesser offense of soliciting the commission of a military offense (e.g., refusal of the performance of duty). In *United States v. Harvey*, 19 C.M.A. 539, 42 C.M.R. 141 (1970), a companion case to *Daniels*, a conviction for making disloyal statements was set aside due to instructional error (the term "disloyal statement" was too broadly defined), but a conviction for the lesser offense of soliciting the commission of an offense was affirmed.

d. In *United States v. Levy*, 39 C.M.R. 672 (A.B.R. 1968), *petition denied*, 18 C.M.A. 627 (1969), the accused was convicted in part for publicly uttering statements with the design to promote disloyalty and disaffection among troops. The Army Board of Review affirmed the conviction and rejected the contention that the accused's statements were protected by the first amendment. In so doing, the board applied a "reasonable tendency" test regarding the likelihood that the accused's statements would cause disaffection and disloyalty among the troops. *Id.* at 677-78.

e. In *Unites States v. Stone* 37 M.J. 558 (A.C.M.R. 1993) the Army Court of Military Review rejected a first amendment challenge to a general court-martial conviction of a Sergeant First Class for willfully & wrongfully giving a speech before a high school assembly in which he gave a false account of his actions in Iraq during Operation Desert Shield / Storm. SFC Stone had deployed to Saudi Arabia as a member of the 101st Airborne Division (Air Assault) as part of Desert Shield. In January 1991, he returned to the U.S. on emergency leave because his mother was seriously ill. He never returned to Saudi Arabia. While he was home in Vincennes, Indiana, he was invited to his alma mater to describe to the students his experiences in the desert. On 5 February 1991, almost three

weeks prior to the commencement of the ground war, he appeared at the high school in his Army uniform wearing a green beret. He addressed two student assemblies during which he falsely described his activities in Southwest Asia. He told of parachuting 50,000 feet into Baghdad as leader of a four-man Special Forces team hours prior to the commencement of the air war in mid January 1991. He claimed he also had been in Iraq in December 1990. He also claimed that he was in danger as terrorists were watching his activities, bent on revenge. A local reporter was present and recounted the stories in the local newspaper. The newspaper publisher, who was the younger brother of then Vice President Quayle, telefaxed his older brother a copy of the story, proudly pointing out the exploits of the local hero. Vice President Quayle sent a copy to the Pentagon. Inquiries determined SFC Stone was not a member of Special Forces and the entire story was fabricated.

The newspaper story appeared on the front page of the *Vincennes Sun-Commercial* on 6 February 1991, and included a photograph of SFC Stone addressing one of the school assemblies. The newspaper reported, inter alia, that:

Stone said his first mission into Iraq was on December 28. About 8:30 p.m. on January 16, Stone was leading one of 20 four-man Green Beret teams into Baghdad. The teams were dropped by parachute from 50,000 feet. The drop of nearly 10 miles takes more than four minutes to complete, he said. As a team leader, Stone said he wears a computerized "glove" valued at $1.2 million. The device ties into "Star Wars" satellites and can pinpoint his geographic location within 20 feet, as well as direct him to the helicopter pickup point and warn of approaching enemies, he said. Their first target was power plants, Stone said. Then, in darkness the American troops donned their night vision goggles and took on the Republican Guard while they either blew up or placed electronic homing devices on various military targets for bombers to target a few hours later. Because the goggles are heat sensitive, bullets leave a visible heat trail in the air, Stone said, and they were "flying everywhere."

At trial, SFC Stone did not dispute that he had misrepresented his combat service during Operation Desert Shield / Storm.

The military judge convicted the appellant, inter alia, of making an unauthorized speech, specifically excepting the words " to the prejudice of good order and discipline in the Armed forces." He thereby found SFC Stone guilty only of service-discrediting conduct. The appellate defense counsel asserted that SFC Stone's presentations were "unofficial" and therefore could not be "service-discrediting." The Court did not agree that SFC Stone's speeches were "unofficial" because he was on leave and supposedly speaking only for himself. The Court held that when SFC Stone, a senior noncommissioned officer, made presentations regarding military activities while in uniform in a public forum, he was acting in an official capacity.

The Court found that a servicemember does not have the unlimited freedom to make a false official presentation to a public forum, holding that giving

a "false speech" in a public forum may constitute in some circumstances an offense under Article 134, UCMJ, for which punitive sanctions may be imposed. As a senior noncommissioned officer, the Court reached it is reasonable to assume that he would be aware of the effect his remarks would have if and when exposed as false. The effect of his deceit, once it became known to those who heard him, was predictably discrediting to the armed forces. Under the circumstances presented, the government had the authority to regulate the conduct of the appellant and to impose punitive sanctions for that conduct. The government provided ample evidence of a diminished confidence by those who heard SFC Stone in the integrity of servicemembers in general. Several students, a teacher, and the newspaper reporter expressed a new distrust in the truthfulness of service personnel as a result of SFC Stone's activity. The presentation, the Court noted, occurred at a moment in time when confidence in the military by its nation was especially important.

f. Captain Hartwis argued that UCMJ Article 133 was unconstitutionally overbroad and vague as applied to the facts surrounding his letter to Gabrielle, the female under the age of sixteen, and under the circumstances violated his first amendment rights to free speech. The Court disagreed.

As a result of an article in her intermediate school newspaper, Gabrielle sent a letter to Soldiers Without Mail, Operation Desert Shield, APO New York. She wrote the letter on regular notebook paper using a pen. Neither the paper nor the envelope was perfumed. The letter was intended to go to a man or woman soldier, Sailor, or Marine. The salutation was "Dear Soldier." In the letter, she gave her name, the name of her school, and her hobbies: swimming, biking, and shopping. She also stated that the soldiers' sleeping habits must have gotten messed up with such time differences, that they should feel important, and how much she supported them. At the time of trial, Gabrielle was fourteen years old.

Captain Hartwis, a reserve office called to active duty for Desert Storm, was a shift officer at the rear area operations center for his unit in Southwest Asia. He received and answered Gabrielle's letter. He wrote:

Dear Gabriella(sic),

3-3-91

I've read your letter for a while, but because of the fighting . . . Thanks for writing. Hope I can write this letter so its not 'boring'. I'm 5'9", brown haired, blue eyed, and single . . . (let me know if you'd like to pursue that later [here appellant drew a heart]). I have interests in swimming, dancing, traveling (I lived in Germany before the war), and saunas (the European variety – coed). I also enjoy nature walks (called Volksmarches, in Germany), photography (go check out David Hamilton at your local bookstore to know more about my favorite themes), and reading. I just finished a book I think you'd enjoy. . . . Butterfly, by Kathryn Harvey. It reminded me of something you could send me. . . . something we're critically short of here. . . . fantasies. Feel free to include in your next letter, if you(sic) like, you most intimate feelings. I'll write you mine, too, if you'd like. I don't know

yet whether I want to go back to Germany after this, or return to the states – I'd miss the freedom of European beaches (topless – (men and women) – or nude (my favorite), parks and swim halls. I am an FKK fan [Here appellant drew a heart]. If you'd like to add something nice to your 'fantasy' letter, you could include a picture of yourself – (it doesn't have to be nude, but, of course, that would be nice. . . .). Have you ever been to Europe? Would you like to go someday? (Would you be interested in checking out the beaches?). I await your next perfumed letter. Hope you write soon.

Love, Charlie

C.P.T. Hartwig

376-60-9747

312th SPT CTR (1 AD)

OPERATION DESERT STORM

APO NY 09761"

After receiving and reading the letter, Gabrielle felt ashamed that people like the writer represented out country. She hid the letter in her room because she thought it would make her mother angry. About an hour later, her mother discovered the envelope on the kitchen table, demanded the letter, and read it. Gabrielle was right. It made her mother angry. " Butterfly" was a book being read by personnel of Hartwis' unit at about the time he wrote the letter to Gabrielle. It was described as a book with sexual overtones. One witness described it as a book with very sexually explicit scenes. The back of the book cover contains the statement that "Above an exclusive men's store on Rodeo Drive there is a private club called Butterfly, where women are free to act out their secret erotic fantasies."

The Court cited *Parker v. Levy*, 417 U.S. 733, 41 L. Ed. 2d 439, 94 S. Ct. 2547 (1974), in which the United States Supreme Court examined UCMJ Article 133. The Court held that Article 133 was not overbroad or void for vagueness. The Court found that an officer could be held to a higher standard than a civilian or enlisted personnel because of the officer's particular position of responsibility and command. *Id.* at 744. The Court further held that a military officer's first amendment right to free speech may be limited because of the different character of the military community and the need to preserve the military's capacity to carry out its mission."

Captain Hartwis further contended that the letter was meant to be private correspondence and that he could not have foreseen any potential embarrassment or bad publicity to the Army. The Court held: "that the government's interest were established in this case. Hartwis' acts took place during Operation Desert Storm, a time when the military services were under particular scrutiny by members of the public. The

nature of his letter was not the type that an officer would send to a person he had never met. His letter was in response to a "Soldier Without Mail" letter, a letter written to show public support for Operation Desert Storm. His contention that he did not commit the offense because he intended the correspondence to be private is not well founded. As an officer, appellant must accept responsibility for his letter which he sent blindly to a reader. Under the circumstances, this Court concludes that the language of the letter was offensive, vulgar, and intended to incite lust. His conduct falls below the standards established for officers. His conduct falls well within the holding of *Parker v. Levy* which limits and officer's first amendment rights."

B. ***Possession of printed materials***

1. ***Prior restraints***. Paragraph III.A.2. of DOD Directive 1325.6 states: "[T]he mere possession of unauthorized printed material may ***not*** be prohibited . . ." (emphasis added). The term "unauthorized" as used in the above provision could be misleading. A reasonable reading of the provision is considered to be that it was not intended to apply to classified security material since unauthorized possession of such material is prohibited by other regulations. This provision parallels the rule of *Stanley v. Georgia*, 394 U.S. 557 (1969), where the Supreme Court held constitutionally invalid a criminal statute prohibiting mere possession of obscene material in one's own home based on the rationale that a man has a right to be left alone and to read what he wants without being subject to criminal sanctions. Article 510.68 of OPNAVINST 3120.32, Subj: STANDARD ORGANIZATION AND REGULATIONS OF THE U.S. NAVY no longer prohibits the ***possession*** of pornography on board a naval unit. If one displays material or possesses it for the purpose of making an illegal distribution, however, it may be seized. DOD Directive 1325.6, para. III.A.2., states that: "[P]rinted material which is prohibited from distribution shall be impounded if the Commander determines that an attempt will be made to distribute." Since a seizure of material would constitute a prior restraint, a commanding officer should be prepared to justify such action by pointing to the facts that led him to conclude that there was a clear danger that an unauthorized distribution would occur. Such a determination would be made in the same manner that a commanding officer decides there is probable cause to order a search. One relevant factor would be how many copies of a particular publication were involved since it is reasonable to assume that an individual is not going to read multiple copies of the same material himself. Another factor would be whether the material is addressed to any particular group.

2. ***Subsequent punishment***. Since mere possession of unauthorized material may not be prohibited, an individual may also not be successfully prosecuted for mere possession under Article 134, UCMJ as prejudicial to good order and discipline. *See United States v. Schneider*, 27 C.M.R. 566 (A.B.R. 1958), where the Army Board of Review disapproved a conviction under Article 134, UCMJ, based on evidence showing only that some obscene photographs were found during a routine inspection of the accused's belongings. There was no evidence of any effort by the accused to either show the

photographs to anyone or to distribute them. The court held that such evidence does not show conduct either directly or inherently prejudicial to good order and military discipline.

C. ***Distribution of printed material***

1. ***Prior restraints.*** DOD Directive 1325.6 distinguishes between distribution through official channels (such as base exchanges or libraries) and "other" channels (such as handing out materials on the sidewalks).

a. ***Official outlets.*** Paragraph III.A.1. of DOD Directive 1325.6 states: "A Commander is not authorized to prohibit the distribution of a specific issue of a publication distributed through official outlets such as post exchanges and military libraries." This provision is designed to preclude the possibility of a commander becoming embroiled in a controversy over supposed censorship of materials that have been accepted for distribution through official outlets. Article 4314f of the *Navy Exchange Manual* contains very broad guidelines for screening pornographic or other offensive materials not acceptable for sale within the military establishment. The DOD Directive does not prohibit the commander from completely removing a publication from an outlet as opposed to censuring a specific issue. However, a commander is required to apply with equality a constant standard to all publications. For example, in *Overseas Media Corp. v. McNamara,* 385 F.2d 308 (D.C. Cir. 1967), the court held that a justifiable claim was made out by a publisher who claimed that the military, acting without criteria, had barred his newspaper from sale at newsstands of post exchanges while admitting others.

b. ***Unofficial outlets.*** Paragraph III.A.1. of DOD Directive 1325.6 provides for a prior restraint and specifies the standard to be used in imposing such prior restraint:

> In the case of distribution of publications through other than official outlets, a Commander may require that prior approval be obtained for any distribution on a military installation in order that he may determine whether there is a ***clear danger*** to the loyalty, discipline, or morale of military personnel, or if the distribution of the publication would ***materially interfere*** with the accomplishment of a military mission. When he makes such a determination, the distribution will be prohibited. (Emphasis added).

These guidelines are designed to preclude condemnation of the regulation as being too broad. Local regulations that are promulgated to implement DOD Directive 1325.6 should themselves be carefully drafted, incorporating the above language. In *Greer v. Spock,* 424 U.S. 828 (1976), the Supreme Court upheld the commander's right to require that prior approval be given before civilians are permitted to distribute campaign literature on a military reservation. A commander may prohibit ***any*** activity if he determines

that the activity constitutes a clear danger to the loyalty, discipline, or morale of troops on the base under his command, as long as his decisions are not made in an arbitrary and capricious manner.

(1) ***Regulatory specificity.*** As an example of restrictive judicial interpretation of a regulation imposing a prior restraint, consider *United States v. Bradley*, 418 F.2d 688 (4th Cir. 1969), where three students were convicted in Federal district court of the offense of entering a Federal installation for an unlawful purpose. They had entered Ft. Bragg, N.C., and distributed handbills without prior approval. The government argued that such activity was unlawful due to a base regulation prohibiting "picketing, demonstrations, sit-ins, protest marches, and political speeches, and similar activities" without prior approval. The court held that the base regulation did not cover handbilling, and therefore reversed the conviction.

(2) ***Protected interests.*** A commanding officer should be prepared to point to facts in support of his determination that a clear danger to the loyalty, discipline, or morale of military personnel would result or that the distribution would materially interfere with the accomplishment of a military mission. An unsupported conclusion may not be sufficient to withstand challenge in Federal court. "The fact that a publication is critical of Government policies or officials is not, in itself, a ground upon which distribution may be prohibited." DOD Dir. 1325.6, para. III.A.3. In this connection, see *Yahr v. Resor*, 431 F.2d 690 (4th Cir. 1970), where servicemembers at Ft. Bragg, N.C., published an underground newspaper called the "Bragg Briefs" and distributed it off base. They then requested permission to distribute the publication in certain areas on base that are normally open to the public. The commanding general refused permission, stating that the distribution would present a clear danger to the loyalty, discipline, or morale of the troops. The servicemembers then sought an injunction in Federal district court forbidding the commanding general from preventing the distribution. The district judge refused to issue the injunction and the servicemembers appealed. The court of appeals ruled that the district judge had not abused his discretion in refusing to issue the injunction, but it also remanded the case for a further hearing to determine whether the commanding general was justified in concluding that the distribution would present a clear danger. Thus, the court was prepared to look behind the commander's decision and see if there was any basis in fact for it.

(3) ***Case-by-case decisionmaking.*** The decision whether to permit distribution of a publication must be made on a case-by-case basis; the June issue of a publication could not be prohibited solely because the March issue was objectionable. *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957). Some grounds upon which distribution might be prohibited are the contents of the publication may be unlawful (e.g., enticing desertion, violating security regulations, containing disloyal statements); or the particular state of events at the command may make distribution objectionable, for example, a history of violence, as in *Dash v. Commanding General*, 307 F. Supp. 849 (D.S.C. 1969), where

a commanding officer prohibited a meeting from taking place because a prior impromptu discussion on base had led to a fist fight.

(4) ***Adequate procedural safeguards.*** DOD Directive 1325.6 is silent as to any procedures to be followed in deciding whether or not to permit distribution of a publication via unofficial sources. The Supreme Court, however, attaches great importance to the procedure employed in making an administrative determination to impose a prior restraint as discussed in section 0907, above. For example, in *Blount v. Rizzi*, 400 U.S. 410 (1971), the Supreme Court struck down a Federal statute authorizing the Postmaster General to prevent use of mail or postal money orders in connection with allegedly obscene materials because of a lack of adequate procedural safeguards. Those safeguards in military context should provide for a hearing to afford the persons desiring to distribute the material an opportunity to present their material for review and state how they wish to distribute the material. Such a hearing could be informal in nature and could be conducted by anyone designated by the commanding officer. The local regulation should then provide for a speedy review of the hearing by the commanding officer who would be well advised to seek the advice of his staff judge advocate as to the legal sufficiency of the record for making a determination whether or not to permit distribution. Reasonable speed in these procedures is essential, for unwarranted delay on the part of the command in replying to a request for permission to distribute could itself result in successful recourse to the Federal courts. The commanding officer should then inform the applicants of his decision. Applicants could then be informed that they are free to forward an appeal through the chain of command. By having had a hearing at the outset, the commanding officer now has a record he can forward to explain his decision. Further, if the applicants decide to seek relief in the Federal courts, a record again is available to support the decision. The above procedure is only suggested, as the only absolute requirements are: (1) a consideration of the request; and (2) a statement of reasons for denial.

(5) ***What constitutes "distribution."*** Questions will inevitably arise concerning the fringe area of "distribution." While each case must be considered on its own facts, the following cases may provide some guidelines:

(a) In *United States v. Ford*, 31 C.M.R. 353 (A.B.R. 1961), the Army Board of Review, citing no authority, held that the showing of an obscene photograph to a fellow officer friend in the privacy of the accused's house did not constitute conduct unbecoming an officer in violation of Article 133. On the other hand, the court did approve the conviction and dismissal from the service of the accused for having loaned a lewd and lascivious book to another.

(b) In *United States v. Jewson*, 1 C.M.A. 652, 5 C.M.R. 80 (1952), the Court of Military Appeals upheld an officer's conviction under Article 133, UCMJ, where he permitted and assisted in the showing of an obscene film to officers and senior noncommissioned officers in his command. *See also United States v. White,*

37 C.M.R. 791 (A.F.B.R. 1965) (affirming a conviction under Article 134 for showing an obscene film).

2. ***Subsequent punishment.*** Written materials could violate any of the criminal statutes listed above. In this connection, if a commander permits distribution of a publication on base, he should advise the person making the distribution, in writing, that he does not in any way condone any material in the publication and that the persons making the distribution could be subject to prosecution for any criminal violations resulting from the distribution.

D. ***Writing or publishing materials***

1. ***Prior restraints***

a. Paragraph III.C of DOD Directive 1325.6 prohibits the use of duty time or government property for personal vice official writing. Such a restriction is clearly valid. The same provision notes that publication of "underground newspapers" by military personnel ***off base***, on their own time and with their own money and equipment, is not in itself prohibited.

b. Sections 401.2 and 403.4 of SECNAVINST 5720.44, Subj: DEPARTMENT OF THE NAVY PUBLIC AFFAIRS POLICY AND REGULATIONS, provide for prior security and policy review of certain materials originated by naval personnel. The case of *United States v. Voorhees*, 4 C.M.A. 509, 16 C.M.R. 83 (1954) dealt with an Army regulation which the court construed to provide for censorship of material for reasons of national security. The accused was a lieutenant colonel in the Army who wrote a book about the Korean conflict. He submitted the book for review in accordance with regulations, and soon became embroiled with the reviewing authorities over some parts of the book. While this was happening, a newspaper (which planned a series of articles on the book) asked the accused to write some articles for the newspaper's series. The accused wrote two such articles and submitted them to the newspaper without first obtaining clearance. The accused did inform the newspaper that clearance would have to be obtained before publication of the articles. Clearance was never obtained, and the articles were never published. The Court of Military Appeals held that the accused had been properly convicted of failure to obey the Army regulation requiring clearance of the material before it was submitted to the newspaper. The court was willing to assume that there was nothing in the articles that violated national security. That, however, did not relieve the accused of the obligation to comply with the censorship regulation. No case has been found which deals with the requirement of censorship of materials on the grounds of possible conflict with established governmental policy as compared to national security grounds.

2. ***Subsequent punishment.*** Depending on the content of a writing, publication could violate any of the criminal statutes listed above, as well as security regulations. Article 1121.2 of *U.S. Navy Regulations, 1990*, prohibits: "any public speech

or . . . publication of an article . . . which is prejudicial to the interests of the United States." For example, in *United States v. Priest*, 21 C.M.A. 64, 44 C.M.R. 118 (1971), the Court of Military Appeals affirmed a conviction under Article 134, UCMJ, for making disloyal statements with the design to promote disloyalty and disaffection among the troops, based on articles the accused had published in his underground newspaper. Although the court did not have the constitutional issue presented on appeal, it is clear that disloyal statements are not protected by the first amendment.

0812 RIGHT TO PEACEABLE ASSEMBLY

A. ***Demonstrations.*** DOD Directive 1325.6 (with change 1) distinguishes between on-base and off-base demonstrations:

1. ***On base***

a. ***Prior restraint.*** A commanding officer should prohibit an on-base demonstration which "could result in interference with or prevention of orderly accomplishment of the mission of the installation, or present a clear danger to loyalty, discipline, or morale of the troops." DOD Directive 1325.6, para. III.D. This test is narrowly drawn, both to protect substantial governmental interests and withstand judicial scrutiny. In *Dash v. Commanding General*, 307 F. Supp. 849 (D.S.C. 1969), the commanding general had refused permission for a group meeting on base to discuss the Vietnam war. The servicemembers then sought a declaratory judgment in Federal court stating that they could hold the meeting. The court declined, stating that the commanding general's decision was justified by reason of the peculiar circumstances of the military. The government had presented evidence that a prior impromptu discussion on base had led to a fist fight. The court pointed to such evidence as clearly demonstrating the reasonableness of the post commander's decision. The court then was presented with, and accepted, facts to justify the commander's decision. By presenting such facts, the government was able to rebut the argument that the commander had acted arbitrarily.

b. ***Subsequent punishment.*** As with other forms of expression, persons participating in a demonstration on base may violate any number of the criminal statutes set above.

2. ***Off base***

a. ***Prior restraints.*** Paragraph III.E. of DOD Directive 1325.6, prohibits participation by servicemembers in off-base demonstrations in the five following situations:

(1) ***On duty.*** The phrase "on duty" in this context refers to actual working hours, as opposed to authorized leave or liberty. A servicemember attending

an off-base demonstration during working hours would therefore most likely be in an unauthorized absence status.

(2) ***In a foreign country.*** The justification here is to avoid incidents embarrassing to the U.S. Government that could result from servicemembers becoming embroiled in local disputes in a foreign country. In some instances (such as article II of the NATO Status of Forces Agreement), regulations implementing international agreements forbid servicemembers from becoming so involved. In *United States v. Culver*, A.C.M. 20972 (1971), the accused, a captain, participated in civilian clothing in a meeting at Hyde Park, London, with some 50-100 persons. The meeting then broke up into groups of 5-6 people each. The accused went with one of these groups to the American Embassy, where he presented a petition concerning American involvement in Vietnam. The groups then returned individually to Hyde Park and reconvened. The accused argued that he had not participated in a demonstration within the meaning of the regulation but, rather, that he had exercised his first amendment right to petition his government. The general court-martial rejected this argument and convicted the accused of violation of a lawful general order. Because the sentence involved was only a fine, there was no automatic review by the Court of Military Review or the Court of Military Appeals. Subsequently, the District Court for the District of Columbia dismissed an action filed by Culver finding that:

> For a member of the armed forces stationed in a foreign country to encourage and participate in a mass gathering, in a public place, for the announced purpose of demonstrating against U.S. military policies, and with engineered publicity, cannot be squared with conventional concepts of good order, discipline and morale indoctrinated and ingrained in the military establishment since the founding of the Republic.

The court then concluded that the regulation was not over-broad, but rather "reasonably necessary and appropriate to the maintenance of morale and discipline." *Culver v. Secretary of the Air Force*, 389 F. Supp. 331 (D.D.C. 1975).

(3) ***Activities constitute a breach of law and order.*** Effectively, this directs servicemembers not to break the law. In *United States v. Bratcher*, 19 C.M.A. 125, 39 C.M.R. 125 (1969), the court stated "an order to obey the law can have no validity beyond the limit of the ultimate offense committed." *Id.* at 128, 39 C.M.R. at 128. Thus, if a servicemember did participate in a demonstration which somehow violated the law, he should be prosecuted for the underlying violation committed rather than a violation of the regulation implementing DOD Directive 1325.6. Further, the maximum authorized punishment for a particular offense cannot be increased by ordering someone not to commit the offense and then prosecuting him for violation of both a lawful order and the particular criminal misconduct. *See* Part IV, para. 16e(2) Note, MCM, 1984.

(4) ***Violence is likely to result.*** This reflects the traditional responsibility of the commander to preserve the health and welfare of his troops. The commander who invokes his authority should be prepared to cite the factual basis for his determination that violence is likely to result.

(5) ***Overtly discriminatory organizations.*** Paragraph III.G. of DOD Directive 1325.6 prohibits "participation" (defined as actively taking part in public demonstrations, recruiting or training members, or organizing or leading such organizations) in organizations that espouse supremacist causes, attempt to create illegal discrimination or advocate the use of force or violence, otherwise engage in efforts, to deprive individuals of their civil rights overtly discriminate on the basis of race, creed, color, sex, religion, or national origin.

b. ***In uniform.*** DOD Directive 1334.1, Subj: WEARING OF THE UNIFORM, prohibits wearing the uniform:

(1) At any subversive-oriented meeting or demonstration;

(2) in connection with political activities;

(3) when service sanction could be implied from such conduct;

(4) when wearing the uniform would tend to bring discredit to the armed forces; or

(5) when specifically prohibited by the regulations of the department concerned.

Although the aforementioned are somewhat broad in scope, the courts are generally inclined to concede that the military can dictate how and when its uniforms shall be worn. For example, in *Locks v. Laird*, 300 F. Supp. 915 (N.D. Cal. 1969), *aff'd*, 441 F.2d 479 (9th Cir. 1971), the court refused to enjoin the Air Force from enforcing a general order prohibiting servicemembers from wearing the uniform "at any public meeting, demonstration, or interview if they have reason to know that a purpose of the meeting . . . is the advocacy, expression or approval of opposition to the employment or use of the Armed Forces of the United States." The court did, however, add a caveat concerning the constitutionality of such an order in time of peace rather than war. A few years earlier, the Air Force Board of Review, in *United States v. Toomey*, 39 C.M.R. 969 (A.F.B.R. 1968), had upheld the same general order and the accused's conviction for participating in an antidraft demonstration in uniform.

B. ***Off-base gathering places***

1. ***Prior restraint***. Paragraph III.B. of DOD Directive 1325.6 states: ***Off-Post Gathering Places***. Commanders have the authority to place establishments "off-limits", in accordance with established procedures, when, for example, the activities taking place there, including counselling members to refuse to perform duty or to desert, involve acts with a significant adverse effect on members' health, morale or welfare.

Under OPNAVINST 1620.2A / 1 MCO 1620.2A / COMDTINST 1620.1C (Subj: ARMED FORCES DISCIPLINARY CONTROL BOARDS), armed forces disciplinary control boards, operating under the cognizance of the area coordinator, have the authority to declare places "off-limits" where conditions exist that are detrimental to the good discipline, health, morals, welfare, safety, and morale of armed forces personnel. The commanding officer also has authority to act independently in emergency situations. The Federal courts will consider the decision to declare an establishment "off-limits" as final and not subject to review by the courts, providing the command has followed the procedures established in the regulations. *Ogden v. United States* 758 F.2d 1168 (1985). *Harper v. Jones*, 195 F.2d 705 (10th Cir.), *cert. denied*, 344 U.S. 821 (1952); *Ainsworth v. Barn Ballroom Co.*, 157 F.2d 97 (4th Cir. 1946). Those procedures include notification and a hearing for the affected parties. *See Treants and Assoc., Inc. v. Cooper*, No. 82-57-CIV-4 (E.D.N.C. Oct. 28, 1982). Note that the AFDCB requirements do not apply in foreign countries. In such cases, commanders may declare establishments or places off-limits at their discretion. Typically, such action is taken by the area coordinator (e.g., Commander, U.S. Naval Forces, Japan).

2. ***Subsequent punishment***. Servicemembers frequenting an establishment duly declared "off-limits" would be subject to prosecution for violation of a lawful order.

C. ***Membership in organizations***

1. ***General rule***. ***Passive*** membership in any organization by servicemembers cannot be prohibited. The line between "passive" and "active" membership is sometimes hard to define. In *United States v. Robel*, 389 U.S. 258 (1967), the Supreme Court set aside a conviction, under the Subversive Activities Control Act of 1950, which made it unlawful for members of Communist-action organizations to engage in any employment in any defense facility. The Court struck down the statute as too broad, finding that it prohibited employment by members of organizations without regard to whether the particular member concerned subscribed to any illegal goals the organization might have, and without regard to whether the employee's membership in a proscribed organization in fact threatened the security of a defense installation. This was considered too broad an incursion into the freedom of association protected by the first amendment.

The DOD Directive 1325.6 (applied to Navy via OPNAVINST 1620.1A) prohibits active duty members from "active" participation:

"Military personnel must reject participation in organizations that espouse supremacist causes; attempt to create illegal discrimination based on race, creed, color, sex, religion, or national origin; or, advocate the use of force or violence, or otherwise engage in efforts, to deprive individuals of their civil rights. Active participation, such as publicly demonstrating or rallying, fund raising, recruiting and training members, and organizing or leading such organizations is incompatible with Military Service, and is therefore prohibited. Commanders have authority to employ the full range of administrative procedures, including separation or appropriate disciplinary action against military personnel who actively participate in such groups."

The terrorist bombing of a Federal building in Oklahoma City in 1995, caused the Secretary of the Navy via a message, 102300ZMAY95, to reemphasize the policy and enforcement of DOD Directive 1325.6:

> "IN THE WAKE OF THE RECENT TRAGEDY IN OKLAHOMA CITY, IT IS IMPORTANT TO REMIND ALL ACTIVE DUTY MEMBERS THAT THE DOD DIRECTIVE 'GUIDELINES FOR HANDLING DISSIDENT AND PROTEST ACTIVITIES AMONG MEMBERS OF THE ARMED FORCES,' IS STILL IN EFFECT.
>
> "DOD POLICY PROHIBITS ACTIVE DUTY SERVICE MEMBERS FROM PARTICIPATING IN ORGANIZATIONS THAT SUPPORT SUPREMACIST CAUSES, ENCOURAGE ILLEGAL DISCRIMINATION, OR ADVOCATE FORCE OR VIOLENCE AS A MEANS OF DEPRIVING OTHERS OF THEIR CIVIL RIGHTS. ACTIVE PARTICIPATION IN SUCH AN ORGANIZATION IS ABSOLUTELY INCOMPATIBLE WITH NAVAL SERVICE.
>
> "COMMANDING OFFICERS ARE AUTHORIZED TO USE THE FULL RANGE OF ADMINISTRATIVE PROCEDURES IN DEALING WITH ANY ACTIVE DUTY SERVICE MEMBER WHO ACTIVELY PARTICIPATES IN SUCH ORGANIZATIONS. WHEN APPROPRIATE, SEPARATION OR DISCIPLINARY ACTION MAY BE UTILIZED.
>
> "PEACEFUL DISSENT IS PART AND PARCEL OF OUR CULTURE. THE ABILITY TO ACCEPT DIFFERENT AND SOMETIMES OPPOSING VIEWPOINTS—WITHOUT RESORTING TO VIOLENCE AND HATRED—HAS MADE AMERICAN SOCIETY THE MODEL OF LIBERTY. THOSE WHO ADVOCATE OR ENGAGE IN VIOLENT DISSENT HAVE NO PLACE ON OUR NAVY-MARINE CORPS TEAM, A TEAM SWORN TO PROTECT OUT SOCIETY."

Thus, organizational activities (such as distributing materials, recruiting new members, or on-base meetings) may, be proscribed by a commanding officer when they present a clear danger to security of the installation, orderly accomplishment of the command's mission, or preservation of morale, discipline, and readiness. Organizations which actively advocate racially discriminatory policies with respect to their membership

(such as the Ku Klux Klan) may be restricted by the commanding officer from the formation of affiliations aboard a naval ship or shore facility and the attendant solicitation of members.

2. ***Servicemembers' unions***. Membership in, organizing of, and recognition of military unions is criminally proscribed by section 976 of title 10, *United States Code*, and SECNAVINST 1600.1A, Subj: RELATIONSHIPS WITH ORGANIZATIONS WHICH SEEK TO REPRESENT MEMBERS OF THE ARMED FORCES IN NEGOTIATION OR COLLECTIVE BARGAINING.

a. ***Military labor organization***. A military labor organization that engages, or attempts to engage, in:

(1) Negotiating or bargaining with any military member or civilian employee on behalf of military members concerning the terms or conditions of service;

(2) representing military members before a civilian employee, or any military member, concerning a military member's grievances or complaints arising out of terms or conditions of military service; or

(3) striking, picketing, marching, demonstrating, or taking similar action intended to induce military members or civilian employees to participate in military union activity.

b. ***Prohibited activities***. Activities now ***prohibited*** in the military include:

(1) Military members knowingly joining or maintaining membership in a military labor organization;

(2) military members and civilian employees of the military negotiating or bargaining ***on behalf of the United States*** concerning terms or conditions of military service with person(s) representing or purporting to represent military members;

(3) anyone enrolling a military member in a military labor organization or soliciting or accepting dues / fees for such organization from any military member;

(4) military members and civilian employees attempting to organize, organizing, or participating in strikes or similar job-related actions that concern the terms or conditions of military service; and

(5) anyone using military facilities for military labor union activities.

c. ***Permissible activities.*** Activities ***permitted*** in the military include:

(1) Request mast;

(2) participation in command-sponsored or command-authorized counsels, committees, or organizations;

(3) seeking relief in Federal court;

(4) joining or maintaining in any lawful organization or association not constituting a military labor organization;

(5) filing a complaint of wrongs as discussed below; and

(6) seeking or receiving information or counseling from any source.

0813 RIGHT TO PETITION FOR REDRESS OF GRIEVANCES

A. ***Request mast.*** Article 0820.c of *U.S. Navy Regulations, 1990,* provides that the commanding officer shall: "afford 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 states: "The right of any person in the naval service to communicate with the commanding officer in a proper manner, and at a proper time and place, is not to be denied or restricted."

B. ***Complaint of wrongs***

1. ***Against the commanding officer.*** Article 138, Uniform Code of Military Justice, states:

> Any member of the armed forces who believes himself [herself] 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 [she] shall, as soon

as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

Proceedings on the complaint held by the officer exercising general court-martial jurisdiction will depend on the seriousness of the allegations; the whereabouts of the complainant, the respondent, and witnesses; the available time; and the exigencies of the service. Implementing instructions are set forth in chapter III of the *JAG Manual.*

2. ***Against another superior.*** Article 1150 of *U.S. Navy Regulations,* 1990, provides that a servicemember who considers himself / herself wronged by a person superior in rank or command, not his / her commanding officer, may report the wrong to the proper authority for redress. The officer exercising general court-martial jurisdiction shall inquire into the matter and take such action as may be warranted, including generally adhering to chapter III of the *JAG Manual.*

C. ***Relief in Federal court.*** A servicemember may seek relief from a Federal court if he / she believes his / her constitutional or statutory rights have been infringed by the military. An example would be the servicemember who petitions for a writ of habeas corpus when he feels the military authorities have improperly denied his application for conscientious objector status. Normally, Federal courts are reluctant to become involved in military affairs and will generally do so only after all administrative remedies are exhausted. In *Berry v. Commanding General, Third Corps, Ft. Hood, Texas,* 411 F.2d 822 (5th Cir. 1969) and *Levy v. Dillon,* 286 F. Supp. 593 (D. Kan. 1968), applications for writs of habeas corpus by servicemembers challenging the legality of post-trial confinement after conviction by courts-martial were denied because the applicants had not exhausted the procedures available to them within the military system. The Supreme Court, in *Orloff v. Willoughby,* 345 U.S. 83 (1952), stated that judges shall not get involved in running the military. In the landmark case of *Chappell v. Wallace,* 462 U.S. 296, 103 S.Ct. 2362 (1983), the Supreme Court once again confirmed the Federal courts reluctance to interfere with the discretionary decisions of the military chain of command. The petitioners were five minority crewmembers of USS Decatur (DDG-31). The respondents included the commanding officer, four lieutenants, and three noncommissioned officers in the chain of command. Petitioners alleged discrimination by the respondents in making duty assignments, writing performance evaluations, and imposing administrative penalties and punishments. The Court used the reasoning in *Feres v. United States,* 340 U.S. 135 (1950), as a guide in deciding this case and refused to find a remedy in money damages as was found in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971). The Court cited "special factors counseling hesitation" which exist when enlisted military personnel attempt to sue their superior officers.

D. ***Right to petition any Member of Congress or the Inspector General***

1. ***Congressional correspondence.*** Section 1034 of title 10, *United States Code (1993),* entitled "Communicating with a Member of Congress or Inspector General,"

provides: "No person may restrict a member of the armed forces in communicating with a member of Congress or an Inspector General," 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*. In *United States v. Schmidt*, 16 C.M.A. 57, 36 C.M.R. 213 (1966), the accused felt he was being harassed by his first sergeant for complaining to his senator about food and living conditions. He, therefore, requested mast and told his commanding officer that he was going to send a press release entitled "FT RILEY SOLDIER RECEIVES PUNISHMENT FOR EXERCISING RIGHTS" to the newspapers if the alleged harassment did not stop. The accused was then court-martialed and convicted of extortion and wrongful communication of a threat. The Court of Military Appeals reversed in three separate opinions. Judge Furguson emphasized the accused's right to free speech, saying that discipline had been "perverted into an excuse for retaliating against a soldier for doing only that which Congress has expressly said it wishes him to be free to do. . . ." *Id.* at 61, 36 C.M.R. at 217. Section 1034 also mandates specific "whistleblower" protections for servicemembers who contact either Congressmen or an Inspector General. *See* DOD Directive 7050.6, Subj: MILITARY WHISTLEBLOWER PROTECTION; SECNAVINST 5340.7.

2. ***Group petitions.*** Local regulations requiring servicemembers to obtain the base commander's approval before circulating on-base petitions addressed to members of Congress have been upheld. In *Brown v. Glines*, 444 U.S. 348 (1980) and *Secretary of the Navy v. Huff*, 444 U.S. 453 (1980), the Court upheld that the statutory bar in 10 U.S.C. § 1034 applied only to an individual servicemember's ability to submit a petition directly to Congress, and not to group petitions.

E. ***Preferring charges.*** If the circumstances warranted, a servicemember could voice a grievance by swearing out charges against another servicemember. UCMJ, Article 30.

0814 CIVILIAN ACCESS TO MILITARY INSTALLATIONS

A. ***Regulatory authority.*** Article 0802.1 of *U.S. Navy Regulations, 1990*, provides: "The responsibility of the commanding officer for his or her command is absolute. . . ." Authority commensurate with that responsibility has been widely recognized. Section 765.4 of title 32, *Code of Federal Regulations*, reads:

> Visitor Control
>
> Access to any naval activity afloat or ashore is subject to (a) the authorization and control of the officer or person in command or charge and (b) restrictions prescribed by law or cognizant authority to safeguard (1) the maximum effectiveness of the activity, (2) classified information (E.O. 10501, 18 F.R. 7049, as

amended, 50 U.S.C. § 401 note), (3) national defense or security, and (4) the person and property of visitors as well as members of the Department of Defense, and Government property.

The Department of the Navy Information Security Program Regulation and the Navy's *Physical Security and Loss Prevention Manual* should also be consulted for provisions dealing with the responsibility of the commanding officer for maintaining security.

B. ***Visitors***. It is a Federal offense for any person to enter a military reservation for any purpose prohibited by law or lawful regulations, or for any person to enter or reenter an installation after having been barred by order of the commanding officer. 18 U.S.C. § 1382.

1. In *Weissman v. United States*, 387 F.2d 271 (10th Cir. 1967), the conviction of civilians who reentered Ft. Sill, Oklahoma, after being excluded by the commanding officer, was upheld. The defendants had attended a court-martial as spectators and participated in a demonstration which included chanting, making noises, and singing certain phrases—all to the disruption of the court. The defendants were expelled, reentered, and were arrested and prosecuted under 18 U.S.C. § 1382. Defendants argued they were free-lance journalists and that the expulsion order violated the first amendment guarantee of freedom of the press. The court found no constitutional infirmity in the conviction.

2. In *Holdridge v. United States*, 282 F.2d 302 (8th Cir. 1960), the defendants had reentered the Mead Ordnance Depot, Mead, Nebraska, after being removed as trespassers and ordered not to reenter. The defendants offered proof that the reentering had been motivated by religious beliefs with respect to the immorality of war and by a desire to persuade the military authorities to cease construction of the missile base. Their prosecution and subsequent conviction, they argued, therefore infringed upon their freedom of religion, speech, and assembly. The court found no violation of first amendment rights.

3. In *Flower v. United States*, 407 U.S. 197 (1972), it was held that civilians had a right to distribute printed matter on a military installation where the road on which they were distributing the material was a highway extending through the military installation with no guard at either end. For all practical purposes, this was a public highway to which everyone had access. Subsequently, in *Greer v. Spock*, 424 U.S. 828 (1976), the Supreme Court held that a commanding officer has the unquestioned power to exclude civilians from the area of his command and that the enforcement of regulations barring political activities on post, including those areas generally open to the public, was not an unconstitutional infringement of first amendment rights.

4. In *United States v. Albertini*, 472 U.S. 675 (1985), defendant was convicted in Federal district court of violating 18 U.S.C. § 1382 by reentering Hickam Air Force Base, Hawaii, in defiance of an earlier debarment order. Albertini reentered the base

during an "open house" to engage in peaceful antiwar and antinuclear activities. He contended that his activities were protected by the first amendment, and the Ninth Circuit Court of Appeals agreed. *United States v. Albertini*, 710 F.2d 1410 (9th Cir. 1983). The court found that Hickam AFB had become a public forum during the open house. The court distinguished *Greer*, cited above, primarily on the grounds that the Air Force had made the open portions of the base into a public forum and that Albertini's activities were directed mainly at civilian visitors and not active-duty military personnel. Thus, the government's traditional argument regarding a threat to the loyalty, discipline, or morale of troops was unpersuasive. The Supreme Court reversed, holding that Hickam did not become a public forum merely because the base was used by the military to communicate ideas or information during the open house. Further, even if the base was a public forum on the day in question, Albertini still had no right to reenter in violation of his debarment order, merely because other members of the public were free to enter. In spite of the ultimate outcome of the case, the Albertini litigation has prompted a change in how military open houses and ship visits are conducted and advertised. In general, these changes involve a tightening of restrictions on visitors and an approach in advertising which shuns the open house concept in favor of an invitation to the public to visit an installation or ship as the guests of the commanding officer. The invitation will be withdrawn if unauthorized or undesirable conduct ensues. In this way, the commanding officer maintains the traditional controls over his command. *See* Echols, *Open House Revisited: An Alternative Approach*, 129 Mil. L. Rev. 185 (1990).

C. ***Dependents / retirees / civilian employees.*** Civilian dependents of active-duty personnel are allowed by statute to receive certain medical care in military facilities. 10 U.S.C. §§ 1071-1085. Similarly, certain disabled veterans are allowed by statute to use commissaries and exchanges. 10 U.S.C. § 7603. Civilian employees have a vested interest in their jobs and cannot be denied access to their jobs without due process of law. What requirements exist for commanding officer's debarment orders? Are hearings and appeal rights guaranteed? Due process in most situations of this type requires only a consideration of the reasons services were refused and a response to the individual.

Absent entitlement by statute or regulation, persons have no constitutionally protected interest in entering military installations and are not constitutionally entitled to any procedural, due process protections. (This would extend to hearings or appeals.) *Ampleman v. Schlesinger*, 534 F.2d 825 (8th Cir. 1976) (no due process requirement to provide an honorably discharged Air Force Reserve officer with an in-person hearing or a statement of reasons for discharge); *U.S. Navy Regulations, 1990*, Article 0811 (denying admittance to a command to tradesmen and their agents except as authorized by CO). *Berry v. Bean*, 796 F.2d 713 (4th Cir. 1986) (military dependent barred from base after found to be in possession of marijuana cannot demand review of his case - CO discretion upheld).

– In *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy*, 367 U.S. 886, *reh'g denied*, 368 U.S. 869 (1961), a civilian employee of a restaurant operated on the premises of the Naval Gun Factory, Washington, D.C., was

barred from the installation, and thereby from her civilian employment, without a hearing by the commanding officer on the grounds that she failed to meet the security requirements of the installation. On review, Justice Stewart, speaking for the five-man majority, stated: "We may assume that [Appellant] could not constitutionally have been excluded from the Gun Factory if the announced grounds for her exclusion had been patently arbitrary or discriminatory—that she could not have been kept out because she was a Democrat or a Methodist." *Id.* at 898. The Court then held that exclusion for security reasons was not arbitrary or discriminatory and therefore affirmed the judgment for the government. The Court did not require any evidence regarding why the worker had been classified a security risk; rather, the Court accepted the determination of the commanding officer at face value. Two things should be noted concerning the *Cafeteria Workers* decision. First, the case did not present an issue concerning freedom of expression to the Supreme Court. The issue presented to the Court was whether the worker had been deprived of access to her job without due process of law. Second, the exclusion was based on reasons of security, as opposed to a possible threat to good order and discipline or to the health, welfare, or morale of the troops.

D. ***Bibliography***. For articles on this subject, see Duncan, *Criminal Trespass on Military Installations: Recent Developments in the Law of Entry and Re-Entry*, 28 JAG J. 53 (1975); Lloyd, *Unlawful Entry and Reentry into Military Reservations in Violation of 18 U.S.C. § 1382*, 53 Mil. L. Rev. 137 (1971); Lieberman, *Cafeteria Workers Revisited: Does the Commander Have Plenary Power to Control Access to His Base?*, 25 JAG J. 53 (1970).

0815 POLITICAL ACTIVITIES BY SERVICEMEMBERS

A. ***General***. A member of the armed forces is expected and encouraged to carry out his obligation as a citizen but, while on active duty, his participation in partisan political activity is subject to limitation.

B. ***References***

1. DOD Directive 1344.10, Subj: POLITICAL ACTIVITIES BY MEMBERS OF THE ARMED FORCES ON ACTIVE DUTY.

2. MILPERSMAN, Article 6210240.

3. MCO 5370.7, Subj: POLITICAL ACTIVITIES.

C. ***Definitions***

1. ***Partisan political activity***. Partisan political activity is activity in support of, or related to, candidates representing, or issues specifically identified, with national or state political parties and associated or ancillary organizations.

2. ***Active duty***. Active duty is full-time duty in the active military service of the United States for a period of more than 30 days.

3. ***Civil office***. Civil office is an office, not military in nature, that involves the exercise of the powers or authority of civil government. It may include either an elective office or an office that requires an appointment by the President, by and with the advice and consent of the Senate, that is a position in the Executive Schedule.

D. ***Permissible activities***. A member on active duty may engage in the following types of political activity:

1. Register, vote, and express a personal opinion on political candidates and issues, but not as a representative of the armed forces;

2. promote and encourage other military personnel to exercise their franchise, provided such promotion does not constitute an attempt to influence or interfere with the outcome of an election;

3. join a political club and attend its meetings when not in uniform;

4. serve as a nonpartisan election official out of uniform with the approval of the Secretary of the Navy;

5. sign a petition for specific legislative action, provided the signing thereof does not obligate the member to engage in partisan political activity and is taken as a private citizen;

6. write a nonpartisan letter to the editor of a newspaper expressing the member's personal views concerning public issues;

7. write a personal letter, not for publication, expressing preference for a specific political candidate or cause;

8. make monetary contributions to a political party or committee, subject to the limitations of paragraph E below; and

9. display a political sticker on his / her private automobile.

E. ***Prohibited activities***. A member on active duty may ***not*** engage in the following types of political activity:

1. Use official authority or influence for the purpose of interfering with an election, affecting the outcome thereof, soliciting votes for a particular candidate or issue, or requiring or soliciting political contributions from others;

2. campaigning as nonpartisan (as well as partisan) candidate or nominee;

3. participate in a partisan campaign or make public speeches in the cause thereof;

4. make, solicit, or receive a campaign contribution for another member of the armed forces or for a civilian officer or employee of the United States promoting a political cause;

5. allow or cause to be published political articles signed or authored by the member for partisan purposes;

6. serve in any official capacity or be listed as a sponsor of a partisan political club;

7. speak before a partisan political gathering of any kind to promote a partisan political party or candidate;

8. participate in any radio, television, or other program or group discussion as an advocate of a partisan political party or candidate;

9. conduct a partisan political opinion survey or distribute partisan political literature;

10. perform clerical or other duties for a partisan political committee during a campaign or an election day;

11. solicit or otherwise engage in fund-raising activities in Federal offices or facilities for a partisan political cause or candidate;

12. march or ride in a partisan political parade;

13. display a large political sign on top of his / her private automobile, as distinguished from a political sticker;

14. participate in any organized effort to provide voters with transportation to the polls;

15. sell tickets for or otherwise actively promote political dinners;

16. be a partisan candidate for civil office during initial active-duty tours or tours extended in exchange for schools;

17. for a Regular officer on active duty, or retired Regular officer or Reserve officer on active duty for over 180 days, hold or exercise the functions of any civil office in any Federal, state, or local civil office—unless assigned in a military status or otherwise authorized by law [10 U.S.C.A. § 973(b) (West Supp. 1984)];

18. hold U.S. Government elective office, Executive schedule position, or position requiring Presidential appointment with the advice and consent of Congress; or

19. serve as civilian law enforcement officers or members of a reserve civilian police organization.

F. ***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 service members. *See Greer v. Spock*, 424 U.S. 828 (1976); *Ethredge v. Hail*, 996 F.2d 1173 (11th Cir. 1993).

0816 FREEDOM OF RELIGION

A. ***References***

1. 10 U.S.C. § 6031

2. 10 U.S.C. § 774

3. *U.S. Navy Regulations, 1990,* Article §§ 0817, 0820

4. SECNAVINST 1730.8 with Change 1, Subj: ACCOMMODATION OF RELIGIOUS PRACTICES

5. DOD Dir 1300.17, Subj: ACCOMMODATION OF RELIGIOUS PRACTICES WITHIN THE MILITARY SERVICES

6. MILPERSMAN, sections 5810100, 5810110, 5810150

B. ***General.*** Notwithstanding the "establishment clause" of the first amendment, which has been interpreted as preventing Congress from enacting any law intended to promote religion, or which might unduly "entangle" the government with religious practices, Federal law not only provides for the existence of a Navy Chaplain's

Corps, but requires Navy commanding officers to "cause divine services to be performed on Sunday." 10 U.S.C. § 6031(b). The statute, moreover, emphatically states: "it is earnestly recommended to all officers, seamen, and others in the naval service diligently to attend at every performance of the worship of Almighty God." The statute also permits a chaplain to conduct divine services according to the manner and form of his own church. Thus, for example, a Catholic chaplain presiding at divine services may offer Mass; an Episcopal chaplain would be free to conduct Morning Prayer; a Jewish chaplain may conduct Jewish religious services. *See also Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985).

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 commanding officer.

1. Article 0817, Navy Regulations, provides for observance of Sunday as a non-work day, and, except by "reason of necessity" prohibits the sailing of ships or deployment of aircraft or troops on Sunday. MILPERSMAN § 5810100, recognizing that Sunday is not the only day of worship, provides for accommodation of Sabbath days other than Sunday. MILPERSMAN § 5810110 encourages commanding officers to grant leave to allow members to observe "religious holy days" including Passover, Rosh Hashanah, Yom Kippur, Ramadan, 'Idul-Adha, and Easter. MILPERSMAN 5810150 provides for command appointment of religious "lay readers" as a supplement to chaplains to "meet the requirement to provide for the free exercise of religion." No eccliastical status is conveyed by the command's written appointment of the lay reader. The section states that "lay led services are not equivalent to a divine service conducted by chaplains or ordained civilian clergy." Further, the Religious Program Specialists ***shall*** not be assigned as lay readers. No monies should be collected unless authorized by the CO, and if monies are collected they shall be deposited in the "command religious offerings fund" to be used for religious benevolence only. The CO has the exclusive authority to grant permission for administration of sacraments, regardless of religious authority's empowerment.

2. For example, if a servicemember who is scheduled to stand duty on Friday evening requests, based on his religious principles, that he not be directed to stand duty between sundown Friday and sundown Saturday, the commanding officer should carefully consider granting that accommodation request if others are available to stand duty during those hours. However, if no other person is reasonably available to stand duty at that time, the commanding officer could order that member to stand duty based on his determination of military necessity.

3. SECNAVINST 1730.8 provides guidelines to be used by the naval service, in the exercise of command discretion, concerning the accommodation of religious practices—including requests based on religious and dietary observances, requests for immunization waivers, and requests for the wearing of religious items or articles other than religious jewelry (which is subject to the same uniform regulations as nonreligious jewelry) with the uniform.

4. The issue of religious accommodation and the military uniform has been an area of particular concern in recent years. In that regard, SECNAVINST 1730.8 provides a basis for determining a member's entitlement to wear religious apparel with the uniform. (Religious apparel does not include "hair and grooming practices.") It provides that:

a. Religious items or articles which ***are not visible*** may be worn with the uniform as long as they do not interfere with the performance of the member's military duties; and that

b. religious items or articles which ***are visible*** may be authorized for wear with the uniform if:

(1) The item or article is "neat and conservative," meaning that it is discreet and not showy in style, color, design or brightness, that it does not replace or interfere with the proper wearing of any authorized article of the uniform, and that it is not temporarily or permanently affixed or appended to any article of the member's uniform;

(2) the wearing of the item or article will not interfere with the performance of the member's military duties due to either the characteristics of the item or article, the circumstances of its intended wear, or the particular nature of the member's duties; and

(3) the item or article is not worn with historical or ceremonial uniforms, or while the member is participating in review formations, honor or color guards and similar ceremonial details and functions, or during basic and initial military skills or specialty training except during off-duty hours designated by the cognizant commander.

5. The SECNAVINST cites the example of when a skullcap (yarmulke) may be worn consistent with the above guidelines:

a. whenever a military cap, hat, or other headgear is not prescribed; or

b. underneath military headgear as long as it does not interfere with the proper wearing, function, or appearance of the prescribed headgear.

6. The genesis of congressional action in this area is the 1986 Supreme Court decision which addressed a conflict between Air Force dress regulations concerning the visible wearing of religious apparel with the uniform, and the wearing of a yarmulke, without a service cap, by an Air Force officer. *Goldman v. Weinberger*, 475 U.S. 503 (1986). In that case, the Court held that the first amendment does not require the military to accommodate the wearing of religious apparel such as a yarmulke if it would detract from

the uniformity sought by the service dress regulations. Section 747 of 10 United States Code was enacted as a reaction against the *Goldman* decision. *See* Sullivan, *The Congressional Response to Goldman v. Weinberger*, 121 Mil. L. Rev. 125 (1988).

7. Under SECNAVINST 1730.8, commanding officers shall consider the following factors when examining requests for religious accommodations:

a. The importance of military requirements, including individual readiness, unit cohesion, health, safety, morale, and discipline;

b. the religious importance of the accommodation by the requester;

c. the cumulative impact of repeated accommodations of a similar nature;

d. alternative means available to meet the requested accommodation; and

e. previous treatment of the same or similar requests made for other than religious reasons.

8. Right to submit request for visible religious apparel items.SECNAVINST 1730.8 also provides that any visible item or article of religious apparel may not be worn with the uniform until approved, and that, in any case in which a commanding officer denies a request to wear an item or article of religious apparel with the uniform, the member must be advised that he has a right to request a review of the refusal by CNO or CMC. That review will normally occur within 30 days following the request for review for cases arising in the United States, and within 60 days for all other cases.

9. Administrative action, including reassignment, reclassification, or separation, consistent with SECNAV and service regulations, is authorized by this SECNAVINST if:

a. Requests for accommodation are not in the best interests of the unit; and

b. continued tension is apparent between the unit's requirements and the individual's religious beliefs.

10. The SECNAVINST recognizes that action under the UCMJ is not precluded by the instruction in appropriate circumstances.

CHAPTER IX

ENLISTED ADMINISTRATIVE SEPARATIONS

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CHAPTER IX

ENLISTED ADMINISTRATIVE SEPARATIONS

0901 INTRODUCTION. A servicemember's obligation to his armed service continues until terminated. Generally, this time period is determined by the terms of the enlistment contract, but earlier termination may result due to administrative or disciplinary separation based upon specifically identified conduct on the part of the servicemember. The primary reference for enlisted administrative separations is SECNAVINST 1910.4, Subj: ENLISTED ADMINISTRATIVE SEPARATIONS, which implemented DOD Directive 1332.14, Subj: ENLISTED ADMINISTRATIVE SEPARATIONS. Chapter 36 of the MILPERSMAN (Navy) and Chapter 6 of the MARCORSEPMAN (Marine Corps) and Chapter 12-B of the CGPERSMAN provide policy guidance and procedure pertaining to enlisted administrative separations and serve as the basis for the material in this chapter.

NOTE: Several changes to the Navy administrative separation procedures have been announced in NAVADMIN 031/95, 121/96, and 140/96. However, such changes have not been incorporated into the MILPERSMAN as of the printing of this publication.

0902 TYPES OF SEPARATIONS. There are two types of separations given by the armed forces of the United States to enlisted servicemembers: punitive discharges and administrative separations.

0903 PUNITIVE DISCHARGES. Punitive discharges are authorized punishments of courts-martial and can only be awarded as an approved court-martial sentence pursuant to a conviction for a violation of the UCMJ. There are two types of punitive discharges:

A. ***Dishonorable Discharge (DD)***—which can only be adjudged by a general court-martial and is a separation under dishonorable conditions; and

B. ***Bad-Conduct Discharge (BCD)***—which can be adjudged by either a general court-martial or a special court-martial and is a separation under conditions other than honorable (OTH).

0904 ADMINISTRATIVE SEPARATIONS

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

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

1. ***Basis for separation.*** "Basis" is the reason for which the person is being administratively separated (e.g., pattern of misconduct, convenience of the government for parenthood, weight control failure).

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

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

4. ***Entry level status.*** A member qualifies for entry level status during the first 180 days of continuous active military service or the first 180 days of continuous active service after a break of more than 92 days of active service.

– A member of a Reserve component who is not on active duty, or who is serving under a call or order to active duty for 180 days or less, begins entry level status upon enlistment in a Reserve component. Entry level status for such a member of a Reserve component terminates as follows:

(1) 180 days after beginning training if the member is ordered to active duty for training for one continuous period of 180 days or more; or

(2) 90 days after the beginning of the second period of active duty for training under a program that splits the training into two or more separate periods of active duty.

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

6. ***Execution of the separation.*** A term that means the processing for separation has been completed, the actual separation has been approved, and it can be

executed; that is, the separation papers can be delivered to the individual who can then return to civilian life in most cases.

7. ***Convening authority (CA).*** The "convening authority" is the commanding officer (with power to convene a special court-martial) who is responsible for beginning the appropriate administrative separation processing and submitting the documentation to the separation authority when necessary. Under some circumstances, it is mandatory that an individual's commanding officer process said individual for separation. Under most circumstances, however, the commanding officer will be permitted to exercise discretion. (***Note***: This may include a commanding officer for a member who is also TEMDU to a command, but not for one who is TAD.)

8. ***Separation authority (SA).*** The "separation authority" is the officer in the chain of command who decides, based on the documentation presented, whether any recommended separation should be approved or disapproved and, if a separation is approved, what type of separation and whether it should be executed or suspended. In the Navy, the CA is sometimes the same as the SA. MILPERSMAN, Article 3610220 sets forth CA's and SA's for each basis (see also NAVADMIN 140/96). In the Marine Corps, the GCMA is usually the SA. In the Coast Guard, Commandant is usually the Discharge Authority. CGPERSMAN 12-B-1-a sets forth the Discharge Authority for each basis.

9. ***Respondent.*** The "respondent" is a member who has been notified by his / her command that action has been initiated to separate him / her.

C. ***Characterized separations.*** Separations are characterized as either honorable, general (under honorable conditions), or under other than honorable conditions (OTH). The reason for separation and the specific circumstances that form the basis of the separation, as well as the military record, shall be considered on the issue of characterization.

1. ***Honorable.*** This separation (discharge) is with honor and is appropriate when the quality of the member's service has met the standards of acceptable conduct and performance of duty or is otherwise so meritorious that any other characterization would be clearly inappropriate. The following requirements must be met for a servicemember to receive an honorable separation.

a. ***Navy***

(1) A final trait average for the current enlistment in performance and conduct marks of not less than 2.8 ***and*** 3.0 in personal behavior. MILPERSMAN, Article 3610300.3a. (Note: This section may change in accordance with the marks, BUPERSINST 1610.10, Navy Performance Evaluation and Counseling Manual, which changed the values of performance marks).

(2) A member whose marks do not otherwise qualify for an honorable separation may nevertheless receive an honorable separation if certain meritorious personal decorations have been awarded (e.g., Medal of Honor, NAM, Combat Action Ribbon) during the current enlistment. MILPERSMAN 3610300.3A(2).

b. ***Marine Corps***:

(1) For paygrades E-4 and below, overall conduct marks for the current enlistment averaging 4.0 and proficiency marks averaging 3.0 are prima facie qualifications for an honorable separation. (The Marine Corps places great weight on the commanding officer's recommendation of appropriate characterization and a strong recommendation can turn what would otherwise be a general discharge into an honorable discharge and vice versa.) MARCORSEPMAN, paras. 6107, 6305, and 1004.3c.

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

c. ***Coast Guard***:

(1) Personnel must have a minimum characteristic average of 2.5 in each factor for the period of service.

(2) A member whose marks do not otherwise qualify for an honorable separation may nevertheless receive an honorable separation if he/she has received a Coast Guard Commendation or higher personal decoration, been disabled by enemy action, or if the Commandant otherwise directs CGPERSMAN 12-B-2-f(1)-(d).

2. ***General (under honorable conditions)***. MILPERSMAN, Article 3610300.3b CGPERSMAN 12-B-2-f-(2) and MARCORSEPMAN, para. 1004.3b. This type of separation (discharge) is issued to servicemembers whose military record is satisfactory, but less than that required for an honorable discharge. It is a separation under honorable conditions and entitles the individual to most veterans' benefits. However, the Montgomery GI Bill rights are probably forfeited with a general discharge. The member, moreover, will not normally be allowed to reenlist. A servicemember will normally receive a general discharge when the member's service has been under honorable conditions, but either the overall average evaluation mark or the overall average personal behavior mark does not meet the 2.8 / 3.0 (Navy) or 3.0 / 4.0 (Marine) E-4 and below standards, respectively, and the member is not otherwise being processed for separation under OTH conditions.

– For Coast Guard personnel, a general discharge is authorized when the final average marks are less than those required for an honorable discharge, when the member is being discharged for a drug incident, an OTH discharge for a drug incident

may be recommended under severe circumstances or when directed by the Commandant on the basis of the member's overall record.

– 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 (e.g., discreditable involvement with civil authorities while not on active duty for training and while wearing the Navy uniform without authorization). MILPERSMAN, Article 3610300.4c and MARCORSEPMAN, para. 1004.4.

3. ***Under other than honorable conditions (OTH).*** This characterization is appropriate when the reason for separation is based upon one or more acts or omissions that constitute a significant departure from the conduct expected from members of the naval service. Example of such acts or omissions include those punishable by a punitive discharge (see *Manual for Courts-Martial*, app. 12). MILPERSMAN 3610300.3c. For Coast Guard this characterization may only be issued if the reason for discharge is either misconduct, security, requested by the member in lieu of court-martial for the good of the service. CGPERSMAN 12-B-2-F(3) or due to a homosexual act accompanied by aggravating circumstances, CGPERSMAN 12-D-4-d.

a. Persons given an OTH discharge are not entitled to retain their uniforms or wear them home (although they may be furnished civilian clothing at a cost of not more than $50), must accept transportation in kind to their homes, are subject to recoupment of any reenlistment bonus they may have received, are not eligible for notice of discharge to employers, and do not receive mileage fees from the place of discharge to their home of record.

b. The Department of Veterans Affairs will make its own determination with respect as to whether the OTH was of conditions which would forfeit any or all VA benefits. Most veterans' benefits will be forfeited if that determination is adverse to the former servicemember, such as when based on the following circumstances:

(1) Desertion;

(2) escape prior to trial by general court-martial;

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

(4) willful or persistent misconduct;

(5) offense(s) involving moral turpitude;

(6) mutiny or spying; or

(7) homosexual acts involving aggravating circumstances.

c. 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 OTH conditions only if such conduct directly affects the performance of the member's military duties (e.g., conduct that results in incarceration and prevents the member from participating in drills or being mobilized). MILPERSMAN, Article 3610300.4c; MARCORSEPMAN, paras. 6107.2c(4) and 1004.4d.

d. Persons awarded OTH discharges may find employment difficult to secure since its stigma is reputed to be worse than that associated with the bad-conduct discharge. The adverse effects of an OTH discharge, the large number of them issued as compared with punitive discharges, and the absence in administrative separations of the extensive review procedures comparable to those afforded servicemembers awarded a punitive discharge have resulted in congressional concern that those being considered and processed for such OTH discharges also be afforded adequate safeguards. This has resulted in significantly increased protections being afforded persons being processed for an OTH discharge.

(1) Commanding officers are to periodically explain and issue a written fact sheet on the types of characterization of service, the bases on which they can be issued, and the possible adverse effects they may have upon: (1) employment in the civilian community, (2) veterans' benefits, and (3) reenlistment. The Navy and Marine Corps require explanations of the foregoing each time the punitive articles of the UCMJ are explained pursuant to Article 137, UCMJ. Article 137 provides that the explanation be made to enlisted personnel at the time of entering upon active duty or within six days thereafter; again after completing six months of active duty; and at the time of every reenlistment. Failure of any member to receive or understand this advice is not a bar to separation or characterization of service. MILPERSMAN, Article 3610100.3; MARCORSEPMAN, para. 6103, CGPERSMAN 12-B-3.

(2) Any member being separated, except those separated for immediate reenlistment, must be advised of the purpose and authority of the Naval Discharge Review Board (NDRB) and the Board for Correction of Naval Records (BCNR) at the time of processing for such a separation. Under 10 U.S.C. § 1046, servicemembers upon discharge or release from active duty must be counseled in writing—signed by the member and documented in his / her service record—on educational assistance benefits and the procedures for, and advantages of, affiliating with the Selected Reserve. The advice includes a warning that an OTH based on a 180-day or more UA is a conditional bar to veterans' benefits, notwithstanding any action by the NDRB. Failure of any member to receive or understand this advice is not a bar to separation or characterization of service. Male servicemembers are also required to be advised before separation (if born in 1960 or

later and 18 years old or older) of the requirement to register for Selective Service within 30 days of separation from active duty if they have not previously done so. MILPERSMAN, Article 3610100.3d.

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

(a) The servicemember may request an OTH in lieu of trial by court-martial if charges have been referred to a court-martial authorized to adjudge a punitive discharge; in which case, the member will not be entitled to an administrative board. MILPERSMAN, Article 3630650; MARCORSEPMAN, para. 6419, CGPERSMAN 12-B-21.

(b) A member may ***unconditionally*** waive rights to a board and counsel, as well as any other right. Such waiver will usually be accomplished in writing and the member will generally receive an OTH if he / she waives the board. For a Coast Guard member who is being considered for an OTH discharge by reason of misconduct, the member may ***conditionally*** or unconditionally waive rights to a board and counsel. Such waiver must be in writing after the member has been fully counseled regarding the matter by legal counsel. Commandant is the approval authority for a member's waiver to a board. CGPERSMAN 12-B-32-b.

(c) A member of the naval service may be separated while absent without authority after receiving notice of separation processing. In addition, a member may be separated while on unauthorized absence when prosecution of the member appears to be barred by the statute of limitations (which has not been tolled) or when the member is an alien in a foreign country where the United States has no authority to apprehend the member. MILPERSMAN, Article 3640200.1c; MARCORSEPMAN, para. 6312. A Coast Guard member (except reservists) beyond military control by reason of unauthorized absence of more than 1 year may be issued OTH discharge in absentia. Notification of the imminent discharge action and the effect date thereof will be sent by registered mail to the record address of the member or the next of kin. CGPERSMAN 12-B-32-a-(1); 12-B-32-b-(6).

(d) If a member is out of military control because of civil confinement, the case may be heard by the board in the member's absence (following appropriate notice to the confined servicemember) and the case may be presented on respondent's behalf by counsel for the respondent. MILPERSMAN, Article 3640200.2b(5); MARCORSEPMAN, para. 6303.4a, CGPERSMAN 12-B-32-b-(5).

D. ***Uncharacterized separations***

1. ***Entry level separation (ELS).*** A member in an entry level status (as defined in section 0904.B.4 above) will ordinarily be separated with an ELS. A member in an entry level status may also be separated under OTH conditions if warranted by the facts of the case (e.g., separation processing for misconduct or aggravated cases of homosexuality). CGPERSMAN 12-B-20-d. By the same token, a member in entry level status is not precluded from receiving an honorable discharge when clearly warranted by unusual circumstances and approved on a case-by-case basis by the Secretary of the Navy. MILPERSMAN, Article 3610300.5a; MARCORSEPMAN, paras. 6107 and 1004.5a.

– For Coast Guard, Commanding Officer, Recruit Training Center Cape May and Commandant (G-MPC) may authorize an uncharacterized separation for poor performance or conduct during recruit training. The member must have less than 180 days of active service on the date of discharge to qualify. Prior to processing for entry level separation, a member shall be given formal counseling concerning his/her deficiencies and a reasonable opportunity to overcome them.

2. ***Void enlistment or induction.*** A member whose enlistment or induction is void will be separated with an order of release (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: (1) was insane at the time of enlistment, (2) was a deserter from another service, (3) was under age 17 when processed for a minority separation, or (4) tested positive on an entrant urinalysis test. MILPERSMAN, Article 3610300.5b; MARCORSEPMAN, paras. 6107 and 1004.5b. For Coast Guard personnel, a void enlistment includes those entered into:

a. When the person is intoxicated

b. When the person is insane

c. When the person is a deserter from the Armed Forces.

d. When the person is enlisted after receiving orders for induction.

e. When the person is coerced into an enlistment.

f. When the person is enlisted as a result of recruiter misconduct CGPERSMAN 12-B-22-b.

After confirmation of a void enlistment, COMDT-MPC-EPM will direct the action to be taken and the disposition of the person concerned. CGPERSMAN 12-B-22-e.

0905 COUNSELING

A. In many cases, before a member may be processed for separation, the member must first be formally counseled concerning his / her behavior. The formal counseling record involved must be entered into the service record via a page 13 (page 7 for Coast Guard) or 6105 entry. The Division Officer Notebook written counseling sheet will ***not*** suffice. Formal counseling is intended to give the member an opportunity to improve by identifying specific, undesirable behavior which the member has the ability to correct, alter, or cease. The written counseling warning informs the member that his / her potential for further service is recognized and correction of identified deficiencies will result in continuation on active duty. The member, however, must be ***clearly*** informed of what is undesirable.

1. ***Sample descriptions of undesirable behavior for counseling records.*** *See* MILPERSMAN, Article 3610260, MARCORSEPMAN, para. 6105 and CGPERSMAN 12-B-9; 12-B-16, 12-B-20-F.

a. ***Basis: personality disorder***

(1) ***Correct***

(a) "A personality disorder manifested by habitual tardiness, argumentative behavior, failure to complete assigned work, poor impulse control, aggressive behavior."

(b) "A personality disorder manifested by CO's NJP for violation of the UCMJ, Article 128 (simple assault), Article 117 (provoking speech, gestures)."

(2) ***Incorrect***

(a) "Borderline personality disorder, chronic, severe."

(b) "Immature personality disorder, failure to adjust."

b. ***Basis: entry level performance and conduct; unsatisfactory performance***

(1) ***Correct***

– "Habitual tardiness, failure to complete assigned duties, failure to complete PQS within allotted time, failure to stand proper watch."

(2) ***Incorrect***

– "Failure to perform in the manner expected of a PO3."

c. ***Basis: misconduct due to minor disciplinary infractions; misconduct due to a pattern of misconduct***

(1) ***Correct***:

(a) "Habitual tardiness, unauthorized absences, alcohol abuse, breach of peace."

(b) "Violations of UCMJ, Article 86 (unauthorized absence), Article 134 (incapacitated for the performance of duty), Article 116 (breach of peace)."

(2) ***Incorrect***:

(a) "Minor disciplinary infractions."

(b) "Pattern of misconduct."

B. Once counseled, the member may not be processed for separation without first violating the counseling warning. The counseling document is tantamount to a binding contract. Counseling must be documented in the service record of the member, and 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). Administrative separation cases containing an inviolate counseling warning shall / must be rejected by the separation authority.

1. ***Navy***: For Navy personnel, the counseling is documented by a NAVPERS 1070/613 Administrative Remarks (Page 13) entry form. A change in February 1995 (CNO 092030Z Feb 95), made the Page 13 requirement easier in the Navy. The counseling ***must*** be accomplished ***by any command to which the Sailor was assigned within the current enlistment***. (The old rule required a Page 13 from the *parent* command.)

2. ***Marine Corps***: For Marine Corps personnel, the counseling is documented by a MARCORSEPMAN, para. 6105 letter (page 11) entry. The counseling requirement can be accomplished at any command to which the Marine was assigned during the ***current enlistment***. (The new Navy rule).

3. ***Coast Guard***: For Coast Guard personnel, the counseling is documented by a CG - 3307 (page 7) administrative remarks entry form or by letter notification for unsatisfactory performance. CGPERSMAN 12-B-9.

C. Counseling and rehabilitation efforts ***are required*** before the initiation of separation processing for the following:

1. Convenience of the government due to parenthood and personality disorder (MILPERSMAN, Articles. 3620200, 3620215 and 3620225; MARCORSEPMAN, para. 6203); CGPERSMAN 12-B-12 and 12-D-3 for dependency/hardship; 12-B-16 for personality disorder.

2. entry level performance and conduct (MILPERSMAN, Article 3630200.4b; MARCORSEPMAN, para. 6205); CGPERSMAN 12-B-20.

3. unsatisfactory performance (MILPERSMAN, Article 3630300.1; MARCORSEPMAN, para. 6206); CGPERSMAN 12-B-9.

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

5. weight control failure (MILPERSMAN, Article 3620260; MARCORSEPMAN, para. 6203). CGPERSMAN 12-B-12-a-(6).

6. For Coast Guard - Unsuitability due to inaptitude, apathy, defective attitude, unsanitary habits or financial irresponsibility (CGPERSMAN 12-B-16).

7. For Coast Guard - Misconduct due to frequent involvement of a descreditable nature with civil or military authorities, abuse of a family member, shirking, failure to pay just debts, failure to contribute adequate support to dependents or failure to comply with valid orders of civil courts regarding support to dependents. CGPERSMAN 12-B-18.

D. ***Content and form of counseling warnings.*** The command's counseling efforts must be documented in the member's service record and ***must*** include the following:

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. signature and date of signing of the member and a witness; and

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

6. The counseling warning must be dated and signed by the member and witnessed. If the member refuses to sign, a notation to that effect should be made on the counseling form, which is then signed and dated by an officer.

7. ***Counseling formats***

a. 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)

b. ***Navy***: MILPERSMAN, Art. 3610260.5

Date: ADMINISTRATIVE COUNSELING / WARNING

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 implies 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 convictions 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.

6. This counseling and warning is based upon known deficiencies or misconduct. If any misconduct unknown to the Navy is discovered after this counseling and warning is executed, this letter of counseling and warning is null and void.

7. I hereby acknowledge the above Page 13 entry and desire to (make a statement / not make a statement.)

_____ _____

(Signature of Sailor) (Signature of Witness)* / (Date)

* Person who actually counseled the member.

c. ***Coast Guard***: Sample form in PERSMAN 12-B-9-d

From: Commanding Officer, (Unit)
To: (Individual concerned)

Subj: Unsatisfactory Performance
Ref: (a) Article 12-B-9 Personnel Manual COMDTINST M10006

1. This is to inform you that for the previous (as applicable) months your performance has been unsatisfactory when compared to your peers in your pay grade. You are considered to be on performance probation. You must take stock of your actions that have caused this situation to develop and take corrective action. Your performance must improve over the next 6 months or you will be considered for discharge.

2. The reasons for being placed on performance probation are: (state specific facts, incidents, unheeded corrective performance guidance and any other documentation which supports the unsatisfactory performance evaluation(s)).

0906 BASES FOR SEPARATING ENLISTED PERSONNEL

A. ***General.*** "Bases" for separating enlisted personnel are the reasons for processing members for separation. All involuntary and some voluntary separations require the use of either the notification procedure or administrative board procedure. These procedures are discussed in detail in the following section. The primary distinction between the two separation procedures is:

1. Under the notification procedure, the respondent (the servicemember being processed) does not have a right to any type of hearing and cannot receive an OTH. This process is essentially a paperwork drill.

a. The member still has the right to submit a statement objecting to the separation.

b. If a member is being processed for more than one basis, the administrative board procedure will be used if applicable to any one of the bases used in the case.

c. When no entitlement to an administrative discharge board exists, a member may request review by the General Court-Martial Convening Authority.

2. Under the administrative board procedure the respondent ***always*** has the right to request that a hearing (administrative board) be held, but may waive it and receive an OTH (most likely) or whatever discharge the separation authority awards.

3. For Coast Guard, a member has an absolute right to have his/her case heard by an administrative discharge board whenever:

a. The member has been recommended for an OTH characterization;

b. regardless of the characterization recommended, the member has 8 or more years of total service and the reason for discharge is either security, unsuitability, misconduct or unsatisfactory performance; or

c. the member has 8 or more years of total service and is denied reenlistment.

d. A board is not required in the event of a prolonged absence without authority, acceptance of a conditional or unconditional written waiver of such right or when the member requests an OTH in lieu of court-martial.

B. This subsection describes the various bases, lists the characterizations (quality of service) available for the particular basis, states whether counseling is required, and lists the applicable separation procedure (notification or administrative board). Several of the specific bases are grouped in subcategories. The bases are:

1. ***Expiration of enlistment or fulfillment of service obligation.*** MILPERSMAN, Article 3620150; MARCORSEPMAN, para. 1005. CGPERSMAN 12-B-11.

– Honorable, general, or ELS.

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

a. Honorable, general, or ELS.

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

3. ***Convenience of the government*** (CGPERSMAN 12-B-12).

a. Honorable, general, or ELS.

b. Notification procedure generally utilized.

c. There are two categories of convenience of the government separations:

(1) ***Voluntary***. Requires application for separation by the member. While there may exist a right to request separation, there is no right to be separated.

(2) ***Involuntary***. Separation processing is initiated by the commanding officer.

d. ***Voluntary convenience of the government subcategories***. Counseling is not required in these areas.

(1) ***Hardship***. (CGPERSMAN 12-D-3; MILPERSMAN, Article 3620210; MARCORSEPMAN, para. 6407.) 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 he or she can show the following:

(a) The hardship affects the servicemembers immediate family;

(b) hardship is not temporary in nature;

(c) hardship arose or was aggravated since the member's entry into service;

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

(e) no other member of the family can alleviate the hardship and a discharge will materially alleviate the hardship; and

(f) no other means of alleviation are available.

Unlike the Navy, the Marine Corps provides for a three-member ***advisory*** board to be convened by the Marine commander exercising special court-martial jurisdiction over the servicemember to hear the member's case. MARCORSEPMAN, para. 6407.6. The CGPERSMAN and Navy MILPERSMAN provide a format to be used in drafting the application for hardship discharge. The Coast Guard also requires the member to submit at least two affidavits substantiating the dependency or hardship claim. CGPERSMAN 12-D-3-d.

(2) ***Pregnancy or childbirth.*** This is a voluntary separation initiated upon written request by the female servicemember and must be completed prior to the child's birth. The request may be denied in the best interest of the 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. The request may be granted regardless of the limitations if the member demonstrates overriding and compelling factors of personal need which warrant separation. MILPERSMAN, Article 3620220; MARCORSEPMAN, para. 6408. *See also* CNO NAVADMIN 012323Z, SUBJ: DON POLICY ON PREGNANCY, for an excellent statement of such issues as pregnant women and shipboard billets, etc.

– For Coast Guard: Servicewomen who become pregnant while on active duty may be discharged for convenience of the government as per PERSMAN 12-B-12 or dependency/hardship as per PERSMAN 12-D-3. Requests for voluntary separation are handled on a case by case basis. Parenthood or pregnancy is normally not considered sufficient for discharge. See COMDTINST 1900.9 and CGPERSMAN Chapter 4-A-10 for policy on pregnant servicemembers. See also 12-D-5 regarding separation for care of newborn child which provides for a one time leave of absence up to 24 months.

(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 in the bearing of arms may claim conscientious objector status. This is a lengthy process and usually can be alleviated by moving the member to a noncombat position; however, conscientious objector status is different than objecting to the bearing of arms and the original request for conscientious objector status must be resolved. DOD Directive 1300.6; MILPERSMAN, Articles. 3620200.1e, 1860120; MARCORSEPMAN, para. 6409; COMDTINST 1900.8; CGPERSMAN 12-B-12.

(4) ***Surviving family member (vice sole surviving family member).*** DOD Directive 1315.5; MILPERSMAN, Article 3620240; and MARCORSEPMAN, para. 6410. For Coast Guard, see CGPERSMAN 4-A-3 regarding separation of sole survivors. This policy applies to cases in which the father/mother or one or more children of a family, while on active military service has been killed, captured or has been permanently 100% physically or mentally disabled. Upon request of the member or one of the parents, the sole survivor will not be assigned to duty in a combat area.

(5) ***Alien.*** This is a voluntary request initiated upon the written request of the servicemember. The request may be denied in the best interest of the naval service if, for example, the member is serving in a critical rate, has received special compensation during the current enlistment, or has not completed obligated service incurred. MILPERSMAN, Article 3620250. Marines and Coast Guard do not process or separate for this basis. See CGPERSMAN 12-B-47 for procedural requirements pertaining to voluntary separation of aliens.

e. ***Involuntary convenience of the government***. The government informs the members of processing by the notification procedure.

(1) ***Parenthood***. MILPERSMAN, Article 3620215; MARCORSEPMAN, para. 6203.1, and CGPERSMAN 12-B-12a(7). Members must be available for worldwide assignment at any time. When a member's parental responsibilities interfere with the member's present or future availability for worldwide assignment, cause repeated absenteeism, or interfere with the member's effective performance of duties, separation is required unless the member can resolve the problem to the CO's satisfaction.

a. As a preventive measure to avoid the problem, all single- and dual-family military members must have a realistic alternative care plan entered into their service record books. Navy personnel must complete an OPNAV 1740/1, Navy Dependent Care Certificate and the Marines follow MCO 1740.13 to draft a power of attorney.

b. Honorable, General, or ELS characterization.

c. Counseling is required.

d. Notification procedure is utilized.

(2) ***Personality disorder***. CGPERSMAN 12-B-16b(2), MILPERSMAN, Articles. 3620200, 3620200.1g, and 3620225; MARCORSEPMAN, para. 6203.3. Separation processing is discretionary with the member's commanding officer. In order for this to be a proper basis for separation, a two-part test must be satisfied.

(a) A psychiatrist or psychologist must diagnose the member as having a personality disorder such as to render the member incapable of serving adequately in the naval service.

(b) After the required counseling, there must be documented interference with the member's performance of duty. [***Note***: Counseling is generally required, but may be waived if it is clear the member may be an immediate danger to him / herself or others.]

(3) ***Other designated physical or mental conditions*** which cause a danger to the member or others, or interferes with the member's ability to perform duties.

(a) Motion / airsickness, when verified by medical opinion. MILPERSMAN, Article 3620200 and CGPERSMAN 12-B-12a(9).

(b) Enuresis (bed-wetting) / somnambulism (sleepwalking). The Navy and Marine Corps process only such individuals whose behavior has been medically confirmed. MILPERSMAN, Article 3620200, CGPERSMAN 12-B-12-a(12).

(c) Allergies (e.g., uniform material, bee stings). MILPERSMAN, Article 3620200.

(d) Excessive height.

4. ***Weight control failure***. OPNAVINST 6110.1; MILPERSMAN, Article 3620260; NAVADMIN Physical Readiness Program Changes, 25 AUG 94 (148/94); MARCORSEPMAN, paras. 6203, 6206; MCO ALMAR 57/93 (Revised Enlisted Separation Policy for Weight Control); CGPERSMAN 12-B-12-a(6); and COMDTINST 1020.8.

a. Members who continually exceed weight for height and body fat limits, and / or fail to meet physical readiness test (PRT) standards may be separated for weight control failure. Counseling and an opportunity to resolve the failures are required. (See above). However, such personnel will be eligible to apply to BUPERS via the commander, commanding officer or officer-in-charge for a waiver consideration.

b. In the Navy, any three (3) failures of weight control standards or the PRT in any 4-year period require processing (semiannual tests shall be used for administrative separation processing).

c. In the Marine Corps, the program is similar.

d. In the Coast Guard, a member is weighed within 30 days of his/her birthday, when selected for urinalysis and at every physical. If a member exceeds the maximum allowable weight for his/her frame size, the member is given a probationary period of one week for every pound over. There are exceptions for those exceeding the standards solely due to muscle mass.

5. ***Physical disability***. MILPERSMAN, Article 3620270; MARCORSEPMAN, chapter 8; CGPERSMAN 12-B-15; and COMDTINST M1850.2.

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

b. A medical board must determine that a member is unable to perform the duties of his / her rate in such a manner as to reasonably fulfill the purpose of his / her employment on active duty. For Coast Guard members, the Commandant may direct or authorize an honorable or general discharge for physical disability through final action on a physical evaluation board. Members who are unfit for service may not remain on active duty except IAW PERSMAN 17-B.

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

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

(2) Assignment limitations. Personnel who are HIV-positive can only be assigned to shore units within CONUS and within a 300-mile radius of certain medical treatment facilities. Only the immediate commanding officer and medical officer need know the HIV status of a member. Confidentiality is extremely important, and 10 U.S.C. § 1002 provides severe penalties for unauthorized disclosure of AIDS / HIV-related information (information is to be disseminated on a need-to-know basis only).

(3) Adverse action

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

(b) Exceptions—members who are HIV-positive may be ordered not to have unprotected sex and to inform future sex partners of their condition, and may be prosecuted for violating such orders.

6. ***Defective enlistment and induction***

a. ***Minority.*** A member may be separated for enlisting without proper parental consent prior to reaching the age of majority. The type of uncharacterized separation is governed by the member's age when separation processing is commenced / completed. MILPERSMAN, Article 3620285; MARCORSEPMAN, para. 6204.1; CGPERSMAN 12-B-14.

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

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

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

b. ***Erroneous enlistment***. A member may be separated for erroneous enlistment if the enlistment would not have occurred had certain facts been known, there was no fraudulent conduct on the part of the member, and the defect is unchanged in material respects. The member may receive an honorable, ELS, or order of release (OOR) by reason of void enlistment. MILPERSMAN, Article 3620280; MARCORSEPMAN, para. 6204.2; and CGPERSMAN 12-B-12a(5). Coast Guard members undergoing recruit training in an original enlistment who have less than 60 days active service that have a physical disability that was not incurred in or aggravated by military service may be processed for erroneous enlistment under 12-B-12-a(5)(c).

(a) Navy and Marine Corp - If a member is diagnosed as drug or alcohol dependent within the first 180 days of active duty service, processing for erroneous enlistment is appropriate.

(b) Coast Guard members will be processed for fraudulent enlistment as per PERSMAN 12-B-18-b(2)b, if the member deliberately concealed a current or past medical condition or problem that is discovered during recruit training and which would have precluded enlistment had the condition been known.

c. ***New entrant drug and alcohol testing***. After reporting to boot camp, new entrants are required to provide a urine sample. They are then requested during a "moment of truth" to tell if the sample will come up positive. If they tell the truth and it comes up positive they will be separated, but will be given a Reenlistment Code (RE Code) that may allow them to reenlist with a waiver. If they do not tell the truth and they come up positive, they are separated and given an RE Code that does not allow them to reenlist. The same policy is used regarding alcohol. OPNAVINST 5350.4; MARCORSEPMAN, para. 6211.1. These cases may be processed as fraudulent enlistments using the notification procedure. Note: A Coast Guard member involved in drug use either prior to enlistment (as evidenced by a positive urinalysis shortly after training) or during recruit training will be processed for discharge by reason of misconduct as per PERSMAN 12-B-18-(4)-(a).

d. ***Defective enlistment.*** MILPERSMAN, Article 3620283; MARCORSEPMAN, para. 6402; CGPERSMAN 12-B-22-b-(5).

(1) Honorable, ELS, or OOR.

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

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

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

(c) the enlistment was involuntary.

e. ***Fraudulent entry into naval service.*** MILPERSMAN, Article 3630100; MARCORSEPMAN, para. 6204.3. For Coast Guard, see Misconduct due to Fraudulent Enlistment 12-B-18-b-(2).

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

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

(3) A member may be separated for fraudulent entry for any knowingly false representation or deliberate concealment pertaining to a qualification of military service [other than the false representation of age by a minor (Navy only)]. This may become another basis for processing in addition to defective enlistment or other reasons; members must be processed for all known bases. For Coast Guard, a member may be separated for fraudulent enlistment for any knowingly false representation or deliberate concealment which, if known at the time, might have resulted in rejection. The enlistment of a minor with false representation as to age or without proper consent will not in itself be considered as a fraudulent enlistment.

(4) An OTH is possible and the administrative board procedure is required if the fraud involves concealment of a prior separation in which service was not characterized as honorable or the concealed offense(s) would warrant an OTH if they had occurred on active duty or an OTH is appropriate.

(5) For Coast Guard, IAW PERSMAN 12-b-18-b-(2) Commanding Officer TRACEN Cape May is the final discharge authority in the following specific cases for members assigned to recruit training.

(a) Deliberately concealed criminal records or cases of enlistment solely to avoid prosecution.

(b) Any current or past medical conditions or problems discovered during recruit training which would have precluded enlistment had they been known.

7. ***Entry level performance and conduct.*** MILPERSMAN, Article 3630200; MARCORSEPMAN, para. 6205; and CGPERSMAN 12-B-20.

a. ELS.

b. Notification procedure utilized.

c. Counseling required.

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

8. ***Unsatisfactory performance.*** MILPERSMAN, Article 3630300; MARCORSEPMAN, para. 6206; and CGPERSMAN 12-B-9.

a. Honorable or general.

b. Notification procedure utilized.

c. Counseling required.

d. A member may be separated for unsatisfactory performance if:

(1) Performance of assigned tasks and duties is not contributory to unit readiness and / or mission accomplishment as documented in the service record; or

(2) failure to maintain required proficiency in rate as demonstrated by:

(a) below-average evaluations or unsanitary habits (Marine Corps); or

(b) one or more enlisted performance evaluations, regular or special, with unsatisfactory marks for professional factors of 2.6 or below in either military rating knowledge and performance, or with overall evaluations of 2.6 or below (Navy).

(c) a member at a unit for more that 180 days - - with marks in the 1-3 range, steady or declining performance for two or more marking periods where improvement is unlikely. The unsatisfactory performance must be thoroughly documented and it must be clearly shown that the member has been given adequate guidance and opportunity to improve. A member must first be given written notice of the specific deficiencies and a 6 month probationary period to overcome them. A sample notification is contained in CGPERSMAN 12-B-9d. A member with 8 or more years of total service is entitled to a board. (Coast Guard)

e. This basis for separation may not be used for separation of a member in an entry level status. Unsatisfactory performance is not evidenced by disciplinary infractions; cases involving only disciplinary infractions should be processed under misconduct.

9. ***Homosexual conduct.*** MILPERSMAN, Article 3630400; MARCORSEPMAN, para. 6207; CGPERSMAN 12-D-4.

a. ***Policy.*** The policy of the Navy is to judge the suitability of persons to serve in the Navy on the basis of conduct and their ability to meet required standards of duty, performance, and discipline; to distinguish sexual orientation, which is personal and private, from homosexual conduct; and to make clear the procedural rights of a service member. Definitions as used in the MPM article are:

(1) Homosexual - a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

(2) Bisexual - a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.

(3) Homosexual act:

(a) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and

(b) any bodily contact that a reasonable person would understand to demonstrate a propensity or intent to engage in such an act as described in subparagraph (1) above.

(4) Homosexual conduct - a homosexual act, a statement by the member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage.

(5) Statement that a member is a homosexual or bisexual, or words to that effect - language or behavior that a reasonable person would believe was intended to convey the statement that a person engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts.

(6) Sexual orientation - an abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts.

(7) A homosexual marriage or attempted marriage - marriage or attempted marriage to a person known to be of the same biological sex.

(8) Propensity to engage in homosexual acts - more than an abstract preference or desire to engage in homosexual acts; indicate a likelihood that a person engages in or will engage in homosexual acts.

(9) Commander - a commissioned or warrant officer who, by virtue of rank and assignment, exercises primary command authority over a military organization or prescribed territorial area that under pertinent official directive is recognized as a "command".

b. ***Basis for separation***: Homosexual conduct is grounds for separation from the naval service. Homosexual conduct includes homosexual acts, a statement by a member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. A statement by a member that demonstrates a propensity or intent to engage in homosexual acts is grounds for separation not because it reflects the member's sexual orientation, but because the statement indicate a likelihood that the member engages in or will engage in homosexual acts. Sexual orientation is considered a personal and private matter, and is not a bar to continued service unless manifested by homosexual conduct as defined above. Therefore, separation processing is mandatory, if the commanding officer believes that, by a preponderance of the evidence, homosexual conduct as defined above has occurred. All proceedings will follow paragraph 6 of the MPM regarding fact-finding. The verbatim reason for processing on the member's Notice of an Administrative Procedure Proposed Action and Statement of Awareness and Request for, or Waiver of, Privileges is:

Homosexual conduct as evidenced by:

a. member's statement that he or she is a homosexual or bisexual, or words to that effect, which creates a rebuttable presumption that he or she engages in, attempts to engage in,

has a propensity to engage in, or intends to engage in homosexual acts;

b. member engaging in, attempting to engage in, or soliciting another to engage in a homosexual act or acts; and / or

c. member's marriage or attempted marriage to a person known to be of the same biological sex.

c. ***Separation findings***. A member ***shall*** be separated by reason of homosexual conduct if one or more of the following approved findings is made:

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

(a) such acts are a departure from the member's usual and customary behavior;

(b) such acts, under all of the circumstances, are unlikely to recur;

(c) such acts were not accomplished by use of forces, coercion, or intimidation;

(d) under the particular circumstance 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 have a propensity or intent to engage in homosexual acts.

(2) The member has made a statement that he or she is a homosexual or bisexual, or words to that effect, unless there is a further approved finding that the member has demonstrated that he or she is no a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. A statement by a member that he or she is a homosexual or bisexual, or words to that effect, creates a rebuttable presumption that the member engages in, attempts to engage in, has a propensity to engage in or intends to engage in homosexual acts. The member shall be advised of this presumption and given the opportunity to rebut the presumption by presenting evidence demonstrating that he or she does not engage in, attempt to engage in, have a propensity to engage in, or intent to engage in homosexual acts. Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicate a likelihood that a person engages in or will engage in homosexual acts. In determining whether a member has successfully rebutted the presumption that he or she

engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, some or all of the following may be considered:

(a) whether the member has engaged in homosexual acts;

(b) the member's credibility;

(c) testimony from others about the member's past conduct, character, and credibility;

(d) the nature and circumstances of the member's statement; and

(e) any other evidence relevant to whether the member is likely to engage in homosexual acts.

This list is not exhaustive. Any other relevant evidence may also be considered.

(3) The member has married or attempted to marry a person known to be of the same biological sex (as evidenced by the external anatomy of the persons involved).

d. ***Characterization of service or description of separation***. Will be type warranted by service record (honorable or General) or entry level under guidance provided in Article 3610300. Separation may be characterized as under Other Than Honorable ***(OTH)*** conditions if there is a finding that during the current term of service the member attempted, solicited, or committed a homosexual act under any of the following circumstances:

(1) by using force, coercion, or intimidation;

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

(3) with a subordinate in circumstances that violate customary naval superior-subordinate relationships;

(4) openly in public view;

(5) for compensation;

(6) aboard a naval vessel or aircraft; or

(7) in another location subject to naval control under aggravating circumstances that have an adverse impact on discipline, good order, or morale comparable to the impact created by such activity aboard a vessel or aircraft. (e.g. BEQ, BOQ).

e. ***Procedures***

(1) ***The administrative board procedure (Article 3640200) shall be used in all cases*** with the following modifications: When processing is based on homosexual conduct as evidenced by member's statement that he or she is a homosexual or bisexual, or words to that effect, which creates a rebuttable presumption that he or she engages in, attempts to engage in, has a propensity to engage in, or intent to engage in homosexual acts, replace paragraph 4b of the Notice of an Administrative Board Procedures Proposed Action, Letter of Notification to read, "to present verbal or written statements in your behalf, and to present evidence demonstrating that you do not engage in, attempt to engage in, have a propensity to engage in, or intend to engage in homosexual acts", and add the additional right to paragraph 4 of members Statement of Awareness and Request for, or Waiver of Privileges (SOA) to read, "to present evidence demonstrating that I do not engage in, attempt to engage in, have a propensity to engage in, or intend to engage in homosexual acts".

(2) ***Dual processing.*** Members being processed for homosexual conduct must be dual or multiple processed for all reasons for which minimum criteria are met (*See Article 3610260.3*). For example, a member who admits to homosexual acts in addition to making a statement that he or she is a homosexual or bisexual must be dual processed. Separate findings must be made for each reason for processing.

(3) ***Burden of proof.*** The member shall bear the burden of proving throughout the proceeding by a preponderance of the evidence that retention is warranted under the limited circumstances described in subparagraphs 3a(1) through (5) of the M.P.M. article.

f. ***Fact-finding inquiries.***

(1) ***Responsibility***

(a) Only the member's commander is authorized to initiate fact-finding inquiries involving homosexual conduct. A commander may initiate a fact-finding inquiry only when he or she has ***received credible information*** that there is basis for discharge. Commanders are responsible for ensuring that inquiries are conducted properly and that no abuse of authority occurs.

(b) A fact-finding inquiry may be conducted by the commander personally or by a person he or she appoints. It may consist of an examination of the information reported or a more extensive investigation, as necessary.

(c) The inquiry should gather all credible information that directly relates to the grounds for possible separation. Inquiries shall be limited to the factual circumstances directly relevant to the specific allegations.

(d) If a commander has credible evidence of possible criminal conduct, he or she shall follow the procedures outlined in the Manual for Courts-Martial and implementing regulations issued by the Secretary of the Navy.

(2) ***Bases for conducting inquiries***

(a) A commander will initiate an inquiry only if he or she has credible information that there is a basis for discharge.

(b) A basis for discharge exists if:

(c) the member has engaged in a homosexual act;

(d) the member has said that he or she is a homosexual or bisexual, or made some other statement that indicates a propensity or intent to engage in homosexual acts; or

(e) the member has married or attempted to marry a person of the same sex.

(3) ***Not credible information***:

(a) the individual is suspected of engaging in homosexual conduct, but there is no credible information, as described to support that suspicion; or

(b) the only information is the opinions of others that a member is homosexual; or

(c) the inquiry would be based on rumor, suspicion, or capricious claims concerning a member's sexual orientation;

(d) the only information known is an associational activity such as going to a homosexual bar, possessing or reading homosexual publications, associating with known homosexuals, or marching in a homosexual rights rally in civilian clothes. Such activity, in and of itself, does not provide evidence of homosexual conduct.

(4) ***Examples of credible information***:

(a) a reliable person states that he or she observed or heard a service member engaging in homosexual acts, or saying that he or she is homosexual or bisexual or is married to a member of the same sex;

(b) a reliable person states that he or she heard, observed, or discovered a member make a spoken or written statement that a reasonable

person would believe was intended to convey the fact that he or she engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts; or

(c) a reliable person states that he or she observed behavior that amounts to a non-verbal statement by a member that he or she is a homosexual or bisexual; i.e., behavior that a reasonable person would believe was intended to convey the statement that the member engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts.

(5) ***Procedures for fact-finding inquiries***

(a) Informal fact-finding inquiries and administrative separation procedures are the preferred method of addressing homosexual conduct. This does not prevent disciplinary action or trial by courts-martial when appropriate.

(b) Commanders shall exercise sound discretion regarding when credible information exists. They shall examine the information and decide whether an inquiry is warranted or whether no action should be taken.

(c) Commanders or appointed inquiry officials shall not ask, and members shall not be required to reveal whether a member is a heterosexual, homosexual, or bisexual. However, upon receipt of credible information of homosexual conduct, commanders or appointed inquiry officials may ask members if they engaged in such conduct. But the member should first be advised of the Department of Defense policy (DOD Directive 1332.14) on homosexual conduct and his or her rights under the Uniform Code of Military Justice, Article 31b, if appropriate. Should the member choose not to discuss the matter further, the commander should consider other available information. Nothing in this provision precludes questioning a member about any information provided by the member in the course of the fact-finding inquiry or any related proceedings, does it provide the member with any basis for challenging the validity of any proceedings or the use of any evidence, including a statement by the member in any proceeding.

(d) At any given point of the inquiry, the commander or appointed inquiry official must be able to clearly and specifically explain which grounds for separation he or she is attempting to verify and how the information being collected relates to those specific grounds.

10. ***Drug abuse rehabilitation failure.*** MILPERSMAN, Article 3630500; MARCORSEPMAN, para. 6208. The Coast Guard does not separate or process for this basis. Members who have been identified as being drug dependent will be offered treatment prior to discharge. Immediately upon completion of this treatment, if accepted, the member will be discharged. CGPERSMAN 12-C-4.

a. Honorable, general, or ELS.

b. Notification procedures.

c. A member who has been referred to a formal program of rehabilitation for personal drug abuse (Level II or III), in accordance with OPNAVINST 5350.4 or MCO 5300.12, may be separated for:

(1) Failure through inability or refusal to participate in, cooperate in, or successfully complete such a program;

(2) an alcohol incident or drug-related incident any time in his / her career following completion of the formal rehabilitation program and there is no potential for further useful service;

[***Note***: Alcohol incident—conduct or behavior caused by ingestion of alcohol resulting in discreditable involvement with civilian / military authorities. Drug incident—events requiring medical care or creating a public disturbance determine whether the incident is drug-related (any incident in which drug abuse is a factor; includes use, trafficking, and possession of controlled substances and / or paraphernalia).]

(3) failure to follow Level II or III aftercare; or

(4) drug abuse any time after Level II or III rehabilitation and there is no potential for further useful service. This category includes possession and / or use of controlled substances, nonmedical or improper use of other drugs (such as over-the-counter and prescription drugs), use of substances for other than intended use (such as sniffing glue or gasoline fumes), or steroid use.

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

e. If a member is diagnosed drug or alcohol dependent within the first 180 days of active duty service, the member may be processed for erroneous enlistment.

f. Note: Per CNO NAVADMIN 092030ZFEB95, member is ineligible for further Level III treatment if he / she attended (whether successful or not) Level III within three (3) years of the proposed date of discharge.

11. ***Alcohol abuse rehabilitation failure***. MILPERSMAN, Article 3630550; MARCORSEPMAN, para. 6209; CGPERSMAN 20-B-2-K.

a. Honorable, general, or ELS.

b. Notification procedures.

c. A member who has been referred to a formal program of rehabilitation for personal alcohol abuse, per OPNAVINST 5350.4, MCO 5370.6, or COMDTINST M6330.1 may be separated for:

(1) Failure, through inability or refusal, to participate in, cooperate in, or successfully complete such a program;

(2) an alcohol or drug-related incident any time in his or her career following Level II or III rehabilitation treatment;

(3) failure to follow directed Level II or III aftercare; and

(4) returning to alcohol abuse after treatment.

d. Alcohol abuse is defined as the abuse of alcohol to an extent that it has an adverse effect on the user's health, behavior, family, community, the Navy, or leads to unacceptable behavior as evidenced by one or more alcohol incidents.

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

f. Note: Per CNO NAVADMIN 092030ZFEB95, a member is ineligible for further Level III treatment if he / she attended (whether successful or not) Level III within three (3) years of proposed date of discharge.

g. For Coast Guard members who have been involved in an alcohol incident (defined as any violation of law or an act which brings discredit upon the uniformed services or results in the member's loss of ability to perform assigned duties where alcohol is a causative or significant factor) written counseling must be provided to the member as well as referral for medical screening. Commanding Officer's shall reflect counseling on form CG-3307 for enlisted personnel, a copy of which is to be forwarded to G-MPC-EPM. Commanding Officer's may request treatment for alcohol abusers through G-KOM. Members involved in a second alcohol incident are normally processed for separation, but may be recommended for retention and rehabilitation by the Commanding Officer in exceptional cases. Members, E-2 and below, who have more than 2 years of service are normally processed for separation after one alcohol incident. Enlisted members involved in a third alcohol incident shall be processed for separation.

h. Failure of After-Care Program: When a recovering member (after successful completion of an After-Care Program) is consuming alcohol again, the member will

be referred for alcohol screening. An aftercare plan will be reinstituted IAW COMDTINST M6330.1. Counseling, referral and aftercare program shall be recorded in the member's personnel record using a CG-3307. The Commanding Officer shall make recommendations to MPC-EPM regarding separation, retention and further therapy. A second episode of alcohol consumption after completion of an aftercare program will result in separation. Final retention or separation authority rests with Commander (MPC-SEP-2) or Commander, MPC for those members with 8 or more years of service and subject to an Admin Discharge Board.

12. ***Misconduct.*** MILPERSMAN, Articles 3630600 and 3630620; MARCORSEPMAN, para. 6210. CGPERSMAN 12-B-18.

a. Honorable, general, OTH, or ELS.

b. Administrative board procedure will be utilized in all cases involving mandatory processing. See discussion of mandatory processing under commission of a serious offense, civilian conviction, and misconduct due to drug abuse.

c. For Coast Guard personnel, all cases where a discharge under OTH conditions by reason of misconduct is SOUGHT shall be processed using administrative board procedures. In addition, administrative board procedures shall also be followed in the case of any member with 8 or more years of total active or inactive service even if an honorable or general discharge is contemplated.

d. Formal counseling required only for the subcategories of minor disciplinary infractions and pattern of misconduct.

e. ***Subcategories*** under misconduct include: minor disciplinary infractions, pattern of misconduct, commission of a serious offense, and civilian convictions. For Coast Guard, subcategories include: conviction by civil authorities of an offense for which the maximum penalty under the UCMJ is confinement in excess of one year; procurement of a fraudulent enlistment through a deliberate, material misrepresentation; involvement with drugs; obstruction of drug urinalysis testing; frequent involvement of a discreditable nature with civil or military authorities*; sexual perversion, abuse of a family member*; established pattern of shirking*; failure to pay just debts*; failure to adequately support dependents*; failure to comply with court orders concerning support of dependents*; sexual harassment and absenteeism of the following durations:

-1- One year or more.

-2- 3 or more UAs within 6 months, totaling 30 days or more;

or

-3- 6 or more UAs within 6 months, totaling 60 days or more.

* Administrative discharge action in these cases will not be initiated until the member has been afforded a probationary period to overcome their deficiencies. CGPERSMAN 12-B-18-c.

(1) ***Minor disciplinary infractions***. Defined as a series of at least three minor disciplinary infractions (non-BCD offenses) appropriately disciplined under Article 15, UCMJ, and documented in the service record within one enlistment.

(a) ***Coast Guard***. Not applicable.

(b) ***Marine Corps***. The Marine interpretation of this provision is that it is not necessary that the infractions resulted in NJP, only that they be documented in the service record (e.g., a page 11 (para. 6105) counseling / warning regarding extra military instruction).

(c) ***Navy***. The Navy interpretation of this provision is that the UCMJ violations must be between three and eight in number, non-drug related, and, in fact, punished under the UCMJ. If one or more of the violations cited could have resulted in a punitive discharge, or there are three or more periods of unauthorized absence of more than three days duration each, or there are three or more punishments under the UCMJ (NJP's, captain's mast) within the current enlistment, processing in the Navy should be effected for pattern of misconduct rather than minor disciplinary infractions. A page 13 counseling / warning from the current command in the current enlistment is required.

(d) Page 13 formal counseling is required.

(e) The notification procedure is used. However, note that if any of the offenses for which the member is being processed has a punitive discharge authorized in the table of maximum punishments, then the member must be dual-processed for misconduct due to commission of a serious offense.

(f) If separation of a member in entry level status is warranted solely by reason of minor disciplinary infractions, processing should be under entry level performance and conduct rather than misconduct (minor disciplinary infractions).

(2) ***Pattern of misconduct***. MILPERSMAN, Article 3630600.1b; MARCORSEPMAN, para. 6210.3. A pattern of misconduct includes the following:

(a) Any established pattern of involvement of a discreditable nature with civil or naval authorities (the Navy interprets this provision to include two or more civilian convictions for misdemeanors, two or more punishments under the UCMJ (NJP's or courts-martial), or any combination of two minor civilian convictions for

misdemeanors or punishments under the UCMJ (for the Navy, the latest offense must have occurred while assigned to the parent command);

(b) an established pattern of at least three minor unauthorized absences over three (3) days;

(c) an established pattern of dishonorable failure to pay just debts (MILPERSMAN, Article 3630600.1b; MARCORSEPMAN, para. 6310.3); or

(d) 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.

Note: The Navy now requires only a page 13 counseling / warning be from ***any*** command in the current enlistment; the Marine Corps requires a page 11 (para. 6105) counseling warning in the current enlistment.

(3) ***Commission of a serious offense –***

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

-1- In the Marine Corps:

-a- A punitive discharge would be authorized for the same, or a closely related, offense under the UCMJ; and

-b- the specific circumstances of the offense warrant separation (the Navy does not have this element).

-2- In the Navy, when a punitive discharge would be authorized for the same, or a closely related, offense under the UCMJ.

(b) Processing is ***mandatory*** (MILPERSMAN, Article 3630600):

-1- If the CO believes by a preponderance of the evidence that the member committed extremely serious misconduct that either resulted in, or had the potential to result in, death or serious bodily injury;

-2- for sexual perversion (including lewd and lascivious behavior, indecent assault, indecent acts, indecent exposure, or sodomy);

-3- for aggravated sexual harassment (see SECNAVINST 5300.26B); or

-4- for acts against the security of the Navy or the nation (including mutiny and sedition, spying, misbehavior before enemy, and espionage).

(c) All court-martial convictions (SCM, SPCM, GCM), and civilian convictions are binding upon the administrative board as to the issue of whether misconduct occurred. CGPERSMAN 12-B-31-f; NAVADMIN 031/95.

(d) A member may not be separated on the basis of conduct that has been the subject of judicial proceedings resulting in an acquittal or its equivalent, except when such finding is based on a judicial determination not going to the merits of the factual issue of guilt, or when the proceeding was conducted in a state or foreign court and the separation is in the best interest of the service. MILPERSMAN, Article 3610260.12.

Navy. If the basis for processing under this provision is evidenced solely by a court-martial conviction, and the court-martial convening authority has remitted or suspended a punitive discharge, the case should be forwarded to that court-martial convening authority for endorsement prior to forwarding the case to CHNAVPERS. MILPERSMAN, Article 3630600.1(b)(3).

(e) ***Navy and Coast Guard***: Aggravated sexual harassment is the first substantiated incident of:

-1- Threats or attempts to influence another's career or job for sexual favors;

-2- offering rewards in exchange for sexual favors; or

-3- Unwelcomed physical contact of a sexual nature which, if charged as a UCMJ violation, could result in a punitive discharge, e.g. rape (Article 20); sodomy (Article 125); indecent assault (Article 134); assault with intent to commit rape or sodomy (Article 134), and appropriate lesser included offenses.

-4- "Substantiated incident" means there has been an NJP or court-martial conviction, or the CO is convinced by a preponderance of the evidence that sexual harassment occurred. COMDTINST 5350.30A.

(f) Neither a military or civilian conviction is required to process for commission of a serious offense.

(4) ***Civilian conviction***

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

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

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

For Coast Guard, any disposition tantamount to a finding of guilty for an offense where the maximum UCMJ penalty would be greater than one year's confinement or where the offense involves moral turpitude, CGPERSMAN 12-b-18-b-1.

(b) It is mandatory processing if the conduct or the action taken equivalent to a finding of guilty resulted in, or could have resulted in, death or serious bodily injury (Navy).

(c) Separation processing may be initiated whether or not a member has filed an appeal of a civilian conviction or has stated an intention to do so; however, execution of an approved separation should be withheld pending the outcome of the appeal, or until the time for appeal has passed, unless the member has requested separation or the member's separation has been requested by CNO or CMC, and such requests have been approved by the Secretary of the Navy who may direct that the member be separated prior to final action on the appeal. CGPERSMAN 12-B-18-b-1.

(d) For separation of reservists for a civilian conviction, see MILPERSMAN, Article 3610300.4c and MARCORSEPMAN, now para. 1004.4d.

(5) ***Preservice - prior enlistment misconduct***. Members may be processed for separation by reason of misconduct for offenses which occurred preservice or in a prior enlistment, provided the misconduct was unknown to the Navy at the time of enlistment or reenlistment and processing for fraudulent enlistment / reenlistment is inappropriate. Coast Guard members will be processed for Misconduct due to procurement of a fraudulent enlistment as per PERSMAN 12-B-18-b-(2).

(a) Notification procedure.

(b) Characterization: Honorable, General.

13. ***Misconduct due to drug abuse***. MILPERSMAN, Article 3630600; MARCORSEPMAN, para. 6210; CGPERSMAN 12-B-18-b-(4) and 20-C-4.

a. A member must be processed for every drug-related incident. OPNAVINST 5350.4 defines a drug-related incident, in pertinent part, as: "Any incident in which drugs are a factor. For the purposes of this instruction, . . ., use or possession of drugs or drug paraphernalia, or drug trafficking constitute an incident."

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

c. Processing for separation is mandatory for all Navy-Marine Corps and Coast Guard drug incidents. OPNAVINST 5350.4; MCO P5300.12; CGPERSMAN 12-B-18-b-(4).

d. A medical officer's opinion or Counseling and Assistance Center evaluation of the member's drug dependency (as evaluated subsequent to the most recent drug incident) ***must*** be included with the case submission. This is for the purpose of determining VA treatment.

e. ***Characterization of discharge***. Under most circumstances involving possession, use, and / or trafficking, the member will receive an OTH discharge. For Coast Guard, any member involved in a drug incident (involving possession, use and/or trafficking) will be processed for separation with no higher than a general discharge. CGPERSMAN 12-B-18-b-(4). Only those cases in which an OTH discharge is sought or in which the member has served a total of 8 or more years will require an administrative discharge board. CGPERSMAN 20-C-4.

(1) If evidence of the drug-related incident was derived from a urinalysis test, the characterization of the discharge depends upon the circumstances under which the urine sample was obtained. Generally, if the urinalysis result could be used in disciplinary proceedings, it can be used to characterize an administrative discharge as less than honorable. Some reasons for ordering urinalysis tests which yield results that can be used in disciplinary proceedings, and therefore can be utilized to characterize a discharge as OTH, include:

(a) Search or seizure (member's consent or probable cause); CGPERSMAN 20-C-2-a-(2)(3).

(b) inspections [random samples, unit sweeps, service-directed samples, rehabilitation facility staff (military only)]; CGPERSMAN 20-C-2-a-(1) and

(c) medical tests for general diagnostic purposes. CGPERSMAN 20-C-2-a-(4).

(2) Examples of fitness-for-duty urinalysis results which ***cannot*** be used in disciplinary proceedings, and therefore ***cannot*** be used to characterize a discharge as OTH, include:

(a) Command-directed tests (evaluation testing, CGPERSMAN 20-c-2-a-(5) or reasonable suspicion); CGPERSMAN 20-C-2-a-(8)(b);

(b) competence-for-duty exams per BUMEDINST 6120.20; CGPERSMAN 20-C-2-a-(8);

(c) drug rehabilitation tests;

(d) mishap / safety investigation tests; (CGPERSMAN 20-C-2-a(8)(a); and

(e) aftercare testing.

(f) Example:

SN Jones has an NJP for wrongful use of marijuana (the results of a random urinalysis ordered by higher authority). After the NJP, his CO ordered him to submit to a urinalysis screening to determine fitness-for-duty purposes. SN Brown is SN Jones' roommate; he is a 4.0 sailor with no prior indication of drug use. The CO ordered a fitness-for-duty urinalysis screening for SN Brown also. The results of both tests were positive for THC (marijuana). The CO convened an administrative discharge board for each sailor; the grounds for processing were misconduct due to drug abuse. What evidence can each board consider?

SN Jones: In determining whether to retain or separate SN Jones, the board may consider the NJP and the positive urinalysis result of the fitness-for-duty test. When determining the characterization of discharge, however, the board may only consider the drug use leading to NJP. Since the second urinalysis was ordered for the purpose of determining fitness for duty only, it cannot be used by the board in arriving at the proper characterization of Jones' service only for the determination of separation or retention. He still could receive an OTH because of the NJP.

SN Brown: It is mandatory to process SN Brown, however, the fitness-for-duty urinalysis result could not be used for disciplinary purposes, so it can only be used by the board in determining whether to retain or separate SN Brown. It cannot be used to characterize a discharge as OTH; therefore, if the board recommends separation, it would be characterized as type warranted by service record (i.e., honorable in Brown's

case). It is important to note that, since Brown could not have received an OTH discharge, the CO could have elected to process under the notification procedure instead of the administrative board procedure and could act as the separation authority if SN Brown did not object to separation.

NOTE: For Coast Guard purposes, both SN Jones and SN Brown would be processed for separation with no higher than a general discharge. In addition, neither would be eligible for an administrative discharge board unless each had 8 or more years of total service or an OTH discharge is sought for SN Jones. SN Brown could not have received an OTH discharge since his positive urinalysis was the result of a fitness (competence) for duty test.

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

(h) ***Portable urinalysis kits***

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

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

(3) If the urinalysis result is not usable to characterize the discharge as OTH, the commanding officer may elect to use the notification procedure vice the administrative board procedure. Otherwise, BUPERS retains separation authority regardless of the recommendation of the administrative board.

For Coast Guard personnel, all urine specimens shall be collected and processed IAW COMDTINST 5355.1 with the exception of those collected for a valid medical purpose or as part of after-mishap testing in which urine specimens, along with blood or breath specimens will be collected from all personnel involved in a mishap IAW COMDTINST M5100.47. When practical, the provisions of COMDTINST 5355.1 shall be followed during after-mishap testing. CGPERSMAN 20-C-2-b.

14. ***Separation in lieu of trial by court-martial.*** MILPERSMAN, Article 3630650; MARCORSEPMAN, para. 6419; CGPERSMAN 12-B-21-d. The Navy, Marine Corps and Coast Guard permit a member to submit a written request to be discharged to avoid trial by general or special court-martial, provided that a punitive discharge is authorized for the offense(s) preferred. The escalator clause at R.C.M. 1003(d), MCM, 1984, may be used to determine if a punitive discharge is authorized, provided the charges have been referred to a court-martial authorized to adjudge a punitive discharge. The written request ***shall include***:

a. ***A statement*** by the member that the elements of the offense(s) charged are understood;

b. ***a statement*** that the member understands that characterization of service as under other than honorable conditions is authorized, the adverse nature of such a characterization of service, and the possible consequences thereof;

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

c. ***an acknowledgement*** of guilt of one or more offense(s) charged (or of any lesser included offense(s)) for which a punitive discharge is authorized;

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

e. as a condition precedent to approval of the request, the member (if serving in paygrade E-4 or above) must also request administrative reduction to paygrade E-3 (MILPERSMAN, Article 3630650; MARCORSEPMAN, para. 6419); not applicable to Coast Guard.

– Upon approval of a servicemember's request for separation in lieu of trial by court-martial, such member will be reduced to paygrade E-3 pursuant to his / her request.

f. the Navy and Coast Guard also require that the member's request, when forwarded by the command to the separation authority, include the results

of a medical exam attesting to the member's mental competence or a medical officer's statement that a psychiatric evaluation is not necessary. MILPERSMAN, Article 3630650.3c(1) and CGPERSMAN 12-B-21-e. This examination is intended to ensure the member understands the nature and quality of the wrongful conduct and had sufficient capacity to understand the nature of the proceedings. The incriminating statement by the member or member's counsel is not admissible against the servicemember in a court-martial except as provided in Mil.R.Evid. 410.

g. The format in the MILPERSMAN and CGPERSMAN 12-B-21-d must be used.

h. The general court-martial authority may approve or disapprove such requests, direct charges, and direct reduction to paygrade E-3 where applicable. The GCMCA is the only Convening Authority who may ***disapprove*** an OTH in lieu of court-martial request. In the Navy, a SPCMCA may approve an OTH discharge for enlisted members who have been absent without authority over 30 days, have been deserters and returned to naval control, and are charged with only unauthorized absence over 30 days. This is the only scenario in which a SPCMCA may ***approve*** an OTH request. The SPCMCA may not ***disapprove*** any request.

i. For Coast Guard, all requests for discharge under OTH conditions shall be forwarded through the GCMCA for personal review and comment. Commandant-MPC-EPM is the separation authority. CGPERSMAN 12-B-21-e.

15. ***Security***. MILPERSMAN, Article 3630700; MARCORSEPMAN, para. 6212; and CGPERSMAN 12-B-17.

a. Honorable, general, OTH, or ELS.

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

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

d. For Coast Guard members - an OTH discharge is normally awarded in cases involving security.

16. ***Unsatisfactory participation in the Ready Reserve***. MILPERSMAN, Article 3630800; BUPERS 1001.39A; MARCORSEPMAN, para. 6213.

a. Coast Guard - not applicable.

b. Honorable, general, or OTH.

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

d. A member may be separated by reason of unsatisfactory performance under criteria established in BUPERSINST 1001.39A, BUPERSINST 5400.42, or MCO P1000R.1, as applicable. In the Navy, unsatisfactory participation includes the member's failure to report for physical examination or failure to submit additional information in connection therewith as directed. Discharge proceedings shall not be initiated until 30 days after a second notice has been given to the member.

17. ***Separation in the best interest of the service ("BIOTS").*** MILPERSMAN, Article 3630900; MARCORSEPMAN, para. 6214.

a. Coast Guard - not applicable.

b. Honorable, general, or ELS.

c. The notification procedure is utilized, and the member has ***no*** right to an administrative board regardless of time on active duty.

d. The Secretary of the Navy is the only authority to 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. It has been used in cases of cross-dressers and in those cases where members have excessive tattoos in visible areas depicting hate groups.

0907 MANDATORY PROCESSING. The decision whether or not to process an enlisted member for administrative separation is normally a matter within the discretion of the commanding officer. The following bases, however, ***mandate*** separation processing:

A. Homosexual conduct;

B. Misconduct - commission of a serious offense or a civilian conviction when:

1. Misconduct results in, or has the potential to result in, death or serious bodily injury;

2. Misconduct involves sexual perversion;

3. Misconduct involves acts against the security of the Navy or the nation; or

4. Misconduct involves sexual harassment.

C. Defective enlistment - minority or fraudulent; and

D. Drug abuse:

Mandatory processing requires only that the case be forwarded to the separation authority for review and final action. In exceptional circumstances, the separation authority may still retain the servicemember. Remember: ***Mandatory processing ≠ mandatory separation. Do not confuse this point.***

H. Separation responsibility

a. ***Navy***

Unfavorable cases (Pers 83)	DSN 224-8245 / 8266
Voluntary separations (Pers 24)	DSN 224-1285 / 3893
Medical separations (Pers 242)	DSN 224-1412
Conscientious objectors (Pers 2E)	DSN 224-8372
Reservists on inactive duty (Pers 913)	DSN 288-8664 or comm. (202) 433-8664
CHNAVRES SJA (Pers 913)	DSN 363-5303 or comm. (504) 948-5303

b. ***Marine Corps***

GCM Authority SJA or SJA for CMC	DSN 224-4250 / 4197
Medical	DSN 224-2091
Reserves	DSN 224-9100
MMSR	DSN 224-1288 / 3288

c. ***Coast Guard***

Commander, Military Personnel Command

0908 **THIS CHART SHOWS THE ELIGIBILITY FOR BENEFITS BASED ON THE TYPE OF DISCHARGE A MEMBER IS AWARDED. IT DOES NOT INDICATE ANY OTHER CRITERIA THAT MAY ALSO BE REQUIRED FOR AN INDIVIDUAL TO BE ELIGIBLE FOR THE BENEFITS INDICATED.**

DD –	Dishonorable Discharge
BCD GCM –	Bad-Conduct Discharge awarded at a General Court-Martial
BCD SPCM –	Bad-Conduct Discharge awarded at a Special Court-Martial
OTH –	Other than Honorable
GEN –	General (under honorable conditions)
HON –	Honorable Discharge
E –	Eligible
NE –	Not Eligible
A –	Eligible only if the administering agency determines that, for its purposes, the discharge was not under dishonorable conditions.

	DD	BCD GCM	BCD SPCM	OTH	GEN	HON
VA Benefits						
Wartime disability compensation	NE	NE	A	A	E	E
Wartime death compensation	NE	NE	A	A	E	E
Peacetime disability compensation	NE	NE	A	A	E	E
Peacetime death compensation	NE	NE	A	A	E	E
Dependency and indemnity compensation to survivors	NE	NE	A	A	E	E
Education assistance	NE	NE	NE	NE	NE	E
Pensions to widows and children	NE	NE	A	A	E	E
Hospital and domiciliary care	NE	NE	A	A	E	E
Medical and dental care	NE	NE	A	A	E	E
Prosthetic appliances	NE	NE	A	A	E	E
Seeing-eye dogs, mechanical and electronic aids	NE	NE	A	A	E	E
Burial benefits (flag, national cemeteries, expenses)	NE	NE	A	A	E	E
Special housing	NE	NE	A	A	E	E
Vocational rehabilitation	NE	NE	A	A	E	E
Survivor's educational assistance	NE	NE	A	A	E	E
Autos for disabled veterans	NE	NE	A	A	E	E
Inductees reenlistment rights	NE	NE	A	A	E	E

THIS CHART SHOWS THE ELIGIBILITY FOR BENEFITS BASED ON THE TYPE OF DISCHARGE A MEMBER IS AWARDED. IT DOES NOT INDICATE ANY OTHER CRITERIA THAT MAY ALSO BE REQUIRED FOR AN INDIVIDUAL TO BE ELIGIBLE FOR THE BENEFITS INDICATED.

	DD	BCD GCM	BCD SPCM	OTH	GEN	HON
Military Benefits						
Mileage	NE	NE	NE	NE	E	E
Payment for accrued leave	NE	NE	NE	NE	E	E
Transportation for dependents & household goods	NE	NE	NE	NE	E	E
Retain and wear uniform home	NE	NE	NE	NE	E	E
Notice to employer of discharge	NE	NE	NE	NE	E	E
Award of medals, crosses, and bars	NE	NE	NE	NE	E	E
Admission to Naval Home	NE	NE	NE	NE	E	E
Board for Correction of Naval Records	E	E	E	E	E	E
Death gratuity	NE	NE	A	A	E	E
Use of wartime title and wearing of uniform	NE	NE	NE	NE	E	E
Naval Discharge Review Board	NE	NE	E	E	E	E

	DD	BCD GCM	BCD SPCM	OTH	GEN	HON
Other Benefits						
Homestead preference	NE	NE	NE	NE	E	E
Civil Service employment preference	NE	NE	NE	NE	E	E
Credit for retirement benefits	NE	NE	NE	NE	E	E
Naturalization benefits	NE	NE	NE	NE	E	E
Employment as District Court bailiffs	NE	NE	NE	NE	E	E
D.C. police, fireman, & teacher retirement credit	NE	NE	NE	NE	E	E
Housing for distressed families of veterans	NE	NE	A	A	E	E
Farm loans and farm housing loans	NE	NE	A	A	E	E
Jobs counseling, training, placement	NE	NE	A	A	E	E
Social Security wage credits for WW-II service	NE	NE	A	A	E	E
Preference in purchasing defense housing	NE	NE	A	A	E	E

NAVY AND MARINE CORPS
ENLISTED ADMINISTRATIVE SEPARATIONS

REASON FOR SEPARATION	CHARACTERIZATION OF SERVICE	MILPERSMAN/ MARCORSEPMAN	ADMIN BOARD (A)/ NOTIFICATION (N)
1. EXPIRATION OF SERVICE OBLIGATION	HON/GEN/ELS	3620100 / 3620150 6202 / 6403 / 6404 CGPERSMAN 12-B-11	
2. CONVENIENCE OF GOVERNMENT	HON/GEN/ELS	3620200 CGPERSMAN 12-B-12	(N);(A) if 6 yrs 8 yrs for CG
Hardship		3620210 / 6407 / CG-12-D-3	
Parenthood		3620215 / 6203 / CG-12-D-3	
Pregnancy or Childbirth		3620220 / 6408 / None	
Personality Disorder		3620225 / 6203 / CG-12-B-16	
Further Education		3620235 / None / CG-12-B-8	
Surviving Family Member		3630240 / None / CG-4-A-3	
Being an Alien		3620250 / None / None	
Physical Disability		3620270 / 6203 / CG-12-B-15	
Conscientious Objection		1860120/6409 / CG-12-B-12 [MCO 1306.16 DOD Dir 1300.6] / COMDTINST 1900.8	
3. DEFECTIVE ENLISTMENTS			
Minority		3620285 / 6204 / CG-12-B-14	
Under 17	OOR		(N)
Age 17	ELS		(N)
Defective Enlistment	HON/ELS/OOR	3620283 / 6204 / None	(N)
Erroneous Enlistment	HON/ELS/OOR	3620280 / 6204 / CG-12-B-12	(N);(A) if 6 yrs; 8 yrs (CG)
Fraudulent Enlistment*	HON/GEN/ELS OTH/OOR	3630100 / 6204 / CG-12-B-18	(N);(A) if 6 yrs or OTH; 8 yrs (CG)
New Entrant Drug / Alcohol Testing	OOR	OPNAVINST 5350.4 / 6211 / CG-12-B-18	(N) or OTH

REASON FOR SEPARATION	CHARACTERIZATION OF SERVICE	MILPERSMAN/ MARCORSEPMAN	ADMIN BOARD (A)/ NOTIFICATION (N)
4. WEIGHT CONTROL FAILURE	HON/GEN	3620260 / ALMAR 57/93 NAVADMIN 071/93 / CG-12-B-12-b-(6)	
5. ENTRY LEVEL PERFORMANCE AND CONDUCT	ELS	3630200 / 6205 / CG-12-B-20	(N);(A) if 6 yrs; 8 yrs for CG
6. UNSATISFACTORY PERFORMANCE	HON/GEN	3630300 / 6206 / CG-12-B-9	(N);(A) if 6 yrs; 8 yrs for CG
7. HOMOSEXUAL CONDUCT [Mandatory Processing]	HON/GEN/OTH ELS	3630400 / 6207 / CG-12-D-4	(A) (N) if 180 days or less for CG
8. SECURITY	HON/GEN/OTH ELS	3630700 / 6212 / CG-12-B-17	(N);(A) if 6 years or OTH; 8 yrs for CG or OTH
9. DRUG / ALCOHOL ABUSE REHAB FAILURE	HON/GEN/ELS	3630500 / 3630550 6208 / 6209 CG-20-B-2 for alcohol only	(N);(A) if 6 yrs; 8 yrs (CG)
10. MISCONDUCT	HON/GEN/ELS OTH		
Minor Disciplinary Infractions		3630600 / 6210 / None	(N);(A) if 6 yrs or OTH
Pattern of Misconduct		3630600 / 6210 / None	(N);(A) if 6 yrs; 8 yrs (CG)
Frequent Involvement of a Discreditable Nature		CG-12-B-18-b-(5)	or OTH
Commission of Serious Offense*		3630600 / 6210 / None	(N); (A) if 6 yrs or OTH
Civilian Conviction*		3630600 / 6210 / CG 12-B-18-b-(1)	(A); (N) if less than 8 yrs
Misconduct due to Drug Abuse*		3630620 / 6210 / CG-12-B-18-b-(4)	(N);(A) if 6 yrs; 8 yrs (CG) or OTH;

REASON FOR SEPARATION	CHARACTERIZATION OF SERVICE	MILPERSMAN/ MARCORSEPMAN	ADMIN BOARD (A)/ NOTIFICATION (N)
11. SEPARATION IN LIEU OF COURT-MARTIAL	HON/GEN/ELS OTH	3630650 / 6419 / CG-12-B-21	(N);(A) if 6 yrs; 8 yrs (CG) or OTH
12. SEPARATION IN BEST INTEREST OF SERVICE	HON/GEN/ELS	3630900 / 6214 / None	(N)
13. UNSATISFACTORY PERFORMANCE IN READY RESERVE	HON/GEN/ELS OTH	3630650 / 6213 / None	(N);(A) if 6 yrs or OTH
14. DISABILITY	HON/GEN/ELS	3620270 / 8401-8512 SECNAVINST 1850.4C / CGPERSMAN 12-B-15	(N)
HIV INFECTION (AIDS): *See* SECNAVINST 5300.30C			

* MANDATORY PROCESSING IN CERTAIN CASES

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

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

CHAPTER X

ENLISTED ADMINISTRATIVE SEPARATION PROCESSING AND REVIEW

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CHAPTER X

ENLISTED ADMINISTRATIVE SEPARATION PROCESSING AND REVIEW

1001 NOTIFICATION AND ADMINISTRATIVE BOARD PROCEDURES. The primary references for administrative separation processing are the MILPERSMAN (for the Navy), the MARCORSEPMAN (for the Marine Corps), and the CGPERSMAN (for the Coast Guard).

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

1. The notification procedure is used unless (a) the member has over 6 years of service; (b) the member is being processed for homosexual conduct; or (c) an other than honorable (OTH) discharge is possible.

a. ***Coast Guard***: The notification procedure is used unless (a) the member has over 8 years of service; (b) the member is being processed for homosexual conduct and has over 180 days of service and (c) an OTH discharge is desired regardless of the number of years the member has in the service.

b. ***Navy***: Per NAVADMIN 140/96, if an offense or the circumstances surrounding it are such that an OTH is not warranted, the special court-martial convening authority is authorized to use notification procedures. This authority is limited to separation processing based on certain types of misconduct, security, or unsatisfactory participation in the Ready Reserves.

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

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

B. ***Notification procedure***

1. ***Notice***. MILPERSMAN, Article 3640200.2 and MARCORSEPMAN, para. 6303.3a require the commanding officer to notify the member being processed (the respondent), in writing, of the following:

a. Each of the specific reasons for separation that form the basis of the proposed separation including, for each of the specified reasons, the circumstances upon which the action is based and a reference to the applicable provisions of the MILPERSMAN or MARCORSEPMAN;

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

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

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

e. the respondent's right to submit statements;

f. the respondent's right to consult with counsel;

g. a statement of the right to request an administrative board—if the respondent has six or more years of total active and Reserve naval service—and to be represented by qualified counsel if the member elects an administrative board;

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

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

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

k. ***New Change***. Per CNO message 092030Z FEB 95, member now has the right to have general court-martial convening authority (GCMCA) review when there is no entitlement to an administrative discharge board. New policy:

> In order to give members who are not entitled to an administrative discharge board (i.e., members processed under the notification procedure who have under six years total active and / or reserve military service) the opportunity to have their case reviewed, paragraph 4J to MPM 3640200.5 (Notice of Notification Procedure proposed Action (LON)) and the Statement of Awareness para. 4 of MPM 3640200.6 were amended as follows:
>
> "To general court-martial convening authority review if you have under six (6) years total active and / or reserve military service."
>
> If the member elects the right to GCMCA review, the processing activity will forward the member's LON and SOA and all supporting documents to the GCMCA for review. When the review is complete, the GCMCA will return the case for action as directed.

Examples of LON may be found in MILPERSMAN, Article 3640200.5 (Navy) and in MARCORSEPMAN, fig. 6-2 (for the Marine Corps). If the respondent is in civil confinement, absent without authority, in a Reserve component not on active duty, or transferred to the IRR, the relevant additional notification procedures in paragraph B.4 below apply.

l. For Coast Guard members, CGPERSMAN requires the Commanding Officer to notify the member being processed, in writing, of the following:

(1) The specific reason(s) and factual basis for the recommended discharge;

(2) The right to submit a statement; and

(3) If recommended for a general discharge, the right to consult with a lawyer and that prejudice may be encountered in civilian life in circumstances where the type of discharge award has a bearing. The member must acknowledge the above in writing and state whether he/she wishes to submit a statement in rebuttal or otherwise object to the discharge. The notice and acknowledgement are then sent as encosures to a letter that requests discharge authority. All other syupporting documentation must also be included e.g., required counseling entries, performance evaluations, required probationary period notices, a summary of military and civilian offenses and any other pertinent documents.

2. ***Counsel.*** MILPERSMAN, Article 3640200.3; MARCORSEPMAN, para. 6303.3b.

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

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

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

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

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

b. A Coast Guard member's right to consult with military counsel only applies in those instances when a general discharge is indicated by PERSMAN 12-B-2-f. A member will be appointed counsel in all cases in which an OTH discharge is desired or the member has 8 or more years of total service. Civilian counsel of choice may be used by the individual at no expense to the government.

c. Nonlawyer counsel shall be appointed, in writing, whenever qualified counsel is not available under paragraph B.2.a above. Any appointed nonlawyer counsel shall be a commissioned officer with no prior involvement in the circumstances forming the basis of the proposed separation or in the separation process itself. The appointing letter shall state that qualified counsel is unavailable for the applicable reasons in paragraph B.2.a above and that the needs of the naval service warrant processing before qualified counsel will be available, as well as encouraging nonlawyer counsel to seek advice by telephone or other means from any judge advocate on any legal issue relevant to the case whenever practicable. A copy of the appointing letter will be attached to each copy of the written notice of separation processing.

d. The respondent may also consult with civilian counsel at the respondent's own expense. Retention of civilian counsel, however, does not eliminate the command's requirement to furnish counsel as outlined above. Moreover, consultation with civilian counsel shall not delay orderly processing in accordance with this instruction.

e. The member must be advised that it is in their best interest to consult with a judge advocate prior to waiving any of their rights. MILPERSMAN, Article 3640200; MARCORSEPMAN, paras. 6303 and 6304.

3. ***Response.*** MILPERSMAN, Article 3640200.4; MARCORSEPMAN, para. 6303.2c. The respondent shall be provided a reasonable period of time—not less than two working days—to respond to the notice. An extension may be granted upon a timely showing of good cause by the respondent. The respondent's election as to each of the rights set forth in paragraph B.1 above shall be recorded on a separate form (called the Statement of Awareness) provided by the command. This statement is signed by the respondent and witnessed by respondent's counsel, if available locally, subject to the following limitations:

a. If the respondent fails to respond to the notification of separation in a timely manner, this failure constitutes a waiver of rights and an appropriate notation will be made on the retained copy of the Statement of Awareness. If the respondent indicates that one or more of the rights will be exercised, but declines to sign the appropriate form, the election of rights will be noted and an appropriate notation as to the failure to sign will be made.

b. If notice by mail is authorized (*see* B.4 below), and the respondent fails to acknowledge receipt or submit a timely reply, that failure constitutes a waiver of rights and a notation shall be recorded on a retained copy of the Statement of Awareness.

c. The respondent's commanding officer shall forward a copy of the notification and the Statement of Awareness, along with all relevant supporting documents, to the separation authority. Forms for the respondent's statement of awareness may be found in MILPERSMAN, Article 3640200.6 and MARCORSEPMAN, fig. 6-3.

d. Additionally, the member may respond by submitting a statement in rebuttal to the proposed discharge action or may decline to make a statement. For Coast Guard, a member must be "afforded an opportunity" to make a statement in writing. If the member does not desire to make a statement, such fact shall be set forth in writing over the member's signature on the letter of notification. If the member refuses to sign a command's statement, the member's commanding officer will so state in writing.

4. ***Additional notification requirements***

a. ***Member confined by civil authorities.*** MILPERSMAN, Article 3640200.2b; MARCORSEPMAN, para. 6303.4a. If separation proceedings have been initiated against a respondent confined by civil authorities, the case may be processed in the absence of the respondent. Even if a board is required, there is no requirement that the

respondent be present at the board hearing. Rights of the respondent before the board can be exercised on his behalf by counsel. The following additional requirements apply:

(1) Notice shall be in the same fashion as set forth in sections 1001B or 1001C of this chapter, as appropriate. It shall be delivered personally to the respondent or sent by mail or certified mail, return receipt requested (or by an equivalent form of notice if such service is not available for delivery by U.S. mail at an address outside the United States). If the member refuses to acknowledge receipt of notice, the individual mailing the notification shall prepare a sworn affidavit of service by mail which will be inserted in the member's service record—together with PS Form 3800.

(2) If delivered personally, receipt shall be acknowledged in writing by the respondent. If the respondent refuses to acknowledge receipt, an appropriate notation will be made on the Statement of Awareness.

(3) The notice shall state that no action will be taken until a specific date (not less then 30 days from the date of delivery) in order to give the respondent opportunity to exercise the rights set forth in the notice. Failure to respond shall be treated as a waiver of rights, and appropriate action should then be taken.

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

(5) A Coast Guard member unable to appear in person before an administrative discharge board by reason of confinement by civil authorities will be advised by registered mail of the proposed discharge action, the type of discharge certificate that may be issued, and the fact that action has been suspended to give the member the opportunity to exercise the following rights:

(a) to request appointment of a military counsel as a representative to present the case before a board in the member's absence;

(b) to submit statements in own behalf; and

(c) to waive the foregoing rights, either in writing or by declining to reply to the letter of notification within 15 days from receipt of the registered letter. PERSMAN 12-B-32-b-(5).

b. ***Certain reservists***. MILPERSMAN, Article 3640200.2b; BUPERSINST 1001.39; and MARCORSEPMAN, para. 6303.4b.

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

(a) At the request of the member;

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

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

The notice shall contain the matter set forth in sections 1001B or 1001C of this chapter.

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

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

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

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

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

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

C. ***Administrative board procedure***

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

a. If the proposed reason for separation is homosexual conduct; or

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

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

2. ***Notice***. MILPERSMAN, Articles 3640200.2a(9) and 3640200.7, and MARCORSEPMAN 6304 require the commanding officer to notify the respondent being processed under the administrative board procedure of the following:

a. All bases of the proposed separation, including the circumstances upon which the action is based and the reference supporting the applicable reason for separation (it is mandatory that members be dual-processed for all applicable reasons);

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

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

d. the right to consult with counsel in accordance with paragraph 4 below;

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

f. the right to an administrative board;

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

h. the right to representation before the administrative board by counsel as set forth in paragraph 4 below;

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

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

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

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

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

n. in the Navy, a statement that the respondent's proposed separation may continue to be processed in the event that, after receiving notice, the respondent commences a period of unauthorized absence. Such absence may be considered a waiver of his / her right to be at the administrative board.

3. ***Additional notice requirements***. MILPERSMAN, Articles 3640200.2 and 3; MARCORSEPMAN, para. 6304.2.

a. If the respondent is in civil confinement or in a Reserve component not on active duty, the relevant additional notification requirements set forth in section B.4 above apply.

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

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

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

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

4. ***Counsel***. MILPERSMAN, Article 3640200.3; MARCORSEPMAN, para. 6304.3.

a. A respondent has the same right to consult with counsel as that prescribed for the notification procedure (prior to electing or waiving any rights under paras. C.2.d through i above).

b. If an administrative board is requested, the respondent shall be represented by qualified counsel appointed by the convening authority, or by individual counsel of the respondent's own choice. For the respondent to be represented by individual military counsel (IMC) of his own choice, the counsel must be determined to be reasonably available. The determination as to whether individual counsel is reasonably available shall be made in accordance with the procedures in section 0131 of the *JAG Manual* for determining the availability of IMC for courts-martial. Upon notice of IMC's availability, the respondent must elect between representation by appointed counsel and representation by IMC unless the convening authority, in his / her sole discretion, approves a written request from the respondent setting forth in detail why representation by both counsel is essential to ensure a fair hearing.

c. The respondent has the right to consult with civilian counsel, but such consultation or representation will be at his own expense and shall not unduly delay the administrative board procedures. Exercise of this right shall not waive any other counsel rights. If exercise of the right to civilian counsel causes undue delay, the convening authority may direct the board to proceed without the desired civilian counsel after properly documenting the facts.

d. Nonlawyer counsel may represent a respondent before an administrative board if:

(1) The respondent expressly declines appointment of qualified counsel and requests a specific nonlawyer counsel; or

(2) the separation authority assigns nonlawyer counsel as assistant counsel.

5. ***Response***. MILPERSMAN, Article 3640200.4; MARCORSEPMAN, para. 6304.4. The respondent shall be provided a reasonable period of time—but not less than two working days—to respond to the notice. An extension may be granted upon a timely showing of good cause. The election of the respondent as to each of the rights set forth in paragraphs C.2.d through 2.i, and applicable provisions referenced in paragraph C.3, shall be recorded and signed by the respondent and respondent's counsel (if he elects to consult with counsel)—subject to the following limitations:

a. Refusal by the respondent to respond to the notification shall constitute a waiver of rights and an appropriate notation will be made on the command's retained copy of the Statement of Awareness. If the respondent indicates that one or more of the rights will be exercised, but declines to sign, the selection of rights will be noted and an appropriate notation as to the failure to sign will be made on the Statement of Awareness.

b. Failure to acknowledge receipt of notice by mail when authorized, or to submit a timely reply to that mailed notification, constitutes a waiver of rights and an appropriate notation shall be recorded on a retained copy of the Statement of Awareness.

Forms for the respondent's Statement of Awareness may be found in MILPERSMAN, Article 3640300.8 and MARCORSEPMAN, fig. 6-3.

6. ***Waiver***. MILPERSMAN, Article 3640200; MARCORSEPMAN, para. 6304.5.

a. If the right to an administrative board is waived, the case shall be forwarded to the separation authority who will direct either retention, separation, or suspended separation.

b. If a respondent—eligible for transfer to the Fleet Reserve/ retired list and being processed for misconduct or security—waives the right to appear before a board and requests transfer to the Fleet Reserve / retired list, the Chief of Naval Personnel shall make a determination as to whether the respondent should be allowed to transfer in the grade currently held or in the next inferior paygrade. The Chief of Naval Personnel is authorized to transfer a respondent to the Fleet Reserve / retired list, when eligible, if such respondent waives the right to appear before a board.

c. ***Marine Corps***. A respondent entitled to an administrative board may submit a conditional waiver request, waiving his right to a board, contingent upon receiving a general discharge. The commanding officer shall forward the copy of the notification, the conditional waiver request, and a recommendation on the waiver to the separation authority unless he has been delegated authority by the separation authority to disapprove requests for conditional waivers and so elects. Upon receipt of a conditional waiver, the separation authority may either grant the waiver or deny it, depending upon the circumstances of the case. MARCORSEPMAN, para. 6304.5.

Note: Conditional waivers are prohibited in the Navy. *See* MILPERSMAN, Article 3610100.5.

D. ***Message submissions by Navy commanding officers.*** In the Navy, when a member waives the right to an administrative board, commanding officers are authorized to submit the case by message to Chief of Naval Personnel for final action. When an administrative separation case is submitted by message, formal submission of the case by letter of transmittal—with supporting documentation—must be forwarded within 15 working days after submission of the message to Chief of Naval Personnel. Formats for message submission and letter of transmittal are in MILPERSMAN, Article 3640200.

1002 ADMINISTRATIVE BOARDS

A. ***Convening authority.*** MILPERSMAN, Article 3640350.1b; MARCORSEPMAN, para. 6314. An administrative board may be appointed by the following:

1. In the Navy, any commanding officer with authority to convene special courts-martial (SPCM); and

2. in the Marine Corps, any Marine commander exercising SPCM authority or when authorized by an officer who has GCM authority.

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, with a majority of the board commissioned or warrant officers. At least one board member must be an officer serving in the grade of O-4 (not frocked) or higher. Per NAVADMIN 140/96, the senior member of an administrative board may be either a line or staff corps officer and may be either an officer on the active duty list or a TAR (Training and Administration of Reserves) officer.

1. ***Reserve respondent.*** At least one member of the board shall be a Reserve commissioned officer, and all members must be commissioned officers if the member is processed under administrative board problems.

2. ***Numbers.*** It is recommended that an odd number of board members be appointed to avoid evenly divided decisions (there is a required minimum of three members).

C. ***Recorder.*** MILPERSMAN, Article 3640350.1b(4); MARCORSEPMAN, para. 6315.3. The convening authority details an active-duty officer—who assumes overall nonvoting responsibility for ensuring the board is conducted properly and in a timely fashion—as recorder. In the Marine Corps, the recorder should be an experienced warrant or commissioned officer and may be a lawyer within the meaning of Article 27(b), UCMJ, but he may not possess any greater legal qualifications than respondent's counsel. MARCORSEPMAN, para. 6315.3. The recorder's duties include clerical and preliminary preparation, as well as presenting to the board in an impartial manner all available

information concerning the respondent. The convening authority may detail an assistant to the recorder. The recorder shall:

1. Conduct a preliminary review of available evidence;

2. interview prospective witnesses (determining whom to call);

3. arrange for the attendance of all witnesses for the government and witnesses for the respondent who are government employees (military or civilian);

4. arrange for the time and place of the hearing after consulting with the president of the board and respondent's counsel; and

5. prepare the report of the board which, together with all allied papers, is forwarded to the separation authority.

D. ***Reporter.*** There is no requirement that a reporter be appointed. Where witnesses are expected to testify, however, the presence of a reporter is desirable.

E. ***Legal advisor.*** MILPERSMAN, Article 3640350.1b(5); MARCORSEPMAN, para. 6315.4. At the discretion of the convening authority, a nonvoting legal advisor who is a judge advocate certified in accordance with Article 27(b), UCMJ, may be appointed to the administrative board. If appointed, the legal advisor shall rule finally on all matters of procedure, evidence, and challenges—except challenges to himself.

F. ***Hearing procedure.*** MILPERSMAN, Article 3640350.2; MARCORSEPMAN, paras. 6316, 6317.

1. ***Rules of evidence.*** An administrative board is an administrative, rather than a judicial, body; consequently, the strict rules of evidence applicable at courts-martial do not apply. Other than Article 31, UCMJ limitations, the board may consider any competent evidence relevant and material in the case, subject to its discretion; but, it should not exclude evidence simply because it could have been excluded at a trial by court-martial.

a. Witnesses are sworn and testify under oath or affirmation.

b. All witnesses are subject to cross-examination on their testimony and general credibility.

c. The respondent may be sworn and testify at his election, or he / she may make an unsworn statement.

(1) If ***testifying*** under oath, he / she may be cross-examined.

(2) If presenting an ***unsworn statement***, he / she may not be required to be cross-examined. MILPERSMAN, Article 3640350.3h; MARCORSEPMAN, para. 6317.2a.

d. The respondent must be provided a Privacy Act statement whenever personal information is solicited. If witnesses testify to their official duties, there is no need to use a Privacy Act statement. MILPERSMAN, Article 3640350.4c(1).

2. ***Preliminaries***. MILPERSMAN, Article 3640350.3; MARCORSEPMAN, para. 6316.2. At the outset of the hearing, the president of the board (senior member) should inquire into the respondent's knowledge of his rights, including the right:

a. To appear in person (with or without counsel) or, in his absence, have counsel represent him at all open board proceedings;

b. to challenge any voting member of the board for cause only (evidence that the member cannot render a fair and impartial decision):

(1) ***Navy***. If a member is challenged, the convening authority or the legal advisor (if one has been appointed) decides the challenge. MILPERSMAN 3640350.1b. The non-challenged members make recommendations on the record before the matter is brought to the CA for final resolution.

(2) ***Marine Corps***. The board (excluding the challenged member) or the legal advisor, if appointed, determines the propriety of a challenge to any member. A tie vote or a majority vote in favor of sustaining the challenge disqualifies that member from sitting. MARCORSEPMAN, para. 6316.7c.

c. to request the personal appearance of witnesses (*see* paragraph G below—there is no authority for subpoena of civilian witnesses);

d. to submit, either before the board convenes or during the proceedings, sworn or unsworn statements, depositions, affidavits, certificates or stipulations, including depositions of witnesses not reasonably available or unwilling to appear voluntarily;

e. to testify under oath and submit to cross-examination or, in the alternative, to make or submit an unsworn statement and not be cross-examined;

f. to question any witness who appears before the board;

g. to examine all documents, reports, statements, and evidence available to the board;

h. to be apprised of, and to interview, all witnesses to be called;

i. to have witnesses excluded except while testifying; and

j. to make argument.

Note: A failure on the part of the respondent to exercise any of these rights, after being advised of them, will not stop the board from proceeding.

3. ***Presentation of evidence***. The recorder presents the case for the government, first introducing those documentary matters which support the basis for processing. The recorder then calls any relevant witnesses. After the recorder has finished, the respondent has the opportunity to present matters in his behalf. The board proceedings should be sufficiently formal so as to allow the respondent full opportunity to present his case and exercise his rights. Following any matter presented by the respondent, the recorder may, if appropriate, present rebuttal evidence. When the recorder introduces rebuttal evidence, the respondent is entitled to do likewise. Finally, prior to closing for deliberation, the board may call any witness or request any other evidence it deems appropriate.

– If the presentation by the recorder or the respondent includes the calling of witnesses, the procedure for examination of each witness will be: direct examination by the counsel calling the witness; cross-examination by the counsel for the other side; re-direct examination by the side calling the witness; recross-examination by the adversary; and, finally, questions posed by members of the board.

4. ***Burden of proof***. The burden of proof before administrative boards is on the government, and the standard of proof to be employed is the "preponderance of the evidence" test. MILPERSMAN, Article 3640350.5b; MARCORSEPMAN, paras. 6316.10 and 6316.11.

G. ***Witness requests***. MILPERSMAN, Articles 3640350.2c and 3c; MARCORSEPMAN, para. 6317.

1. ***General***. The respondent may request the attendance of witnesses in his behalf at the hearing. The request shall be in writing, dated, signed by the respondent or his counsel, and submitted to the convening authority via the president of the board as soon as practicable after the need for the witness becomes known to the respondent or his counsel.

a. Failure to submit a request for witnesses in a timely fashion shall not automatically result in denial of the request but, if it would be necessary to delay the hearing in order to obtain a requested witness, lack of timeliness in submitting the witness

request may be considered along with other factors in deciding whether or not to provide the witness.

b. No authority exists for issuing subpoenas to civilian witnesses in connection with administrative proceedings. Appearances will be arranged on a voluntary basis only.

c. Nonlocal military personnel, if their presence is deemed necessary, will be issued TAD orders.

2. ***Respondent's witness request involving expenditure of funds.*** If production of a witness will require expenditure of funds by the convening authority, the written request for the attendance of a witness shall also contain the following:

a. A synopsis of the testimony the witness is expected to give;

b. an explanation of the relevance of such testimony to the issues of separation or characterization; and

c. an explanation as to why written or recorded testimony would not be sufficient to provide for a fair determination.

3. ***Convening authority's action.*** The convening authority may authorize expenditure of funds for production of witnesses ***only if*** the presiding officer (after consultation with a judge advocate or the legal advisor, if appointed) determines that:

a. The testimony of a witness is not cumulative;

b. the personal appearance of the witness is essential to a fair determination on the issues of separation or characterization;

c. written or recorded testimony will not accomplish adequately the same objective;

d. the need for live testimony is substantial, material, and necessary for a proper disposition of the case; and

e. the significance of the personal appearance of the witness, when balanced against the practical difficulties in producing the witness, favors production of the witness. (Factors to be considered in relation to the balancing test include, but are not limited to, the cost of producing the witness, the potential delay in the proceeding that may be caused by producing the witness, or the likelihood of significant interference with military operational deployment, mission accomplishment, or essential training.) Guidance for the funding of travel may be found in section 0145 of the *JAG Manual.*

f. Testimonial evidence may be presented through the use of oral or written depositions, unsworn statements, affidavits, testimonial stipulations or any other accurate and reliable means in addition to personal appearance.

4. ***Postponement of the hearing.*** If the convening authority determines that the personal testimony of a witness is required, the hearing shall be postponed or continued to permit the attendance of the witness.

5. ***Witness unavailable.*** The hearing shall be continued or postponed to provide the respondent with a reasonable opportunity to obtain a written statement from the witness, if the witness requested by the respondent is unavailable, when:

a. The presiding officer determines that the personal testimony of the witness is not required;

b. the commanding officer of a military witness determines that military necessity precludes the witness' attendance at the hearing; or

c. a civilian witness declines to attend the hearing.

6. ***Civilian government employee.*** Paragraph G.5.c above does not authorize a federal employee to decline to appear as a witness if directed to do so in accordance with applicable procedures of the employing agency.

H. ***Board decisions.*** MILPERSMAN, Article 3640350.5; MARCORSEPMAN, para. 6319. The board shall determine its findings and recommendations in closed session. A report of the board 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:

1. Findings of fact related to ***each*** of the reasons for processing;

2. recommendations as to ***retention*** or ***separation***;

Note: If the board recommends separation, it may ***recommend*** that the separation be suspended.

3. if separation is recommended, the basis therefor, as well as the character of the separation, must be stated;

4. recommendations as to whether the respondent should be retained in the Ready Reserve as a mobilization asset to fulfill the respondent's total service obligation (except when the board has recommended separation on the basis of homosexual conduct,

misconduct, drug trafficking, or defective enlistment and induction, or has recommended an OTH);

5. in homosexual cases, if the board finds that one or more of the circumstances authorizing separation is supported by the evidence, the board shall recommend separation unless the board finds that retention is warranted under the limited circumstances which allow for retention; in which case, specific findings regarding those circumstances are required [MILPERSMAN, Article 3630400; MARCORSEPMAN, para. 6207(3)(b)(1)];

– ***Note***: There are no local separations for homosexual conduct; all cases must be forwarded to the Chief of Naval Personnel or the Commandant of the Marine Corps, with SECNAV acting as separating authority.

6. 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.

I. ***Record of proceedings***

1. ***General***. 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), the record of proceedings is forwarded to the convening authority.

2. ***Contents of the record of proceedings***

a. ***Navy***. IAW MILPERSMAN, Article 3640350.6-7, the record of proceedings shall, as a minimum, contain:

(1) A summary of the facts and circumstances;

(2) supporting documents on which the board's recommendation is based including (at least) a summary of all testimony;

(3) the identity of respondent's counsel and the legal advisor, if any, including their legal qualifications;

(4) the identity of 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 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 the record is forwarded to the separation authority, as long as they are provided a copy prior to submission. A statement of deficiencies can be submitted separately ***via the convening authority*** to the separation authority. The Report of Administrative Board must still be signed by the board members and counsel for the respondent.

b. ***Marine Corps***. In accordance with MARCORSEPMAN, para. 6320, the record of proceedings shall, as a minimum, contain:

(1) An authenticated copy of the appointing order;

(2) any other communication from the convening authority;

(3) a summary of the testimony of all witnesses including the respondent when he / she testifies under oath or otherwise;

(4) a summary of any sworn or unsworn statements made by absent witnesses if considered by the board;

(5) the identity of the counsel for the respondent and the recorder with their legal qualifications, if any;

(6) copies of the letter of notification to the respondent, advisement of rights, and acknowledgement of rights;

(7) a complete statement of facts upon which the board's recommendation for discharge is based, accompanied by appropriate supporting documents;

(8) a summary of any unsworn statement submitted by the respondent or his counsel; and

(9) the respondent's signed acknowledgement that he / she was advised of, and fully understood, all of his / her rights before the board.

J. ***Actions by the convening authority***

1. ***Navy***. MILPERSMAN, Article 3640350.

a. If the commanding officer determines that the respondent should be retained, the case may be closed—except for any case in which processing is mandatory; in which case, the matter must be referred to the separation authority for disposition.

b. If the commanding officer decides that separation is warranted or separation processing is mandatory, the report is forwarded in a letter of transmittal to the separation authority for action. At no time may the convening authority recommend a discharge characterization less favorable than the board's recommendation.

c. Special court-martial convening authorities are the separation authority when members are processed for separation by reason of:

(1) Other designated physical or mental conditions;
(2) Review action;
(3) Dependency or hardship;
(4) Parenthood;
(5) Pregnancy or childbirth;
(6) Personality disorder;
(7) Surviving family member;
(8) Reservists becomes a minister;
(9) Weight control failure;
(10) Entry level performance and conduct;
(11) Drug abuse rehabilitation failure;
(12) Alcohol abuse rehabilitation failure;
(13) Defective enlistment - erroneous;
(14) Defective enlistment - minority;
(15) Defective enlistment - defective enlistment agreement;
(16) Defective enlistment - separation from delayed entry program; and
(17) Separation in lieu of trial by court-martial, only when the request is based solely on an unauthorized absence of 30 days or more.

d. Special court-martial convening authorities may also serve as separation authority when a member is processed for separation for one of the following reasons:

(1) Defective enlistment - fraudulent;
(2) Misconduct - pattern of misconduct;
(3) Misconduct - commission of a serious offense;
(4) Misconduct - civilian conviction;

(5) Misconduct - drug abuse; or
(6) Unsatisfactory performance in the Ready Reserve

provided either notification procedures are sued or administrative board procedures are used and the administrative board recommends separation with an honorable, general, or entry level separation.

e. General court-martial convening authorities are the separation authority for separation in lieu of trial by court-martial (except for homosexual conduct cases, which must be forwarded to CHNAVPERS, and cases based solely on unauthorized absences of 30 days or more, which may be handled by special court-martial convening authorities also serve as separation authority when members are processed for one of the following reason:

(1) Defective enlistment - fraudulent;
(2) Misconduct - pattern of misconduct;
(3) Misconduct - commission of a serious offense;
(4) Misconduct - civilian conviction;
(5) Misconduct - drug abuse; or
(6) Unsatisfactory performance in the Ready Reserve

provided administrative board procedures are used and the administrative board recommends an OTH or retention, or the members waives the board.

f. CHNAVPERS is the separation authority when members are processed for separation by reason of:

(1) Early release to further education;
(2) Selected changes in service obligations - general demobilization or reduction in strength;
(3) Selected changes in service obligations - acceptance of an active-duty commission or appointment;
(4) Conscientious objection;
(5) Homosexual conduct;
(6) Any basis for separation when the member has 18 years or more of total active federal military service;
(7) Misconduct cases when the member has physical evaluation board action completed or pending; and
(8) Fraudulent enlistment when the processing command is recommending a waiver of processing and retention of the member.

g. The Secretary of the Navy is the separation authority when members are processed by reason of:

(1) Best interest of the service;
(2) Disability;
(3) All cases involving reservists within 2 years of eligibility for retired or retainer pay;
(4) All cases when the sole basis for processing is a special or general court-martial conviction for which the member did not receive a punitive discharge, and the processing command recommends an OTH; and
(5) All misconduct cases based solely on civilian convictions when final action on the member's appeal has not been taken (unless the member requests separation before final action on the appeal).

h. Record-keeping. Regardless of separation authority, all cases will be forwarded to BUPERS after the separation authority's final action on the case for review and filing in the member's permanent record. A copy of the member's DD-214 (Record of Discharge) should accompany the administrative separation package if the member was separated locally.

2. ***Marine Corps***. MARCORSEPMAN, para. 6305.

a. If the convening authority is not the appropriate separation authority, the convening authority will forward the case with a recommendation in a letter of transmittal to the appropriate separation authority.

b. If the convening authority is the appropriate separation authority, before taking final action, he will refer the case to his staff judge advocate for a written review to determine the sufficiency in fact and law of the processing—including the board's proceedings, record, and report. MARCORSEPMAN, para. 6308.1c.

K. ***Action by the separation authority***

1. ***General rules (other than homosexual conduct cases)***. When the separation authority receives the record of the board's proceedings and report, he may take one of the following actions (MILPERSMAN, Article 3640370; MARCORSEPMAN, para. 6309.2):

a. Approve the board's recommendation for retention;

b. disagree with the administrative board's recommendation for retention and refer the entire case to the Secretary of the Navy for authority to direct a separation under honorable conditions with an honorable or general discharge or, if appropriate, entry level separation or, if eligible, transfer to the Fleet Reserve / retired list in the current or next inferior paygrade;

c. approve the board's recommendation for separation and direct execution of the recommended type of separation (including, if applicable, transfer to the Fleet Reserve / retired list in the current or next inferior paygrade);

d. approve the board's recommendation for separation, but upgrade the type of characterization of service to a more creditable one;

e. approve the board's recommendation for separation, but change the basis therefore when the record indicates that such action would be appropriate;

f. disapprove the recommendation for separation and retain the member;

g. disapprove the board's recommendation concerning transfer to the IRR;

h. approve the recommendation for separation, but suspend its execution for a specific period of time;

i. approve the separation, but disapprove the board's recommendation as to suspension of the separation;

j. (USN only) submit the case to SECNAV recommending separation when the no misconduct findings of the board are contrary to the substantial weight of the evidence; or

k. set aside the findings and recommendations of the board and send the case to another board hearing if the separation authority finds legal prejudice to the substantial rights of the respondent, or that findings favorable to the respondent were obtained by fraud or collusion.

Note: Both the Navy and Marine Corps provide a separation authority with power to send a case to a second board hearing. Neither the members nor the recorder from the first board may sit as voting members of the second board. Although the second board may consider the record of the first board's proceedings, less any prejudicial matter, it may neither see nor learn of the first board's findings, opinions, or recommendation. Additionally, the separation authority may not approve findings or recommendations of the subsequent board which are less favorable to the respondent than those ordered by the previous board—unless the separation authority finds that fraud or collusion in the previous board is attributable to the respondent or an individual acting on the respondent's behalf.

2. ***Suspension of separation.*** MILPERSMAN, Article 3610200.14; MARCORSEPMAN, para. 6310.

a. Except when the bases for separation are fraudulent enlistment or homosexual conduct 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. The administrative discharge board and the convening authority may both recommend suspension, and the separation authority may make its own determination of a suspension.

b. Unless sooner vacated or remitted, execution of the approved separation shall be remitted upon completion of the probationary period, upon termination of the member's enlistment or period of obligated service, or upon decision of the separation authority that the goal of rehabilitation has been achieved.

c. During the period of suspension, if further grounds for separation arise or if the member fails to meet appropriate standards of conduct and performance, one or more of the following actions may be taken:

(1) Disciplinary action;

(2) new administrative action; or

(3) vacation of the suspension and execution of the separation.

d. Prior to vacation of a suspension, the member shall be notified in writing of the basis for the action and shall be afforded the opportunity to consult with counsel and to submit a statement in writing to the separation authority. The respondent must be afforded at least two days to act on the notice.

3. ***Homosexual conduct.*** ALNAV 0417372 Feb 93 and ALMAR 0478062 Feb 93 direct that all cases of homosexual conduct be referred to CHNAVPERS and CMC for review and action as separation authority. Change 9 to the MPM provides the content guidelines on homosexual conduct policy.

a. If the separation authority determines that there is insufficient evidence to support separation, the separation authority should direct retention unless there is another basis for separation and the member has been duly notified.

b. If the separation authority determines that one or more of the circumstances authorizing separation has occurred, the member will be processed and separated unless retention is warranted under the limited circumstances set forth earlier.

c. For Marines, SECNAV is the separation authority. All cases will be referred to CMC (MMSR) for review; in turn, all cases will be forwarded for action to SECNAV as the separation authority.

d. If there has been a waiver of board proceedings, the separation authority disposes of the case in accordance with the following provisions:

(1) If the separation authority determines that there is insufficient evidence to support separation, the separation authority should direct retention—unless there is another basis for separation of which the member has been duly notified.

(2) If the separation authority determines that one or more of the circumstances authorizing separation has occurred, the member will be separated—unless retention is warranted under the limited retention guidelines.

e. Presuming evidence supporting the finding of homosexual conduct exists, the burden of proving that retention is warranted rests with the member—except in cases where the member's conduct was solely the result of a desire to avoid or terminate military service.

f. Findings regarding the existence of the limited circumstances warranting a member's retention are required only if:

(1) The member, either personally or through counsel, asserts to the board—or when there has been a waiver of board proceedings, to the separation authority—that one or more such limited circumstances exists; or

(2) the board or separation authority relies upon such circumstances to justify the member's retention.

1003 PROCESSING GOALS. Every effort should be taken to meet the Secretary of the Navy's processing time goals. MILPERSMAN, Article 3610100.6; MARCORSEPMAN, para. 6102.

A. ***Discharges without board action.*** When board action is not required or is waived, separation action should be completed in 15 working days from the date of notification to the date of separation, except when the initiating authority and the separation authority are not located in the same geographic region—in which case, separation action should be completed in 30 working days (10 days of which is allocated in the Navy to the initiating command).

B. ***Separations with board action***. Separations which involve an administrative board should be completed within 50 working days from the date of notification to the date of separation (30 days of which is allocated in the Navy to the initiating command).

C. ***Separations with Secretarial action***. When action is required by the Secretary, final action should be completed within 55 working days.

1004 NAVAL DISCHARGE REVIEW BOARD

A. ***General***. The Naval Discharge Review Board (NDRB) was established pursuant to 10 U.S.C. § 1553 (1982), and operates in accordance with SECNAVINST 5420.174, Subj: REVIEW AT THE LEVEL OF THE NAVY DEPARTMENT OF DISCHARGES FROM THE NAVAL SERVICE. MILPERSMAN, Article 5040200; MARCORSEPMAN, fig. 1-2. The NDRB is composed of five-member panels of active-duty Navy and Marine Corps officers in grades O-4 or higher. The NDRB panels sit regularly in Washington, DC, and also travel periodically to other areas within the continental United States.

B. ***Petition***. The NDRB may begin its review process based on:

1. Its own motion;

2. the request of a surviving member; or

3. the request of a surviving spouse, next of kin, legal representative, or guardian (if the former member is deceased or incompetent).

C. ***Scope of review***. The NDRB is authorized to change, correct, or otherwise modify a discharge—except that, by statute, it may not review punitive discharges awarded as a result of general court-martial nor may it review a discharge executed more than 15 years before the application to NDRB. In addition, the NDRB is not authorized to do any of the following:

1. Change any document other than the discharge document;

2. revoke a discharge;

3. reinstate a person in the naval service;

4. recall a former member to active duty;

5. change reenlistment codes;

6. cancel reenlistment contracts;

7. change the reason for discharge from, or to, physical disability;

8. determine eligibility for veterans' benefits; or

9. review a release from active duty until a final discharge has been issued.

D. ***Modifications.*** In order to change, correct, or otherwise modify a discharge certificate or issue a new certificate, the NDRB must be convinced that the original certificate was "improperly or inequitably" given. In making its determination, the board is usually confined to evidence in the former member's record during the particular period of naval service for which the discharge in question had been issued—including any information disclosed to, or discovered by, the naval service at the time of enlistment or other entry into the service. This evidence may, and indeed should, include facts "found" by a fact-finding body (such as a court-martial, a court of inquiry, or an investigation in which the former member was a defendant or interested party and which were properly approved either on appeal or during review). Unless this former member can show that coercion was exercised, the foregoing evidence should include charges and specifications to which guilty pleas were appropriately entered in court or which prompted the former member to request separation in lieu of trial by court-martial. A discharge is deemed to be improper when an error of fact, law, procedure, or discretion at the time of issuance prejudiced the applicant's rights or when a change in policy of the applicant's branch of service is made expressly retroactive to the type of discharge he was awarded. Like the Board for Correction of Naval Records, which will be discussed next, the NDRB is ***not*** empowered to change any discharge to one more favorable solely because the applicant has demonstrated exemplary conduct and character since the time of his / her discharge (which is the subject matter of the present application), regardless of the length of time that has elapsed since that discharge.

E. ***Secretarial review.*** Action taken by the NDRB is administratively reviewable only by the Secretary of the Navy. If newly discovered evidence is presented to the NDRB, it may recommend to the Secretary of the Navy reconsideration of a case formerly heard but may not reconsider a case without the prior approval of the Secretary.

F. ***Mailing address.*** Applications and other information may be obtained from:

Naval Discharge Review Board
Department of the Navy
801 N. Randolph St.
Arlington, VA 22203

1005 THE BOARD FOR CORRECTION OF NAVAL RECORDS

A. ***General.*** The Board for Correction of Naval Records (BCNR) was established pursuant to 10 U.S.C. § 1552 (1982). MILPERSMAN, Article 5040200; MARCORSEPMAN, fig. 1-2. It consists of at least three civilian members and considers all applications properly before it for the purpose of determining the existence of an error or an injustice and making appropriate recommendations to the Secretary of the Navy.

B. ***Petition.*** Application may be made by a former member or any other person considered by the board to be competent to make an application. When a "no change" decision has been rendered by the NDRB, and a request for reconsideration by that board has been denied, a petition may then be filed with the BCNR. The law requires that the application be filed with the BCNR within three years of the date of discovery of the error or injustice. The board is authorized to excuse the fact that the application was filed at a later date if it finds it to be in the interest of justice. The board is empowered to deny an application without a hearing if it determines that there is insufficient evidence to indicate the existence of probable material error or injustice.

C. ***Scope of review***

1. Applications to BCNR are subject to several qualifications which should be stressed in the advice given to members being processed for OTH discharges. First, in addition to its power to consider applications concerning discharges adjudged by GCM's—something the NDRB may not do—the BCNR may also review cases involving inter alia:

a. Requests for physical disability discharge and, in lieu thereof, retirement for disability;

b. requests to change character of discharge or eliminate discharge and restore to duty;

c. removal of derogatory materials from official records (such as fitness reports, performance evaluations, nonjudicial punishments, failures of selection, and marks of desertion);

d. changing dates of rank, effective dates of promotion or acceptance / commission, and position on the active-duty list for officers;

e. correction of "facts" and "conclusions" in official records (such as lost time entries or line of duty / misconduct findings);

f. restoration of rank; and

g. pay and allowances items (such as special pays, incentive pay, readjustment pay, severance pay, and basic allowance for quarters).

2. ***In no event will an application be considered before other administrative remedies have been exhausted.***

3. In determining whether or not material error or an injustice exists, the board will consider all evidence available—including, among other things:

a. All information contained in the application;

b. documentary evidence filed in support of the application;

c. briefs submitted by, or on behalf of, the applicant;

d. all available military records—including, of course, the applicant's service record.

D. ***Secretarial action***. Cases considered by the board are forwarded to, and reviewed by, the Secretary of the Navy for final action—except that, in the following ten categories, the board is empowered to take final action without referral of the matter to the Secretary of the Navy:

1. Leave adjustments;

2. retroactive advancements for enlisted personnel;

3. enlistment / 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 members' reenlistment codes.

E. ***Mailing address.*** The mailing address for filing applications or requesting other information is:

The Board for Correction of Naval Records
Department of the Navy
Washington, DC 20370

ADMINISTRATIVE SEPARATIONS CHECKLIST

The following checklist will assist you in preparing the documents needed for processing a service member for discharge under the notification procedure or the administrative board procedure. You should consult Chapter 36 of MILPERSMAN, or Chapters I and VI of the MARCORSEPMAN to determine which method is appropriate.

1. Prepare the notice of proposed action and the statement of awareness. Be sure to use the examples for the proper procedure, notification or administrative board, as the examples are different. They must be used exactly as set forth in the instructions.

2. Deliver the signed notice of proposed action and the unsigned statement of awareness to the member. Briefly explain what the options are in order to ensure the member's understanding.

3. If member knows at this time which rights he / she wishes to elect, have member 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 are desired, explain the two-day waiting period and inform as to when the response is required.

5. If member wishes to consult with counsel prior to electing rights, contact the NLSO or Law Center, make arrangements for counsel, and inform member of the time and date of the appointment.

6. Have member take service record, copy of the letter of notification, statement of awareness, and any investigative reports to 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. A better approach would be to deliver the documents early or to place them in the custody of the duty driver, who keeps custody at all times—other than when the defense counsel has the file. An escort may be with members on restriction and should carry the package.

7. If member has not elected an administrative discharge board, the letter of transmittal to the separation authority can be completed. In most cases, a message requesting discharge may also be sent (for Navy members). Consult MILPERSMAN, chapter 36 to determine when message requests are required or desired. If submitted by message, supporting documentation must be submitted to BUPERS within 15 working

days. (If member has elected an administrative discharge board, go to number 10 below.)

8. When you receive the approval for discharge from your local CA or BUPERS, 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. Prior to receipt of discharge authority, arrange with personnel or PSD for final outprocessing.

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 commanding officer.

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 for the senior member and copies of the pertinent sections of the MILPERSMAN or MARCORSEPMAN for each member. 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 recorder, ensure that there are enough tapes for the proceedings. (This is recommended and will be helpful in preparing the results of the proceedings, particularly in summarizing testimony.) If tape is made, it is a good idea to save it for several months in case a problem arises later.

15. Prepare a findings worksheet for the members and a privacy act statement for the respondent.

16. Mark and copy all exhibits you will need as recorder prior to the board. Prepare exhibit packages for each member, counsel for the respondent, and yourself. Provide the package to the counsel for the respondent several days before the board, if possible.

17. Prepare the blank Findings and Recommendation Worksheet (found at the back of your Discharge Guide).

18. 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 court-martial E&M witness requests.

19. After the board is concluded, have all members complete and sign the findings worksheet, answering all the questions on the board's findings. If dissent exists, make sure the dissenting opinion is completed. Collect all exhibits and materials.

20. Prepare the transcript of the administrative board proceedings for the senior member to authenticate. Immediately prepare a report of the board for signature of all members and counsel, and get it signed while everyone is still onboard the command.

21. Forward a copy of the record to the counsel for the respondent for review and / or comment after the senior member has signed it.

22. Prepare the letter of transmittal to the separation authority for the commanding officer's signature.

23. Make sufficient copies of the transmittal letter, the transcript, and the report of the administrative board for the respondent's service record, for the respondent, for the office files, and as needed for the command's correspondence files.

24. Upon notification of retention or discharge from the separation authority, file a copy in the service record, in the office file, and give one copy to the member.

25. If member has been retained, normally a warning will be required. This must be completed and filed in the member's service record.

26. If discharge has been authorized, notify personnel or PSD for final out-processing.

Note: SAMPLE FORMS FOR ADMINISTRATIVE BOARD PROCEDURES AND NOTIFICATION PROCEDURES CAN BE FOUND IN THE MILPERSMAN (CHAPTER 36), THE MARCORSEPMAN, AND THE ADMINISTRATIVE DISCHARGE BOARD PRACTICAL EXERCISE.

CHAPTER XI

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CHAPTER XI

OFFICER PERSONNEL MATTERS

1101 INTRODUCTION

A. ***General.*** Commissioned officers hold positions of special trust and confidence. The U.S. Constitution provides that the President:

> [s]hall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, . . . and all other Officers of the United States . . . but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone . . . or in the Heads of Departments.

U.S. Const. Article II, § 2, cl. 2. The Constitution further provides that the President shall "Commission all the Officers of the United States." *U.S. Const.* Article II, § 3. The appointment and commissioning of officers in the armed forces is prescribed by title 10, *United States Code,* which includes the Defense Officer Personnel Management Act [hereinafter DOPMA]. The transition provisions of DOPMA can be found in the ancillary laws and directives accompanying section 611 of title 10, *United States Code.*

B. ***Chapter content.*** This chapter is divided into three parts. Part A provides a brief overview of selected officer personnel matters including appointments, promotions, resignations, retirements, and continuation on active duty. Part B discusses detachments for cause. Part C outlines the bases for, characterization of, and procedures for separation of officers for cause (e.g., substandard performance of duty, misconduct, etc.).

PART A - OFFICER APPOINTMENTS, PROMOTIONS, RESIGNATIONS, RETIREMENTS, AND CONTINUATION ON ACTIVE DUTY

1102 APPOINTMENTS

A. ***Entry-grade credit.*** Many officers, particularly those in the staff corps, receive credit upon appointment in the Navy or Marine Corps for prior commissioned service or advanced education and training completed while not in a commissioned status. Where the

entry-grade credit is not properly computed the officer concerned may be disadvantaged, since placement on the active-duty list and subsequent consideration for promotion is dependent on entry grade and date of rank in grade. The only way to check entry-grade-credit computations is to review the Secretarial appointment regulations.

B. ***Appointment regulations***. The Secretarial regulations on initial appointment in the various staff corps or as judge advocates include the following (with highlights on their entry-grade provisions):

1. Chaplain Corps - SECNAVINST 1120.4 (3 to 7 years credit);

2. Civil Engineer Corps - SECNAVINST 1120.7 (credit for prior commissioned service only);

3. 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);

4. 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);

5. Medical and Dental Corps - SECNAVINST 1120.12 & 1120.13 (4 to 14 years entry-grade credit for certain types of training, education, experience, and prior commissioned service);

6. Medical Service Corps - SECNAVINST 1120.8 (0 to 6 years entry-grade credit for certain types of professional experience, training, education, and prior commissioned service); and

7. Nurse Corps - SECNAVINST 1120.6 (0 to 5 years entry-grade credit for certain types of professional experience, training, education, and prior commissioned service).

C. ***Placement on the active-duty list***

1. ***General***. The active-duty list is utilized for determining eligibility for consideration for promotion by an active-duty promotion board and for determining precedence. There is a separate active-duty list for both—the Navy and the Marine Corps. An officer's position on the active-duty list is fixed based on: (a) Grade; (b) date of rank within that grade; and (c) tie-breaker rules set forth in SECNAVINST 1427.2, Subj: RANK, SENIORITY AND PLACEMENT OF OFFICERS ON THE ACTIVE-DUTY LISTS OF THE NAVY AND THE MARINE CORPS.

2. ***Reserve officers recalled to active duty.*** A Reserve officer recalled to active duty after a break in active service of over six months may have the date of rank in grade adjusted to a later date of rank (more junior in precedence) to reflect more appropriately the qualifications and level of experience attained in the competitive category in which being placed on the active-duty list. This authority is generally utilized to ensure that recalled Reserve officers have sufficient time to compensate for their break in active service before consideration by an active-duty promotion board.

1103 PROMOTIONS. The basic reference source for promotions is SECNAVINST 1420.1A, Subj: PROMOTION AND SELECTIVE EARLY RETIREMENT OF COMMISSIONED OFFICERS ON THE ACTIVE-DUTY LISTS OF THE NAVY AND MARINE CORPS.

A. ***Competitive categories.*** Officers in the same competitive category (i.e., unrestricted line, Judge Advocate General's Corps, Supply Corps, etc.) compete among themselves for promotion.

B. ***Promotion plans.*** Each year the Secretary of the Navy approves a master promotion plan, with specific selection opportunities for each competitive category and grade, based upon projected vacancies and requirements in that competitive category and grade. The promotion zones are established with a view toward providing relatively similar opportunities for promotion over the next five years. For grades O-4 through O-6, the legislative history of DOPMA and the Secretary of Defense have ***suggested*** the following promotion windows:

Grade	Years of Commissioned Service (Including Entry-Grade Credit)	Selection Opportunity
O-6	22 years + or - 1 year	50%
O-5	16 years + or - 1 year	70%
O-4	10 years + or - 1 year	80%

C. ***Notice of convening and communication with selection boards.*** The convening of a promotion selection board is publicized by ALNAV at least 30 days in advance. Each officer eligible for consideration by the board may communicate in writing with the board (including endorsements or enclosures prepared by another), but the communication must arrive by the date of the board's convening. *See* SECNAVINST 1420.1, para. 5h.

D. ***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 and is subject to placement in the active-duty list. *See* SECNAVINST 1420.1, para. 5b.

E. ***Promotion boards***

1. ***Membership***. The membership of selection boards is constituted in accordance with 10 U.S.C. § 612 and paragraph 5e of SECNAVINST 1420.1.

2. ***Precept***. A precept signed by the Secretary of the Navy is utilized to convene each selection board and to furnish it with pertinent statutory, regulatory, and policy guidelines—including skill-needs information.

3. ***Selection criteria***. Each officer selected by a board must be fully qualified and the best qualified for promotion within each competitive category, giving due consideration to the needs of the armed force for officers with particular skills.

4. ***Board reports***. The report of selection board, including the list of eligible officers and selectees, is forwarded to the Secretary of the Navy for approval and subsequent publication of the selectees' names by message.

5. ***Failure of selection***. An officer has failed of selection when considered for promotion to grade O-6 or below as an officer in or above the promotion zone and not selected. Counseling of failed-of-select officers is required by paragraph 6 of SECNAVINST 1420.1 and MILPERSMAN, Article 2220210.

F. ***Promotion timing***

1. ***Promotion to O-2***. Two years' time in grade is required for promotion to O-2 under SECNAVINST 1412.6. Under the instruction, these promotions may be delayed for cause and an officer who is found not qualified for promotion to O-2 may be discharged.

2. ***Promotions to O-3 and above***. Backdating of regular active-duty-list promotions is not permitted under DOPMA. Instead, the date of rank of an officer promoted under DOPMA is the date of appointment published in the ALNAV or ALMAR.

3. ***Delay of promotions***. The promotion of an officer on the active-duty list may be delayed under 10 U.S.C. § 624(d) and paragraph 7b of SECNAVINST 1420.1, if:

a. Sworn charges against the officer have been received by the officer's GCM convening authority and the charges have not been disposed of;

b. an investigation is being conducted to determine whether disciplinary action of any kind should be brought against the officer;

c. a board of officers has been convened to determine whether the officer should be required to show cause for retention on active duty;

d. a criminal proceeding in a Federal or state court is pending against the officer; or

e. there is cause to believe that the officer is mentally, physically, morally, or professionally unqualified to perform the duties of the grade for which selected for promotion.

The officer must be afforded notice of the delay and an opportunity to submit a statement. Under 10 U.S.C. § 624(d)(4), there are certain time limitations imposed on the delay of a promotion under the foregoing provisions which necessitate that such cases be processed expeditiously.

4. ***Removal from promotion list.*** Removal of the name of an officer from a promotion list for cause must be approved by the Secretary of the Navy or the President, as appropriate.

G. ***Special promotion selection boards***

1. ***General.*** Special promotion-selection boards provide an avenue of relief for officers who through an error or omission were not ***considered***, or not ***properly considered***, by a regularly scheduled active-duty-list selection board. Detailed guidelines concerning these boards are contained in SECNAVINST 1401.1, Subj: SPECIAL PROMOTION SELECTION BOARDS FOR OFFICERS ON THE ACTIVE-DUTY LISTS AND WARRANT OFFICERS ON ACTIVE DUTY IN THE NAVY AND MARINE CORPS. It should be pointed out that this instruction is prospective only in nature and applies only to errors or omissions which occurred under DOPMA after 15 September 1981. There is no provision in law for special selection boards for Reserve inactive-duty promotions.

2. ***Grounds.*** The Secretary of the Navy ***must*** convene a special promotion-selection board when an eligible officer who was in, above, or below the promotion zone was not considered, through administrative error, for promotion by a regularly scheduled promotion-selection board for his competitive category and grade. In addition, the Secretary ***may*** convene a special promotion-selection board when an officer who was an in- or above-zone eligible was considered, but not selected, by a regularly scheduled selection board and:

a. The action of the board was contrary to law;

b. the action of the board involved material error of fact or material administrative error; or

c. the board did not have material information before it for its consideration.

Special-promotion-selection-board procedures basically involve comparing the record of an officer seeking relief from a selection-board error or omission to a sampling of records of officers who were selected and not selected by the regularly scheduled selection board before whom the error or omission occurred.

H. ***Reserve officers not on the active-duty list***

1. ***Running mates***. Reserve officers not on the active-duty list, serving in a Reserve component in grades O-2 or above, are assigned running mates from the active-duty list in the same competitive category and are placed on a Reserve precedence list comparable to the active-duty list.

2. ***Competitive categories***. Reserve competitive categories, in addition to those which match the competitive categories for active-duty-list officers, include TAR's and Special Duty Officers (Merchant Marine).

1104 RESIGNATIONS. The Secretary of the Navy may accept an officer's resignation which satisfies the criteria enunciated in SECNAVINST 1920.6, encl. (2), as well as the amplifying criteria set forth in MILPERSMAN, Article 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.

1105 VOLUNTARY RETIREMENTS. The policy guidelines concerning consideration of voluntary retirement requests are set forth in SECNAVINST 1811.3, Subj: Voluntary Retirement of Members of the Navy and Marine Corps Serving on Active Duty; policy governing. *See also* MILPERSMAN, Articles 3860100, 3860260-3860300; MARCORSEPMAN, paras. 2003-2004.

1106 PHYSICAL DISABILITY SEPARATION / RETIREMENT. Officers in the naval service found unfit for continued active service may be separated with severance pay or retired, by reason of their physical disability, in accordance with the *Disability Evaluation Manual*. *See also* MARCORSEPMAN, ch. 8; MILPERSMAN, Articles 3860340-3860400.

1107 INVOLUNTARY RETIREMENT FOR YEARS OF SERVICE OR FAILURES OF SELECTION

A. ***DOPMA.*** The DOPMA provisions concerning involuntary retirement or discharge of Regular commissioned O-2's through O-6's (other than LDO's), who are not covered by the savings provisions discussed in paragraph B immediately below, for failures of selection or years of service are as follows:

Grade	Grounds for discharge or, if eligible, retirement
O-2	2 failures of selection
O-3	2 failures of selection
O-4	2 failures of selection
O-5	28 years of active commissioned service*
O-6	30 years of active commissioned service*

* Under section 624(a) of DOPMA, active commissioned service for officers serving on active duty before 15 September 1981, for purposes of these statutes, may include time spent in a Reserve component and / or constructive service credit for their service through 15 September 1981 since their pre-DOPMA service date carries forward.

Those officers subject to involuntary separation for failures of selection for promotion with 5 or more, but less than 20, years of service on active duty may be entitled to separation pay under SECNAVINST 1900.7 if the conditions of discharge or release from active duty warrant separation pay. An officer subject to discharge as an O-2, O-3, or O-4 for two failures of selection—who is within 2 years of attaining eligibility for voluntary retirement for 20 years of active service—is retained on active duty until eligible for retirement. Six months' time in grade is ***generally*** required for involuntary retirement of a Regular officer in the highest grade in which satisfactorily served.

B. ***Savings provision.*** Section 613(a) of the transition provisions of DOPMA provide that Regular officers serving in grades O-4, O-5, or O-6, or on a promotion list to such grades on 14 September 1981, shall be retired under pre-DOPMA laws unless they are selected for promotion to a higher grade or continuation on active duty by a board convened under DOPMA; in which case, they become subject to the DOPMA involuntary-retirement provisions.

1. There are additional savings provisions in DOPMA for women officers in the line, Supply Corps, Civil Engineer Corps, and Chaplain Corps serving in grades O-2 and O-3 and for pre-DOPMA flag and general officers. *See* SECNAVINST 1920.6, encl. (3), para. 3.

2. The computation of years of service for purposes of involuntary retirement was an exceedingly complicated subject under the pre-DOPMA statutory scheme. Some statutes (such as those pertaining to the Nurse Corps and women line officers) counted only active commissioned service in determining an officer's years of service. Other statutes (such as those pertaining to male line officers and officers in the Medical Corps, Dental Corps, Judge Advocate General's Corps, Medical Service Corps, and Chaplains Corps) included commissioned service in a Reserve component not on active duty in an officer's total commissioned service for purposes of involuntary retirement. The base date from which those officers' years of service for purposes of involuntary retirement was computed was referred to as an officer's service date.

3. Many officers in the Medical Corps, Dental Corps, Judge Advocate General's Corps, Chaplain Corps, and Medical Service Corps had no service date prior to DOPMA because there was no means by which to compute their commissioned service under the statutory scheme. Their service dates must be computed under DOPMA, §§ 613, 624, and SECNAVINST 1821.1, Subj: Regulations to govern the computation of total commissioned service for purposes of involuntary retirement or discharge of certain Staff Corps Officers (NOTAL). Briefly stated, service dates under that instruction are computed by assigning the staff corps officer the same service date as an NROTC or USNA graduate who is a due-course officer with continuous active service and who is immediately junior to the staff corps officer being matched. The service date is then adjusted to a later date to reflect constructive service credit the officer received upon appointment in the staff corps. Regular officers in the Judge Advocate General's Corps are generally covered by SECNAVINST 1821.1, with the exception of those individuals who were SDO (Law) Regular officers when the JAGC was created on 8 December 1967. Those officers retained their service dates as line officers under the transition provisions of the JAGC Act (Act of Dec 8, 1967, Pub. L. No. 70-179, 81 Stat. 545).

1108 CONTINUATION ON ACTIVE DUTY. A Regular O-3 or above subject to involuntary retirement or discharge for failure of selection or years of service may, if selected by a continuation board, be continued on active duty.

The decision to convene a continuation board for a particular competitive category and grade is discretionary with the Secretary of the Navy. This management tool is designed for use when there is shortfall in manning in a particular competitive category and grade or in a skill area within a competitive category.

1. For O-4's selected and promoted to that grade after 15 September 1981, who twice fail of selection to O-5 within six years of qualifying for a 20-year retirement, there are contradictory policy pronouncements that address the officer's automatic continuation on active duty until retirement eligible.

2. ***Compare*** 10 U.S.C. § 637(e) ("The Secretary of Defense shall prescribe regulations for administration of this section" (continuation on active duty) ***and*** DOD Dir. 1320.8, Subj: CONTINUATION OF REGULAR COMMISSIONED OFFICERS ON ACTIVE DUTY (mandating the continuation on active duty of all O-4's within six years of qualifying for retirement) ***with*** 10 U.S.C. § 637(a)(1) (reserving to the Secretary of the Navy, whenever the needs of the service require, continuation on active duty of officers otherwise subject to discharge or retirement) ***and*** SECNAVINST 1920.7, Subj: CONTINUATION ON ACTIVE DUTY OF REGULAR COMMISSIONED OFFICERS IN THE NAVY AND MARINE CORPS (reserving the discretion to convene continuation boards to the Secretary based on the needs of the service, but mandating that an officer ***selected*** for continuation on active duty, who is within six years of qualifying for retirement, be continued until eligible for retirement).

PART B - DETACHMENT FOR CAUSE

1109 INTRODUCTION

A. ***General.*** In the Navy, the detachment of an officer for cause is the administrative removal of an officer from a current assignment by reason of misconduct or unsatisfactory or marginal performance of duty. It has a serious effect on the officer's future naval career, particularly with regard to promotions, duty assignments, selections for schools, and special assignments. While the Navy has detailed regulations laid out in the MILPERSMAN which are briefly discussed in the paragraphs below concerning detachment of a naval officer for cause, the Marine Corps has no comparable regulations other than a brief passing reference to such transfers in the ACTSMAN, due in large part to the fact that detachments for cause are normally handled by a marine base commander instead of referring the matter to Headquarters, U.S. Marine Corps.

B. ***References***

1. MILPERSMAN, Article 3410105

2. NAVMILPERSCOMINST 1611.1

3. MCO P1000.6 (ACTSMAN), para. 2209

C. ***Procedures***

1. ***Counseling.*** The officer concerned must be counseled by the command. If, after a reasonable period of time, the officer has not achieved a satisfactory level of performance, the use of a letter of instruction issued by the command to the officer concerned is considered appropriate.

2. ***Documentation.*** All factual allegations of misconduct or unsatisfactory or marginal performance of duty should be adequately documented (e.g., fitness reports, criminal investigations).

3. ***Command correspondence.*** The command's request for detachment of an officer for cause is sent to Chief of Naval Personnel (Pers 82) in accordance with MILPERSMAN 3410105. The request shall contain, inter alia, a reasonably detailed statement of the specific incidents of misconduct or performance; corrective action taken to improve inadequate performance including counseling; any disciplinary action taken, in progress, or contemplated. A special report of fitness is no longer submitted in conjunction with a request for detachment for cause. *See* NAVMILPERSCOMINST 1611.1.

4. ***Officer's statement.*** The officer concerned shall be afforded a reasonable period of time, normally 10 working days, in which to prepare a response to the detachment-for-cause request. *See* MILPERSMAN, Article 3410105.5g.

5. ***Review.*** Adherence to the regulations on detachment for cause is mandatory in order to safeguard the individual officer's rights and preclude judicial challenges by the officer concerned to the detachment for cause. *See Arnheiter v. Ignatius,* 292 F. Supp. 911 (N.D. Cal. 1968), *aff'd,* 435 F.2d 691 (9th Cir. 1970).

PART C - ADMINISTRATIVE SEPARATION OF OFFICERS

1110 INTRODUCTION

A. ***General.*** The separation of an officer for cause by reason, inter alia, of misconduct, or moral or professional dereliction, may be effected by administrative action or by courts-martial. Dismissals of officers from the naval service are authorized punishments of general courts-martial. Administrative separation of officers for cause may be effected for a wide variety of reasons involving performance or conduct identified not more than 5 years prior to the initiation of processing using the notification procedure or administrative board procedure, as appropriate, with a characterization of service as discussed below. The analysis that follows is not exhaustive, and any questions that arise should be resolved by utilizing SECNAVINST 1920.6, Subj: ADMINISTRATIVE

SEPARATION OF OFFICERS; MILPERSMAN, Article 3830160; and MARCORSEPMAN, ch. 4.

B. ***Provision of information during separation processing.*** During separation processing, the purpose and authority of the Naval Discharge Review Board (NDRB) and the Board for Correction of Naval Records (BCNR) shall be explained in a fact sheet. It shall include an explanation that a discharge under other than honorable conditions, resulting from a period of continuous unauthorized absence of 180 days or more, is a conditional bar to benefits administered by the Department of Veteran's Affairs—notwithstanding any action by the NDRB. These requirements are a command responsibility and not a procedural entitlement. Failure on the part of a member to receive or to understand the explanation required by this paragraph does not create a bar to separation or characterization.

1111 DEFINITIONS

A. ***Active commissioned service.*** This term refers to service on active duty as a commissioned officer (including as a commissioned warrant officer).

B. ***Convening authority.*** The Secretary of the Navy or his delegates are empowered to convene boards in conjunction with separation of officers for cause.

C. ***Continuous service.*** This term refers to military service unbroken by any period in excess of 24 hours.

D. ***Drop from the rolls.*** This refers to a complete severance of military status pursuant to specific statutory authority without characterization of service.

E. ***Nonprobationary officers.*** Regular commissioned officers (other that commissioned warrant officers or retired officers) with five or more years of active commissioned service, and Regular commissioned officers (other than commissioned warrant officers or retired officers) who were on active duty on 14 September 1981 and who have completed more than three years' continuous service since their dates of appointment as Regular officers.

F. ***Probationary officers.*** Regular commissioned officers (other than commissioned warrant officers or retired officers) with less than five years of active commissioned service, and Regular commissioned officers (other than commissioned warrant officers or retired officers) who were on active duty on 14 September 1981 and who have completed less than three years' continuous service since their dates of appointment as Regular officers.

G. ***Retention on active duty.*** This refers to continuation of an individual in an active-duty status as a commissioned officer in the naval service.

1112 CHARACTERIZATION OF SERVICE. Separations are characterized as either honorable, general (under honorable conditions), or under other than honorable conditions. Characterization of service is determined based upon the following Secretarial guidelines:

A. ***Honorable.*** An officer whose quality of service has generally met the standards of acceptable conduct and performance of duty for officers of the naval service, or is otherwise so meritorious that any other characterization would be clearly inappropriate, shall have his / her service characterized as honorable. Service must be characterized as honorable when the grounds for separation are based solely on:

1. Preservice activities;

2. substandard performance of duty;

3. removal of ecclesiastical endorsement; or

4. personal abuse of drugs (the evidence of which was developed as a result of an officer's volunteering for treatment under the self-referral program).

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 of such conduct or performance include acts or omissions which under military law are punishable by confinement for six months or more; abuse of a special position of trust; an act or acts which bring discredit upon the armed services; disregard by a superior of customary superior-subordinate relationships; acts or omissions that adversely affect the ability of the military unit or the organization to maintain discipline, good order, and morale, or endanger the security of the United States or the health and welfare of other members of the armed forces; and deliberate acts or omissions that seriously endanger the capability, security, or safety of the military unit or health and safety of other persons.

D. ***Limitations***

1. ***Reserve officers.*** Conduct in the civilian community of a member of a Reserve component, who is not on active duty or on active duty for training and was not wearing the military uniform at the time of such conduct giving rise to separation, may form the basis for characterization of service as other than honorable ***only*** if the conduct directly affects the performance of military duties and the conduct has an adverse impact on the overall effectiveness of the service (including military morale and efficiency).

2. ***Homosexuality.*** The criteria for characterization of service for officers being separated by reason of homosexuality are identical to those for enlisted personnel. Service must be characterized as honorable or general consistent with the guidance in paragraphs A and B above, unless aggravating factors are included in the findings.

3. ***Preservice misconduct.*** Whenever evidence of preservice misconduct is presented to a board, the board may consider it ***only*** for the purpose of deciding whether to recommend separation or retention of the respondent. Such evidence shall not be used in determining the recommendation for characterization of service. The board shall affirmatively state in its report that such evidence was considered only for purposes of determining whether it should recommend retention or separation of the officer.

1113 BASES FOR SEPARATION. This section lists the bases or specific reasons for involuntary separation of officers for cause as discussed in SECNAVINST 1920.6, encl. (3).

A. ***Substandard performance of duty.*** This ground for separation refers to an officer's inability to maintain adequate levels of performance or conduct, as evidenced by one or more of the following reasons:

1. Failure to demonstrate acceptable qualities of leadership required of an officer in the member's grade;

2. failure to achieve or maintain acceptable standards of proficiency required of an officer in the member's grade;

3. failure to properly discharge duties expected of officers of the member's grade and experience;

4. failure to satisfactorily complete any course of training, instruction, or indoctrination which the officer has been ordered to undergo;

5. a record of marginal service over an extended time as reflected in fitness reports covering two or more positions and signed by at least two reporting seniors;

6. personality disorders, when such disorders interfere with the officer's performance of duty and have been duly diagnosed by a physician or clinical psychologist;

7. failure, through inability or refusal, to participate in, or successfully complete, a program of rehabilitation for personal abuse of drugs or alcohol to which the officer was formally referred (nothing in this provision precludes separation of an officer, who has been referred to such a program, under any other provision of this instruction in appropriate cases);

8. failure to conform to prescribed standards of dress, weight, personal appearance, or military deportment; or

9. unsatisfactory performance of a warrant officer, not amounting to misconduct, or moral or professional dereliction.

B. ***Misconduct, or moral or professional dereliction***. Performance or personal or professional conduct (including unfitness on the part of a warrant officer) which is unbecoming an officer as evidenced by one or more of the following reasons:

1. ***Commission of an offense***. Processing may be undertaken for commission of a military or civilian offense which, if prosecuted under the UCMJ, could be punished by confinement of six months or more, and any other misconduct which, if prosecuted under the UCMJ, would require specific intent for conviction.

2. ***Unlawful drug involvement***. Processing for separation is mandatory. An officer shall be separated if an approved finding of unlawful drug involvement is made. Exception to mandatory processing or separation may be made on a case-by-case basis by the Secretary when the officer's involvement is limited to personal use of drugs and the officer is judged to have potential for future useful service as an officer and is entered into a formal program of drug rehabilitation.

3. ***Homosexuality***. The basis for separation may include 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, using the same criteria as for an enlisted member.

4. Sexual perversion.

5. Intentional misrepresentation or omission of material fact in obtaining appointment.

6. Fraudulent entry into an armed force or the fraudulent procurement of commission or warrant as an officer in an armed force.

7. Intentional misrepresentation or omission of material fact in official written documents or official oral statements.

8. Failure to complete satisfactorily any course of training, instruction, or indoctrination which the officer has been ordered to undergo when such failure is willful or the result of gross indifference.

9. Marginal or unsatisfactory performance of duty over an extended period, as reflected in successive periodic or special fitness reports, when such performance is willful or the result of gross indifference.

10. Intentional mismanagement or discreditable management of personal affairs, including financial affairs.

11. Misconduct or dereliction resulting in loss of professional status, including withdrawal, suspension, or abandonment of license, endorsement, certification, or clinical medical privileges necessary to perform military duties in the officer's competitive category of Marine Corps Occupational Field.

12. A pattern of discreditable involvement with military or civilian authorities, notwithstanding the fact that such misconduct has not resulted in judicial or nonjudicial punishment under the UCMJ.

13. Conviction by civilian authorities (foreign or domestic), or action taken which is tantamount to a finding of guilty, for an incident which would amount to an offense under the UCMJ.

C. ***Retention is not consistent with the interests of national security.*** An officer (except a retired officer) may be separated from the naval service when it is determined that the officer's retention is clearly inconsistent with the interests of national security. This provision applies when a determination has been made (under the provisions of SECNAVINST 5510.30, Subj: DEPARTMENT OF THE NAVY PERSONNEL SECURITY PROGRAM) that administrative separation is appropriate. An officer considered for separation under the provisions of SECNAVINST 5510.30 will be afforded all the rights provided in this part.

D. ***Limitations on multiple processing***

1. An officer may be processed for separation for any combination of the reasons specified in paragraphs A-C above.

2. Subject to paragraph D.4 below, an officer who is processed for separation because of substandard performance of duty or parenthood, and who is determined to have established that he / she should be retained on active duty, may not again be processed for separation for the same reasons within the one-year period beginning on the date of that determination.

3. Subject to paragraph D.4 below, an officer who is processed for separation for misconduct, moral, or professional dereliction or in the interest of national security, and who is determined to have established that he / she should be retained on active duty, may again be required to show cause for retention at any time.

4. An officer may not again be processed for separation under paragraphs D.2 or D.3 above solely because of performance or conduct which was the subject of previous proceedings, unless the findings and recommendations of the board that considered the case are determined to have been obtained by fraud or collusion.

E. ***Separation in lieu of trial by court-martial***

1. ***Basis***. An officer may be separated in lieu of trial by court-martial upon the officer's request if charges have been preferred with respect to an offense for which a punitive discharge is authorized. This provision may not be used as a basis for separation when the escalator clause of R.C.M. 1003(d) of *Manual for Courts-Martial*, 1984, provides the sole basis for a punitive discharge, unless the charges have been referred to a court-martial authorized to adjudge a punitive discharge.

2. ***Characterization of service***. The characterization of service is normally under other than honorable conditions, but a general discharge may be warranted 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.

3. ***Procedures***

a. The request for discharge shall be submitted in writing and signed by the officer.

b. The officer shall be afforded an opportunity to consult with qualified counsel. If the member refuses to do so, the commanding officer shall prepare a statement to this effect which shall be attached to the file, and the officer shall state that the right to consult with counsel is waived.

c. Unless the officer has waived the right to counsel, the request shall also be signed by counsel.

d. In the written request, the officer shall state that he / she understands the following:

(1) The elements of the offense or offenses charged;

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

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

e. The request shall also include:

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

(2) a summary of the evidence or list of documents (or copies thereof) provided to the officer pertaining to the offenses for which a punitive discharge is authorized.

f. Statements by the officer or the officer's counsel submitted in connection with a request under this subsection are not admissible against the member in a court-martial except as provided by Military Rule of Evidence 410, *Manual for Courts-Martial*, 1984.

F. ***Removal of ecclesiastical endorsement.*** Officers on the active-duty list in the Chaplain Corps, who can no longer continue professional service as a chaplain because an ecclesiastical endorsing agency has withdrawn its endorsement of the officer's continuation on active duty as a chaplain, shall be processed for separation (in accordance with SECNAVINST 1900.10, Subj: ADMINISTRATIVE SEPARATION OF CHAPLAINS UPON REMOVAL OF PROFESSIONAL QUALIFICATIONS) using the Notification Procedures contained in SECNAVINST 1900.10. Processing solely under this paragraph is not authorized when there is reason to process for separation for cause under any other provision of this instruction, except when authorized by the Secretary in unusual circumstances based upon a recommendation by the Chief of Naval Personnel.

G. ***Parenthood.*** An officer may be separated by reason of parenthood if it is determined that the officer is unable to perform duties satisfactorily or is unavailable for worldwide assignment or deployment.

H. ***Dropping from the rolls.*** A Regular or Reserve officer may be summarily dropped from the rolls of an armed force without a hearing or a board, if the officer:

1. Has been absent without authority for at least three months; or

2. has been sentenced to confinement in a Federal or state penitentiary after having been found guilty by a civilian court and whose sentence has become final. *See* SECNAVINST 1920.6, encl. (4), para. 8.

I. ***Reserves.*** Other bases for involuntary separation of Reserve officers are set forth in SECNAVINST 1920.6, encl. (3), including, *inter alia*:

1. General mobilization or reduction in authorized strength;

2. age-in-grade restrictions;

3. lack of mobilization potential;

4. release from active duty of Naval Reserve officers on the active-duty list by reason of retirement eligibility; and

5. elimination of Reserve officers from an active status in a Reserve component to provide a flow of promotion.

1114 NOTIFICATION PROCEDURES

A. ***When required.*** The notification procedure shall be used when:

1. A probationary Regular officer or a Reserve officer above CWO-4 with less than three years of commissioned service, or a permanent Regular or Reserve warrant officer with less than three years of service as a warrant officer, is processed for separation for substandard performance of duty or for parenthood;

2. a temporary LDO or temporary warrant officer is processed for termination of 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 permanent status as a warrant officer or enlisted member);

3. a probationary officer is processed for separation for misconduct, or moral or professional dereliction, retention not consistent with national security, or parenthood and a separation with an honorable or general characterization of service is recommended by a board of officers to the Secretary of the Navy;

4. a Reserve officer is processed for removal from an active status due to age or lack of mobilization potential; or

5. a Regular or Reserve officer is processed for separation for failure to accept appointment to O-2.

B. ***Letter of notification.*** The commanding officer shall notify the officer concerned in writing of the following:

1. The reason(s) for which the action was initiated (including the specific factual basis supporting the reason);

2. the recommended characterization of service is honorable (or general, if such a recommendation originated with a board of officers);

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 the Secretary to support the proposed separation (Classified documents may be summarized.);

7. that the officer has the right to waive the rights enumerated in paragraphs 3, 4, 5, and 6 above, and that failure to respond shall constitute waiver of these rights; and

8. that the officer has a specified period of time (normally five working days) to respond to the notification.

C. ***Right to counsel.*** A respondent has the right to consult with Article 27(b), UCMJ, certified, qualified counsel when the notification procedure is initiated, except when the commanding officer determines that the needs of the naval service require processing and access to qualified counsel is not anticipated for at least the next five days because the vessel, unit, or activity is overseas or remotely located relative to judge advocate resources. Nonlawyer counsel shall be appointed whenever qualified counsel is not available. The respondent may also consult with a civilian counsel at the respondent's own expense.

D. ***Response.*** The respondent shall be provided a reasonable period of time—normally five working days, but more if in the judgment of the commanding officer additional time is necessary—to act on the notice. An extension may be granted by the commanding officer upon a timely showing of good cause by the officer. If the respondent declines to respond as to the selection of rights, even if notice is provided by mail as authorized for the Reserves, such declination shall constitute a waiver of rights and an appropriate notation will be made in the case file. If the respondent indicates that one or more of the rights will be exercised, but declines to sign the appropriate notification statement, the selection of rights will be noted and notation as to the failure to sign will be made.

E. ***Submission to the Secretary.*** The commanding officer shall forward the case file with the letter of notification and response, supporting documentation, and any tendered resignation via the Chief of Naval Personnel or the Commandant of the Marine Corps, as appropriate, to the Secretary of the Navy.

F. ***Action of the Secretary.*** The Secretary shall determine whether there is sufficient evidence supporting the allegations set forth in the notification for each of the reasons for separation. The Secretary may then:

1. Retain the officer;

2. order the officer separated or retired, if eligible (if there is sufficient factual basis for separation);

3. accept or reject a tendered resignation; or

4. direct, if the Secretary determines that an honorable characterization is not appropriate, that the case of a Regular O-1 or above be reviewed by a board of officers or that the case of any other officer be reviewed by a board of inquiry (if the case had originally been initiated by a board of officers and the Secretary determines that the recommended honorable or general characterization of service is inappropriate, he may then refer it directly to a board of inquiry).

1115 ADMINISTRATIVE BOARD PROCEDURES

A. ***When required.*** The administrative board procedure refers to a three-tiered board system consisting of a board of officers, board of inquiry, and board of review, which must be utilized to remove certain Regular O-1's or above from active duty for cause. Other officers who are entitled to a hearing before an administrative board before separation for cause are referred to a board of inquiry only for a hearing.

1. ***Three-tiered board system.*** The following Regular O-1's or above are processed for separation in accordance with the administrative board procedures by referral of their cases first to a board of officers:

a. A probationary officer (not recommended to SECNAV for an honorable or general discharge) or a nonprobationary officer being processed for misconduct, or moral or professional dereliction, or because retention is not consistent with the interests of national security; and

b. a nonprobationary officer being processed for substandard performance of duty or parenthood.

2. ***Board of inquiry only.*** The following officers are processed for separation by referral of their cases to a board of inquiry:

a. Reserve officers (including Reserve warrant officers) and permanent Regular warrant officers being processed for termination of appointment or

separation because of misconduct, moral or professional dereliction, or retention inconsistent with the interests of national security; and

b. Reserve officers with more than three years of commissioned service, Reserve warrant officers with more than three years of service as a warrant officer, and permanent Regular warrant officers with three or more years of continuous active service from the date they accepted their original appointment as warrant officers, being processed for separation or termination of appointment for substandard performance of duty or parenthood;

c. any case not specifically provided for involving discharge under other than honorable conditions; and

d. any other cases the Secretary considers appropriate (e.g., retired-grade determinations in certain voluntary retirement cases).

If proceedings by a board of inquiry are mandatory in order to release an officer from active duty or discharge, such action will not be taken except upon the approved recommendation of such a board.

B. ***Board memberships***. Boards of officers, boards of inquiry, and boards of review shall consist of not less than three officers in the same armed force as the respondent.

1. In the case of Regular commissioned officers (other than temporary LDO's and WO's), members of the board shall be highly qualified and experienced officers on the active-duty list in the grade of O-6 or above and senior in grade to the respondent.

2. In the case of Reserve, temporary limited duty, and warrant officers, the members constituting the board of inquiry (the only board that hears such cases) shall be senior to the respondent—unless otherwise directed by the Secretary. If the respondent is a Reserve officer, at least one member of the board shall be a Reserve officer—unless otherwise directed by the Secretary.

3. At least one member shall be an unrestricted line officer. Such officer will have command experience whenever possible. One member shall be in the same competitive category as the respondent. However, if the respondent's competitive category does not include O-6's or above, an O-6 from a closely related designator shall be used to satisfy this membership requirement. If there is not a designator closely related to that of the respondent, then an unrestricted line officer shall be used. The Chief of Naval Personnel or the Commandant of the Marine Corps, as appropriate, may waive each of these requirements on a case-by-case basis when compliance would result in undue delay. The purpose of these representation requirements is not to serve the interest of any specific group, but to increase the knowledge and experience of the board as a whole.

4. When sufficient highly qualified and experienced officers on the active-duty list are not available, the convening authority shall complete board membership with available retired officers who meet the criteria set forth above (other than the active-duty-list requirement) and who have been retired for less than 2 years.

5. Officers with personal knowledge pertaining to the particular case shall not be appointed to the board considering the case. No officer may be a member of more than one board convened under this instruction to consider the same officer.

6. The senior member of a board of officers or board of inquiry shall be the presiding officer and rule on all matters of procedure and evidence, but may be overruled by a majority of the board. If appointed, the legal advisor shall rule finally on all matters of procedure and evidence.

7. For boards of inquiry, the convening authority is not limited to officers under his direct command in selecting qualified board members.

C. ***Recorder***. The convening authority shall appoint a nonvoting recorder to perform such duties as appropriate, but the recorder shall not participate in closed sessions of any board.

D. ***Legal advisor***. The convening authority may appoint a nonvoting legal advisor to perform such duties as the board desires, but the legal advisor shall not participate in closed sessions of any board. The convening authority shall rule finally on all challenges for cause against the legal advisor.

E. ***Board of officers***

1. ***Convening***. The Chief of Naval Personnel or the Commandant of the Marine Corps, as appropriate, shall convene boards of officers for Regular O-1's or above when referred by the Secretary, or when they receive information of incidents involving officers whose performance or conduct is such that processing for separation by board procedures is appropriate or required. The purpose of the board is to review the record of the officer and determine whether the officer shall be required, because of substandard performance of duty, misconduct, moral or professional dereliction or national security interests, to show cause for retention on active duty.

2. ***Notification and board review***. An officer shall be advised of impending proceedings by a board of officers which considers all record information available prior to making its determination. The board has no independent investigative function and may not hear testimony or depositions from witnesses or the respondent.

3. ***Board decisions.*** The board of officers, after deliberations, shall determine by majority vote one of the following:

a. That there is sufficient evidence that the respondent should be required to show cause for retention for one or more of the reasons specified (this determination is mandatory when a preponderance of the evidence supports a finding of homosexual conduct or unlawful drug involvement); or

b. that none of the reason(s) are supported by sufficient evidence of record to warrant referral to a board of inquiry and that the case is, therefore, closed.

When, in the case of a probationary officer, the board determines that the record supports separation of the respondent and that the circumstances warrant an honorable or general discharge, it may supplement its findings with a nonbinding recommendation for separation for stated reason(s) and an honorable or general characterization, as appropriate.

4. ***Board report.*** The report of the board, signed by all members, shall state that its findings were by majority vote and include:

a. A finding on each of the reason(s) for separation specified, together with a summary of the relevant facts;

b. a conclusion that the case should be closed or the respondent required to show cause for retention for reasons specified; and

c. a recommendation, in the case of a probationary officer, if the circumstances warrant, that the officer be separated with an honorable or general characterization of service and the facts supporting that recommendation.

5. ***Action on the board report.*** The report of the board shall be reviewed by the Chief of Naval Personnel or the Commandant of the Marine Corps, as appropriate. In the absence of relevant matters which may reasonably be deemed to have escaped the full appreciation of the board members, a report shall not be returned to the board for reconsideration of findings, opinions, or recommendations going to the substantial merits of the case. If the board of officers closes the case, no further proceedings are conducted. If the board finds sufficient evidence to require the respondent to show cause for retention, the Chief of Naval Personnel or the Commandant of the Marine Corps shall, upon approval of the findings of the board of officers, convene a board of inquiry. If the board recommends direct separation of a probationary officer with an honorable or general characterization of service, the case shall be processed under notification procedures.

F. ***Board of inquiry***

1. ***Convening***. The Chief of Naval Personnel or the Commandant of the Marine Corps, or an officer exercising general court-martial jurisdiction when so directed, shall convene a board of inquiry (when required in paragraph A above). The purpose of this board is to give the officer a full and impartial hearing for responding to, and rebutting, the allegations which form the basis for separation for cause and / or retirement in a paygrade inferior to that held and present matters favorable to his / her case on the issues of separation and / or characterization of service.

2. ***Notification to, and rights of, a respondent***. The respondent shall be notified in writing at least 30 days before the hearing of the case by a board of inquiry of the following:

a. The reasons requiring the showing of cause for retention in the naval service or retirement in the grade next inferior to that currently held;

b. the least favorable characterization of service authorized;

c. the right to request reasonable additional time from the convening authority or board of inquiry to prepare the case;

d. the right to counsel (as provided in paragraph F3 below);

e. the right to present matters in his / her own behalf;

f. the right to obtain copies of records relevant to the case (except information withheld in the interests of national security; in which case, a summary will be provided to the extent that national security permits);

g. the right to notice of all witnesses in advance of the board's proceedings;

h. the right to challenge any member for cause;

i. the right to request from the convening authority or the board of inquiry the appearance before the board of any witness whose testimony is considered to be pertinent to the case;

j. the right to submit evidence before or during the proceedings (including service record entries, depositions, stipulations, etc.);

k. the right to examine or cross-examine witnesses;

l. the right to give sworn or unsworn testimony;

m. the right to appear in person, with or without counsel, at all open proceedings of the board;

n. the right to present argument;

o. the right to a copy of the record of proceedings, findings, and recommendations of the board;

p. the right to submit a statement in rebuttal to the findings and recommendation of the board of inquiry for consideration by the board of review;

q. the right to waive the rights in subparagraphs 2.c through p above; and

r. failure of the respondent to respond after being afforded a reasonable opportunity to consult with counsel constitutes a waiver of these rights.

3. ***Counsel.*** A respondent is entitled:

a. To have qualified military counsel appointed;

b. to request military counsel of his / her own choice, provided the requested counsel is reasonably available (as prescribed in the *JAG Manual* for individual military counsel for courts-martial); and

c. to engage civilian counsel at no expense to the government, in addition to, or in lieu of, military counsel.

4. ***Witnesses.*** The respondent may request in a timely manner the attendance of witnesses in his behalf at the hearing. Material witnesses located within the immediate geographic area of the board shall be invited to appear or, in the case of Federal government employees (military or civilian), directed to appear. If production of a witness will require expenditure of funds because the witness is located outside the immediate geographic area of the board, the rules prescribed for submission of the respondent's witness request, the convening authority's action on the request, and the postponement or continuance of the board's proceedings to await the witness' appearance or, absent that, preparation of the witness' written statement, are identical to the guidelines in enlisted administrative separation cases.

5. ***Hearings.*** Hearings must be conducted in a fair and impartial manner, but the Military Rules of Evidence for courts-martial are not strictly applicable. Oral or written matter may, however, be subject to reasonable restrictions as to authenticity,

relevance, materiality, and competency as determined by the board of inquiry. If suspected of an offense, the officer should be warned against self-incrimination under Article 31, UCMJ, before testifying as a witness. Failure to so warn the officer may not preclude consideration of the testimony of the officer by the board of inquiry.

6. ***Board decisions***. The board shall make the following determinations, by majority vote, based on the evidence presented at the hearing:

a. A finding on each of the reason(s) for separation specified, based on the preponderance of evidence;

b. a recommendation for separation of the respondent from the naval service for specified reason(s) with a characterization of service and for referral of the case to the board of review, when required (a recommendation for separation is mandatory when a preponderance of the evidence supports a finding of homosexual conduct or unlawful drug involvement);

c. a finding that none of the reasons specified are supported by sufficient evidence prescribed to warrant separation for cause and the case is, therefore, closed; or

d. a recommendation, in the case of a retirement-eligible officer, to retire the officer in the grade currently held or, if the officer has not satisfactorily served in that grade, the next junior grade.

7. ***Board report***. The report of the board, signed by all members (including any separate, minority reports), shall include a verbatim transcript of the board's proceedings for Regular commissioned officers when directed by the convening authority, and a summarized transcript for all other officers. The transcript shall be provided to the respondent for examination prior to signature by the board members, and a statement reflecting that fact—plus any deficiencies noted by the respondent—shall be attached to the report. The report shall also include:

a. The individual officer's service and background;

b. each of the specific reasons for which the officer is required to show cause for retention;

c. each of the acts, omissions, or traits alleged and the findings on each of the reasons for separation specified;

d. the position taken by the respondent with respect to the allegations, reports, or other circumstances in question and the acts, omissions, or traits alleged;

e. the recommendations of the board that the respondent be separated and receive a specific characterization of service, or, if retirement eligible, that the officer be retired in the grade currently held or in the next inferior grade; or

f. the finding of the board that separation for cause is not warranted and that the case is closed; and

g. a copy of all documents and correspondence relating to the convening of the board (e.g., witness request).

The respondent shall be provided a copy of the report of proceedings and the findings and recommendations of the board and shall be provided an opportunity to submit written comments for consideration by the board of review.

8. ***Action on the report.*** The report of the board shall be submitted via the convening authority to the Chief of Naval Personnel or Commandant of the Marine Corps, as appropriate, for termination of proceedings or further action, as appropriate. Further action includes:

a. In the case of Reserve, limited duty, and warrant officers recommended for separation, review and endorsement of the case to the Secretary for final determination;

b. in the case of Regular O-1's or above recommended for removal from active duty, delivery of the case to the board of review; and

c. in the case of a retirement-eligible officer whose case was referred to the board solely to determine the retired grade, review and endorsement of the case to the Secretary.

G. ***Board of review***

1. ***Convening.*** Boards of review are convened by the Chief of Naval Personnel or the Commandant of the Marine Corps, as appropriate, to review the reports of boards of inquiry which recommend separation for cause of permanent Regular O-1's and above and make recommendations to the Secretary.

2. ***Respondent's rights.*** The respondent does not have the right to appear before a board of review or to present any statement to the board, except the statement of rebuttal to the findings and recommendations of the board of inquiry.

3. ***Board's review and report.*** The board shall make the following determinations by majority vote, based on a review of the report of the board of inquiry:

a. A finding that the respondent has failed to establish reasons 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); or

b. a finding that the respondent should be retained on active duty and the case is, therefore, closed.

The report of the board shall be signed by all members—including nonconcurring members. A nonconcurrent member shall submit a separate minority report detailing the extent of nonconcurrence.

4. ***Action on the report of the board.*** The report of the board of review recommending separation shall be delivered with any desired recommendations by the Chief of Naval Personnel or the Commandant of the Marine Corps, as appropriate, to the Secretary who may direct:

a. Retention; or

b. discharge with a characterization of service not less favorable than that recommended by the board of inquiry.

H. ***Retirement and resignation.*** An officer 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 satisfactorily served—as determined by the Secretary under the guidelines of 10 U.S.C. § 1370.

1. SECNAVINST 1920.6, encl. (6), allows the Secretary to reduce an officer only one grade for not serving "satisfactorily," even if time-in-grade requirements are met.

– 10 U.S.C. § 1370 authorizes more than a one-grade reduction, but the Secretary is restricted to a one-grade reduction.

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.

1116 PROCESSING TIME GOALS. The Secretary has established the following time ***goals*** for processing officer separations for cause:

A. Thirty (30) days from the date a command notifies an officer of the commencement of separation proceedings in cases where no board of inquiry or board of review is required;

B. ninety (90) days from the date a command notifies an officer of the commencement of separation proceedings in cases where only a board of inquiry is required; and

C. One hundred twenty (120) days from the date a command notifies an officer of the commencement of separation proceedings in cases where a board of officers, a board of inquiry, and a board of review are all required.

1117 SEPARATION PAY

A. ***Reference***. SECNAVINST 1900.7, Subj: ELIGIBILITY FOR SEPARATION PAY UPON INVOLUNTARY DISCHARGE OR RELEASE FROM ACTIVE DUTY.

B. ***Eligibility***. Regular and Reserve officers and Reserve enlisted members involuntarily discharged or released from active duty with 5 or more, but less than 20, years of active service are entitled to separation pay, except when discharged or dismissed by sentence of a court-martial, dropped from the rolls, discharged under other than honorable conditions, released from active duty for training, or, upon discharge or release from active duty, are eligible for retainer or retired pay.

CHAPTER XII

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CHAPTER XII

FAMILY ADVOCACY PROGRAM

1201 REFERENCES

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B. SECNAVINST 1752.3A, Subj: FAMILY ADVOCACY PROGRAM

C. SECNAVINST 1754.1, Subj: DEPARTMENT OF THE NAVY FAMILY SERVICE CENTER PROGRAM

D. SECNAVINST 5800.11, Subj: PROTECTION AND ASSISTANCE OF CRIME VICTIMS AND WITNESSES

E. OPNAVINST 1752.2A, Subj: FAMILY ADVOCACY PROGRAM

F. OPNAVINST 1752.1, Subj: RAPE PREVENTION AND VICTIM ASSISTANCE

G. MCO 1752.3B, Subj: MARINE CORPS FAMILY ADVOCACY PROGRAM

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I. MCO 1700.24, Subj: MARINE CORPS FAMILY SERVICES CENTER PROGRAM

J. COMDTINST 1750.7, Subj: COAST GUARD FAMILY ADVOCACY PROGRAM

K. NAVMEDCOMINST 6320.22, Subj: FAMILY ADVOCACY PROGRAM

1202 INTRODUCTION

A. ***Extent.*** Family violence is a significant social problem in American society and the number of reported cases is continuing to increase. The sea services are not immune from the problems of spouse abuse and child maltreatment.

B. ***Causes.*** Family maltreatment is a complex and multidimensional problem. There are many factors that contribute to the incidence of violence and neglect in families, for example, experiencing or witnessing abuse as a child, the stress that a family experiences due to the member's return from extended sea duty, severe financial difficulties, or other stressful periods. Also, abuse and neglect in families tends to be passed on from one generation to the other.

C. ***Costs.*** The costs of family maltreatment are incalculable. The human costs are the most obvious and the most immediately tragic. There are, however, significant costs to the DON as well (e.g., jeopardizing mission of operating forces). Our ultimate goal, then, is to break the cycle of violence and neglect and to prevent it from recurring. This is not achieved easily. Just as the problem is complex, intervention strategies must be varied and flexible.

D. ***History.*** Like the civilian community, the military began to specifically address the problem of family maltreatment in the early 1970's. In 1976, the Navy established the Child Advocacy Program within the Navy Medical Department. In 1979, this program, which had addressed only the maltreatment of children, was expanded to include spouse abuse, sexual assault, and rape. The program was redesignated the Family Advocacy Program (FAP) and, in 1980, became line managed—with Chief of Naval Personnel (Code 66) serving as program manager. In 1981, Department of Defense Directive 6400.1 established guidelines for the "Family Advocacy" program for all military services.

E. ***DOD policy.*** The Department of Defense (DOD) Family Advocacy Program (FAP) has the goal of improving the quality of life for all military families. DOD policy is to:

1. Develop programs to promote healthy family life;

2. identify incidents of family violence and neglect so that further injury can be prevented and therapy for dysfunctional families provided;

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

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

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

1203 OVERVIEW OF THE FAMILY ADVOCACY PROGRAM

A. ***Goals of DON FAP.*** SECNAVINST 1752.3A outlines the five primary goals of the DON FAP:

1. prevention;

2. victim safety and protection;

3. offender accountability;

4. rehabilitative education and counseling; and

5. community accountability/responsibility for a consistent, appropriate response.

B. ***DON Directives.*** Responsibility for achieving these goals lies throughout the chain of command. The DON in SECNAVINST 1752.3A established the following directives to achieve these goals Navy wide:

1. Conduct programs and activities that contribute to a healthy family life, prevent the occurrence of abuse and neglect, and seek to restore affected families to a healthy, non-violent status.

2. Identify cases of child and spouse abuse promptly and provide early intervention to break patterns of abusive behaviors.

3. Ensure that all victims and witnesses of child and spouse abuse in DON families have access to appropriate protection, safety, care, support, case management and educational rehabilitation services as needed, to the extent allowable by law and resources.

4. Ensure victims of abuse are not re-victimized through actions such as unnecessary removal from housing, repeated or coercive interviews, or other negative interventions.

5. Ensure all commands hold military offenders accountable by applying a range of disciplinary or administrative sanctions, as appropriate, for acts or omissions constituting child or spouse abuse.

6. Provide rehabilitation and behavioral education and counseling to offenders as appropriate to stop child and spouse abuse in DON families, recognizing that offenders can be both service members and family members.

7. Ensure community responders (e.g., medical, legal, base security, and law enforcement, educators, counselors, advocates, chaplains, etc) are trained in family violence risk factors and dynamics, basic community information and referral, safety planning, and appropriate responses for their discipline.

C. ***Players in FAP***

1. ***The commanding officer***. While supported by the Medical Treatment Facility (MTF), FAP remains a line-managed program. The Family Advocacy Officer (FAO), and Family Advocacy Representative (FAR) report to the installation commander. Additionally, the final decision making authority on treatment recommendations and disciplinary or administrative action towards suspected offenders is the cognizant commanding officer. Thus, the installation commander and the cognizant unit commanding officer remain the most important individuals in deciding the course and outcome of family advocacy cases.

2. ***Family advocacy officer (FAO) / FAP officer (FAPO) (USN / USMC).*** The FAO / FAPO is appointed by the installation commander and charged with overall coordination of the local FAP. In the Navy the FAO ***must*** be a line officer, 0-4 or above. In the Marine Corps, the FAPO ***must*** be a senior field grade officer who has access to the installation commander. The FAO / FAPO:

a. Serves as the point of contact for coordination of nonmedical family advocacy matters;

b. serves as the point of contact for unit commanders concerning the medical / intervention issues related to family advocacy;

c. coordinates local efforts designated to achieve FAP objectives; and

d. monitors and provides staff support for the program.

3. ***Family advocacy representative (FAR) / FAP manager (FAPM) (USN / USMC).*** The FAR / FAPM is a trained social worker whose primary duties involve implementation and management of the medical component of the FAP. The installation

commander is responsible for ensuring a properly trained FAR/FAPM is recruited and maintained. Specific responsibilities of the FAR / FAPM include:

a. Receiving all reports of maltreatment and referring them to the civilian authorities (as appropriate);

b. notifying the servicemember's commanding officer of all alleged cases of abuse;

c. ensuring protection of victims when civilian authorities are unavailable;

d. reporting cases to the Family Advocacy Case Review Committee (CRC);

e. making clinical assessments, providing treatment, referring for treatment / action, and coordinating all aspects of case management; and

f. notifying BUPERS / CMC via DD Form 2486.

4. ***Family advocacy committee (FAC).*** Each installation commander is responsible for establishing a multidisciplinary FAC. The FAC functions as a policy advisory group: it ensures proper planning, resource management, monitoring, problem-solving, and advocacy (marketing) of the FAP. The FAC does ***not*** become involved in individual case management; this is delegated to a specialized committee (to be discussed *infra*). FAC membership will usually include the FAO / FAPO (chairman), FAR / FAPM (in the USN, typically the co-chairman) tenant command representatives, medical and / or dental officers, staff or command judge advocate, base security personnel, NCIS, chaplain, drug / alcohol counsellors (CAAC / SACC), public affairs officer, housing officer, MWR and ombudsman. Off-base representation may include child protective services, shelters, and other similar entities.

5. ***Case review committee (CRC) (USN / USMC).*** The CRC is responsible for the review and oversight of individual cases where family maltreatment is alleged. The CRC makes a determination as to whether a particular case is substantiated or unsubstantiated and will make recommendations on whether treatment and rehabilitation is appropriate. The composition and responsibilities of the CRC are discussed *infra*.

6. ***Judge advocate.*** As noted above, effective prevention and intervention in family violence requires a cooperative and collaborative effort on the part of all command professionals. Attorneys in the military have a key role in the program. It is ***mandatory*** that a Judge Advocate act as recorder for all administrative separation boards for child sexual abuse, and strongly encouraged that they act as recorders for all other types of child and spouse abuse cases when available. Additionally, attorneys are often called upon to:

a. Recommend action that will insure the safety of the victims;

b. recommend and support the use of legal action against perpetrators;

c. balance punishment of the perpetrator with the needs of the children and families (determine the impact of a punitive discharge, forfeitures, or confinement on the family unit);

d. provide legal advice to other command personnel involved with the FAP (enclosure (6) of NAVMEDCOMINST 6320.22 provides guidance in the area of self-incrimination and when warnings should be given);

e. participate actively as a member of the FAC and in the CRS / CRC;

f. employ special procedures to protect child victims during the legal process; or

g. be involved in the development, review, and revision of memorandums of understanding (MOUs) with civilian authorities.

D. *PREVENTION OF FAMILY MALTREATMENT*

1. ***Definitions***. FAP concerns itself with a broad range of harmful activity that may occur within the family unit, including physical abuse, emotional injury, sexual offenses, and / or neglect. For purposes of FAP, the following definitions pertain:

a. ***Physical abuse of children*** includes any ***major injury*** (brain damage, skull or bone fracture, subdural hematoma, sprain, internal injury, poisoning, scalding, severe cut, laceration, bruise, or any combination constituting a substantial risk to the life or well-being of the child) and ***minor injuries*** (twisting or shaking) intentionally inflicted by the child's parent or caretaker.

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

c. ***Emotional maltreatment of children*** is an act of ***commission*** (intentional berating or disparaging a child) or ***omission*** (passive / aggressive inattention to a child's emotional needs) by the caretaker which causes injury to the child as evidenced by low self-esteem, undue fear or anxiety, or other damage to the child's emotional well-being.

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

e. ***Spouse abuse*** includes physical abuse, sexual abuse, property violence as a means to scare or intimidate, or psychological violence inflicted on a partner in a lawful marriage.

i. Under the UCMJ and some state laws, nonconsensual coitus with one's spouse is considered rape.

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

2. Family service centers

a. It is incumbent upon every commander to develop programs and activities that contribute to a healthy family life. Providing a reasonable quality of life for military personnel and their families is both ethical and pragmatic—ethical because it is the moral thing to do and pragmatic because the health of Navy families directly impacts job performance, retention, and readiness. It is far preferable to alleviate the stresses of military life through support and educational programs in building healthy families than it is to treat or rebuild families that have experienced maltreatment.

b. A major function of the FCC is the prevention of problems and the enhancement of family life. Services that the FCC typically offer include:

i. Informational and educational programs;

ii. short-term non-medical counselling for problems such as: adult anti-social behavior; child and adolescent anti-social behavior; academic, occupational, or parent-child problems; marital problems; and non-medical interventions commonly recommended for family violence, e.g., support groups, violence containment groups, and parent education groups;

iii. identification, intervention, and referral of families in need of FAP services; and

iv. coordination among existing Navy and civilian family support services.

E. *IDENTIFICATION AND INTERVENTION*

1. ***Identification***. All personnel have a duty to report suspected or known cases of abuse and neglect. U.S. Navy regulations, article 1137; SECNAVINST 1752.3, paragraph 7.f(2). Military personnel will report such matters to the FAR / FAPM, who in turn will report the incident to the appropriate civilian agencies—usually child protective services (CPS). If the FAR / FAPM is not available, the report should be made directly to the CPS. MTF's must also report the abuse to the sponsor's CO within 48 hours. The FAR / FAPM serves as the point of contact between the command and local agencies. Each installation must have a written Memorandum of Understanding (MOU) with the local CPS agency defining investigative responsibilities. 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 in the course of performance of duties. Reporting shall normally be done via the FAR. Even voluntary self-referrals must be reported by the FAR if the state so requires.

2. ***Voluntary self-referral***. Such referral is encouraged since the goal of FAP is to prevent or break the cycle of abuse. An admission of abuse is sufficient to substantiate a FAP case and requires notification of the member's CO and the FAR / FAPM, unless the admission is made as a privileged communication to an attorney or clergyman. Self-referral for abusive behavior ***does not insulate a member from the initiation of disciplinary and administrative action and does not limit the use of a member's statements in such proceedings***. Statements made by a member pursuant to self-referral are not privileged or protected from use as evidence except when made to a chaplain (as an act of conscience) or attorney (where an attorney-client privilege applies). Self-referrals should be made to the FAR, CAAC / DAPA, FCC counselor, CO, or XO. Unfortunately, few cases of abuse are self-referrals. A majority of cases come to the CO's attention through police or hospital reports.

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

a. **MILITARY PROTECTIVE ORDERS**. A Military Protective Order (MPO) is similar to a Temporary Restraining Order issued by a civilian court. It can be issued after hearing only one side of the story, or ex parte, when the issuing authority determines that it is necessary to ensure safety and protection of the persons for whom it is issued. MPO's are lawful orders for purposes of the UCMJ, but should not contain overly harsh provisions that could be construed as the imposition of pre-trial restraint and start a

speedy trial clock. The order should be in writing, specifically state how long it will remain in effect (i.e. 10 days), what areas are restricted, and have provisions for emergency situations. The order should come from a senior officer in the command, but it is best to not have the commanding officer issue the order. Having the commanding officer issue the order could preclude him/her from conducting NJP if the order is subsequently violated. Sample MPO's can be found in the OPNAVINST and MCO. In general MPO's should:

i. state their military purpose (i.e. safety of victims and good order and discipline);

ii. be specific in controlling certain behaviors; and

iii. be comprehensive to prevent misunderstanding.

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

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

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

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

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

iii. in some cases, it may be appropriate to withdraw overseas command-sponsorship and / or arrange for early return of dependents and / or members. In situations where the abuse has been substantiated by the subcommittee and the CO recommends the family be returned to CONUS, a message must be sent to the appropriate service headquarters—BUPERS-4 or USMC HQ (MMOS)—in Washington for authorization with an information copy provided to BUMED. In the Navy, BUPERS-661 and BUMED-343

make recommendations to BUPERS-40 as to where the servicemember should be assigned in the United States.

4. Treatment and rehabilitation

a. The MTF is responsible for determining the need for treatment and for the referral to other professional resources as needed. The Marine Corps implements this through the FCC. The ***primary*** goal of the FAP is to protect the victim and provide treatment for ***all*** involved family members. Treatment is generally subject to a one-year limitation.

b. Some cases are not amenable to treatment (such as extra familial pedophiles, who are considered far less capable of rehabilitation). In these cases, discipline or ADSEP processing is mandatory.

c. Counseling / treatment is recommended when the member has a positive record of performance and good potential for treatment. At the same time, appropriate disciplinary action is an important part of treatment and should be considered unless there is a "bona fide" voluntary self-referral or, based on the facts of the case, it is determined that only therapy is needed to stop the abuse / neglect, protect the victim, and improve family function or, as mentioned earlier, disciplinary action may be taken—but may be appropriately suspended conditioned on rehabilitation.

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

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

f. Dependents and retirees who are victims or perpetrators should be offered appropriate intervention and encouraged to participate voluntarily. Victims must be informed of their rights and provided counseling pursuant to DODINST 1030.2 and SECNAVINST 5800.11A. Victims of abuse may also qualify for state victim compensation funds and / or DOD retirement funds (10 U.S.C. § 1408) or DOD transitional assistance.

F. ***DETERRENCE***

1. It is DON policy that offenders must be held accountable for their actions. The prospect of disciplinary action is often a strong and necessary motivating factor for offenders to complete rehabilitation and counseling. ***The decision to proceed with disciplinary action is solely at the discretion of the member's commanding officer.*** FAP does not have disciplinary authority over members of other commands and does not make such recommendations. Providing assistance to maltreators under the FAP shall not, in and of itself, be the basis for adverse actions—such as punitive action; removal from base housing; revoking or removing security clearances, Personnel Reliability Program (PRP), enlisted classification code, or warfare specialty. Swift intervention and disciplinary action is an effective deterrent to family violence. It is important to remember that treatment and rehabilitation and disciplinary options are not mutually exclusive; often a combination proves most effective.

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

b. Disciplinary / administrative action is ***most*** appropriate when:

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

ii. the behavior is compulsive;

iii. the victim is seriously injured;

iv. there is sufficient evidence for a conviction; and

v. testifying in court would be in the best interest of the victim.

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

d. Often disciplinary actions are taken, but the punishment may be wholly or partially suspended to encourage rehabilitation and deter further maltreatment offenses.

2. ***Incest cases***. Only those child sexual abuse offenders retained on active duty at the conclusion of ***all appropriate disciplinary/administrative action*** shall be eligible for long term rehabilitation, education, and counseling. Child sex abuse is mandatory processing. (See MILPERSMAN Sec. 3610240 (1)(r).

a. ***Coast Guard***. Coast Guard policy on processing and retention is similar to the Navy and USMC. If the CO wants to retain and place the member into long-term treatment, however, the case must be forwarded to Commander, (MPC-EPM) or (MPC-OPM) who will review the matter and consider the recommendations of Commandant (CG-WPM). The Coast Guard requires this review in ***all*** abuse cases.

1204 CASE REVIEW COMMITTEE

A. ***FUNCTION***. All incidents of child and spouse abuse that result in the initiation of a FAP case will be reviewed by a local multi-disciplinary CRC. The CRC will initially make a determination of the status of the case (i.e., substantiated, unsubstantiated) and identify the abuser. If abuse is substantiated, the CRC will develop an intervention plan for the individual offender. Along with the case manager, the CRC will also assist the command with victim safety planning and victim protection. Lastly, the CRC will forward reports on the CRC's findings to the command . The contents and routing of the report are discussed *infra*.

B. ***COMPOSITION***. The CRC is made up of no more that eight voting members, with special non-voting consultants brought in for particular cases as needed. Permanent members are appointed in writing by the installation Commanding General or Commanding Officer. All CRC members must attend annual training on issues relating to domestic violence and child abuse. Determinations of the committee are decided by a majority vote. During the course of the CRC meeting, the members will review old and pending cases, and seek information in the form of written and live statements, and a review of all available records. After all available and needed information has been considered, the committee members will debate and vote on a particular case.

1. In order to conduct a Navy CRC meeting, the following members or their alternates must be present:

a. A line officer, 0-4 or above, who is not the FAO or the reporting senior of any other CRC member;

b. Physician;

c. FAR;

d. Mental Health Provider; and

e. Judge Advocate.

2. Additional voting members can be appointed to the CRC, as long as the total number of voting members does not exceed eight. Additional voting members can be one of the following:

a. MTF Social Worker;

b. FSC Social Worker;

c. Representatives from state child protective services;

d. Pediatrician;

e. Pediatric or Emergency Room Nurse;

f. NCIS (may participate in debate on case determination but does not vote); or

g. Base Security or Law Enforcement representative.

3. Special consultants can be brought in on a particular case if the need for their specialty or information arises. For example it may be necessary to speak with a child's school teacher in a child abuse case, or with a drug and alcohol counselor in a case of spouse abuse involving alcohol. Additionally, a representative from a member's command can provide invaluable information on a member's work performance and any stress that may be existing in the work place. All of these consultants are brought in to ensure that the CRC has enough information to make a case determination. Special consultants do not vote on the case determination, nor do they sit in during debate. Examples of special consultants include:

a. Community Health Nurse;

b. Installation Security Officer;

c. Drug and Alcohol Program Advisor (DAPA) or Counseling and Assistance Center representative (CAAC);

d. Chaplain;

e. School counselor or nurse; and

f. Representative from alleged offender's or victim's command.

C. ***CASE DETERMINATIONS***. When cases are brought before a CRC, the most important decisions facing the CRC are whether the reported abuse occurred and who was the perpetrator. These findings are determined by a majority vote of the members, based upon a preponderance of the evidence standard. If abuse is determined to have occurred, the case will be "substantiated." A determination of "substantiated" will also trigger the requirement for the committee to formulate an intervention plan for the offender, along with treatment recommendations if appropriate. CRC's do not make recommendations on issues involving disciplinary or administrative actions, which are the sole province of the unit commanding officer. Additional findings that the CRC can make are "unsubstantiated" and "suspected." Unsubstantiated is further broken down to either "did not occur", or "unresolved" which is an indication that there was insufficient evidence for a complete determination. "Suspected" is a temporary determination that can only be used for 60 days.

1. All findings and recommendations made by the CRC should be made in a timely manner, normally not to exceed 90 days from receipt of the allegation, unless unusual circumstances exist such as complicated child sex abuse allegations, or if a member or victim is deployed.

2. Alleged offenders are entitled to at least seven days notice before the committee meets to review their case. They are notified in writing and have the right to submit a written statement to the CRC. Alleged offenders and victims do not have the right to speak before the CRC, although they will have been questioned by the FAR when the case was first reported.

1205 REVIEW OF CASE REVIEW COMMITTEE DECISIONS

A. ***GENERAL***. Subject to the review process set out below, CRC decisions are final in regards to the FAP. In order to add integrity to the system, CRC determinations are now subject to a formal review process. SECNAVINST 1752.3A directed the Chief of Naval Operations and the Commandant of the Marine Corps to: "Establish a review process for cases of child and spouse abuse that will assure fair treatment and observance of the applicable rights of victims and alleged offender." The Navy has developed two avenues of review: review by the local CRC, and review by a Headquarters Review Team (HRT) located at BUPERS. MCO P1752.3B is presently under revision, but it is anticipated that the review process for Marine cases will be solely before the local CRC, and can be based upon two grounds: new information available or violation of CRC procedures. Navy Review procedures are outlined below.

B. ***HEADQUARTERS REVIEW TEAM.*** The HRT is chaired by a representative from Pers-6, and is made up of representatives of various disciplines using the prescribed membership of a local CRC as a model. At a minimum, a law enforcement officer, legal representative, psychologist or psychiatrist, pediatrician, social worker, and an 0-4 line officer will be present.

C. **REVIEW OF CHILD SEX ABUSE CASES.** When a CRC determines that allegations of incest and/or extra-familial child sexual abuse are unsubstantiated, normally the case will be closed and the temporary flag will be removed from the member's record. If either Pers-8 or Pers-661 believes that the local CRC reached an incorrect decision and the case should be substantiated, then either Pers-8 or Pers-6 may refer the case to the Navy HRT for a clinical opinion. In determining whether the CRC decision was incorrect, the issue is not whether other reviewers may disagree with its conclusions, but whether all relevant information has been considered.

D. ***REPORT OF CRC DECISION.*** Once the CRC has made a determination as to whether the allegations are substantiated or unsubstantiated, the FAR will forward a report of the CRC's decision to the alleged military offender and/or victim's commanding officer. In addition, commands will take appropriate steps to ensure the CRC report is forwarded to alleged civilian offenders and victims and military offenders and victims. Upon receipt of the CRC report, the commanding officer, or designee, shall review and discuss the case summary with the alleged offender, victim or sponsor as appropriate. The commanding officer will exercise his discretion as to whether the command's intended response to the CRC's recommendations are to be discussed. A signed "rights advisement" will be obtained from all military offenders and victims, and from civilian offenders and victims where possible. The report contains the following information:

1. The names of the parties involved in the case;

2. the CRC decision and recommendation;

3. the positions/disciplines that were present and participated in the decision and recommendations;

4. a synopsis of the information/documents considered;

5. a statement of rights letter for the alleged offender or victim, as appropriate.

E. ***WHO CAN REQUEST REVIEW.*** The following individuals may request review of the CRC determination to substantiate/unsubstantiate the allegations of abuse:

1. Alleged Offender (military or civilian). The CRC must have found substantiated abuse on the part of the military offender who is requesting review.

2. Alleged Victim (military or civilian). The CRC must have found unsubstantiated abuse in an incident involving the alleged victim. If the victim is a minor child, his or her non-offending parent may request review.

3. Commanding Officer. The commanding officer of the alleged offender or victim, or the commanding officer of the sponsor of the alleged offender or victim, may request the local CRC to reconsider its decision in an individual case.

F. ***PROCEDURES AND GROUNDS FOR REVIEW.*** Requests for review of CRC decisions must be in writing, although there is no prescribed format for the request. They should normally be forwarded within 30 days of receipt of the CRC decision, absent unusual circumstances. Requests for review can be filed with either the local CRC that made the determination or to the HRT. It is not required that review be requested by the local CRC before a request is made to the HRT. Review can be requested by the local CRC and then by the HRT if a petitioner is dissatisfied with the decision of the local CRC. Requests can be based upon the following grounds:

1. Newly discovered information. The petitioner must demonstrate that:

(a). The information was discovered within 30 days of the date the petitioner was notified of the CRC's decision;

(b) The new information is not such that it would have been discovered by the petitioner at the time of CRC case disposition in the exercise of due diligence; and

(c) The newly discovered information, if considered by the CRC, would probably produce a substantially more favorable result for the petitioner.

2. Fraud on the installation CRC. The petitioner must demonstrate that the fraud substantially influenced the CRC decision. Examples of such fraud would include:

(a) Confessed or proved perjury in statements or forgery of documentary evidence which substantially influenced the CRC decision;

(b) Willful concealment of information by one or more of the CRC members that was favorable to the petitioner and had a substantial likelihood to result in a different decision by the CRC.

3. Voting member was absent. The petitioner must show that a voting member was absent **and** such absence negatively impacted the outcome of the CRC determination. The absent member must be one of the prescribed members of the CRC discussed above, and the petitioner must affirmatively demonstrate a substantial likelihood that the voting member's presence may have changed the outcome of the CRC determination. If a designated CRC member's alternate was present, this will negate HRT review on this ground.

4. Not guilty/guilty finding after a military or civilian trial on the merits. The petitioner must demonstrate that new or additional evidence was considered during the trial. The following limitations apply:

(a) The charge(s) decided upon during the trial on the merits must be directly related to the incident which formed the basis of substantiated or unsubstantiated abuse findings by the CRC; and

(b) The petitioner demonstrates a substantial likelihood that the new evidence in question, if considered by the CRC, may have produced a substantially more favorable result for the petitioner, or the evidence in question directly impacted upon the finding of guilty/not guilty.

5. Plain legal or factual error. The petitioner must demonstrate that an examination of the record establishes that the decision of the CRC was based upon plain error. For example, the alleged offender was TAD out of the area on the date the alleged assault took place.

1206 REPORTING REQUIREMENTS

A. ***Spouse Abuse*** Spouse abuse is the most frequently reported type of family abuse within the Navy, and frequently co-exists with child abuse.

1. Law enforcement. If a spouse abuse report involving physical injury or the use of a dangerous weapon is received by law enforcement officials, verbal notification must be made to the FAR/FAPM and the member's command immediately. A written report shall be issued within 24 hours to the FAR/FAPM as well as the member's command.

2. Medical Treatment Facility. If a victim of alleged spouse abuse comes to a MTF for treatment of injuries relating to abuse, the case is referred to the FAR/FAPM immediately. If there is major physical injury or the indication of a propensity or intent to inflict such injury by the alleged offender, the case must be referred to law enforcement officials.

B. ***Child Abuse***. All DoN personnel must report any incident or suspected incident of child abuse occurring on a military installation or involving military persons to the local FAR/FAPM. Depending on the outcome of the initial assessment, the FAR/FAPM will notify the member's command and appropriate civilian agencies. In all cases of major injury or the offender's propensity to inflict such injury, the FAR/FAPM must report the case to law enforcement officials. For overseas locations, notification will be made in accordance with applicable Status of Forces Agreements (SOFA).

1. Child Sex Abuse. In addition to the above, all incidents or suspected incidents of child sexual abuse must be reported to the Naval Criminal Investigative Service (NCIS). Reports must also be made to BUPERS and CMC.

C. All cases must have a completed DD 2486 (Child / Spouse Abuse Incident Report) forwarded to the Commanding Officer, Naval Medical Data Services Center (Code 42) within 15 days of the date that CRC makes a status determination or closes, transfers, or reopens the case. Enclosure (9) of NAVMEDCOMINST 6320.22, Subj: FAMILY ADVOCACY PROGRAM, provides directions for completion of the form.

1207 FLAGGING OF PERSONNEL RECORDS

A. ***OVERVIEW*** The term "flag" refers to the indicator placed in a member's file letting detailing personnel know that they will have to get clearance before issuing permanent change of station orders for an individual. The flagging process is intended to prevent further stress on the service member and family members, to prevent re-abuse, and to ensure assignment to a geographic location which has adequate services available. Flagging is also used to ensure the availability of the service member or family members for case disposition, rehabilitation, education and counseling.

1. BUMED Assignment Control Flag. (Navy Only) Placed on recommendation of the CRC on spouse abuse and child physical abuse and neglect cases. This is a temporary flag which is normally removed within a year.

2. BUPERS Assignment Control Flag. (Navy Only) Placed into the personnel data system by Pers-8 for all suspected child sexual abuse cases. This flag restricts transfers, reenlistments, advancements and/or promotions until case resolution. A member is notified of these restrictions by BUPERS via his/her commanding officer after the case has been reported. It is lifted at case resolution.

1208 PROGRAM SPONSORS

A. Navy sponsor:

Bureau of Naval Personnel (BUPERS 661)
Commercial (703) 614-5892 / 5893
DSN 224-5892

B. Marine sponsor:

Marine Family Programs (Code MFP)
Commercial (703) 696-1188
DSN 426-1188

C. Coast Guard sponsor:

Individual & Family Support Programs Branch – (202) 267-6199