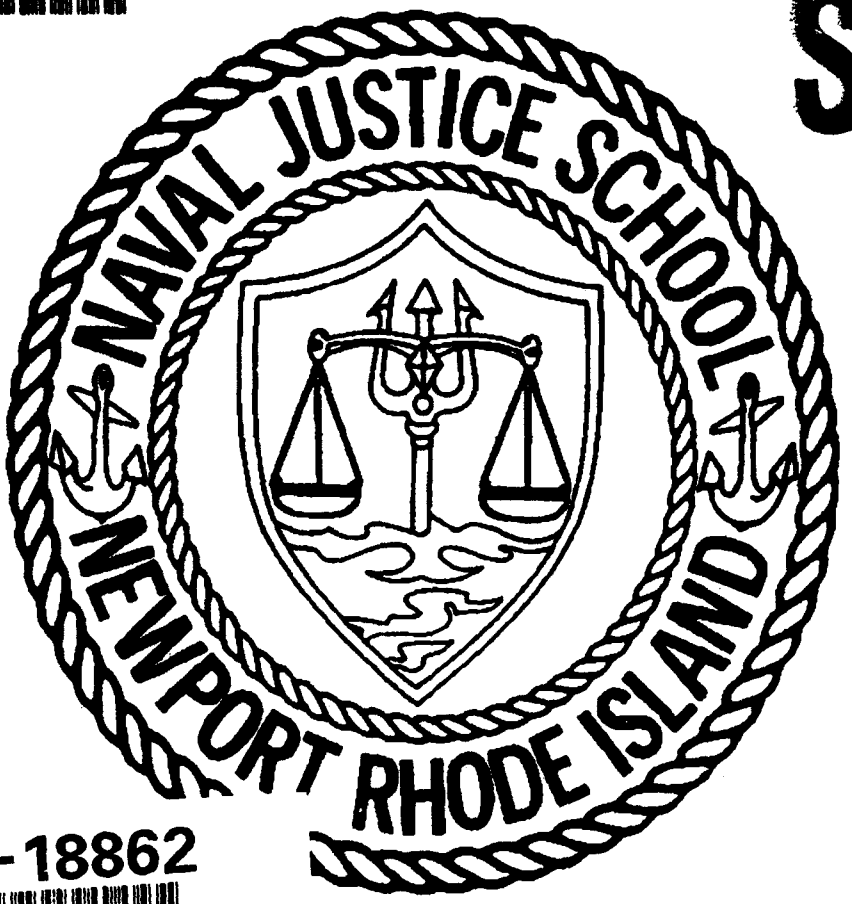
LAWYER

CIVIL LAW



STUDY GUIDE

April 1993

NAVAL JUSTICE SCHOOL
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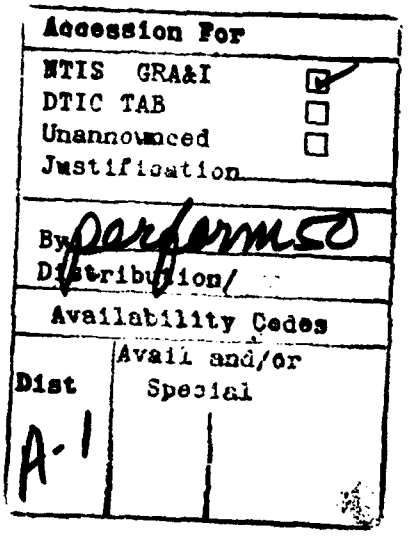
Civil Law
Study Guide
Rev. 4/93

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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CIVIL LAW STUDY GUIDE

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CHAPTER I

INVESTIGATIONS NOT REQUIRING A HEARING

PART A - ADMINISTRATIVE INVESTIGATIONS (FACT-FINDING BODIES)

0101 INVESTIGATIONS - GENERALLY

A. Background. Almost every naval officer will have some type of contact with an administrative fact-finding body (commonly referred to as a "JAGMAN" investigation) during their military career, either as an investigating officer or as a convening authority. The regulations governing such investigations are contained in the *JAG Manual* (JAGMAN). The primary purpose of an administrative fact-finding body 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 on this information. 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.

B. Function. The primary function of an administrative fact-finding body is to search out, develop, assemble, analyze, and record all available information relative to the incident under investigation.

C. Types. There are three types of administrative fact-finding bodies (courts of inquiry, bodies required to conduct a hearing, and bodies not required to conduct a hearing); however, for purposes of procedure, there are two types of fact-finding bodies.

1. Fact-finding bodies required to conduct a hearing (including courts of inquiry and investigations required to conduct a hearing): ordinarily composed of several board members, all testimony is taken under oath, a verbatim record is kept of all evidence, and the designation of parties may be authorized.

-- A collateral function in the case of a court of inquiry and an investigation required to conduct a hearing is to provide a hearing to individuals who have been designated as parties to the investigation.

2. Fact-finding bodies not required to conduct a hearing (investigations not requiring a hearing): normally composed of a single investigator who obtains statements -- rather than taking testimony -- and who is not authorized, in the Navy and Marine Corps, to designate parties.

0102 INVESTIGATION OF SPECIFIC TYPES OF INCIDENTS

A. Generally. The importance of an administrative fact-finding body cannot be stressed enough. It is not only an efficient management tool, but can also be used in a wide variety of situations ranging from the proper disposition of claims to the timely and accurate reply to public inquiry. Various directives establish requirements for the conducting of inquiries into specific matters; the *JAG Manual*, however, is the most inclusive. Some incidents involve conducting an inquiry for several different purposes which can be handled by one investigation; others may not. One must be careful to determine why an investigation is being conducted, who is supposed to conduct it, and whether it will satisfy all requirements or only a portion of them. The following are examples of the various types of investigations.

B. JAGMAN investigations

1. Aircraft accidents. An investigation under JAGMAN, § 0230 is separate and distinct from an aircraft mishap investigation.

2. Vehicle accidents. JAGMAN, § 0231.

3. Explosions. JAGMAN, § 0232.

4. Stranding of a ship of the Navy. *See* appendix A-7 of this text for a checklist. JAGMAN, § 0233.

5. Collisions. In collision cases, be aware of the claims problems -- particularly the admiralty claims regulations found in chapter XII of the *JAG Manual*. *See* appendix A-6 of this text for a checklist. JAGMAN, § 0234.

6. Accidental or intentional flooding of a ship. *See* appendix A-5 of this text for a checklist. JAGMAN, § 0235.

7. Fires. Document significant fires ashore or aboard ship by conducting a JAGMAN investigation. For a definition of "significant" fires, *see* JAGMAN, § 0236. *See* appendix A-4 of this text for a checklist.

8. Loss or excess of government funds or property. JAGMAN, § 0237.

9. Claims for or against the government. *See* appendix A-3 of this text for a checklist. JAGMAN, § 0238; JAGMAN, ch. VIII; JAGINST 5890.1.

10. 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 inactive-duty training (drill, or while traveling directly to or from such duty). JAGMAN, § 0239.

11. Admiralty matters. JAGMAN, ch. XII.

12. Firearm accidents. JAGMAN, § 0240.

13. Pollution incidents. JAGMAN, § 0241(a); JAGMAN, ch. XIII.

14. Combined investigations of maritime incidents. JAGMAN, § 0241(b).

15. Security violations. JAGMAN, § 0241(c).

16. Postal violations. JAGMAN, § 0241(d).

17. Injuries and diseases incurred by servicemembers. *See* appendix A-2 of this text for a checklist. JAGMAN, §§ 0215 - 0224.

18. Quality of medical care reasonably in issue. JAGMAN, §§ 0226a(3), 0805.

19. Redress of damage to property - art. 139 claims. JAGMAN, ch. IV.

20. Death cases. JAGMAN, § 0226.

a. Fact-finding body required. JAGMAN, § 0226a. A fact-finding body must be convened in the following situations:

(1) In any case in which the death of a member of the naval service occurred, while on active duty, from other than a previously known medical condition.

(2) In any case in which civilians or other non-naval personnel are found dead on a naval installation under peculiar or doubtful circumstances, unless the incident is one over which NCIS has exclusive jurisdiction.

(3) In any case involving death, or permanent disability, in which the adequacy of medical care is reasonably in issue.

b. Death as a result of enemy action. No report to the Judge Advocate General (JAG) is required in the case of a death occurring as a result of enemy action. A fact-finding body should be convened, however, and the record forwarded in any case in which it is unclear if enemy action caused death. Because a number of commercial life insurance policies contain certain restrictions and/or certain types of double-indemnity provisions, it is desirable to ensure that the essential facts are recorded while witnesses are known and available. To the extent feasible, the facts reported should permit determinations as to whether death resulted from accidental causes, natural causes, or enemy action. JAGMAN, § 0226d.

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

d. Advance copy. Next of kin are advised that they may request copies of the death investigation from JAG (Code 33). It is most important, therefore, that mature, experienced officers complete these investigations in an accurate, professional, and expeditious manner. Forward an advance copy of each death investigation, with the general court-martial convening authority's endorsement, to JAG. If it would unduly delay submission of the investigation to await a final autopsy report, autopsy protocols, death certificates, or similar documents, submit an initial report promptly upon completion of the investigation. A supplemental report should be submitted via the review chain, with an advance copy to JAG, once the autopsy has been completed. The advance report is usually released to the requesting next of kin by JAG (after exclusion of materials protected by the exemptions to the Freedom of Information/Privacy Acts), unless JAG has been alerted that subsequent reviewers may significantly alter findings, opinions, or recommendations; in which case, release is withheld until the investigative report is finally reviewed.

C. Other directives

1. Safety investigations. OPNAVINST 5100.14.

a. Aircraft accident reports and aircraft mishap investigations. OPNAVINST 3750.6.

b. Accidental injury to personnel. OPNAVINST 5102.1.

c. Automobile accidents. OPNAVINST 5100.12; MCO 5101.8.

2. Admiralty. JAGINST 5880.1.

3. Naval Criminal Investigative Service (NCIS) investigations

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

b. Exclusive NCIS jurisdiction. SECNAVINST 5520.3; OPNAVINST 5450.97.

4. Security violations. OPNAVINST 5510.1.

5. Stolen Government property. SECNAVINST 5500.4.

6. Claims for or against the Government. JAGINST 5890.1.

7. Postal violations. OPNAVINST 5112.6.

8. Environmental matters. OPNAVINST 5090.1A.

D. Investigations required by other regulations. If an investigation is required under the JAGMAN, it must be conducted in addition to any investigation required by other regulations. JAGMAN, § 0208a. Situations in which two investigations may be required are listed in JAGMAN, § 0208b.

1. A JAGMAN investigation is not required if there is no reason for the investigation other than possible disciplinary action. To avoid interference, a JAGMAN investigation should not normally proceed at the same time as a law-enforcement type of investigation by the FBI, NCIS, or local civilian law-enforcement units. JAGMAN, § 0208c.

2. If an investigation is required for other than disciplinary action, the JAGMAN investigating officer should communicate with the law-enforcement personnel, explain the need for the JAGMAN investigation, and request that the police investigators keep the investigating officer informed of what information is obtained. Usually, this simplifies the JAGMAN investigating officer's duties.

PART B - INVESTIGATIONS NOT REQUIRING A HEARING

0103 GENERALLY. The type of fact-finding body to be convened is determined by the purpose(s) of the inquiry, the seriousness of the issues involved, the time allotted for completion of the investigation, and the nature and extent of the powers required to conduct a thorough investigation. This chapter will concentrate on the most common administrative fact-finding body, the investigation not requiring a hearing. Courts of inquiry and investigations requiring a hearing will be discussed in chapter II. Keep in mind, however, that many of the basic rules and principles discussed in this chapter also apply to other types of investigations. As is the case with any fact-finding body, the primary function of an investigation not requiring a hearing is to gather information. A fact-finding body not requiring a hearing does not have the power to designate parties and, therefore, does not have the collateral function of providing a hearing to a party.

0104 AUTHORITY TO CONVENE. Any officer in command may order an investigation not requiring a hearing. For purposes of the JAGMAN, "officer in command" means an officer authorized to convene any type of court-martial or authorized to impose disciplinary punishment under Art. 15, UCMJ, including officers in charge. JAGMAN, § 0204d(1).

0105 RESPONSIBILITY TO CONVENE AN INVESTIGATION. An officer in command is responsible for initiating investigations of incidents occurring within his command or involving his personnel. If an officer in command feels that investigation of an incident by the command is impracticable, another command can be requested to conduct the investigation. JAGMAN, § 0206a.

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 it deploys before an investigation can be completed, another command can be requested to conduct the investigation. This request should be made to the area coordinator in whose geographic area of responsibility the incident occurred. JAGMAN, § 0206b.

B. Incidents involving more than one command. A single investigation should be conducted into an incident involving more than one command, convened by an officer in command of any of the activities involved. If difficulties arise concerning who shall convene the investigation, the common superior of all commands involved will determine who shall convene it. 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 common superior of all the officers involved shall convene the investigation. JAGMAN, § 0206c.

C. Incidents involving Marine Corps personnel

1. When an investigation of a serious injury or death that was the result of a training or operational incident is required, the commander of the organization next senior in the chain of command to the organization involved will consider conducting 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, may be appointed to conduct the investigation without the blessing of the next senior commander. JAGMAN, § 0206e(1).

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 assistance from a Marine commander authorized to convene general courts-martial in the immediate area where the incident occurred. JAGMAN, § 0206e(2).

0106 THE INVESTIGATORY BODY

A. Composition. An investigation not requiring a hearing may be composed of a single investigator or a board consisting of two or more members. The most common is the one-officer investigation. JAGMAN, §§ 0204d(1), 0211a.

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, § 0211a.

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, § 0207a(1).

B. Seniority principle. Unless impracticable, the investigating officer should be senior to any person whose conduct or performance of duty will be subject to inquiry. JAGMAN, § 0211a.

C. Participation by expert. An expert may participate as investigating officer or for the limited purpose of using his special experience. The report should make clear any participation by an expert. JAGMAN, § 0211c.

D. Counsel. Ordinarily, counsel is not appointed for an investigation not requiring a hearing, although a judge advocate is often made available to assist the investigating officer with any legal problems or questions that may arise. JAGMAN, § 0211c.

0107 APPOINTING ORDER

A. General

1. An investigation not requiring a hearing is convened by a written order called an appointing order. The "officer in command" issues this order; however, an officer holding delegation of authority for such purposes from the convening authority may also issue it. For example, the executive officer may order a junior officer to do an investigation based upon the commanding officer's delegation to the executive officer. JAGMAN, § 0204d(1).

2. An appointing order must be in official letter form, addressed to the investigating officer of the one-officer investigation. 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. *See* appendix A-2-C for a sample. JAGMAN, § 0211b.

B. Contents. The written appointing order for a JAGMAN investigation not requiring a hearing will contain:

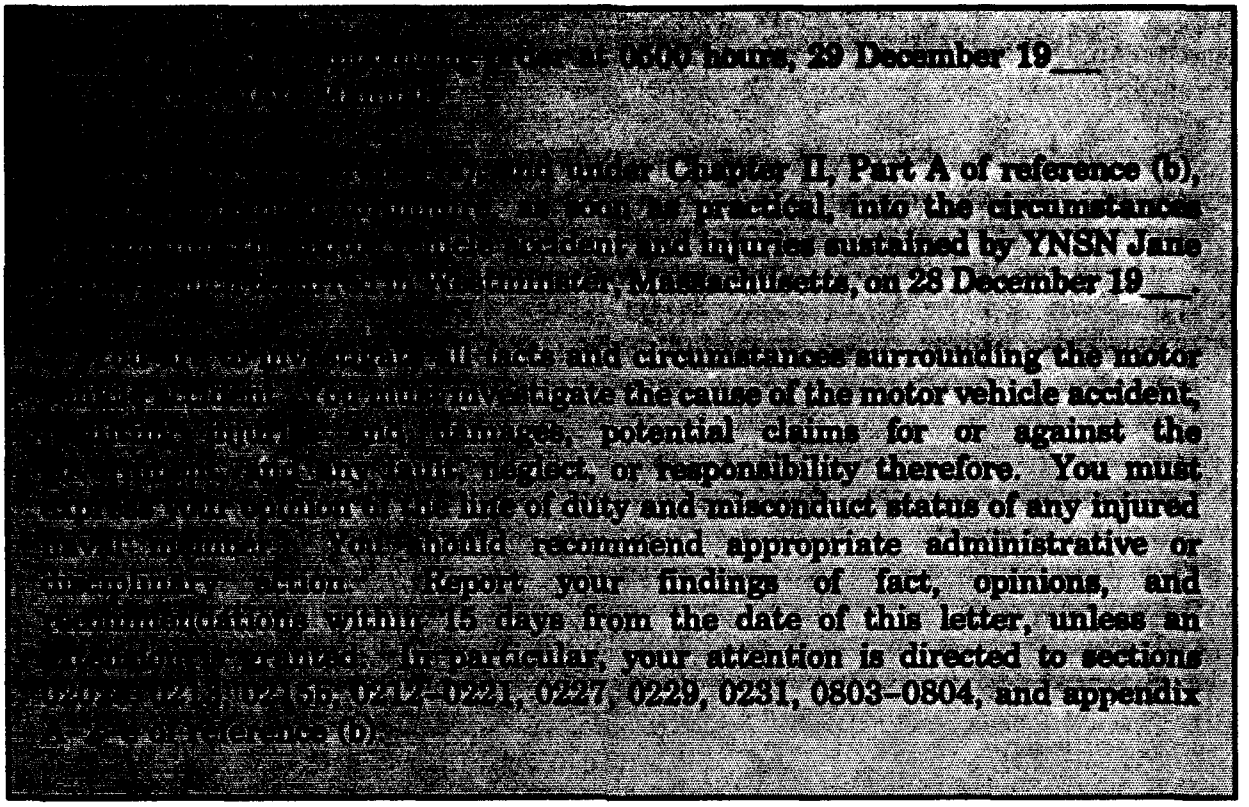
1. Example 1 - subject line:

Subj: INVESTIGATION TO INQUIRE INTO THE CIRCUMSTANCES SURROUNDING 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 which must be done in accordance with OPNAVNOTE 5211, as in example 1.

b. JAGMAN investigations are filed by calendar year groupings, by surname of individual, bureau number of aircraft, name of ship, hull number of unnamed water craft, or vehicle number of Government vehicle.

2. Example 2 - witness warnings, purpose and scope of the investigation:



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. JAGMAN, § 0211c.

(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) JAG may be concerned with a 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.

(1) In the typical investigation not requiring a hearing, the appointing 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:

(a) The resulting damage;

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

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

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

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

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

(2) During the course of the investigation, on advice of the investigative body or on his own initiative, the convening authority may broaden or narrow the scope of the inquiry by issuing supplemental directions amending the appointing order. JAGMAN, § 0211d.

c. Paragraph 2 of example 2 also directs the investigating officer to report opinions and recommendations. Unless specifically directed by the appointing order, opinions or recommendations are not made. The convening authority may require recommendations in general, or in limited subject areas. JAGMAN, § 0211c.

d. The appointing order may direct that testimony or statements of some or all witnesses be taken under oath, and may direct that testimony of some or all witnesses be recorded verbatim. When a fact-finding body

not requiring a hearing takes testimony or statements of witnesses under oath, it should use the oaths prescribed in JAGMAN, § 0212b.

3. Witness warnings. Paragraph 2 of example 2 directs compliance with the Privacy Act (JAGMAN, § 0202e), Art. 31(b) of the UCMJ [JAGMAN, § 0213c(2)], and injury/disease warning (JAGMAN, § 0215b). It also directs the investigating officer to 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, § 0202e(2)] in the course of a JAGMAN investigation when that information will be included in a "system of records" [as defined in JAGMAN, § 0202e(3)]. 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, § 0202e.

-- Social security numbers should not be included in JAGMAN 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, § 0204e(4).

(2) Art. 31, UCMJ. Warn a witness suspected of an offense under Art. 31(b), UCMJ. If prosecution for the suspected offense appears likely, refer to JAGMAN, § 0213c(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 the statutory right 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 JAGMAN 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, § 0215b. Appendix A-2-f 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.

4. Time limits. Paragraph 2 of example 2 directs completion of the investigating officer's report within fifteen days of the date of the appointing order. JAGMAN, § 0202c establishes the following time limits for processing JAGMAN investigations:

a. The convening authority prescribes the time limit the fact-finding body has to submit its investigation. This period should not normally exceed 30 days from the date of the appointing order; however, this period may be extended for good cause. Always include requests and authorizations for extensions as enclosures to the investigation. JAGMAN, § 0202c(1).

b. The convening authority and each subsequent reviewer have 30 days (20 days in death cases) to review the investigation. JAGMAN, § 0202c(2).

-- Reasons for exceeding these time limits must be documented by the responsible endorser, and deviations must be requested and approved in advance by the immediate senior in command who will next review the investigation.

c. 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 limit.

5. Example 3 - attorney work product statement:

> 3. This investigation is appointed in contemplation of litigation and for the express purpose of assisting attorneys representing interests of the United States in this matter. You will contact LCDR Al Bundy, JAGC, USN, for direction and guidance as to those matters pertinent to the anticipated litigation.

-- Example 3 is an "attorney work product statement." This language must be included if the possibility of litigation or a claim for or against the Government exists. JAGMAN, § 0211c.

6. Example 4 - administrative support:

> [redacted], a 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 4 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 4 also addresses the issue of social security numbers. As discussed in 0107B.3.a.(1), above, social security numbers should not be solicited from a witness, but should be obtained from official sources.

7. Example 5 - the following combines examples 1-4 into the required letter format and is the typical appointing order:

DEPARTMENT OF THE NAVY
Naval Justice School
Newport, Rhode Island 02841-5030

5830
Ser OO/333
1 Jan CY

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

Subj: INVESTIGATION TO INQUIRE INTO THE CIRCUMSTANCES SURROUNDING 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 A 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 0202e, 0213, 0215b, 0212-0221, 0227, 0229, 0231, 0803-0804, and appendix A-2-e of reference (b).

3. This investigation is appointed in contemplation of litigation and for the express purpose of assisting attorneys representing interests of the United States in this matter. You will contact LCDR Al Bundy, JAGC, USN, for direction and guidance as to those matters pertinent to the anticipated litigation.

Subj: INVESTIGATION TO INQUIRE INTO THE CIRCUMSTANCES SURROUNDING 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___.

4. 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

8. *See* JAGMAN, § 0211 and appendixes A-2-c & A-2-d for assistance with appointing orders.

0108 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 appointing 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 appointing order. Most importantly, however, the investigating officer should begin work on the investigation immediately upon notification of appointment, whether or not a formal appointing 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 one or more of the parties was injured, would involve: interviews at the hospital with the injured parties; collection of hospital records and police records; eyewitness accounts; vehicle damage estimates; mechanical evaluation; inspection of the scene; and other matters required by JAGMAN §§ 0215-0224, 0227, & 0231. 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 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 an investigation not requiring a hearing is that the interviewing of witnesses may be done at different times and places, rather than at a formal hearing. JAGMAN, § 0213.

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, §§ 0213a & 0213c.

-- 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 JAGMAN investigation; however, the enclosures, which

frequently comprise the bulk of an NCIS investigation, can be used. The JAGMAN investigation should not interfere with the completion of the NCIS investigation; therefore, it is advisable that the investigating officer wait until NCIS completes its investigation before obtaining a copy for use of the statements gathered by NCIS. JAGMAN, §§ 0208c & 0214f.

b. Aircraft mishap investigative reports. Aircraft accidents are investigated by one or more investigative bodies under existing instructions and legal requirements. For the sole purpose of safety and accident prevention, the Chief of Naval Operations issues special instructions for the conduct, analysis, and review of investigations of aircraft mishaps (OPNAVINST 3750.6). These investigations are known as Aircraft Mishap Investigation Reports (AMIR's). Because these investigations are directed toward safety problems, confidentiality is essential in order to allow personnel to be as honest as possible when giving statements; therefore, statements obtained in AMIR's will not be available to the investigating officer from any official source. Investigating officers from both the aircraft safety investigation and the JAGMAN investigation, however, should have equal access to all real evidence and have separate opportunities to question and obtain statements from all witnesses. OPNAVINST 3750.16 and JAGMAN, § 0230.

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 JAGMAN investigative report; however, if essential for a complete understanding of the incident, the location of the polygraph report should be cross-referenced in the report. JAGMAN, § 0214f.

f. Medical quality assurance investigations. A Naval Hospital will conduct its own investigation (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 JAGMAN investigation.

E. Types of evidence. Photographs, records, operating logs, pertinent directives, watchlists, 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 will ensure that all evidence is properly preserved and safeguarded until the investigation is complete and all relevant actions have been taken. JAGMAN § 0213c(1).

1. Photographs and videotapes. Photographs and videotapes which have sufficient clarity to depict actual conditions are invaluable as evidence. Although, in some instances, color photos present the best pictorial description, they are more difficult to reproduce and normally require more time to develop; therefore, it may be more prudent to utilize black-and-white film. Polaroid prints offer instant review to ensure that the desired picture is obtained, but are somewhat 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 should 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. Lurid or morbid photographs and videos that serve no useful purpose should not be taken. JAGMAN, §§ 0209d & 0229d.

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 § 0213c(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 appointing 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 (such as pretrial investigations). 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 appointing order and the requirements in the JAGMAN, Chapter II, Part B, 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.

0109 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 appointing 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, § 0211d.

0110 INVESTIGATIVE REPORT

A. General. JAGMAN, § 0214. The investigative report, submitted in letter form, shall consist of:

1. A list of enclosures;
2. a preliminary statement;
3. findings of fact;
4. opinions;
5. recommendations; and
6. enclosures.

B. Example 6 - 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 § 0215b 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 6, 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, § 0214f.

2. Include any requests for extensions of time for submission as enclosures, in addition to letters granting or denying such requests.

3. JAGMAN, § 0229a 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 6).

4. Enclosures are listed in the order referenced in the investigation. JAGMAN, § 0214f.

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

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

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

8. The signature of the investigating officer on the investigative report letter serves to authenticate all of the enclosures. JAGMAN, § 0214f.

C. Example 7 – preliminary statement:

PRELIMINARY STATEMENT

1. Pursuant to enclosure (1), and in accordance with reference (a), a one-officer JAGMAN investigation not requiring a hearing 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.

2. While certain minor conflicts appear in the evidence, none was of [illegible]

3. [illegible] of the original [illegible]

4. All social security numbers were obtained from official sources and not [illegible] servicemembers.

5. [illegible] being prepared in contemplation of litigation and for the express purpose of assisting attorneys representing interests of the United States in this matter.

6. 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, § 0214b.

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 appointing 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 and the reasons for any delay;

(4) if the evidence in the enclosures is in any way contradictory, a factual determination in the findings-of-fact section along with an explanation of the basis for that determination (this explanation should be reserved for material facts);

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

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

(7) an attorney work product statement (*see* para. 4 of example 7) when a claim, or litigation by or against the United States, is reasonably possible (JAGMAN, §§ 0211c, 0214b); and

(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 <u>not necessary</u> for the investigating officer to provide an outline of the method used to obtain the evidence contained in the report. JAGMAN, § 0214b.

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 a car accident, findings of fact must describe the car, time, place of accident, identity of the person, and other relevant information. JAGMAN, § 0214b.

D. <u>The "ROYAL RUMBLE"</u>. 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 <u>something that is or happens</u> (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 8 - 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, § 0214c.

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. (X) and, in the findings of fact, state: "The car ran over Seaman Smith's foot," referencing encl. (X) as in example 8. When read together, the findings of fact should tell the whole story of the incident without requiring reference back to the enclosures. JAGMAN, § 0214c.

3. Burden 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, § 0213b(1).

b. Clear and convincing. In order to find that the acts of a deceased member may have caused harm and/or loss of life, including his own, through intentional acts, findings of fact relating to those issues must be established by clear and convincing evidence. Clear and convincing means a degree of proof beyond the preponderance of evidence discussed above. It is proof which should:

(1) Leave no reasonable doubt in the minds of those considering the facts; and

(2) create a firm belief or conviction.

It is that degree of proof that is intermediate, being more than a preponderance, but not reaching the extent of certainty as beyond any reasonable doubt. JAGMAN, § 0213b(2).

4. Checklists. To ensure complete findings of fact, the investigating officer should use the appointing 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 0215, injuries to servicemembers;

b. section 0231, vehicular accidents; and

c. section 0238 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:

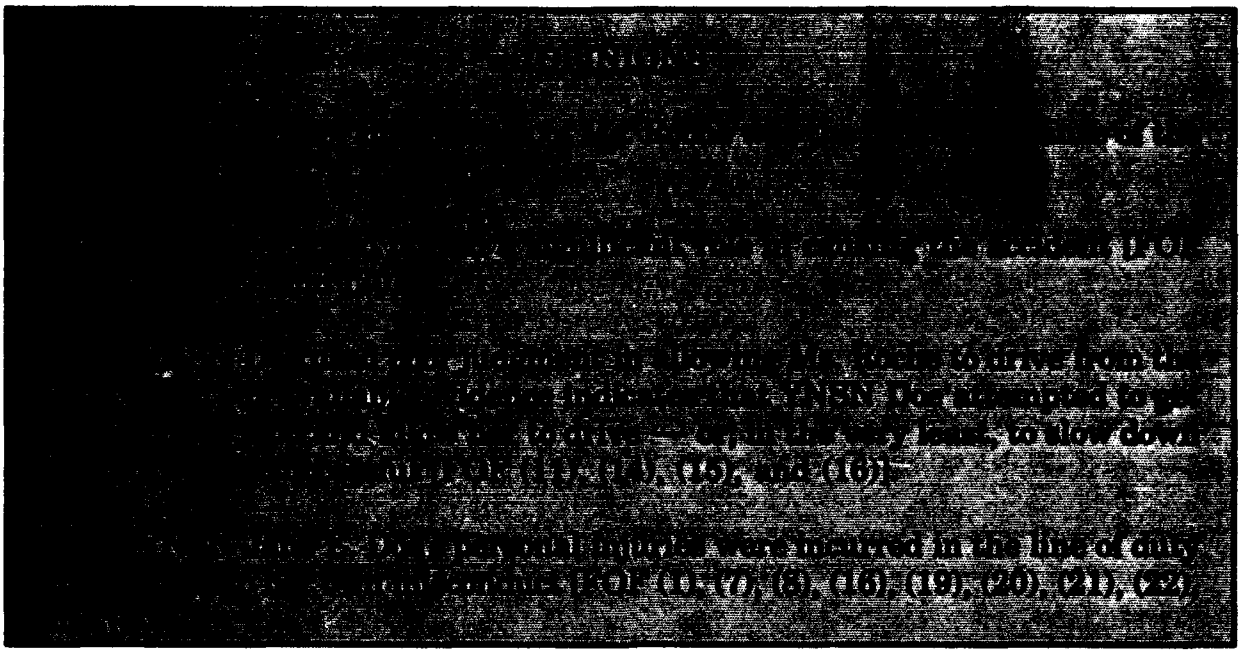
a. Problem. The enclosures in an investigation reveal the following information. Mr. A states: he had seen a vehicle speeding by him at 90 mph; he was almost hit by the car; he does not own a car, is 80 years old, and has not driven since 1945 [encl. (4)]. Mr. B, an off-duty police officer, states that, 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."

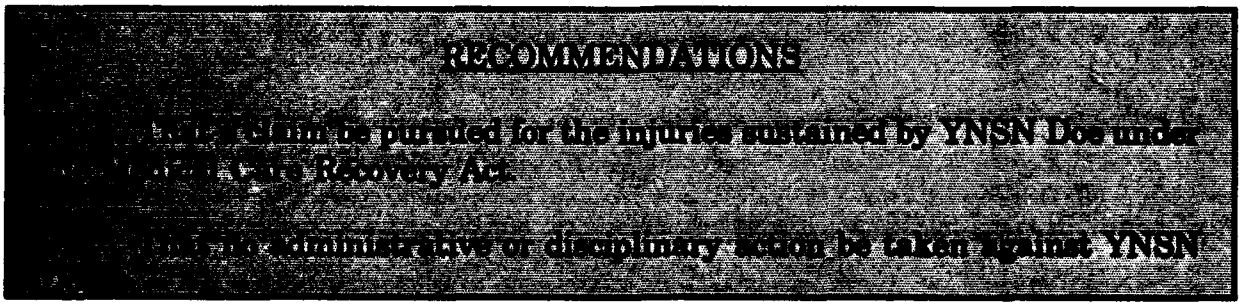
d. Only rarely will the conflict in evidence or the absence of it prevent the investigating officer from making a finding of fact in a particular area. Thus, this should not be used as a way for the investigating officer -- who is either unwilling to evaluate the facts or too lazy to gather the necessary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

F. Example 9 - opinions:



-- 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 9 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, § 0214d.

G. Example 10 - recommendations:



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, § 0214e.

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

a. If trial by court-martial is recommended, submit a unsigned, charge sheet as an enclosure to the investigative report. Unless specifically directed by proper authority, an investigating officer must not prefer or notify an accused of the charges. (JAGMAN, § 0214e requires a signed charge sheet, recent MCM changes have now caused the speedy trial clock to start on preferral.)

b. If a punitive letter of reprimand or admonition is recommended, prepare a draft of the recommended letter and submit it with the investigative report. JAGMAN, §§ 0114c & 0209c.

c. If a nonpunitive letter is recommended, a draft is not included in the investigation, but should be forwarded to the appropriate authority separately for issuance. JAGMAN, §§ 0105b(2) & 0209c.

d. If an award is recommended, draft the appropriate citation and include it as an enclosure.

H. Example 11, following, is an example of a completed JAGMAN investigative report (without enclosures). JAGMAN, app. A-2-e 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: INVESTIGATION TO INQUIRE INTO THE CIRCUMSTANCES SURROUNDING 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, § 0215b 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 one-officer JAGMAN investigation not requiring a hearing 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.

Subj: INVESTIGATION TO INQUIRE INTO THE CIRCUMSTANCES SURROUNDING 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___

4. This investigation is being conducted and this report is being prepared in contemplation of litigation and for the express purpose of assisting attorneys representing interests of the United States in this matter.

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

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)].

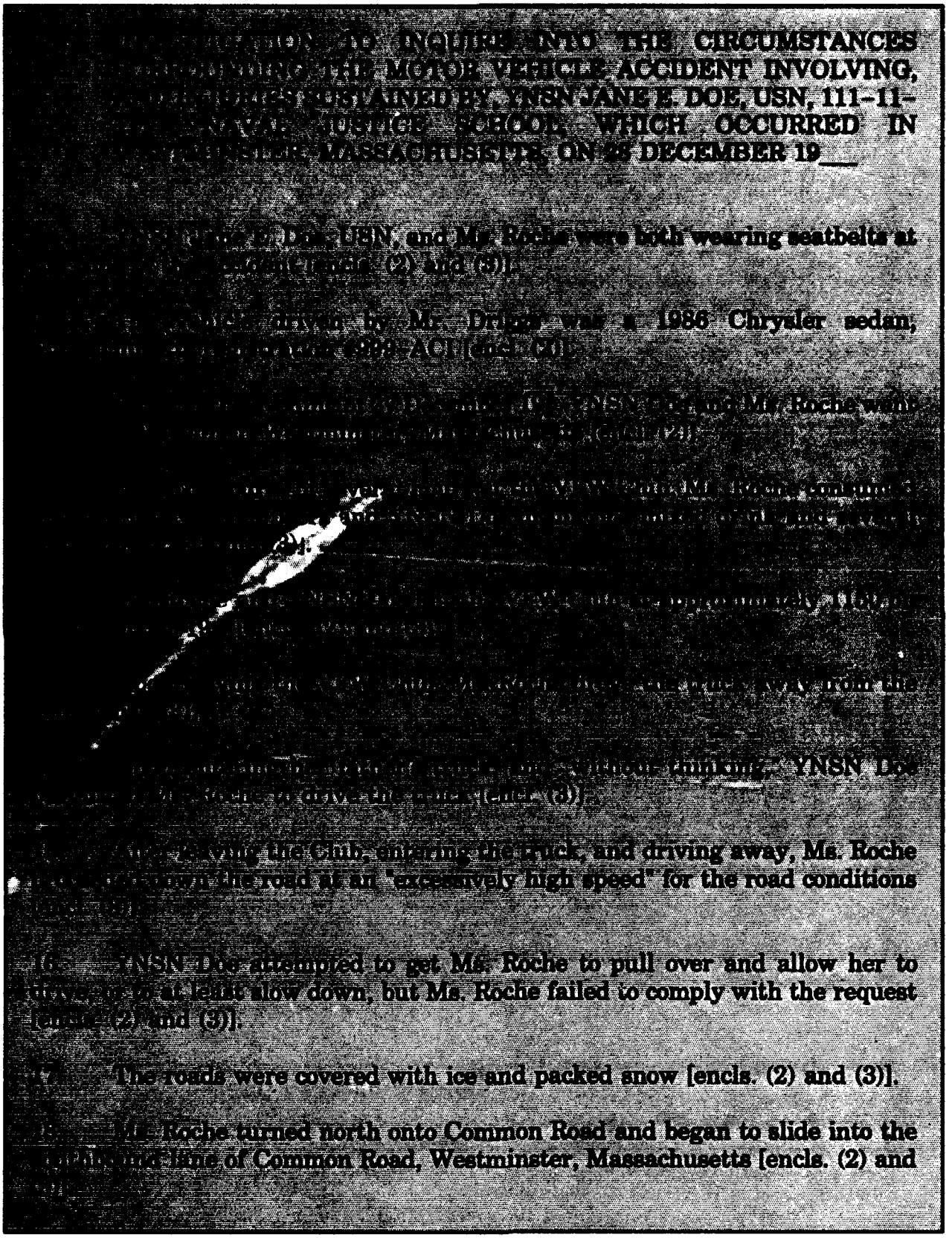
3. At the time of the motor vehicle accident, the vehicles involved were being driven by Ms. Paula Roche of 165 Center Lane, South Ashburnham, Massachusetts, and Mr. Gary S. Driggs of Vino Street, New Braintree, Massachusetts [encl. (2)].

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)].



...TO INQUIRE INTO THE CIRCUMSTANCES ... MOTOR VEHICLE ACCIDENT INVOLVING, ... SUSTAINED BY, YNSN JANE E. DOE, USN, 111-11-... NAVAL JUSTICE SCHOOL, WHICH OCCURRED IN ... MASSACHUSETTS, ON 25 DECEMBER 19___

... Doe, USN, and Mr. Roche were both wearing seatbelts at ... [encls. (2) and (3)].

... driven by Mr. Driver was a 1986 Chrysler sedan, ... 999-ACI (encl. (2)).

... YNSN Doe and Mr. Roche were ...

... Mr. Roche ...

... YNSN Doe ...

... YNSN Doe ... (encl. (3)).

... the Club, entering the truck, and driving away, Ms. Roche ... the road at an "excessively high speed" for the road conditions ...

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

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

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

Subj: INVESTIGATION TO INQUIRE INTO THE CIRCUMSTANCES SURROUNDING 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___

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)].

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 19CY, a period of 12 days [encl. (4)].

26. The cost of 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)].

INVESTIGATION TO INQUIRE INTO THE CIRCUMSTANCES SURROUNDING 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__

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)].

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, § 0202d.

0111 ACTION BY THE CONVENING AND REVIEWING AUTHORITIES

A. Review and forwarding. JAGMAN, § 0209. The investigating officer submits the JAGMAN investigative report to the convening authority, who reviews it and transmits it by endorsement to the appropriate superior officer. The endorsement will:

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

2. forward the record, setting forth appropriate comments, recording approval or disapproval, in whole or in part, of the 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 12 - first endorsement on JAGMAN investigative report:

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: Judge Advocate General
Via: Commander, Naval Education and Training Center, Newport

Subj: INVESTIGATION TO INQUIRE INTO THE CIRCUMSTANCES SURROUNDING 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___

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 13 - 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 12 would read:

Example 14 - 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.

C. Disciplinary action. Whenever punitive or nonpunitive disciplinary action is contemplated or taken respecting an individual as a result of the incident under inquiry, the action shall be noted in the endorsement of the convening

authority. Disciplinary action should be taken in a timely manner and should not await the concurrence of higher authority. JAGMAN, § 0209c.

D. Intermediate routing. After the convening authority endorses the investigative report, it is made available to all superior commanders in both administrave and operational chains of command who having a direct official interest in the recorded facts. The subject matter and facts found will dictate the routing of the report. Include area coordinators, or comparable authorities of shore-based activities, as via addressees on the investigative report if the investigation relates to a subject matter affecting their area coordination, command responsibility, or claims adjudicating authority unless they direct otherwise. JAGMAN, § 0209.

-- The reviewing authority endorses the report similar to the convening authority, with one addition: The reviewing authority may forward the report indicating that it contains no direct official interest to the authority. JAGMAN, § 0209b(1).

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

F. Special routing

1. General. Except as provided in JAGMAN, § 0210b, the complete original record or report of every JAGMAN investigation is routed to the Judge Advocate General (JAG), Department of the Navy, 200 Stovall Street, Alexandria, Virginia 22332-2400. JAGMAN, § 0210a.

2. Investigations requiring special routing -- JAGMAN, § 0210b:

a. Medical investigations in which the adequacy of medical care is reasonably in issue and involve significant potential claims, permanent disability, or death;

b. claims for or against the government (including article 139 claims for redress of injuries);

c. loss of government funds/property (where accountable officer involved);

d. security violations;

e. Marine Corps incidents that are forwarded via the Commandant, including:

(1) Incidents that may result in extensive media coverage;

(2) training and operational incidents causing death or serious injury;

(3) incidents involving lost, missing, damaged, or destroyed Marine Corps property;

(4) incidents involving officer misconduct;

(5) incidents or investigations that may require Headquarters Marine Corps action;

(6) incidents required to be reported to Headquarters Marine Corps by other directives; and

(7) those in which an advance copy of the investigation was forwarded via the Commandant to JAG.

G. Copies

1. Forward one complete copy of the investigation with the original for each intermediate reviewing authority, and an additional copy for JAG. JAGMAN, § 0210c.

-- In cases involving death or injury to servicemembers, JAG receives the original and three copies. JAGMAN, § 0210c.

2. When certain types of incidents are investigated, forward advance copies of the investigative report as soon as possible. Investigations requiring advance copies are:

a. Admiralty cases;

b. collisions;

c. loss or stranding of a ship;

d. postal losses;

e. serious incidents;

f. death/serious injury;

g. material property damage; and

h. claims investigations.

3. In all cases where it is appropriate to forward an advance copy of an investigation to JAG, the advance copy shall be forwarded by an officer exercising general court-martial convening authority and shall include that officer's endorsement. JAGMAN, § 0209c(1).

4. All advance copies of Marine Corps investigations shall be forwarded to JAG via the Commandant after endorsement by an officer exercising general court-martial convening authority. JAGMAN, § 0209c(2).

H. Releasing investigations. Convening and reviewing authorities are not authorized to release JAGMAN investigations. The Chief of Naval Operations (OP-09N) is the release authority for investigations involving classified information and the Judge Advocate General is the release authority for all other JAGMAN investigations.

APPENDIX A

CHECKLIST FOR INVESTIGATING OFFICERS

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 appointing order.

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

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

___ 1. The appointing 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. (*See*, Section 11 B for a list).

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 the 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, § 0215b.

___ 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.

___ 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 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.

___ 2. If a possible claim is involved, include the appropriate "attorney work product" language required by JAGMAN, §§ 0211c & 0214c.

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 appointing 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.

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 appointing order or the JAGMAN and any others considered appropriate.

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

___ a. **Include an <u>unsigned</u> charge sheet with the investigation. <u>Do not</u> prefer charges unless directed to do so by proper authority.**

___ b. Draft a punitive letter of reprimand, if recommended.

E. ENCLOSURES:

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

___ a. Appointing 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 II

COURTS OF INQUIRY AND INVESTIGATIONS REQUIRED TO CONDUCT A HEARING

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CHAPTER II

COURTS OF INQUIRY AND INVESTIGATIONS REQUIRED TO CONDUCT A HEARING

PART A - PARTY TO AN INVESTIGATION

0201 PARTIES. Other than conducting a hearing, the common thread that runs between a court of inquiry and an investigation required to conduct a hearing is the concept of "parties."

A. Definition. A "party" is a person subject to the UCMJ who has properly been designated as such in connection with a court of inquiry or an investigation required to conduct a hearing whose conduct is the subject of the inquiry or who has a direct interest in the inquiry. Upon request, an employee of the Department of Defense having a direct interest in the subject of the inquiry must be designated as a party. Designation as a party affords that individual a hearing on possible adverse information concerning him. JAGMAN, § 0205a; JAGINST 5830.1.

1. Subject of 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, § 0205b.

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

a. The findings, opinions, or recommendations may, in view of his relation to the incident or circumstances under investigation, reflect questionable or unsatisfactory conduct or performance of duty; or

b. the findings, opinions, or recommendations may relate to a matter over which the person has a duty or a right to exercise control. JAGMAN, § 0205c.

B. Who may designate. The convening authority of the court of inquiry or investigation required to conduct a hearing may designate parties, or the fact-finding body may be expressly authorized by the convening authority to designate parties. JAGMAN, § 0204; JAGINST 5830.1.

C. Rights of a party. A person designated as a party before a court of inquiry or an investigation required to conduct a hearing, has the following rights:

1. To be given due notice of such designation [JAGMAN, § 0204d(1)];

2. to be present during the proceedings, except when the investigation is cleared for deliberations [JAGMAN, § 0204d(2)];

3. to be represented by counsel [JAGMAN, § 0204d(3)];

-- 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 Art. 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 [JAGMAN, § 0204d(4)];

6. to object to the testimony of witnesses and to cross-examine witnesses other than his own [JAGMAN, § 0204d(5)];

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 [JAGMAN, § 0204d(6)];

9. to testify at his own request, but not be called as a witness [JAGMAN, § 0204d(7); JAGINST 5830.1, encl. (1), para. 9d(9); encl. (2), para. 9d(9)];

10. to refuse to incriminate himself and, if accused or suspected of an offense, to be informed of the nature of the accusation and advised that 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 [JAGMAN, § 0204d(8)];

11. to make a voluntary statement, oral or written, sworn or unsworn, to be included in the record of proceedings [JAGMAN, § 0204d(9); 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 [JAGMAN, § 0204d(10)];

13. to be properly advised concerning the Privacy Act of 1974 [JAGMAN, § 0204d(11)]; and

14. to challenge members of the court of inquiry and the investigating officer or, when assigned, the president and any member of the investigation required to conduct a hearing for cause [JAGMAN, § 0204d(12)].

D. Chart. The following chart sets forth the circumstances under which particular fact-finding bodies may designate parties as well as who may be designated (e.g., military and/or civilian personnel). JAGMAN, §§ 0205, 0204; JAGINST 5830.1.

COURT OF INQUIRY

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

INVESTIGATIONS REQUIRED TO CONDUCT A HEARING

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

PART B - FACT-FINDING BODIES REQUIRED TO CONDUCT A HEARING

0202 COURT OF INQUIRY. The court of inquiry is the traditional means by which serious military incidents have been 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.

-- 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, § 0204b(1); Art. 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, § 0204b(2); Art. 135(b), UCMJ; JAGINST 5830.1, encl. (1), para. 3a].

3. Legal counsel, certified under article 27(b) and sworn under article 42(a), appointed for the court and under the direct supervision of the president of the court, assists in 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 of inquiry. JAGMAN, § 0204b(2); JAGINST 5830.1, encl. (1), para. 2b(3).

4. The court is convened by written appointing order, the contents of which are much the same as those discussed in Chapter I. The required contents, along with an example, can be found in JAGINST 5830.1, encl. (1), para. 4, and encl. (3).

5. All testimony is under oath (except for a person designated as a party who may make an unsworn statement) and transcribed verbatim. JAGMAN, § 0204b(3); Art. 135(f), UCMJ; JAGINST 5830.1, encl. (1), paras. 10e(1) and 14.

6. Using a formal hearing procedure, 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. JAGMAN, § 0204b(4); JAGINST 5830.1, encl. (1), para. 10.

a. Although a court of inquiry uses a formal hearing procedure, it is administrative not judicial. Therefore, as in any other administrative fact-finding body, 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.

b. The court is held to the same burdens of proof, "preponderance of evidence" and "clear and convincing," as discussed in Chapter I of this study guide.

7. A person subject to the UCMJ whose conduct is subject to inquiry must be designated a party. JAGMAN, §§ 0204b(5), 0205; JAGINST 5830.1, encl. (1), para. 9.

8. Upon request, a person subject to the UCMJ (or a DoD employee who has a direct interest in the subject of inquiry) must be designated a party. JAGMAN, §§ 0204b(6), 0205; JAGINST 5830.1, encl. (1), para. 9.

9. 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, § 0204b(7); R.C.M. 703(e)(2); JAGINST 5830.1, encl. (1), para. 12.

0203 INVESTIGATIONS REQUIRED TO CONDUCT A HEARING. The investigation required to conduct a hearing is intended to be an intermediate step between an investigation not requiring a hearing and a court of inquiry. 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.

-- Principal characteristics. The principal characteristics of an investigation required to conduct a hearing are listed below.

1. The investigation is convened by any person authorized to convene a general or special court-martial. JAGMAN, § 0204c(1); JAGINST 5830.1, encl. (2), para. 2.

2. It consists of one or more commissioned officers. JAGMAN, § 0204c(2).

-- The investigation 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 investigation required to conduct a hearing. 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 of an investigation required to conduct a hearing. It 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. 0202 A.3, above). JAGMAN, § 0204c(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. All testimony is under oath and all proceedings are transcribed verbatim. JAGMAN, § 0204c(3); JAGINST 5830.1, encl. (2), paras. 10e(2) and 14b.

6. A formal hearing procedure, similar to the court of inquiry, is used (*see* sec. 0202, A.6, above). JAGMAN, § 0204c(4); JAGINST 5830.1, encl. (1), para. 10.

7. The convening authority may designate those persons whose conduct is subject to inquiry or who have a direct interest in the subject of inquiry as parties in the convening order. JAGMAN, §§ 0204c(5), 0205; JAGINST 5830.1, encl. (2), para. 9.

8. The convening authority may authorize the fact-finding body to designate parties during the proceedings. JAGMAN, §§ 0204c(6), 0205; JAGINST 5830.1, encl. (2), para. 3d(6).

9. Unless convened to investigate a claim under Art. 139, UCMJ, and JAGMAN, chapter IV, an investigation does not possess the power to subpoena civilian witnesses. JAGMAN, § 0204c(6); JAGINST 5830.1, encl. (2), para. 12(a).

0204 USES OF THE RECORD OF INVESTIGATION

A. Nonjudicial punishment (NJP)

1. 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, 0209c; JAGINST 5830.1, encl. (1), para. 9d(1); encl. (2), para. 9d(1).

2. 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, 0209c; JAGINST 5830.1, encl. (1), para. 9d(1); encl. (2), para. 9d(1).

B. 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, at the pretrial investigation, the subject matter of the offense was investigated, the accused was present at the investigation and was afforded the opportunity for representation, cross-examination, and presentation of evidence. If a court of inquiry is used in place of an article 32 investigation, the accused can demand to recall witnesses for further

cross-examination and to offer any new evidence on his own behalf. Normally, the convening of a separate article 32 investigation is the most efficient method for bringing an accused to trial. JAGMAN, § 0209c; JAGINST 5830.1, encl. (1), para. 9d(3); Art. 32(c), UCMJ; R.C.M. 405(b).

C. Use of testimony. Sworn testimony contained in the record of proceedings of a court of inquiry or investigation required to conduct a hearing 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 Art. 50, UCMJ, and Mil. R. Evid. 804. JAGINST 5830.1, encl. (1), para. 9d(4); encl (2), para. 9d(3).

D. 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. 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.

PART C - SELECTION OF FACT-FINDING BODIES

0205 PRELIMINARY CONSIDERATIONS. Deciding which type of fact-finding body to convene depends upon the purpose of the inquiry, the relative seriousness of the subject under inquiry, the complexity of the factual issues involved, the time allotted for completion of the investigation, and the nature and extent of powers required to conduct the investigation. The type of fact-finding body selected is left to the judgment and discretion of the officer in command. Before convening an investigation, the convening authority must consider the powers the fact-finding body will require and the desirability of designating parties. If the subject of the inquiry involves disputed issues of fact and a risk of substantial injustice if an individual is not afforded the rights of a party, a court of inquiry or an investigation required to conduct a hearing should be ordered. If the ability to subpoena witnesses is necessary, a court of inquiry should be convened.

0206 MAJOR INCIDENTS. If the subject of the investigation is a major incident, a court of inquiry should be convened. For less serious cases, an investigation not requiring a hearing will normally be adequate.

A. Major incidents defined. Section 0202a(3) of the JAG Manual 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

-- "If at any time during the course of an investigation into a major incident 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, § 0207b(4).

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.

4. 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 of inquiry or investigation required to conduct a hearing as the appropriate means of investigating the incident. JAGMAN, § 0226c(2).

C. Cognizance over major incidents. The first flag or general officer exercising general court-martial convening authority over the incident or in the chain of command, or any superior flag or general officer, will take immediate control over the case as the convening authority. If the convening authority determines that an incident initially considered major is not, or that a court of inquiry is not warranted under the circumstances, those conclusions must be reported to the next flag or general officer in the chain of command before any other type of investigation is convened. JAGMAN, §§ 0207b(2) and (3).

D. Preliminary investigation of major incidents. Because investigating major incidents is sometimes complicated by the premature appointment of a board of inquiry or investigation required to conduct a hearing, the convening authority may wish to initially convene a one-officer investigation not required to conduct a hearing to immediately begin to collect and preserve evidence and locate and

interview witnesses. In order to decide which course of action to pursue, the convening authority should set a specific date for the investigating officer to submit an interim oral report. Summaries of testimony or evidence developed by the investigating officer may be used as an aid by any subsequent investigative body, and the initial investigating officer may be detailed to assist the fact-finding body.

E. Convening authority support

1. Courts of inquiry and investigations required to conduct a hearing are only used to investigate the most serious incidents. These incidents frequently have extraordinary media and congressional interest, and considerable pressure is often exerted to complete the investigation in a limited period of time. Because of the nature of these investigations, convening authorities are tasked with providing support for the investigation. Personnel assigned to support these investigations are under the command of the president of the court of inquiry or the investigating officer in an investigation requiring a hearing. The investigation becomes the primary duty of all support personnel.

2. The following types of support will be provided when appropriate:

a. Technical advisers;

b. court reporters;

c. interpreters;

d. evidence custodians;

e. security;

f. administrative support personnel;

g. public affairs officers; and

h. messages. If the investigation requires transmitting or receiving information electronically, it may be necessary to assign a temporary plain language address to ensure that information sent or received is not widely disseminated. JAGINST 5830.1.

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, the commanding officer is required to inquire into certain cases of injury, disease, or death incurred by members of his command. When these inquiries are conducted, the commanding officer is required to make what is 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.

A. Responsibility to convene. Normally, the commanding officer of the servicemember involved is responsible for making the determination as to the type of, and necessity for, inquiry required.

1. If a servicemember is injured and admitted to a naval hospital, the commanding officer of the naval hospital shall, if no investigation has been ordered, report the matter to the local area coordinator or other comparable authority who shall take action to cause an investigation to be conducted. JAGMAN, § 0206d.

2. Section 0105 of the Civil Law Study Guide and section 0206 of the *JAG Manual* describe when investigations are convened by a command other than the servicemember's.

B. Why LOD/misconduct determinations are required. 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.

0302 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, § 0215.

B. Death. Opinions concerning line of duty are prohibited in death cases. Misconduct, as defined in JAGMAN, § 0218, 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, § 0226b(1).

-- Because Federal agencies (especially the Department of Veterans' Affairs) must make determinations with respect to survivor benefits, all significant and relevant facts shall be recorded in a timely manner when the command is required to investigate the death of a member. JAGMAN, § 0226b(1).

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, § 0239.

0303 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, § 0217b.

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 evidence offered in support of a proposition then 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 when the question has been raised requires clear and convincing evidence. Clear and convincing means a degree of proof beyond the preponderance of evidence discussed above, should leave no reasonable doubt in the minds of those considering the facts, and should create a firm belief or conviction. It is that degree of proof that is intermediate, being more than a preponderance, but not reaching the extent of certainty as beyond any reasonable doubt. JAGMAN, § 0213b(2).

0304 WHAT CONSTITUTES LINE OF DUTY

A. Presumption. Sections 0217a and c 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. 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, §§ 0217a(3), 0217d(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 his 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, § 0217d(2).

2. while confined under sentence of a court-martial that included an unremitted dishonorable discharge [JAGMAN, § 0217a(4)];

3. while confined under sentence of a civil court following conviction of an offense that is defined as a felony by the law of the jurisdiction where convicted [JAGMAN, § 0217a(5)];

4. while avoiding duty by deserting the service [JAGMAN, § 0217a(2)]; or

5. as a result of the member's own misconduct, as defined in JAGMAN, § 0218 [JAGMAN, § 0217a(1)].

0305 WHAT CONSTITUTES MISCONDUCT

A. Presumption. Sections 0218a and b 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 his own misconduct unless there is clear and convincing evidence that:

1. The injury was intentionally incurred; or

2. the injury was the result of grossly negligent conduct that 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. Gross negligence: 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, § 0218a.

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." JAGMAN, § 0219a.

C. Special rules

1. Intoxication - JAGMAN, § 0221a. 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 clear showing that the following three elements existed:

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

(2) the extent of such impairment; and

(3) 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. Careful attention must be paid to the facts of each case, especially when the blood alcohol content of the injured member is above that constituting a legal state of intoxication in the particular jurisdiction (normally 0.10% BAC). A showing of a blood alcohol level of above .10 mg/dl will, in many cases, be sufficient to satisfy the first two elements; however, additional evidence should be sought in determining whether or not there existed any physical impairment which directly contributed to the injury of the servicemember. 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.

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, § 0221b.

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, § 0222a.

4. Venereal disease. Any disability resulting from venereal disease is the result of misconduct if the member has not complied with the regulations that require reporting and receiving treatment for such disease. JAGMAN, § 0222b.

D. Mental responsibility. A member may not be held responsible for his acts and their foreseeable consequences if, as the result of a mental defect, disease, or derangement, he was unable to comprehend the nature of such acts or to control his actions. In the absence of evidence to the contrary, it is presumed that all persons are mentally responsible for their acts. JAGMAN, §§ 0220a 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, § 0220c.

-- 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, § 0229i.

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, § 0220c.

0306 RELATIONSHIP BETWEEN MISCONDUCT AND LINE OF DUTY

A. Determinations. There are only three possible determinations. JAGMAN, § 0219b.

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, § 0223.

0307 RECORDING LOD/MISCONDUCT DETERMINATIONS. The inquiry into, and findings concerning, injuries or disease can be recorded in one of three ways:

A. Health and dental record entries - JAGMAN, § 0224a. Use health and dental record when:

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

2. the medical representative and commanding officer agree that the injury or disease:

a. is not likely to result in permanent disability, and

b. was incurred "in line of duty" and "not as a result of the member's own misconduct."

B. Form reports - JAGMAN, § 0224b.

1. Use an injury report form (NAVJAG Form 5800/15) when all of the following conditions are met:

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

b. in the opinion of the medical officer, a permanent or permanent partial disability will likely result; and

c. a fact-finding body is not required under the *JAG Manual* and is not otherwise contemplated.

2. In any case, even if a health and dental record entry would suffice, a form report may be made to the Judge Advocate General if there appears to be any reason for maintaining a record in that office.

3. Send the form report to JAG via a general court-martial convening authority for review. (JAG returns many forms, either because they are not filled in as required or they were not forwarded via the general court-martial convening authority or the Commandant of the Marine Corps, as appropriate.)

4. Self-inflicted injuries. Never use a form report when an injury is self-inflicted, either intentionally or accidentally, since a finding of misconduct often results in either case.

C. JAGMAN investigation - JAGMAN, § 0224c. A fact-finding body must be convened, and the commanding officer must make findings concerning misconduct and line of duty in any case in which:

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

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

3. there is a reasonable chance of permanent disability, and the commanding officer considers the appointment of a fact-finding body the appropriate means to ensure an adequate official record is made concerning the circumstances surrounding the incident; or

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

0308 ACTION BY REVIEWING AUTHORITIES

A. Convening authority's action. The convening authority must specifically comment on the LOD/misconduct opinion and take one of the following actions:

1. The convening authority must approve, disaprove, or modify the opinion expressed by the fact-finding body by simply stating his conclusion in the endorsement; or

2. 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" and due to the member's own misconduct, the member may be (this is not a requirement) afforded an opportunity to submit any desired information. JAGMAN, § 0225a(2).

a. If provided the opportunity to submit additional information, the member shall be advised that:

(1) No statement against his interest relating to the origin, incurrence, or aggravation of any disease or injury suffered need be made [JAGMAN, §§ 0215b, 0225a(2)(a)]; and

(2) if the member is suspected of having committed an offense, he shall be so advised, as required by Art. 31(b), UCMJ [JAGMAN, §§ 0213c(2), 0225a(2)(b)].

b. If the member elects not to provide further information, that election shall be set forth in the reviewing authority's endorsement.

B. Service record entries. The convening authority should ensure that appropriate time lost, enlistment extension, and similar entries are made in service and/or medical records before forwarding the report of investigation of an injury concluded to have been incurred not in line of duty. In the event the NLOD opinion is later disapproved by the officer exercising general court-martial convening authority, corrective entries can be made at that time.

0309 FORWARDING. Unless the convening authority is empowered to convene general courts-martial, the record or report shall be forwarded to an officer exercising general court-martial jurisdiction. JAGMAN, § 0225b.

A. General court-martial authority's action. This officer may take any action on the report that could have been taken by the convening authority. With respect to conclusions concerning misconduct and line of duty, he shall indicate his approval, disapproval, or modification of such conclusions unless he returns the record for further inquiry. A copy of this action shall be forwarded to the commanding officer of the member concerned so that appropriate entries may be made in the service and medical records. JAGMAN, § 0225b.

B. Subsequent reviews. Reviewing authorities subsequent to the officer exercising general court-martial jurisdiction need neither comment nor record approval or disapproval of the prior actions concerning line of duty and misconduct.

0310 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 gross negligence 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 gross negligence; 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 gross negligence and 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 form report 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 gross negligence, 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 (Chapter XII), Foreign Claims Act (Chapter VIII), and article 139 claims 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 will find that the government contractor is, in fact, a government employee. The standard personnel qualification and safety standards provisions in government contracts are not enough to turn a government contractor into a government employee. 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.

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. Perhaps no single exclusion under FTCA has generated as much litigation as the "discretionary function" exclusion. The key issue will usually be whether the governmental activity involved in the claim was a discretionary function. The problem is complicated by the fact that neither the FTCA nor any court has ever formulated a comprehensive definition of "discretionary function." Each case must be decided on its own facts. *See, e.g., Dalehite v. United States*, 365 U.S. 15 (1953); *Birnbaum v. United States*, 588 F.2d 319 (2d Cir. 1978). A detailed discussion of the extensive case law on this problem is contained in *Liuzzo v. United States*, 508 F. Supp. 923 (E.D. Mich. 1981).

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 (1982) and the Public Vessels Act, 46 U.S.C. §§ 781-790 (1982). 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.

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*, 107 U.S. 2063 (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); *Zoula v. United States*, 217 F.2d 81 (5th Cir. 1954); *United States v. United Services Auto. Ass'n*, 238 F.2d 364 (8th Cir. 1956). Such claims may be payable under the Military Claims Act, the Military Personnel and Civilian Employees' Claims Act, or the nonscope claims statute. A third-party plaintiff may not implead the government in a suit by a *Feres* disqualified plaintiff. The third-party plaintiff gains no additional rights beyond those available if the plaintiff had brought a direct action against the government. *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977).

(2) Rationale for *Feres*. The *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. 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, rehabili[illegible]on, and disability payments, however, will be deducted from the compensation [illegible]d to the claimant. *Brooks v. United States*, 337 U.S. 49 (1949).

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

(a) The member must have been off duty;

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

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

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

If any of the above four factors are absent, the claim usually will be held by the courts to be incident to military service. *See* 1 L. Jayson, *Handling Federal Tort Claims* 155.02, 155.03, and 155.07 (1979) (has an extensive discussion of the principles and case law on this point).

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

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

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

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

b. Civilian Federal employees. Civilian Federal employees usually cannot recover under the FTCA for injury or death that occurs on the job because of FECA compensation benefits.

c. Intra-agency claims. One Federal agency usually may not assert an FTCA claim against another Federal agency. Government property is not owned, for FTCA purposes, by any specific agency of the government. 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 $25,000 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. 109 (1979). The fact that the injured person is an infant or incompetent does not toll the running of the statute of limitations.

2. Six-month waiting period. When a claimant presents an FTCA claim to a Federal agency, the agency has six months in which to act on the claim. During this waiting period, unless the agency has made a final denial, the claimant may not file suit on the claim in Federal court. If, after 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., Bailey v. United States*, 642 F.2d 344 (8th Cir. 1981); *Kielwien v. United States*, 540 F.2d 676 (4th Cir. 1976); *Allen v. United States*, 517 F.2d 1328 (6th Cir. 1975). Observance of the "sum certain" requirement does not prevent the claimant from recovering more than the amount originally claimed. The claimant may amend the claim at any time prior to final agency action on the claim. 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 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. An investigation not requiring a hearing usually will suffice. Responsibility for convening and conducting the investigation usually lies with the command most directly involved in the incident upon which the claim is based. When circumstances make it impractical for the most directly involved command to conduct the investigation, responsibility may be assigned to some other command.

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 legal service office in Newport, Rhode Island, is the adjudicating authority for claims arising in the six New England states and New York.

(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. An adjudicating authority can deny FTCA claims up to twice his or her approval limit. For example, if an adjudicating authority can pay FTCA claims up to $20,000, FTCA claims up to $40,000 can be denied. Claims in excess of $40,000 could be denied only by an adjudicating authority in the Office of the Judge Advocate General. Even though a claim may demand more than the payment or denial limits of an adjudicating authority serving a particular area, the command receiving the claim should forward it to the appropriate local adjudicating

authority, who can attempt to compromise the claim for an amount within payment limits.

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

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

(2) deny the claim, if within the denial limits;

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

(4) refer the claim to the Office of the Judge Advocate General if:

(a) Payment is recommended in an amount above the adjudicating authority's payment limits; or

(b) denial is recommended, but the amount claimed is above the adjudicating authority's denial limits.

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 Drivers' Act. The Federal Drivers' Act, 28 U.S.C. § 2679(b)-(e) (1988), enacted by Congress in 1961, provides that "the exclusive remedy against a Federal employee based on a claim arising out of the employee's operation of a motor vehicle within the scope of employment" is an action against the United States under the FTCA. If a Federal driver is served with process from a Federal or state court, the driver shall immediately deliver all process and papers to his/her commanding officer who will promptly notify the Judge Advocate General (Code 34). The Navy will then forward all papers to the office of 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. The Drivers' Act provides a personal immunity to Federal drivers for their actions in operating a motor vehicle while acting within the scope of their employment.

c. Medical personnel. 10 U.S.C. § 1089 (1988) provides, in part, that the exclusive remedy for personal injury, including death, caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, paramedic, or other assisting personnel of the armed forces, acting within the scope of their duties, shall be against the United States. This statute provides personal immunity against civil liability for military medical personnel acting within the scope of their employment. The procedures for removal of the suit from state court to Federal district court parallel those of the Federal Drivers' Act.

d. 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 $20,000 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 to ENS DeMolish's automobile.

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 safeg 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 competent person. 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, the claimant will recover an amount based on the property's replacement cost. This amount will be reduced to reflect any depreciation. Schedules of depreciation

deductions are published by the Judge Advocate General. The schedules do not normally require depreciation for items less than six months old. Older items are depreciated on a basis of a percentage of the replacement cost for each year the claimant owned the property. Depreciation deductions will not usually be taken for certain expensive items that appreciate in value over time (e.g., antiques, heirlooms, valuable jewelry, etc.) or for relatively unique items such as original works of art. Deductions may also be taken when the claimant retains property that cannot be economically repaired, but nonetheless retains a significant salvage value.

2. Dollar limits on recovery. The maximum amount payable under the Personnel Claims Act is $40,000. Lower maximum amounts may be imposed for certain types of property. For example, noncollision damage claims for motor vehicles are limited to $2,000, except when the vehicle is being shipped pursuant to PCS orders.

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.

B. 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 pulled 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, 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.

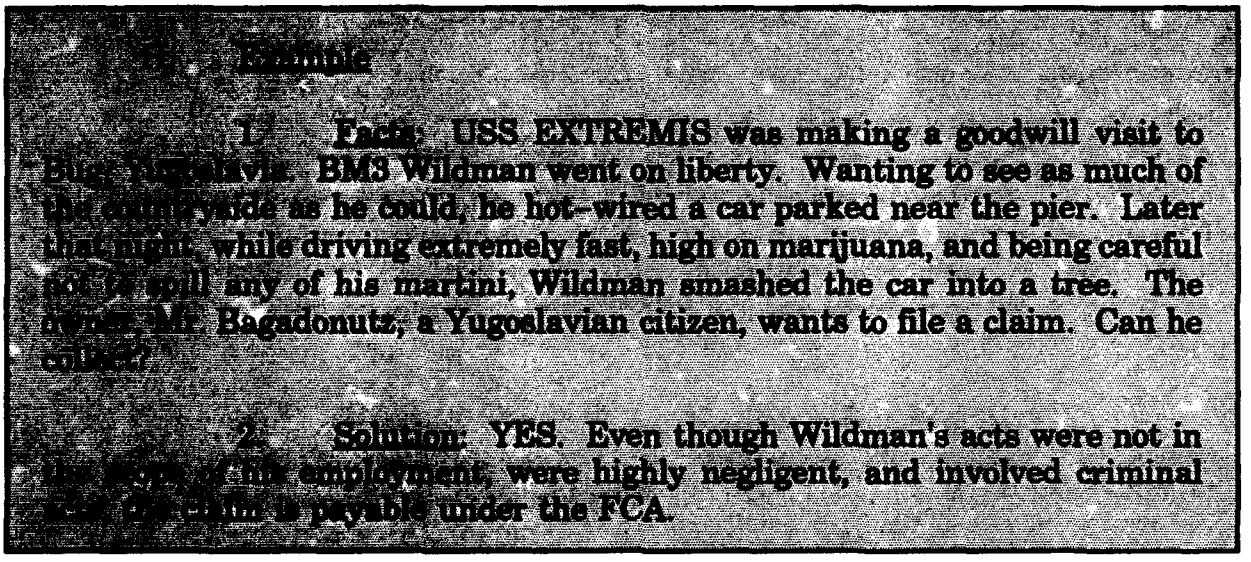
E. Measure of damages

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 a *JAG Manual* investigation not requiring a hearing, but also is empowered to settle the claim within certain dollar limits.



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 (1982). The Suits in Admiralty Act provides that a suit in admiralty may be brought against the Federal Government in all circumstances under which an admiralty suit could be brought against a private party or vessel.

2. Public Vessels Act, 46 U.S.C. §§ 781-790 (1982). The Public Vessels Act supplements the Suits in Admiralty Act and provides for admiralty remedies in cases involving naval vessels.

3. 10 U.S.C. § 7623 (1982). Section 7623 provides for settlement of claims by the government against private parties and vessels.

4. *JAG Manual*. Chapter XII of the *JAG Manual* prescribes the Navy's regulations governing reporting, investigation, and adjudication of admiralty claims for and against the government.

C. Scope of liability. The Federal Government has assumed extensive liability for personal injuries, death, and property damage caused by naval vessels or incident to naval maritime activities. Examples of the specific types of losses that give rise to admiralty claims include incidents such as:

1. Collisions;

2. 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 Navy is responsible; and

8. personal injury or death of civilians not employed by the Federal Government (e.g., longshoremen, harbor workers, and passengers).

D. Exclusions from liability. Certain categories of persons are precluded from recovering under an admiralty claim for personal injury or death incurred incident to maritime activities. Such potential claimants are compensated under other statutes. For example:

1. Military personnel cannot recover for personal injury, death, or property damage resulting from the negligent operation of naval vessels except when they are injured or killed while aboard a privately owned vessel that collides with a naval vessel.

2. Civil Service employees and seamen aboard Military Sealift Command vessels are limited to compensation under the Federal Employees' Compensation Act, 5 U.S.C. §§ 8101–8150 (1982), for personal injury or death.

E. Measure of damages

1. Surveys. A survey of damaged property is required in all collisions and any other maritime incidents involving potential liability for property damage. 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. The Secretary of the Navy is authorized to settle admiralty claims up to $1,000,000. Amounts in excess of that must be certified to Congress for appropriation. Certain other officials in the Department of the Navy are authorized to settle admiralty claims for smaller amounts.

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.

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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.

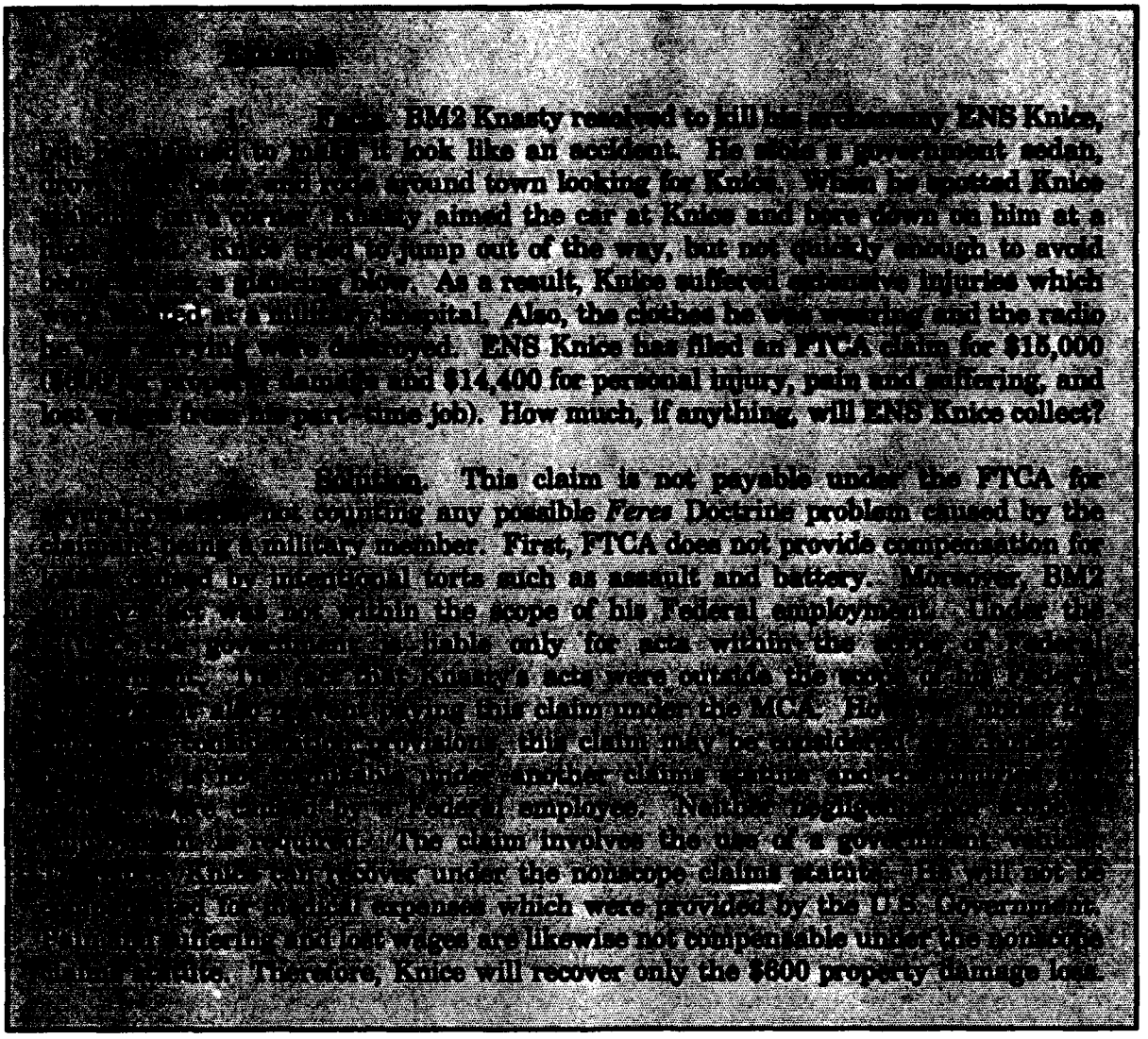
F. Statute of limitations. A nonscope claim must be presented within two years after the claim accrues or it will be forever barred.

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.



Example

Problem. BM2 Knasty resolved to kill his [illegible] ENS Knice, [illegible] to make it look like an accident. He stole a government sedan, [illegible] and took around town looking for Knice. When he spotted Knice [illegible] corner, Knasty aimed the car at Knice and bore down on him at a [illegible]. Knice tried to jump out of the way, but not quickly enough to avoid [illegible] glancing blow. As a result, Knice suffered extensive injuries which [illegible] at a military hospital. Also, the clothes he was wearing and the radio [illegible] were destroyed. ENS Knice has filed an FTCA claim for $15,000 [illegible] and $14,400 for personal injury, pain and suffering, and lost [illegible] part-time job). How much, if anything, will ENS Knice collect?

Solution. This claim is not payable under the FTCA for [illegible] not counting any possible *Feres* Doctrine problem caused by the [illegible] being a military member. First, FTCA does not provide compensation for [illegible] by intentional torts such as assault and battery. Moreover, BM2 [illegible] was not within the scope of his Federal employment. Under the [illegible] liable only for acts within the scope of [illegible] Knasty's acts were outside the scope of [illegible] claim under the MCA. However, [illegible] this claim may be considered [illegible] under another claims statute [illegible] Federal employee. Neither negligence [illegible] The claim involves the use of a government [illegible] Knice can recover under the noncombat claims statute. He will not be [illegible] expenses which were provided by the U.S. Government. [illegible] and lost wages are likewise not compensable under the noncombat [illegible] 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 generally do not have an effective means by which to be reimbursed for property damage or loss in these situations. Historically, article 139 claims have been extremely rare within the Department of the Navy (DON) because of the low dollar limit and a requirement that an investigation requiring a hearing be conducted to investigate the validity of

the claim. Because it is the only Victim's Rights Act that the DOD has, there is a new emphasis being placed on article 139 claims within the DON. The implementation of JAGINST 5800.7C (*JAG Manual*) in October of 1990 made several significant changes in article 139 claims' dollar limitations and investigation procedures. Although the individual member, not the Federal Government, is liable for the damage, the member's command has significant procedural responsibilities which can be found in Chapter IV of the *JAG Manual*.

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 Art. 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 may be investigated by an investigation not requiring a hearing. There is no requirement that the alleged offender be designated as a party to the investigation and afforded the rights of a party. The investigation inquires into the circumstances surrounding the claim, gathering all relevant information about the claim. 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 (C.D. Cal. 1974), *aff'd*, 530 F.2d 850 (9th Cir. 1976); *United States v. United States Auto. Ass'n*, 431 F.2d 735 (5th Cir. 1970).

H. Uninsured motorist coverage. Another potential source of recovery of medical care costs is the "uninsured motorist" coverage provisions of the typical automobile insurance policy. If an injured servicemember has obtained such coverage, and the tortfeasor is uninsured, the typical uninsured motorist coverage clause provides for payment to the policyholder of these sums which he would have been able to recover from the tortfeasor, but for the fact that the tortfeasor was uninsured. Like medical payments insurance coverage, the right of the United States to recover is based upon the terms of the insurance contract and not upon the MCRA. If the term "insured" includes "any person," then the courts have generally held that the United States is entitled to recover. *United States v. Geico*, 440 F.2d 1338 (5th Cir. 1971).

I. No-fault statutes. The recovery of the United States under the MCRA in states that have enacted no-fault statutes will be determined by the language of the statute. It is necessary to determine if the United States is within the terms of the statute so as to be entitled to recover for medical care provided. If the state statute eliminates a cause of action against the tortfeasor, the only probable source of recovery is under the injured party's no-fault insurance. If the United States is excluded and has no cause of action, then there may be no recovery in the particular case. *Hohman v. United States*, 628 F.2d 832 (3d Cir. 1980); *Gov't Employment Ins. Co. v. Rozmyslowicz*, 605 F.2d 669 (2d Cir. 1979).

J. Bibliography. The following references are helpful in working with MCRA claims:

1. Bernzweig, *Pub. L. No. 87-693: An Analysis and Interpretation of the Federal Medical Care Recovery Act*, 64 Colum. L. Rev. 1257 (1964).

2. Turner, *Hospital Recovery Claims (42 U.S.C. § 2651): The United States as a Subrogee*, 12 A.F. JAG L. Rev. 44, 51 (1970).

3. Long, *Administration of the Federal Medical Care Recovery Act*, 46 Notre Dame L. 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

RELATIONS WITH CIVIL AUTHORITIES

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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* deals 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.

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. 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.

b. E-3 Jones is stationed ashore or afloat outside of the territorial jurisdiction of the requesting authority, but not overseas. The servicemember must be informed of his right to require extradition. If he does not waive extradition, the requesting authority must complete extradition proceedings before the Navy will release the individual.

In any event, release under these conditions 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.

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. 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.

4. Circumstances in which delivery is refused

a. If a servicemember is alleged to have committed several offenses -- including major Federal offenses and serious, but purely military, offenses -- 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 and to the cognizant OEGCMJ. JAGMAN, §§ 0125 and 0610. 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 Art. 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). 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.

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. 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.

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) 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, arts. 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. 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 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*, art. 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 supoenas 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.*, art. 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, art. I, § 8, cl. 17. Condemnations by the Federal Government are included in the term "purchase," but land leased by the Federal Government is not. The second method is cession by the state. This method, while not specifically provided for by the Constitution, developed by means of case law. The third method of Federal acquisition occurs when the Federal Government reserves to itself certain jurisdiction when the State is admitted to the union. The Federal Government, in effect, maintains the legislative jurisdiction it held when the state was a territory.

-- 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). 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 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, 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.

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.

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. 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.

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.

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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 5400.7, Subj: DOD FREEDOM OF INFORMATION ACT PROGRAM

b. SECNAVINST 5720.42, 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 5720.42. There is no obligation to create, compile, or obtain a record not already in existence.

D. Form of request. To qualify as a request for permission to examine or obtain copies of 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 5720.42;

2. contain a reasonable description of the particular record or records requested (fishing expeditions are not authorized, nor are commands required to respond to blanket requests for all documents); and

3. contain:

a. a check or money order for the anticipated search and duplication fees determined in accordance with enclosure (3) of SECNAVINST 5720.42;

b. a clear statement that the requester will be willing and able to pay all fees required; or

c. satisfactory evidence that the requester is entitled to a waiver of fees.

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 request must be expeditiously forwarded to that activity. The request, letter of transmittal, and the envelope or cover should be conspicuously stamped or labeled "FREEDOM OF INFORMATION ACT." Additionally, a record should be kept of the request -- including the date and the activity to which it was forwarded.

4. 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. 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 readdress and forwarded to the Naval Inspector General.

d. *JAG Manual* investigations. Requests for *JAG Manual* investigations shall be readdressed and forwarded to OJAG (Code 33). Notify the requester of the referral action.

e. Mishap investigation reports. Requests for mishap investigation reports shall be readdressed and forwarded to the Commander, Naval Safety Center. 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: Release of NNWI is done through CNO (OP-09B30) who will coordinate with the naval activities holding the information. 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.

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 5720.42 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.

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 5720.42:

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 5720.42 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; 21 U.S.C. § 1175 on drug abuse prevention / rehabilitation; and 42 U.S.C. § 4582 on alcohol abuse prevention / rehabilitation.

4. Trade secrets and commercial or financial information. This exemption refers to trade secrets or commercial or financial information obtained from a person or organization outside the government with the understanding that the information will be retained on a privileged or confidential basis. For this exemption to apply, the disclosure of the information must be likely to cause substantial harm to the competitive position of the source, impair the government's ability to obtain necessary information in the future, or impair some other legitimate government interest (e.g., trade secrets, inventions, sealed bids, and scientific and manufacturing processes or developments).

5. Inter / intra-agency memorandums or letters. This refers to internal advice, recommendations, and subjective evaluations -- as contrasted with factual matters. If the record would be available through the discovery process in litigation with the Department of the Navy, the record should not be withheld under this exemption. A directive or order from a superior to a subordinate, though contained in an internal communication, generally cannot be withheld if it constitutes policy guidance or decision -- as distinguished from a discussion of preliminary matters or advice. The purpose and intent of this examination is to allow frank and uninhibited discussion during the decisionmaking process. Examples of this exemption include, among other things, nonfactual portions of staff papers, after-action reports, records prepared for anticipated administrative proceedings or litigation, attorney-client privilege documents, attorney work-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.

7. Investigatory records and information compiled for law enforcement purposes. This exemption applies only to the extent that the production of such records would:

a. Interfere with enforcement proceedings;

b. deprive a person of a right to a fair trial or an impartial adjudication;

c. constitute an unwarranted invasion of personal privacy;

d. disclose the identity of a confidential source;

e. disclose investigative techniques and procedures; or

f. endanger the life or physical safety of law enforcement personnel.

8. Financial institutions. This exemption applies to matters that are contained in, or related to, examination, operation, or condition reports prepared by, on behalf of, or for the use of, an agency responsible for the regulation or supervision of financial institutions.

9. Wells. This exemption refers to geological and geographical information and data -- including maps -- concerning wells.

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.

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 are collected, maintained, used, or disseminated;

2. permit an individual to prevent records pertaining to him, that were obtained by such agencies for a particular purpose, from being used or made available for another purpose without his consent;

3. permit an individual to gain access to information pertaining to him in a Federal agency's records, to have a copy made of all or any portion thereof, and to correct or amend such records;

4. collect, maintain, use, or disseminate any record of identifiable personal information in a manner that ensures that such action is for a necessary and lawful purpose, that the information is current and accurate for its intended use, and that adequate safeguards are provided to prevent misuse of such information;

5. permit exemptions from the requirements with respect to records provided in the Act only in those cases where there is an important public policy need for such exemption as has been determined by specific statutory authority; and

6. be subject to civil suit for any damages which occur as a result of acts or omissions that violate any individual's rights under the Act.

B. Definitions

1. Record. Any item, collection, or grouping of information about an individual that is maintained by the Federal Government and contains personal information and either the individual's name, symbol, or another identifying particular assigned to the individual (e.g., social security number).

2. System of records. A group of records from which information is retrieved by the name of the individual or by some identifying number, symbol, or other 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 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. To ensure such public knowledge, the Privacy Act requires that a catalog of all such systems of records be published in the *Federal Register*, and that such publication be updated at least annually. Such public notice must include, in an understandable form:

1. The name and 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 5720.42, 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 5211.5, enclosure (11)], and exercised by the denial authority.

2. Personal access. Hand-in-hand with the provisions concerning personal notification of records is the Privacy Act's mandate that an individual will be allowed to inspect and have copies of records pertaining to him / her that are maintained by Federal agencies. Upon receiving a request from an individual, the systems manager shall permit that individual to review records pertaining to him / her from the system of records in a form that is comprehensible to the individual. The individual to whom the record pertains may authorize a third party to accompany him / her when seeking access.

-- Note: 5 U.S.C. § 552a(d)(5) provides that: "Nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding."

3. Amendment. The Privacy Act permits the individual to ensure that the records maintained about him / her are as accurate as possible by allowing him / her to amend information that is inaccurate, to appeal a refusal to amend, and to file a statement of dispute in the record should an appeal be denied. Exceptions to this rule permitting amendment of personal records may only be exercised in accordance with published notice where authorized by law, claimed by the Federal agency head, and exercised by the denial authority.

B. Administrative procedures

1. Individual's action. An individual requesting notification concerning records about him / herself must:

a. Accurately identify him / herself;

b. identify the system of records from which the information is requested;

c. provide the information or personal identifiers needed to locate records in that particular system; and

d. request notification of personal records within the system from the system manager; or

e. request access from the system manager; or

f. request amendment in writing from the system manager; and

g. state reasons for requesting amendment and provide information to support such request.

2. Command action

a. Denials / deficient requests. Denials of initial requests for notification may only be made by denial authorities. If the request is deficient, the command should inform the individual of the correct means, or additional information needed, for obtaining consideration of his / her request for notification. A request may not be rejected, nor may the individual be required to resubmit the request, unless essential for processing the request.

b. Notification. Requests for personal notification may be granted by officials who have custody of the records, even if they are not the system manager or denial authority.

c. Access. If it is determined that the individual should be granted access to the entire record requested, the official should inform the individual, in writing, that access is granted and furnish a copy of the record, or advise when and where it is available. Fee schedules for duplication costs are contained in SECNAVINST 5211.5.

d. Amendments. If an available exemption is not exercised, an individual's request for amendment of a record pertaining to him / her shall be granted if it is determined, on the basis of the information presented by the requester and all other reasonably available related records, that the requested amendment is warranted in order to make the record sufficiently accurate, relevant, timely, and complete as to ensure fairness in any determination which may be made about the individual on the basis of record. Other agencies holding copies of the record must be notified of the amendment. 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 or records in the following ways:

1. Knowingly and willfully discloses information protected by the Privacy Act to a person or agency not entitled to receive it;

2. willfully maintains a system of records without meeting the public notice requirements of the Privacy Act; or

3. knowingly and willfully requests, obtains, or discloses any record concerning personal information about another individual from an agency under false pretenses.

The above violations are misdemeanors, and the individual is subject to a fine of up to $5,000 for each file or name disclosed illegally. With regard to the criminal sanctions, all pertain to intentional misdeeds. Therefore, if an individual makes a good faith and honest effort to comply with the provisions of the Privacy Act, he should be protected from criminal liability. Criminal violations of the Privacy Act are not punishable by incarceration.

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 authority will act as the cognizant DON or DOD official.

B. DON personnel: active-duty or former military personnel of the naval service (including retirees); civilian personnel of DON; personnel of other DOD components serving with a DON component; nonappropriated fund activity employees; non-U.S. nationals performing services overseas for DON under status of forces agreements (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

A. 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

LEGAL ASSISTANCE

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CHAPTER VIII

LEGAL ASSISTANCE

PART A - LEGAL ASSISTANCE PROGRAM

0801 GENERAL. Few problems are as frustrating for military members as unresolved legal difficulties. Since 1943, the Department of the Navy has sought to maintain a legal assistance program to assist military personnel, their dependents, and other authorized persons in obtaining adequate legal advice and services from within the naval service. Until recently, legal assistance was provided not from any legislative compulsion, but rather from the perceived need for such services. The 1985 DOD Authorization Bill (10 U.S.C. § 1044), Pub. L. No. 98-525, has provided a statutory basis for legal assistance and essentially has codified the existing program. The assets devoted to legal assistance by naval legal service offices or Marine law centers necessarily varies with the ebb and flow of military justice at the command. Chapter 7 of the *JAG Manual* and the *Legal Assistance Manual* (JAGINST 5801.2) provide that legal assistance officers: counsel, advise, and assist persons eligible for assistance or refer such persons to a civilian lawyer; prepare and sign correspondence and all types of legal documents on behalf of a client; negotiate with another party or his lawyer; where appropriate, serve as advocate and counsel for -- and provide legal representation in court to -- persons eligible for such assistance; establish, contact, and maintain liaison with local organizations interested in providing legal assistance; and render advice with respect to discrimination complaints. The sheer breadth of the legal assistance field prevents a detailed analysis here of every topic a military attorney might encounter in a given tour. Therefore, most of the topics discussed in this chapter are either military-specific or Federal law and have nationwide applicability. They are presented in a very abbreviated form.

0802 PERSONS ELIGIBLE FOR LEGAL ASSISTANCE. Legal assistance is a service which is intended to benefit active-duty servicemembers. While each legal field command is required to provide legal assistance, the scope of those services has been left to individual command discretion as dictated by the workload of the office. The following groups of persons are eligible for legal assistance:

A. Active-duty personnel;

B. dependents of active-duty personnel;

C. military personnel of allied nations serving in the United States, its territories, or possessions;

D. retired military personnel;

E. dependents of retired military personnel;

F. survivors of members of the armed forces who would be eligible were the servicemember alive;

G. civilians, other than local-hire employees, who are in the employ of, serving with, or accompanying the U.S. forces in overseas areas and their dependents. JAGMAN, § 0706; and

H. reservists, in certain limited situations.

0803 EXPANDED LEGAL ASSISTANCE PROGRAM. Section 0711 of the *JAG Manual* provides for the Expanded Legal Assistance Program (ELAP), which allows legal assistance officers to represent certain military personnel in civilian court at no expense to the member. The personnel eligible for this program are paygrades E-3 or below, E-4 with dependents, or any member that cannot afford the services of a civilian attorney and, therefore, would be forced to go into court without adequate representation. The types of cases covered by the ELAP program include:

1. Adoptions;

2. name changes;

3. routine or "short form" statutory probates of small estates;

4. divorce, separation, and child-custody matters;

5. paternity;

6. nonsupport and Uniform Reciprocal Enforcement of Support Act cases;

7. collection of security deposits and debts;

8. actions involving conditional-sales contracts or warranties;

9. minor tort cases, in particular where there is a clear claim and an unjustified refusal to pay;

10. defense of disputed indebtedness; and

11. criminal defense in traffic and minor misdemeanor cases.

The ELAP is not intended to deprive civilian attorneys of sources of income. To the contrary, it is intended to provide needed legal services for eligible personnel who cannot afford to hire a civilian attorney.

0804 LIMITATIONS ON SERVICE PROVIDED: SPECIAL PROBLEMS FOR THE ACTIVE-DUTY JUDGE ADVOCATE

A. Assistance in official military matters. Legal assistance duties are separate and apart from the duties of a trial counsel, defense counsel, or other officer involved in the processing of courts-martial, nonjudicial punishment, administrative boards, investigations, or other such official military matters. Whenever a member suspected or accused of an offense under the UCMJ requests consultation with a legal assistance officer/lawyer, he should be referred to an officer regularly performing defense counsel duties. *See United States v. Gunnels*, 8 U.S.C.M.A. 130, 23 C.M.R. 354 (1957). Legal offices at large commands normally have one or more judge advocates assigned full-time to the legal assistance program, thereby keeping their duties separate from the responsibilities of others involved in the processing of court-martial cases. At small commands, one lawyer may perform both legal assistance and military justice functions. In either situation, an accused or suspect may request advice or wish to consult the lawyer who acts as legal assistance officer. Additionally, there may be circumstances whereby the regularly detailed defense counsel is unavailable (e.g., absence or conflict of interest), so that referral of a military justice problem to the legal assistance officer will furnish the most satisfactory service. In all such circumstances, advice or consultation to the accused, although not really a legal assistance function, should be rendered by the legal assistance officer. In like manner and subject to the usual "reasonable availability" criteria, the legal assistance officer may serve in court-martial proceedings as individual defense counsel. JAGMAN, § 0709.

B. Professional responsibility. In all states, the rules covering professional responsibility prohibit attorneys from giving advice and counsel regarding matters that are beyond their expertise. If a matter is beyond a legal assistance officer's expertise, he must either refuse to act or take the time to educate himself appropriately.

C. Nonlegal advice. While giving legal advice, the legal assistance officer may also determine that the client needs or desires advice on related but nonlegal matters (e.g., financial counseling or family counseling). Faced with this situation, the legal assistance officer should provide legal advice only or defer giving such advice and refer the client to the appropriate person or agency for nonlegal counseling. JAGMAN, § 0709a.

D. Domestic relations cases. It is generally accepted that the same lawyer should not represent both parties in a domestic relations case. Most states also prohibit the same "office" from counseling both sides. The other party should be directed to another legal assistance office if available, a non-legal assistance attorney at the NLSO, or a civilian attorney.

E. Proceedings involving the United States. A legal assistance officer may not advise on, assist in, or become involved with, individual interests opposed to, or in conflict with, the interests of the United States without the specific approval of the Judge Advocate General. JAGMAN, § 0709d. This includes Art. 138, UCMJ, complaints, BCNR petitions, fitness report rebuttals, and Central Physical Evaluation Board rebuttals, which are normally handled by a defense counsel.

F. Fees and compensation. Military and civilian employees of the Department of the Navy on active duty are prohibited from accepting any compensation of any nature for legal services rendered to any person entitled to legal assistance, whether or not the service is normally provided or available to such persons as part of a legal assistance program, and whether or not the service is rendered on or off duty. Reserve judge advocates on inactive duty are prohibited from receiving compensation of any kind for legal services provided any person entitled to legal assistance with respect to matters about which they consulted or advised said person in an official capacity. JAGMAN, § 0710 and Rule 1.5 of JAGINST 5803.1A (regarding fees).

G. Telephone advice. In the absence of unusual or compelling circumstances, legal advice should not be given over the telephone. JAGMAN, § 0709e.

H. Professional legal advice. Only legal assistance officers, who by definition are qualified lawyers and members of one or more state bars, are authorized to render services that call for the professional judgment of a lawyer. Servicemembers not assigned duties as a judge advocate -- especially legalmen and paralegals -- must avoid the unauthorized practice of law. JAGINST 5803.1A.

I. Government ethics. Advice on those matters is the sole province of the unit ethics counselor. If advice is provided, no attorney-client relationship is formed; thus, communications are not privileged.

0805 CONFIDENTIAL AND PRIVILEGED CHARACTER OF SERVICE PROVIDED. All information and files of legal assistance officers pertaining to persons served will be treated as confidential and privileged in the legal sense, as outlined in Rule 1.6 of the Rules of Professional Responsibility (enclosure 1 of JAGINST 5803.1A). Privileged matters may not be disclosed to anyone, except upon the specific permission of the person concerned, and disclosure may not be lawfully ordered by superior military authority. Maintenance of the strictest confidence is essential to the proper functioning of the legal assistance program in order to assure individuals that they may disclose completely all relevant information pertaining to their problem without fear that their confidence will be abused or used against them.

0806 REFERRAL TO CIVILIAN LAWYERS. If it is determined that the legal assistance needed is beyond either the scope of assistance authorized to be provided or the capabilities of the legal assistance officer, the client should be referred to a civilian lawyer. If the client does not know a lawyer he wishes to represent him, the case may be referred to an appropriate bar organization, lawyer referral service, legal aid society, or other organization for obtaining counsel. If a lawyer referral service is not used or available, there is no required minimum number of lawyers' names that should be given to the client for referral purposes; but, care should be taken to avoid the appearance of impropriety in consistently referring cases to an unreasonably small number of attorneys. JAGMAN, § 0710a. Referral to a specific attorney should be limited to situations that require unique expertise. Both active duty and inactive duty military personnel acting in an official capacity are prohibited from advising any person entitled to legal assistance to seek legal services from themselves in their private capacities, or from any law firm with which they are associated, or from any attorney with whom they share office space. *See* SECNAVINST 5370.2, Subj: STANDARDS OF CONDUCT AND GOVERNMENT ETHICS. A legal assistance attorney shall not accept any compensation for any client referral to a civilian attorney.

0807 MALPRACTICE LIABILITY

A. Disciplinary Rule 6-101(A) of the American Bar Association Code of Professional Responsibility provides, in pertinent part: "A lawyer shall not: (1) Handle a legal matter which he knows or should know he is not competent to handle without associating with a lawyer who is competent to handle it [; or] (2) handle a legal matter without preparation adequate in the circumstances." Prior to the passage of the Department of Defense Authorization Act for Fiscal Year 1987 (Pub. L. No. 99-661), there was some question about whether judge advocates performing legal assistance might be subject to personal financial liability for legal malpractice. This concern was based primarily on the existence of statutes that specifically exempted medical and dental personnel of the Department of Defense

from personal liability for malpractice (*see* 10 U.S.C. § 1089) as compared to the absence of such a statutory provision for lawyers and paralegals. Indeed, strong arguments could be made under the *Feres* Doctrine (for active duty claimants) that no tort remedy exists and, under scope of employment, that the Federal Tort Claims Act provides an exclusive remedy as against other claimants. Nevertheless, to ensure that DOD attorneys and paralegals performing legal assistance received the same protection as DOD medical and dental personnel, the FY-87 DOD Authorization Act added section 1054 of title 10 of the *United States Code* to provide that the Federal Tort Claims Act shall be the exclusive remedy in cases of legal malpractice.

B. Samuel T. Currin, U.S. Attorney for the Eastern District of North Carolina and a Reserve Army judge advocate, offers the following advice to judge advocates on how to avoid malpractice:

> 1. Use office checklists to ensure that all possible needs/issues are routinely covered during interviews;
>
> 2. attend local and state Continuing Legal Education courses, especially in the areas of wills, trusts, estate planning and family law;
>
> 3. know whether the client is, or is not, entitled to legal assistance;
>
> 4. know the limitations placed on the scope of legal assistance by the DOD, DON and local directives and policies; and
>
> 5. when the complexity or scope of the legal issue is beyond your expertise, do not attempt it, regardless of who requests it.

Sullivan, *Legal Malpractice: Pitfalls and Prevention*, ABA Legal Assistance Newsl., Vol. 19, Apr. 1984, at 31-32.

0808 REFERENCES. There are many references available to legal assistance officers. Since the law on any subject will vary from state to state, it is critical that legal assistance officers obtain all available local resources, including, inter alia:

A. *Soldiers' and Sailors' Civil Relief Act Guide*, Pub JA 260, The Judge Advocate General's School, U.S. Army

B. *Family Law Guide*, Pub JA 263, The Judge Advocate General's School, U.S. Army

C. *Wills Guide*, Pub JA 262, The Judge Advocate General's School, U.S. Army

D. *Consumer Law Guide*, Pub JA 265, The Judge Advocate General's School, U.S. Army

E. *All States Income Tax Guide*, The Judge Advocate General's School, U.S. Air Force

F. JAGINST 5801.1, Subj: LEGAL CHECKUP PROGRAM

G. *Pub 17/Package X*, Department of the Treasury, Internal Revenue Service

H. *LAMPlighter* (a quarterly legal assistance newsletter published by the American Bar Association Standing Committee on Legal Assistance for Military Personnel)

I. *Martindale-Hubbell Law Digest*

J. *Marine Corps Manual for Legal Administration (LEGADMINMAN)*, MCO P5800.8C (30 Jun 92)

K. *Notarial Guide*, Pub JA 268, The Judge Advocate General's School, U.S. Army

L. *Legal Assistance Memoranda (LAM)*, Office of the Judge Advocate General, Legal Assistance Division (Code 36)

M. *Drafting Libraries (DL) Wills Software (Military version)*, a commercial computer-assisted wills drafting program created by Attorneys' Computer Network, Inc., made available to Navy legal assistance attorneys under a licensing agreement with the Judge Advocate General.

N. *Real Property Guide*, Pub JA 261, The Judge Advocate General's School, U.S. Army

O. *Legal Assistance Office Directory*, Pub JA 267, The Judge Advocate General's School, U.S. Army

P. *Legal Assistance Federal Income Tax Information Series*, Pub JA 269, The Judge Advocate General's School, U.S. Army

Q. *Veteran's Reemployment Rights Law*, Pub JA 270, The Judge Advocate General's School, U.S. Army

R. *Legal Assistance Office Administration Guide*, Pub JA 271, The Judge Advocate General's School, U.S. Army

S. *Legal Assistance Deployment Guide*, Pub JA 272, The Judge Advocate General's School, U.S. Army

T. *Navy Legal Assistance Powers of Attorney Program*, prepared by the Office of the Judge Advocate General, Legal Assistance Division (Code 36), this WordPerfect merge-macro program drafts general and special powers of attorney, with forms keyed to those found in Chapters 3 and 4 of the *Legal Assistance Deployment Guide*

U. *Legal Assistance Living Wills Guide*, Pub JA 273, The Judge Advocate General's School, U.S. Army

V. *USFSPA Outline and References*, Pub JA 274, The Judge Advocate General's School, U.S. Army

W. *Model Tax Assistance Program*, Pub JA 275, The Judge Advocate General's School, U.S. Army

X. *Preventive Law Series*, Pub JA 276, The Judge Advocate General's School, U.S. Army

Y. *Child Support Enforcement Deskbook*, Office of the Judge Advocate General, Legal Assistance Division (Code 36)

Z. *Essentials for Attorneys in Child Support Enforcement*, Second Edition, U.S. Department of Health and Human Services, Office of Child Support Enforcement

Note: "Many of these publications are available on the JAG Bulletin Board (JAGNET BBS). Attorneys unable to access JAGNET BBS may contact the Legal Assistance Division for a 'zipped' publication on disk."

PART B - DOMESTIC RELATIONS

0809 NONSUPPORT OR INSUFFICIENT SUPPORT OF DEPENDENTS GENERALLY. Nonsupport complaints are among the most common problems handled by the Navy and Marine Corps legal assistance program. The typical case involves an accusation by a servicemember's spouse, made either in person or by letter, that the servicemember has neglected legal and/or moral obligations to the spouse and children. Other instances concern an allegation by the member's former spouse of failure to make child support payments in accordance with the divorce decree. In still other circumstances, the servicemember may require assistance to handle a spendthrift spouse or one who insists that family support payments must be increased. The Navy and Marine Corps recognize that every servicemember has a moral and legal obligation to support dependents and, further, that failure to provide adequate support brings discredit upon the naval service. Moreover, persistent support difficulties divert a servicemember's attention from service duties and thereby decrease job performance. It must be remembered that support obligations apply to all members, regardless of sex. The obligations discussed here refer only to those expected of a member by the military, which may not necessarily coincide with a member's moral obligations or the legal obligations which may be imposed by the laws of any particular state.

0810 POLICY. "The Navy will not act as a haven for personnel who disregard or evade obligations to their legal family member. All members shall provide adequate and continuous support for their lawful family members . . . . Any failure to do so which brings discredit upon the naval service may be cause for administrative . . . action . . . which may include . . . separation . . . ." MILPERSMAN, art. 6210120.1. *See also* LEGADMINMAN, para. 8001.

0811 OBLIGATIONS

A. Spouse. The member has a continuing obligation to provide adequate and continuous support to a dependent spouse unless:

1. A court order relieves the member of the obligation;

2. the dependent spouse relinquishes the support, preferably in writing;

3. there is mutual agreement of the parties that no support will be paid (e.g., a separation agreement); or

4. a waiver granted by the Director, Defense Finance and Accounting Service-Cleveland Center (Code DG) (for Navy) or Commandant of the Marine Corps (MPH-20) (for Marine Corps).

B. Waiver of military obligation to support spouse (MILPERSMAN, art. 6210120.4; LEGADMINMAN, para. 8004.4)

1. Grounds. The servicemember's obligation to support a dependent spouse may be waived, at the request of the servicemember, for desertion without cause, infidelity, or physical abuse by the dependent spouse.

2. Procedure. The servicemember must submit a written request for waiver of the obligation to support the dependent spouse -- including substantiating evidence, such as:

a. An affidavit based on personal knowledge of any affiant (although documents from the servicemember or relatives should be supported by corroborative evidence); or

b. written admissions made by the spouse contained in letters written by him/her to the servicemember or other persons.

3. Effect. The support obligation does not terminate until the waiver has been granted. Such a waiver does not relieve the member of any court-ordered obligation to the spouse. As a general rule, a court order must always be followed by the member. If the amount of support ordered by the court is excessive, or if the dependent spouse is acting irrationally, the remedy for the member is not a waiver but rather to seek modification of the court order.

C. Children. The obligation of a parent to support minor children, whether natural or adopted, is unaffected by desertion or other misconduct on the part of the spouse. In the event of divorce, the support obligation continues -- except in the rare case of a decree specifically negating the parent's obligation to provide child support. A decree silent as to child support is not construed as relieving the servicemember of the obligation. Any obligation to support one's natural children terminates upon their adoption by others; however, care of the child by someone under a custody agreement is not adoption and does not in itself relieve the natural parent of the duty to support.

0812 AMOUNT OF SUPPORT

A. Significant factors. Factors that many courts consider in determining the amount of the support to be ordered are:

1. The member's pay;

2. other private income of the member;

3. income of the dependent(s);

4. cost for the necessities of life of the dependent(s); and

5. other financial obligations of the member and dependent(s) in relation to income.

B. Specific support guidelines. Support amounts acceptable to the naval service are determined according to one of the following:

1. Court order. A court order for support payments normally takes into account the factors listed in paragraph A above. Where such an order has fixed the amount of support due a spouse and/or children, the servicemember will be expected to comply with the order.

2. Mutual agreement. Preferably, any mutual agreement of the parties should be in writing.

3. Absence of court order or mutual agreement. In the absence of a court order or mutual agreement, article 6210120.3a of the MILPERSMAN and paragraph 8002 of the LEGADMINMAN provide guidelines that may be used until such time as an appropriate order or agreement is obtained. These guidelines are only interim measures and are not a permanent solution to nonsupport or insufficient support problems. The scale amounts are not intended as fixed standards, but may be increased or decreased as the factors of any particular case warrant.

a. Navy

Relationship and number of dependents	Support to be provided
Spouse only	1/3 gross pay
Spouse and one minor child	1/2 gross pay
Spouse and two or more children	3/5 gross pay
One minor child	1/6 gross pay
Two minor children	1/4 gross pay
Three minor children	1/3 gross pay

For the purposes of this table, gross pay includes basic pay, BAQ and VHA, but does not include hazardous duty pay, sea and foreign duty pay, incentive pay, or basic allowance for subsistence.

b. Marine Corps

Relationship and number of dependents	Support to be provided
Spouse only	BAQ-VHA plus 20% of basic pay
Spouse and one minor child	BAQ-VHA plus 25% of basic pay
Spouse and two or more minor children	BAQ-VHA plus 30% of basic pay
One child	one-sixth of basic pay
Two minor children	one-fourth of basic pay
Three or more minor children	one-third of basic pay

In no event should the amount of support be less than the applicable rate of basic allowance for quarters.

0813 COMPLAINTS OF NONSUPPORT OR INSUFFICIENT SUPPORT

A. Interview. Upon receipt of a complaint alleging nonsupport or insufficient support of dependents, the command must interview the servicemember concerned. Normally, this interview is done by the member's division officer or command legal officer.

B. Action

1. Undisputed failure of support. If the member acknowledges the obligation and admits a support delinquency, he will be informed of the policy concerning support of dependents, including the potentially adverse consequences an unsatisfactory response may have upon his service career. In the absence of a determination by a civil court or mutual agreement of the parties, the support guidelines previously mentioned will be applied.

2. Disputes. Disputed complaints should be referred to the nearest legal assistance officer. In no case, though, will a servicemember be allowed to suspend support payments while resolution of a dispute is pending. If satisfactory evidence of an agreement or order substantiating a claim that some amount less than demanded is due cannot be produced, the support guidelines previously mentioned will be applied.

3. Command's response. The command should notify the complainant that the matter has been referred to the servicemember and inform the complainant of any intended action on the complaint by the servicemember.

4. Withholding action for child support. A Navy command may withhold acting on a complaint for alleged failure to support a child/children if:

a. The whereabouts of the child/children is unknown; or

b. the person requesting support does not have physical custody of the child/children. Note: If some person other than the parent has legitimate custody, payments may be made to that person.

C. Repeated complaints

1. Possible penalties and other action for noncompliance. The member who refuses to carry out support obligations, or upon whom numerous justifiable complaints have been received, should be counseled that one or more of the following actions could occur:

a. Lower evaluations;

b. administrative separation for a pattern of misconduct;

c. nonjudicial punishment under Art. 134, UCMJ, dishonorable failure to support dependents:

d. BAQ will be withheld and/or recouped;

e. loss of tax exemption for the dependent;

f. garnishment of pay;

g. removal from sensitive duties (e.g., PRP); and

h. involuntary allotment.

2. Administrative separation. Article 3630600.1b(2) of the MILPERSMAN and paragraph 6210.3 of the MARCORSEPMAN authorize administrative separation processing for misconduct by reason of, inter alia, an established pattern of dishonorable failure to contribute adequate support to dependents or failure to comply with orders, decrees, or judgments of a civil court concerning support of dependents. Before processing, the member concerned must be counseled and given a reasonable opportunity to begin making adequate support payments. MILPERSMAN, art. 3630600; MARCORSEPMAN, paras. 6210.3, 6105. At the time such counseling is rendered, an appropriate warning entry should be made on page 11 (USMC)/page 13 (USN) of the member's service record book.

D. Garnishment

1. General. Garnishment is a legal proceeding by which a court orders the employer to withhold all or a portion of an individual's pay and to pay the withheld amount to the court to satisfy a court-ordered judgment. Section 659 of title 42 *United States Code* authorizes the garnishment of wages paid to employees of the Federal Government, including active-duty and retired military members, for the purpose of enforcing child support and alimony obligations. The Uniformed Services Former Spouses' Protection Act (USFSPA) 1002(a), 10 U.S.C.A. § 1408 (West Supp. 1984), also provides for garnishment to enforce the terms of a property settlement incident to divorce if certain requirements are met.

2. References. SECNAVINST 7200.16, Subj: GARNISHMENT OF PAY OF NAVAL MILITARY AND CIVILIAN PERSONNEL FOR COLLECTION OF CHILD SUPPORT AND ALIMONY; DODPM, pt. 7, ch. 7.B; 3 NAVCOMPTMAN, ch. 3; LEGADMINMAN, para. 8006.

3. Procedures. The spouse of the servicemember must first obtain a child support or alimony order from a court of competent jurisdiction. This will normally be a decree of divorce, although it does not necessarily need to be. If the servicemember fails to comply with this court order, the spouse then may go to the same or a different court seeking an order in garnishment to enforce the original order. Upon a showing of an order awarding support or alimony and a failure to comply, the second court will then issue an order garnishing the servicemember's pay.

4. Service of process. Process affecting the military pay of active-duty, Reserve, Fleet Reserve, or retired members, wherever serving or residing, may be served personally or by registered or certified mail to the following:

a. Navy:

Director, Defense Finance and Accounting Service-
Cleveland Center (Code DG)
1240 East Ninth Street
Cleveland, OH 44199-2087

b. Marine Corps:

Director, Defense Finance and Accounting Service-
Kansas City Center (Code DG)
Kansas City, MO 64197-0001

Process affecting the pay of active civilian employees of the Department of the Navy shall be forwarded to the designated officials listed in paragraph 4a(3) of SECNAVINST 7200.16, cited above.

5. Pay subject to garnishment. Only pay that is "remuneration for employment" is subject to garnishment. Those entitlements designated "pay" are generally subject to garnishment, while "allowances" are not. (As a result of garnishment, many allotments such as "B," "C," "D," "I," and "L" may be involuntarily stopped.)

6. Command responsibility. Upon receipt of a writ or order of garnishment (also called a wage assignment, an order to withhold and deliver, or a writ or order of attachment), the command will forward all correspondence to the action officer mentioned in paragraph D.4 above. Simultaneously, the command receiving the request will send a letter to the requester advising of such forwarding action. The commanding officer of the member or employee shall ensure that the member or employee has written notice of the action and is afforded counseling. The command will then receive and comply with instructions from the cognizant finance activity.

7. Defenses for the member. Finance centers will not entertain defenses raised by the member in garnishment actions from U.S. courts. Disputes must be litigated in the state that issued the garnishment order; however, if the member is supporting family members other than those to whom the garnishment order pertains, make sure the finance center knows this since it can affect how much money is deducted from the member's pay.

E. Involuntary allotments. An involuntary allotment can be initiated against an active-duty servicemember to pay for child support or a combination of spousal and child support (but not spousal support only). Under the Tax Equity and Fiscal Responsibility Act of 1982, § 172(a), codified at 42 U.S.C. § 665, if a member is two (2) or more months in arrears on child support payments or child and spousal support payments (or the total amount owed is greater than or equal to two (2) months of payments), the member's spouse/former spouse may seek an involuntary allotment. Upon notification by the state authorities, the cognizant finance center is required to notify the member to begin payments within 30 days or suffer automatic deductions of the payments from his/her pay.

1. Basic requirements. The basic requirements for an involuntary allotment are a state court or administrative support order that includes a child support component and an arrearage equal to or exceeding the support required for a 2-month period.

2. Procedure. A state court or child support enforcement (CSE) agency sends a letter to the military finance center stating that the requisite arrearage exists and requesting that a "mandatory allotment" be started. The finance center notifies the member's commander and the member concerning the request. Absent presentation of an adequate and timely defense by the member, the allotment is started. The allotment will be for the amount of the monthly support obligation, payable per the request and continuing until the requester advises that it should stop. Arrearages can be collected, but there must be a second court order requiring payment of the arrearage by involuntary allotment (a letter from a CSE agent asking for arrearages is insufficient).

3. Limitations

a. If the member is supporting other family members, the maximum amount of the involuntary allotment is 50 percent of disposable earnings. "Disposable earnings" is basic pay plus most bonuses and special pay, minus taxes and other deductions. The term also includes BAS for officers and warrant officers and BAQ for members with dependents and all members in the grade of E-7 and above. *See* 32 C.F.R. § 54.6(b).

b. If the member is not supporting other family members, the maximum is 60 percent of disposable earnings. An additional 5 percent is tacked on to the maximum (i.e., the maximum is boosted to 55 percent or 65 percent) if "the total amount of the member's support payments is 12 or more weeks in arrears." 32 C.F.R. § 54.6(a)(5)(iii).

4. Defenses for the member

a. The member can show that information in the request is in error. He must submit an affidavit and evidence to support the claim of error to the finance center within 30 days of their notice.

b. The member may also try to negotiate a mutually acceptable resolution with the child support agency or the custodial parent. Do not have the member start a voluntary allotment upon receiving notification of an involuntary allotment action; the member will simply have two allotments deducted from military pay.

F. Wage assignment orders. These are "involuntary allotments" created by state law that can be used to enforce support obligations against civilian and military parents. The trigger for a wage assignment generally is an arrearage of not more than 30 days. The Family Support Act of 1988 requires all states have automatic wage withholding that take effect immediately upon issuance of the support order, whether or not there is an arrearage, when the custodial parent is receiving benefits through Aid for Dependent Children (AFDC). In cases involving contingent withholding provisions, the absent parent receives notice of intent to initiate a wage assignment and, if no defense is presented, a notice of assignment is sent to the employer. All employers must honor wage assignment orders; DOD agencies process them as if they were garnishment orders.

1. Assisting the noncustodial parent. Upon receipt of notice of a wage assignment, the agency should be notified of any error in alleged arrearages, modifications of the underlying support order, or other facts which negate the support obligation. If applicable, the finance center should be notified that the member is supporting other family members. If a member is paying support by allotment and a decree or support order is pending in a state with automatic wage assignments, the allotment should be stopped several months before the decree is issued.

2. Assisting custodial parents. Custodial parents should be referred to the nearest state or county child support enforcement office.

G. Uniformed Reciprocal Enforcement of Support Act (URESA). The primary purpose of URESA is the enforcement of an order issued by another court. URESA does not create a support obligation; it merely enforces obligations created under other provisions of state law. The statute allows the custodial parent to go to the court where (s)he resides and file a petition to enforce a support order against the absent parent who resides in another jurisdiction. The court in the "initiating state" reviews the petition and forwards it to the appropriate court or agency in the state where the absent parent resides. The district attorney or other official in the "responding" state prosecutes the enforcement action against the absent parent. The

custodial parent need not appear, but may present evidence through an affidavit or less formal means. The law of the forum court applies. The court issues an order based on the facts presented.

0814 CHILD CUSTODY

A. Uniform Child Custody Jurisdiction Act (UCCJA). The UCCJA seeks to cure several problems arising from child custody litigation involving more than one state. It is used to avoid jurisdictional conflicts, promote cooperation between courts and states, deter abductions, avoid relitigation of prior custody disputes, and provide a stable home environment for the child. This is accomplished by mandating that child custody litigation take place in the state where the child and family have the closest contacts. All states have adopted the UCCJA, although some have modified the uniform language in places.

1. Key definitions

a. Custody determination: a court order providing the custody of a child, including visitation rights, but not including support or other monetary obligations.

b. Home state: the state where a child has lived with a parent for at least six months immediately preceding the date on which the action is commenced or, if the child is less than six months old, the state where the child has lived from time of birth.

2. Basic jurisdictional provisions. UCCJA, § 3. The child's physical presence in the state is not by itself a sufficient basis to exercise jurisdiction. On the other hand, while the child's physical presence in the state may be desirable, it is not a prerequisite for jurisdiction in a custody proceeding. A court may exercise jurisdiction over a custody proceeding if it has subject matter jurisdiction under state law and:

a. is considered the "home state" at the time the proceeding is commenced, the child has been removed by a person claiming custody, and a parent continues to live in the state; or

b. the child and at least one parent have a *significant connection* with the state and there is available in the state substantial evidence regarding the child's present or future care, protection, training, and personal relationships; or

c. the child is physically present in the state and has been abandoned or emergency action is necessary to protect the child from actual or threatened mistreatment, abuse, or neglect; or

d. no other state has jurisdiction under any of the first three grounds or another state has declined jurisdiction on the ground that custody would more appropriately be determined in the state proposing to exercise jurisdiction.

3. UCCJA enforcement. A custody decree by a court with jurisdiction binds all parties who have been appropriately served and put on notice. Courts of one state are required to recognize and enforce a decree of another state rendered under the UCCJA or a substantially similar act. If a court finds itself to be an inconvenient forum, it can require the party bringing the action to pay all costs, including travel expenses of the child and opposing parties. The same provision requires all costs and attorneys fees be paid by a party who has wrongfully taken the child or engaged in other reprehensible conduct. The court may order any person within the state to appear and, if that person has physical custody of the child, to appear with the child. If a party outside the state desires to appear, the court may require the party requesting the hearing to pay any costs. A court may request a court in another state order a party to appear before the requesting state court and, if the party has custody of the child, to appear with the child. A court may request a court of another state to hold evidentiary hearings or to have a social services study made.

4. International application. UCCJA, § 23. The Act applies internationally if there was reasonable notice, the jurisdiction has laws substantially similar to the Act, and an opportunity to be heard was given to all affected persons.

B. The Parental Kidnapping Prevention Act (PKPA). 28 U.S.C. § 1738A. Congressional dissatisfaction over increasing numbers of parental kidnappings, inconsistent and conflicting court orders, excessive relitigation, lack of criminal enforcement mechanism in UCCJA, and desire to track down runaway parents was the impetus for the PKPA.

1. Jurisdiction. Full faith and credit must be given to valid sister-state child custody determinations. Such determinations are valid as long as the rendering state had jurisdiction pursuant to one of the four jurisdictional bases found in the UCCJA. *See* A.2.a–d, above.

2. Modifications. A court in one state is entitled to modify a custody award by a court of another state if it has jurisdiction, the court in the other state no longer has jurisdiction or has declined to exercise jurisdiction to make a modification, and if there is no other custody action pending in another state that is exercising

and if there is no other custody action pending in another state that is exercising jurisdiction consistent with the PKPA. (The statute provides that the state with original jurisdiction continues as long as the child or one parent remains in the state.)

3. Enforcement. Parental kidnapping is an act for which a warrant for unlawful flight to avoid prosecution may be issued under 18 U.S.C. § 103 if there is evidence that the child was taken across interstate or international borders and the state from which the child was taken has a statute which makes such taking a felony.

PART C - PATERNITY COMPLAINTS

0815 GENERAL

A. References. MILPERSMAN, art. 6210125; LEGADMINMAN, para. 8005; PERSMAN 8-6-5.

B. Complaints alleging that a servicemember is the father of an illegitimate child may be received by the command before, as well as after, the birth of the baby. Neither civil law nor naval regulations require a man to marry the mother of his child. Local law, however, generally requires that a father support his illegitimate offspring and Navy and Marine Corps policy concerning support of dependents applies equally to legitimate, as well as illegitimate, children.

C. In many cases, a proper solution to a paternity problem involves not only the legal assistance officer who will advise the member as to his legal obligations and liabilities, but also the chaplain who may advise the member concerning the moral aspects of the situation.

0816 PROCEDURES

A. Interview and action. Upon receipt of a paternity complaint, the command concerned will interview the servicemember and take the following action:

1. Judicial order or decree of paternity or support. If a judicial order or decree of paternity or support is rendered by a state or foreign court of competent jurisdiction, the member shall be advised that he is expected to provide financial assistance to the child regardless of any doubts of paternity he may have. Questions concerning the competency of the court to enter such a decree against the servicemember, particularly where the servicemember was not present in court at the time the order or decree was rendered, should be researched by the legal assistance

officer and will probably require referral to a civilian attorney in the issuing court's jurisdiction.

2. Acknowledgement of paternity. If, in the absence of legal action declaring him the father, a member admits to paternity or the legal obligation to support the child, the military expects him to furnish support payments for the child and assist in the payment of prenatal expenses. The member should be advised that, once support payments are begun, the child will probably qualify for an armed forces dependents' identification card. *See* NAVMILPERSCOMINST 1750.1.

3. Disputed or questionable cases. In instances where no legal action has fixed the paternity of the child, and the servicemember disputes or is uncertain of the accusation of the child's mother, a legal assistance attorney should immediately contact the clerk of the court issuing the complaint and arrange for a blood test. Since many states construe an offer of, or actual payment of, any support for the child as an admission of paternity, the servicemember should be advised not to make any payments or give any indication of intent to provide financial support before he has been advised to do so by his attorney.

4. Correspondence. Replies to individuals concerning paternity cases should be as kind and sympathetic as circumstances permit. MILPERSMAN, art. 6201025; LEGADMINMAN, para. 8005. Article 6210125.5 of the MILPERSMAN sets out sample replies which may be appropriate in some cases.

B. Amount of support. MILPERSMAN, art. 6210125.3a; LEGADMINMAN, para. 8002.

1. Court decree. If a court order specifying an amount of support to be provided has issued from a court of competent jurisdiction, the servicemember will be expected to comply.

2. Reasonable agreement with mother or legal guardian of child. If agreement can be reached by the natural mother and father, that amount should be paid. The legal assistance officer can help determine a reasonable and fair amount.

3. Support guidelines. The support guidelines for illegitimate children are identical to those discussed for legitimate and adopted children in section 0812 B.3 above.

4. Lump-sum settlements. In many states, "paying off" the mother of the child -- even where she agrees in writing to forego pursuing any claims of paternity or child support -- is ineffective as well as against public policy. The naval service has no stated policy concerning this practice apart from its firm directive that

servicemembers will provide "adequate and continuous support for their lawful dependents."

5. Basic allowance for quarters (BAQ). Note that support of an illegitimate child may entitle a member to BAQ at the "with dependents" rate. A single member living in bachelor quarters will only rate the difference between single BAQ and BAQ "with dependents."

C. Marriage. Since there is no legal requirement for a father to marry the mother of his child, the matter is one for the personal determination of the servicemember. Questions that he may have concerning his moral obligation should be referred to the chaplain.

PART D - INDEBTEDNESS AND CONSUMER PROTECTION

0817 GENERAL. In this age of expanded credit opportunities, the servicemember's regular and relatively secure source of gradually increasing income has made him attractive to installment retailers, loan companies, and other consumer credit operations. Unfortunately, the ease with which credit is made available sometimes results in the tendency to overextend and, in some cases, the inability to pay. In cases of default, disappointed creditors frequently correspond with the commanding officer of the member concerned in hopes that official pressure will be exerted to make the debts good.

0818 POLICY

A. References. MILPERSMAN, art. 6210140; LEGADMINMAN, para. 7001.

B. From inception to final settlement, a monetary obligation is regarded as a private matter between the servicemember and his creditor. A member of the naval service, however, is expected to settle just financial obligations in a proper and timely manner.

C. The failure to pay just debts, or the repeated undertaking of obligations beyond one's ability to pay, is regarded as evidence of irresponsibility which will be considered in retaining security clearances, making advancements in rate or special duty assignments, recommending reenlistments, or authorizing extensions. In aggravated circumstances, indebtedness problems may become grounds for disciplinary action or administrative separation. Accordingly, although the naval service has no authority to require a member to pay any private debt or to divert any portion of his salary in payment thereof, and no commanding officer may adjudicate

claims or arbitrate controversies respecting alleged financial defaults, all commanding officers should cooperate with creditors to the limited extent of referring "qualified correspondence" to the member concerned. Particular situations evidencing continued or consistent financial irresponsibility should be dealt with as outlined above and in section 0813 C.1 of this text.

0819 THE MILITARY AND CONSUMER CREDIT PROTECTION

A. Truth in lending

1. General. The Federal Truth in Lending Act, title I, 15 U.S.C. §§ 1601-1613, 1631-1641, 1671-1677 (1988), is designed to assure "a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various terms available to him and avoid the uninformed use of credit." To this end, the Act requires that credit terms and costs be explained to the consumer in a uniform manner by revealing "the annual percentage rate of the total finance charge."

2. Coverage. The Act applies to virtually everyone who extends consumer credit -- including loan credit, credit extended by sellers, real estate credit, chattel credit, retail revolving credit, and bank and other credit card arrangements. It affects those individual purchase transactions undertaken "primarily for personal, family, household or agricultural purposes." In lieu of the Federal requirements, state disclosure regulations apply whenever the Federal Reserve Board has determined that the state in question has imposed substantially similar requirements together with adequate enforcement measures.

B. DOD Directive 1344.9. In outlining service policies regarding indebtedness of military personnel, DOD Dir. 1344.9 of 7 May 1979, Indebtedness of Military Personnel, provides that creditors seeking to have indebtedness complaints administratively referred to the allegedly defaulting servicemember must first demonstrate compliance with the disclosure requirements of the Truth in Lending Act and also show that the military "Standards of Fairness" have been applied to the transactions.

C. Standards of Fairness. These "Standards of Fairness," published as enclosure (3) to DOD Dir. 1344.9 cited above, include provisions ensuring that the nature and elements of a credit transaction will be fair, equitable, and ethical. For example:

1. Usury. No finance charge contracted for, made, or received under any contract shall be in excess of the charge which could be made for such contract under the law of the state in which the contract is signed. In the event a contract is

signed with a U.S. company in a foreign country, the lowest interest rate of the state or states in which the company is chartered or does business shall apply.

2. Attorney's fee. No contract or loan agreement shall provide for an attorney's fee in the event of default unless suit is filed, in which event the fee provided in the contract shall not exceed 20 percent of the obligations found due.

3. Prepayment. There shall be no "penalty charge" for prepayment of an installment obligation. Moreover, in the event of prepayment, the creditor may collect only a portion of the potential finance charges prorated to the date of prepayment.

4. Late payments. No late charge shall be made in excess of 5 percent of the late payment, or $5.00, whichever amount is the lesser; and only one late charge may be made for any tardy installment. Late charges will not be levied where an allotment has been timely filed, but payment of the allotment has been delayed.

5. Assignment to escape defenses. In loan transactions, defenses which the servicemember may have against the original lender may not be "cut off" through the assignment of his obligation to a third party. As an example, consider the case of Rollo having purchased on credit a television set from Department Store M. If M sells Rollo's agreement to pay for the television to collection agency B, and the television breaks down, B may not insist upon the fact that the breakdown is M's responsibility and therefore has nothing to do with Rollo's obligation to pay B.

D. Fair Debt Collection Practices Act

1. General. The Federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692 (1982), prohibits contact by a debt collector with third parties (such as a commanding officer) for the purpose of aiding debt collection unless there has been prior consent by the debtor, or a court order has been obtained. The Act carefully defines a debt collector as those firms who are engaged in the collection of debts as their primary purpose; in other words, the original creditor has given up trying to collect and turned it over to a "professional." The Act does not prohibit the original creditor from contacting the command.

2. State law. While the Federal Fair Debt Collection Practices Act is a law with application in every locale, many states have enacted state laws covering the same subject. These state laws may be more strict than the Federal law and, when inconsistent, the more strict provisions must be complied with.

3. Action. If it is determined that the debt collector is in violation of the Fair Debt Collection Practices Act or a state statute regulating debt collection practices, the correspondence will be returned to the sender, along with a letter similar to sample letter No. 1 set forth in article 6210140.13 of the MILPERSMAN or fig 7-5, LEGADMINMAN. If a letter is in compliance with the appropriate Federal or state law in this regard, the indebtedness complaint will be processed as set forth in section 0820 below.

E. Electronic Fund Transfer Act (EFTA), 15 U.S.C. § 1693 (1988)

1. General. Automatic Teller Machines (ATM's) are widely used by military personnel, especially when deployed. They provide a substantial benefit, but can also be the root of financial disaster. The EFTA defines the rights and liabilities of the parties involved in such transactions. The cardholder bears full responsibility for all authorized transfers. Any transfer initiated by the cardholder, someone given access by the cardholder, fraudulently initiated by the cardholder or an accomplice, or which constitutes an "error" by a financial institution is authorized. Any other transfer is considered unauthorized.

2. Liability. A cardholder's maximum liability for unauthorized transfers is $50 if he/she reports within two (2) business days of discovery. The maximum liability is $500 if he/she fails to report within two (2) business days of discovery. A consumer will be liable for all unauthorized transactions if no report is filed within 60 days of receiving a bank statement giving notice that such transfers are occurring. None of the protections of this Act may be waived.

3. Resolving errors. The consumer must give written or oral notice within 60 days of receiving the bank statement. Notice should include the consumer's name, account number, statement of error, the amount of the error, and the reason the consumer believes the statement is in error. Upon notification, the financial institution has 10 business days (20 days if the consumer is overseas) to investigate and report the results of the investigation to the consumer. The institution, at its option, can extend the report period by provisionally recrediting the account within 10 business days of notice. Recrediting gives the bank 45 days (90 days if the consumer is overseas) to investigate and report the results of the investigation to the consumer. Following completion of the investigation, the institution shall either correct any errors within 1 business day or, if no errors are found, notify the consumer within 3 business days and forward copies of all documents relied upon (if requested by the consumer). Failure to comply with provisions of this act exposes the financial institution to both civil and criminal penalties.

F. Fair Credit Billing Act (FCBA), 15 U.S.C. § 1666. The purpose of the FCBA is to reduce the volume of consumer complaints by encouraging cooperation between consumers and creditors, by clarifying the consumer's rights and obligations,

and by establishing dispute resolution procedures. The Act applies to open-end consumer credit transactions involving billing errors, including:

- bills for transactions that never occurred;
- transactions conducted by unauthorized people;
- bills for erroneous amounts;
- bills for goods / services that were not delivered or not accepted;
- failure to properly apply credit to accounts;
- computation errors; and
- bills sent to incorrect address.

1. Procedure. The consumer must notify the creditor of any billing error, in writing, within 60 days of receiving the erroneous statement. The creditor must then acknowledge the complaint or resolve the error within 30 days of receipt. If the complaint is not resolved, the creditor has two billing cycles (no more than 90 days) after receipt of the debtor's notice of error to either make appropriate corrections in the debtor's account or conduct an investigation and send the debtor a written explanation of why the creditor believes the debtor's account was correctly shown in the statement. Pending resolution of a billing dispute, the creditor may not, prior to sending the written explanation or clarification to the debtor, take any collection action, restrict or close the account, or report adversely on the debtor's credit rating based on the disputed amount. The creditor may, however, apply the disputed amount against the debtor's credit limit.

2. Remedies. Remedies available are similar to those under the EFTA above. If the creditor violates the billing error resolution procedures, the consumer recovers from the creditor the disputed amount and any finance charges thereon up to $50. If the billing issue remains unresolved, the consumer's claims and defenses can be asserted directly against the credit card issuer if:

a. The consumer has made a good faith effort to resolve the problem with the individual honoring the card;

b. the amount of the initial transaction exceeds $50;

c. the initial transaction was in the same state as the cardholder's designated address or within 100 miles of such address; and

d. the merchant is not the card issuer.

G. Fair Credit Reporting Act (FCRA), 15 U.S.C. §§ 1681-1681t. The purpose of the FCRA is to ensure that the credit reports on which the banking industry depends are current, accurate, and fair and that the reporting agencies respect the consumer's right to privacy, The Act does not regulate creditors, only those agencies such as TRW that "regularly engage in . . . the practice of assembling or evaluating consumer credit information on consumers for the purpose of furnishing consumer reports to third parties." Consumer Reporting Agencies (CRA's) may furnish consumer reports only in the following situations: (1) in response to a court order; (2) with the consumer's consent; or (3) upon request of a person who the agency "has reason to believe" intends to use the report in connection with a credit transaction, for insurance or employment purposes eligibility, or for a license or other government benefit or business transaction where the user has a legitimate business need.

1. Obsolete information. Unless otherwise specified, "obsolete" information cannot be included in a CRA's consumer credit report. Information more than 7 years old may not be included in the report, except for bankruptcy which may appear for 10 years. "Obsolete" information can be included in the consumer report IF the report is intended for use involving a credit transaction of $50,000 or more, issuance of life insurance coverage of $50,000 or more or employment with an annual salary of $20,000 or more.

2. Consumer's rights (15 U.S.C. § 1681g). Upon request, the consumer can obtain a summary of the credit report and a list of those who have received the report within the past 2 years for employment purposes, and within the past 6 months for other purposes. If the consumer disputes the completeness or accuracy of the report, the agency must reinvestigate and record the current status of the disputed information unless the agency has reason to believe that the dispute is frivolous or irrelevant. If the investigation does not resolve the dispute, the consumer may file a brief statement. In future reports, the agency must note that the entry is disputed by the consumer and provide the consumer's statement. If the investigation reveals that the disputed entry is inaccurate or can no longer be verified, it must be deleted. Following either correction of the report or receipt of a consumer's statement in rebuttal, the CRA must furnish a copy of the annotated report (and consumer's statement, where appropriate) to "any person specifically designated by the consumer" who has received the report within the past 2 years for employers, the past 6 months for others.

3. Remedies. The Act provides for civil penalties for willful or negligent noncompliance. There are also criminal penalties for obtaining information under false pretenses.

4. Current problems with the FCRA. Creditors send reports to CRA's on a monthly basis, not just when adverse information occurs. Creditors report minor as well as substantial adverse information. Adverse information, even of a minor nature, stays in credit records for 7 years. Consumers are not notified when creditors send in reports to agencies. The FCRA does not require accurate credit reports, only "reasonable procedures" to avoid errors. The definition of "legitimate business need" for release does not protect consumers from improper releases. Although an agency must give consumers the nature and substance information in its files, it has the latitude to refuse to give consumers copies of their credit files. Creditors may develop lists of qualifications for credit and send the lists to an agency along with a list of names of consumers they want checked for credit worthiness. The FCRA has no provision that allows a consumer to dispute an item of information in a credit report with the original creditor.

H. Door-to-door sales. The Federal Trade Commission (FTC) promulgated the home solicitations trade practices rule (16 C.F.R. Part 429) because it believed that door-to-door sales were especially prone to fraud and predatory practices. The rule permits a consumer to withdraw unilaterally from contracts resulting from door-to-door solicitations.

1. Definition. A door-to-door sale is a sale, lease, or rental of consumer goods or services with a purchase price of $25 or more in which the seller personally solicits the sale, including those in response to an invitation by the buyer, and the contract is made at a place other than the seller's place of business. 16 C.F.R. § 429.1, Note 1(a). Door-to-door sales under this section do not include phone transactions; transactions in which the buyer has initiated the contact and the goods or services are needed to meet a bona fide immediate personal emergency of the buyer (and the buyer furnishes the seller with a signed statement so stating); repair or maintenance work on the buyer's personal property; sales of automobiles at public auctions and tent sales if the seller has at least one permanent place of business [53 Fed. Reg. 45,455 (Nov. 10, 1988)]; and sales of arts and crafts at fairs, shopping malls, civic centers, community centers, and schools [53 Fed. Reg. 45,455 (Nov. 10, 1988)].

2. Deceptive trade practices (16 C.F.R. § 429.1). The FTC has determined that it is a deceptive trade practice if a door-to-door sales representative:

a. Fails to furnish a contract informing the buyer of the right to cancel the transaction within 3 business days;

b. fails to furnish cancellation form stating the seller's name and address and the date by which the transaction may be canceled (this can be a copy of the contract as long as it contains the cancellation language);

c. fails to inform the buyer orally of the right to cancel or misrepresents the buyer's right to cancel; or

d. fails to honor a valid notice of cancellation and refund any payments made within 10 days of the cancellation.

3. Cancellation. The buyer must deliver to the seller a signed and dated copy of the notice of cancellation within 3 business days of the transaction, make any goods delivered by the seller available to the seller at the buyer's residence in substantially as good condition as when received, or comply with the seller's instructions regarding the return of the goods at the seller's risk and expense. If the buyer fails to make the goods available to the seller, the buyer remains liable for performance of all obligations under the contract. If the seller fails to collect any goods delivered to the buyer within 20 days of the date of the notice cancellation, the buyer may retain or dispose of the goods without any further obligation.

0820 PROCESSING OF INDEBTEDNESS COMPLAINTS

A. General. Complaints of indebtedness are generally referred to the servicemember when the creditor correspondence is accompanied by:

1. Evidence that the debt complained of has been reduced to judgment; or

2. a "Certificate of Compliance," or its equivalent, that the credit transaction was made in accordance with the Truth in Lending Act and the Standards of Fairness.

B. Statement of Full Disclosure. A nonjudgment creditor must also submit a statement of "Full Disclosure" showing the terms of the transaction disclosed to the servicemember at the time the contract was executed. Marine Corps procedure for processing of indebtedness complaints, outlined in paragraph 7002 of the LEGADMINMAN, is essentially the same as that detailed in article 6210140 of the MILPERSMAN. Significant variations will be discussed at the end of this section.

C. Qualified indebtedness complaints

1. Types. The types of indebtedness complaints which qualify for referral to the servicemember include:

a. Creditor correspondence evidencing that the alleged debt has been reduced to judgment by a court of competent jurisdiction;

b. correspondence from a nonjudgment creditor that includes copies of the statement of Full Disclosure and the Certificate of Compliance showing execution by both parties prior to the consummation of the contract;

c. correspondence from a nonjudgment creditor who has not executed a Certificate of Compliance prior to the consummation of the contract, or who cannot produce the certification provided that such correspondence includes:

(1) certification by the creditor that the Standards of Fairness have been complied with and the unpaid balance adjusted accordingly, if necessary; and

(2) a statement of Full Disclosure.

d. correspondence from a creditor not subject to the Truth in Lending Act (e.g., a public utility company) that includes a certification that no interest, finance charge, or other fee is in excess of that permitted by the law of the state involved; and

e. correspondence from creditors declared exempt from certification of compliance with the Standards of Fairness and Full Disclosure by article 6210140.8 of the MILPERSMAN. Examples include:

(1) Companies furnishing services such as milk, laundry, etc., in which credit is extended solely to facilitate the service, as distinguished from inducing the purchase of the product or service;

(2) contracts for the purchase, sale, or rental of real estate;

(3) claims in which the total unpaid amount does not exceed $50;

(4) claims for the support of dependents;

(5) purchase money mortgages on real property; and

(6) claims based on a revolving or open-end credit account, if the account shows the periodic rate and its annual equivalent and the balance to which it is applied to compute the charge (e.g., credit cards, department store charge accounts).

NOTE: Above exemptions do not apply in the Marine Corps.

2. Advising the command

a. Referral to debtor servicemember. Normally, referral of a qualified indebtedness complaint to the debtor servicemember is accomplished by a division officer or command legal officer conference, at which time the member is confronted with the allegation of default. If, after confrontation, the servicemember acknowledges the debt and the ability to pay, the member should be instructed to make good the debt as soon as possible. In the event the servicemember disputes the debt or indicates an inability to pay, the member should be referred to the nearest legal assistance officer. Such referral should also be made in the case of a judgment debt apparently obtained in violation of the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. app. 501-591 (1988). In all cases, the servicemember should be warned of the potential adverse consequences the continued nonpayment of a just debt may have upon service status.

b. Correspondence with the creditor. In the case of a complaint referred to a servicemember-debtor, it is expected that the creditor will receive notification of the referral and some indication of the debtor's intentions. Accordingly, the command should forward a letter, as set forth in sample letter number 3 in article 6210140.13 of the MILPERSMAN or figure 7-4 of the LEGADMINMAN, to the creditor and ensure that the member's intentions will reach the creditor either directly or through a legal assistance officer.

D. Unqualified or questionably qualified indebtedness complaints

1. Initial reply. If the creditor has no judgment, is subject to the Truth in Lending Act, is not exempt under MILPERSMAN 6210140.8, and has not met the compliance-disclosure requirements already discussed, the command shall forward a letter, as set forth in sample letter number 2 of article 6210140.13 of the MILPERSMAN or figure 7-5 of LEGADMINMAN, enclosing a copy of the Standards of Fairness and forms for Full Disclosure and the Certificate of Compliance. The complaint should be held in abeyance pending reply from the creditor.

2. Action on reply from creditor. If the creditor resubmits his complaint and includes the completed, required forms, or their equivalent, the complaint will be considered qualified and processed accordingly. If the resubmitted complaint contains neither form, or a set incompletely or insufficiently accomplished, the command shall return the creditor's correspondence with a cover letter patterned on sample letter number 4 of article 6210140.13 of the MILPERSMAN and a copy thereof to the Chief of Naval Personnel.

3. Questionable qualified indebtedness complaints. Cases of questionable qualification should be referred to a staff judge advocate or legal officer for review and opinion. In such instances, correspondence to the creditor should be tailored appropriately.

4. Congressional inquiries. Occasionally, a disgruntled creditor who has failed to qualify his complaint for referral writes to his Congressman. In the event of a congressional inquiry based on such an event, sample letter number 5 in article 6210140.13 of the MILPERSMAN may be used.

E. Marine Corps variations

1. In the Marine Corps, complaints of indebtedness are processed under Chapter 7 of the LEGADMINMAN. The Marines consider qualified correspondence to be that which either certifies compliance with DOD Standards of Fairness, comes from creditors not subject to the Truth in Lending Act, or relates to indebtedness reduced to judgment in accordance with state law. The Marine Corps recognizes none of the exemptions from compliance with the DOD standards set forth in MILPERSMAN 6210140.8 and discussed in section C.1.e above. These exemptions should be considered applicable to naval personnel only.

2. As in the Navy, qualified correspondence is referred to the Marine who is counseled concerning obligations as well as being advised as to rights. If appropriate, referral may also be made to additional financial, legal, or credit counseling on base. *See* LEGADMINMAN, § 7002.5.

3. Special procedures for detached Marines. In cases where a commander receives an indebtedness complaint regarding a Marine no longer a member of the command, the letter is forwarded to the new command and the debtor's new duty station address is sent to the creditor (if available from local records). If the present location of the debtor is unknown, the commander will refer the creditor to the locator at CMC. If the complaint regarding a detached member has come from CMC rather than directly from the creditor, the commander will readdress and forward it or return it to CMC as appropriate. *See* fig. 7-6, LEGADMINMAN. (The Navy follows a similar procedure, although it is not specified in the MILPERSMAN.)

0821 ADMINISTRATIVE OR DISCIPLINARY ACTION BECAUSE OF INDEBTEDNESS

A. General. Actions discussed by this section are usually reserved for aggravated cases of servicemembers who persist in demonstrating no inclination to settle qualified obligations that have been referred to them through their commands. Such cases involve members who continually overextend themselves despite prior

difficulties from, and warnings regarding, living beyond their means. Normal indications of these problems are repeated complaints from the same creditor or multiple complaints from different sources.

B. Administrative separations. MILPERSMAN, art. 3630600; MARCOR-SEPMAN, para. 6210.3. Servicemembers may be separated for misconduct due to a pattern of misconduct when they exhibit an established pattern of dishonorable failure to pay just debts. Processing for misconduct could result in an other than honorable separation with attendant loss of service benefits. In each case, the member concerned must have received prior counseling and been afforded a reasonable opportunity to overcome his deficiencies. Following such counseling, an appropriate warning entry should be made on page 11 (USMC) / page 13 (USN) of the member's service record.

C. Disciplinary action. Article 134, UCMJ, includes the offense of "dishonorable failure to pay a just debt," which carries a maximum punishment of six months' confinement, forfeiture of all pay, and a bad-conduct discharge. Deceit, willful evasion, false promise, or other circumstances indicating gross indifference must be proved to establish the offense. Nonjudicial punishment or court-martial action may be initiated under article 134 at the discretion of the command. It should be remembered, however, that disciplinary action is never an appropriate vehicle for assisting creditors in the collection of debts. Moreover, disciplinary action not resulting in discharge is likely to produce financial hardship in the form of reduction or forfeiture, an end hardly likely to rehabilitate the debtor. Accordingly, in most cases, administrative actions, rather than disciplinary measures, offer more appropriate solutions to aggravated indebtedness situations.

0822 BANKRUPTCY

A. Policy. The Navy neither encourages nor discourages the filing of a petition in bankruptcy. A discharge in bankruptcy does not give a member immunity from prosecution for offenses of dishonorable failure to pay just debts committed prior to a petition of bankruptcy. MILPERSMAN, art. 6210140.3k.

B. Action. Bankruptcy involves a complex and relatively expensive legal process. Members contemplating personal bankruptcy proceedings frequently entertain misconceptions concerning the ease with which the project may be carried through and the actual rehabilitative effect bankruptcy will have on their financial status. A legal assistance officer may give basic counseling. Should bankruptcy be pursued further, members must be referred to a civilian bankruptcy attorney.

PART E - SOLDIERS' AND SAILORS' CIVIL RELIEF ACT (SSCRA)

0823 BACKGROUND. It has long been recognized that a person's entry into the armed service carries with it a potentially burdensome disruption of personal affairs. The servicemember's assignment far from home and occupation with military duties may impair his ability to attend to personal, financial, and legal matters; his financial situation may be affected by a substantial reduction in income; and the member's presence in states other than that of his domicile could subject him to multiple taxation of income and property. During the Civil War period, many states enacted stay laws which imposed an absolute moratoria on enforcement of legal rights against servicemembers. Experience soon taught, however, that such arbitrary and rigid prohibitions of suits against servicemembers were not only unnecessary but, in truth, a self-defeating kindness to the soldier. Most servicemembers can, if given time and opportunity, attend to their affairs and meet their obligations, making the total prohibition upon enforcing rights against servicemembers unnecessary while having the untoward effect of denying credit to the member and family at a time when it may be most needed.

The first nationwide legislation designed to protect the servicemember, the Soldiers' and Sailors' Civil Relief Act of 1918, Act of Mar. 8, 1918, ch. 20, 40 Stat. 440, rejected the absolute prohibition approach of the early states' stay laws. This Act provided protection in the form of suspension of legal proceedings and transactions which may prejudice the "civil rights" of a servicemember during the time that a person is in the military service, when, and if, opportunity and capacity to perform personal obligations are materially impaired by reason of being in the military service. This general approach of suspending proceedings and transactions based upon the determination of material impairment is carried forward into the Soldiers' and Sailors' Relief Act of 1940, 50 U.S.C. app. 501-591 (1988) [hereinafter SSCRA] which is largely a reenactment of the Soldiers' and Sailors' Civil Relief Act of 1918. Except for specific relief provisions deemed necessary to the Act's objectives, this approach is embodied in most of the remedies afforded by the SSCRA. Additionally, criminal penalties are added for actions evading or frustrating the relief provisions of the SSCRA. The SSCRA was most recently amended in 1991 following Operation Desert Storm [SSCRA Amendments of 1991, Pub. L. 102-12 (18 March 1991)].

0824 ARTICLE I: GENERAL PROVISIONS

A. Purpose and scope of the Act. The SSCRA is intended to enable persons on active duty with the armed forces of the United States to devote their attention exclusively to the defense needs of the nation by providing for the temporary suspension of civil proceedings which might prejudice the civil rights of such persons.

50 U.S.C. app. 510 (1988). It should be noted that the SSCRA does not extinguish any liabilities or obligations, but merely suspends action and enforcement until such time as the ability of the servicemember to answer or comply is no longer materially impaired by reason of military service.

B. Persons entitled to benefits and protections of the Act

1. Persons in the military service defined

a. Members of the U.S. military establishment, whether officer or enlisted, volunteer or inductee (from the date of receipt of the induction order), who are on active duty with any armed force, or who are in training or education under supervision of the United States preliminary to induction, are entitled to the protections and benefits of the SSCRA. 50 U.S.C. app. 511 (1988). The definition encompasses full-time training at a service school so designated by law or the Secretary of the military department concerned. It does not cover retired personnel not on active duty or Reserve personnel not on active duty. In some circumstances, a servicemember absent from duty for other than "sickness, wounds, leave or other lawful cause" may be considered not on active duty and hence divested of rights under the SSCRA. In *Mantz v. Mantz*, 69 N.E.2d 637 (Ohio C.P. 1946), the court held that a soldier sentenced by a general court-martial to five years' confinement at hard labor, total forfeitures, and a dishonorable discharge at the termination of his confinement was not a soldier on "active duty" or "active service" and hence not entitled to the immunities and benefits under the SSCRA. The court reasoned that commitment for any violation of the Army's rules and regulations would not necessarily divest the soldier of his rights under the Act, but the gravity of the offense charged and the sentence of the court-martial are factors to be considered in determining the situation. Thus, in *Shayne v. Burke*, 158 Fla. 61, 37 So.2d 751 (1946), it was held that a soldier who overstayed his authorized leave by 16 days, because of his wife's condition upon the birth of their first child, was entitled to the benefits of the SSCRA. As for deserters, the Judge Advocate General of the Army has often expressed his advisory opinion that they are not "persons in the military service of the United States" for purposes of the SSCRA. *See, e.g.*, JAGA 1952/3654 (22 Apr. 1952). Persons reported missing are also afforded certain safeguards under the SSCRA. 50 U.S.C. app. 581 (1988).

b. Merchant seamen, civilian employees, contract surgeons, and others accompanying one of the services have been held not to be "persons in the military service" and hence not entitled to the benefits of the Act.

c. Public Health Service (PHS) officers qualify if the PHS has been designated by the President as a military service, a move allowable only in time of war or national emergency.

2. Persons secondarily liable. The enforcement of any liability or obligation against any person primarily or secondarily liable with a servicemember may be subject to the same delays and vacations available to the servicemember. In other words, the courts enjoy considerable discretion in granting stays, postponements, or suspensions of suits or proceedings to sureties, guarantors, endorsers, accommodation makers, and others. The SSCRA further provides that, whenever the military service of a principal on a criminal bail bond prevents the sureties from enforcing the servicemember's attendance, the court shall not enforce the provisions of the bond during the principal's military service and may even, either during or after said service, discharge the sureties and exonerate the bail. 50 U.S.C. app. 513(3) (1988). In the codefendant situation, however, the SSCRA provides that as to stays "where the person in military service is a codefendant with others the plaintiff may nevertheless by leave of court proceed against the others." 50 U.S.C. app. 524 (1988).

3. Dependents of servicemembers. Dependents of military personnel may apply to a court for the benefits of the SSCRA concerning rent, installment contracts, mortgages, liens, assignments, and leases under section 0825A of this chapter. 50 U.S.C. §§ 530-536 (1988).

4. U.S. citizens serving with allied forces. Persons serving with an allied force who were, prior to that service, citizens of the United States are entitled to the benefits and protections of the SSCRA unless dishonorably discharged therefrom. 50 U.S.C. app. 512, 572 (1988).

C. Scope. The Act applies within the United States, in all states and territories subject to U.S. jurisdiction, and to proceedings in all courts --Federal, state, or municipal -- therein. Except as discussed below concerning the statute of limitations, the SSCRA contains no reference to administrative proceedings. 50 U.S.C. app. 525 (1988). In the few cases where the issue has been raised, it has been held that administrative proceedings (such as hearings before area rent directors and departmental police hearings) are not covered.

D. Waiver of benefits. An exception to the SSCRA enables servicemembers to waive in writing the protections given them in other provisions of the Act in the case of contracts and security agreements executed during their military service. 50 U.S.C. app. 517 (1988). It was not meant to prohibit servicemembers or their duly authorized representatives from entering into any verbal agreement when such agreement did not waive any rights guaranteed by the Act. *Pailet v. Ald, Inc.*, 194 So.2d 420 (La. App. 1967).

E. Future financial transactions, 50 U.S.C. app. § 185 (1990 amendment). Retaliatory action against those who invoke the SSCRA is prohibited. An application under the provisions of the SSCRA for a stay, postponement, or suspension of any

tax, fine, penalty, insurance premium, or other civil obligation or liability cannot be the basis for lenders then determining that the servicemember is unable to pay an obligation or liability. With respect to a credit transaction between servicemembers and creditors, creditors cannot then deny or revoke credit, change the terms of an existing credit arrangement, refuse to grant credit in the terms requested, submit adverse credit reports to credit reporting agencies or, if an insurer, refuse to insure a servicemember.

0825 ARTICLE II: GENERAL RELIEF

A. Default judgments

1. General. In "any action or proceeding commenced in any court" where there is a "default of any appearance by the defendant, the plaintiff, before entering judgment, shall file in the court an affidavit setting forth facts showing that the defendant is not in military service." 50 U.S.C. app. 520 (1988). Without an affidavit showing that the defendant is not in the military service, no default judgment may be entered without an order of the court, and the court concerned must first appoint an attorney to represent and protect the interests of any servicemember-defendant. This section protects servicemembers from default judgments being entered against them without their knowledge. "[I]t does not prevent *entry of* such a judgment when there has been notice of pendency of the action and adequate time and opportunity to appear and defend." *United States v. Kaufman*, 453 F.2d 306 (2d Cir. 1971).

2. "Action or proceeding commenced in any court" defined. This includes actions based on transactions occurring both before and during the period of military service. The reach of default judgment protection is comprehensive in blanketing all civil actions or proceedings, whatever their nature, but not administrative proceedings. There seems to be little reported controversy on this point apart from the position of the Ohio court which, in *Case v. Case*, 124 N.E.2d 865 (Ohio P.Ct. 1955), decided to the contrary respecting the presentation of a will for probate (the minor son of the decedent was in the military at the time). The great majority of decisions have included probate cases within the scope of the default judgment protections.

3. "Any appearance" defined. The courts are agreed that "any appearance" whatsoever by the servicemember-defendant will operate to obviate the default judgment protections and thereby render the member subject to a default judgment. The words embrace the concept of voluntary submission to the court's jurisdiction in whatever form. Any act before the court by the member or by their retained attorney, as distinguished from a court-appointed attorney, will generally constitute a disqualifying appearance. Courts dealing with the issue have found an

appearance based on motions to dismiss for lack of jurisdiction, motions to quash service, and motions for continuance. In some states, servicemembers receiving service of process may write a letter or send a telegram to the court asking for protection under the Act, and such informal communication has not been classified as an "appearance." *Rutherford v. Bentz*, 354 Ill. App. 532, 104 N.E.2d 343 (1952). Legal assistance attorneys should be aware that a letter, signed by them for a client, may constitute an appearance. *Skates v. Stockton*, 140 Ariz. 505, 683 P.2d 304 (Ct. App. 1989). Before advising a servicemember to write her own letter or preparing a document for her, however, a legal assistance officer must be certain that such informal communication with the trial court or the clerk of such a court will not be construed as an "appearance" by the servicemember.

4. Action by the court

a. Where an affidavit shows the defendant is in the military, no default judgment may be entered until the court has appointed an attorney to represent the servicemember-defendant. In addition, the power of the court to enter a default judgment will depend upon state law on *in personam* jurisdiction. Upon application, the court shall make such an appointment; but no such appointed attorney has the power to waive any right of the servicemember or to bind the servicemember by his acts. In addition, the court may require as a condition of judgment that the plaintiff file a bond approved by the court to indemnify the servicemember-defendant or make such "further order or enter such judgment as in its opinion may be necessary" to protect the rights of the defendant under the Act.

b. Where no affidavit has been filed, technically, no default judgment should be entered; however, some courts treat this situation as if an affidavit showing the defendant were in the military has been filed and proceed accordingly. Default judgments entered in violation of the Act are voidable. *See* paragraph 5, *infra*.

c. Where a false affidavit has been filed, the person filing the false affidavit may be punished as a misdemeanant subject to a maximum punishment of imprisonment for one year and a $1,000 fine. 50 U.S.C. app. 520(2) (1988). If brought to the attention of the court, a false statement that the defendant is not in the military should result in action as in subparagraph a above. The matter should then be referred to a U.S. attorney for criminal prosecution.

5. Servicemember's remedy. Any default judgment entered against a servicemember, under whatever circumstances, is merely voidable and not void. *Davison v. General Finance Corp.*, 295 F. Supp. 878 (D.D.C. 1968). This rule appears to apply, even for the situation involving a default entered based on a false affidavit. *See Hudson v. Hightower*, 307 Ky. 295, 210 S.W.2d 933 (1948). Accordingly, any default judgment entered against a servicemember is valid unless the member moves

to have the judgment vacated within ninety days after the termination of the member's service. 50 U.S.C. app. 520(4) (1988). In every case, however, the servicemember must show both that the member was prejudiced by reason of military service in making a defense to the judgment, and that a meritorious or legal defense lies to the action or some part of it. *Thompson v. Lowman*, 108 Ohio App. 453, 155 N.E.2d 258 (1958). In a circumstance involving a false affidavit, the servicemember might also seek Federal prosecution of the offender. No criminal or other penalty is provided for those situations where a default judgment was entered against the servicemember absent the filing of any affidavit, with or without the appointment of an attorney, or with an affidavit showing military service but without the appointment of an attorney.

B. Stay of proceedings and executions

1. General. The general stay provision of the SSCRA declares that, at any stage of any action or proceeding in any court in which a servicemember is involved, either as plaintiff or defendant, the court in which the action is pending may, on its own motion, and shall, on application by the servicemember-party or someone on behalf of the servicemember, stay the action or proceeding unless, in the opinion of the court, the ability of the servicemember-party to participate is not materially affected by reason of his/her military service. This protection is available throughout the period of service and for sixty days thereafter, and covers actions or proceedings based on both preservice and inservice transactions. 50 U.S.C. app. 521 (1988).

a. In every case, the grant of a stay is discretionary with the trial court. This is so despite the apparent mandatory direction for cases involving applications since, in each instance, application or not, the grant depends upon the opinion of the court as to whether military service has materially affected the servicemember's ability to participate in the proceedings. *Boone v. Lightner*, 319 U.S. 561, *reh'g. denied*, 320 U.S. 809 (1943).

b. Factors going to "material effect" generally include such things as:

(1) The relationship of the servicemember to the action (e.g., whether member's presence will add to the action or may actually be necessary to protect rights). *See Gross v. Williams*, 149 F.2d 84 (8th Cir. 1945); *Royster v. Lederle*, 128 F.2d 197 (6th Cir. 1942).

(2) The servicemember's diligence with regard to the action (e.g., whether leave was applied for [*Semler v. Oerturg*, 234 Iowa 233, 12 N.W.2d 265 (1943)], leave was denied [*Simpson v. Swinehart*, 122 Ind. App. 1, 98 N.E.2d 509 (1951)], leave was applied for and denied [*Graves v. Bednar*, 167 Neb.

847, 95 N.W.2d 123 (1959)], and the member's geographical availability to the court [*Smith v. Smith*, 222 Ga. 246, 149 S.E.2d 468 (1966)].

(3) The servicemember's good faith in asserting the act. *See Boone v. Lightner*, 319 U.S. 561, *reh'g. denied*, 320 U.S. 809 (1943) (a servicemember is not entitled to a stay in proceedings where the provision of the Act is used as a shield for wrongdoing).

2. Special provisions allowing for stays of specific proceedings. In actions on certain installment contracts, mortgages, trust deeds, and other secured obligations entered into by the servicemember prior to his entering the military service, the grant of a stay is discretionary with the court depending upon a finding that the servicemember's ability to comply with the terms of the transaction or obligation is materially affected by reason of military service. 50 U.S.C. app. 531-532 (1988).

3. Stays or vacations of judgments, orders, etc. The execution of judgments or orders against a servicemember may be stayed, and attachments or garnishments against property, money, or debts may be vacated or stayed at the discretion of the court depending upon its opinion as to whether the servicemember's ability to comply with the judgment or order is materially affected by reason of military service. 50 U.S.C. app. 523 (1988). *Bowsman v. Peterson*, 45 F. Supp. 741 (D. Neb. 1942).

4. Duration and terms of stays. Ideally, a servicemember can obtain a stay based on the foregoing provisions for the entire period of military service plus three months thereafter. 50 U.S.C. app. 524 (1988). The actual duration of stays allowed, when less than this permissible maximum, may depend upon the equities of each case.

C. Statutes of limitation. Periods of military service shall not be included in computing any period of limitation prescribed for the bringing of any action or proceeding in any court, by or against a servicemember or his/her heirs, whether such action or proceeding accrued prior to, or during, such military service. This includes the computing of any period provided by law for various types of redemptions of real property. This provision is applicable to administrative proceedings as well as court actions. It is inapplicable, though, to the statutes of limitation under the Federal Internal Revenue laws. *Allen v. United States*, 439 F. Supp. 463 (C.D. Cal. 1977). Unlike other general relief provisions, there is no requirement that material effect as to the servicemember's ability or inability to participate in the proceedings be shown. Since it is always self-executing, courts have no discretion in applying it. 50 U.S.C. app. 525 (1988).

0626 ARTICLES III, IV, AND V: SPECIFIED TRANSACTIONS AND OBLIGATIONS. Articles III, IV, and V of the 1940 Act, 50 U.S.C. app. 530-574 (1988), contain extensive provisions conferring certain benefits, protections, and status for enumerated specific transactions and both private and governmental (tax) obligations.

A. Article III: rent, installment contracts, mortgages, liens, assignments, leases. A servicemember's dependents may not be evicted from a dwelling the rent for which does not exceed $1200 per month, except upon a court order. 50 U.S.C. app. 530 (1988) (SSCRA Amendments of 1991). This article directs the stay of any application for such an order for a maximum of three months, unless it appears that the tenant's ability to pay rent is not materially affected by military service. Moreover, the Secretary of the Navy is empowered "to order allotments in reasonable proportion to discharge the rent of premises occupied for dwelling purposes" by the dependents of a servicemember. Provision is also made for (1) the resolution of installment contracts for the purchase, lease, or bailment of real or personal property; (2) mortgages, trust deeds, and certain secured transactions accomplished prior to entry into military service; and (3) settlement of cases involving stayed proceedings to foreclose mortgage on, resume possession of, or terminate contracts for purchase of personal property. Provisions for the termination of leases executed prior to entry into military service are also covered. 50 U.S.C. app. 534 (1988). Protective restrictions placed upon the operation of certain preservice life insurance policy assignments, as well as upon enforcement of specified storage liens, is also handled. 50 U.S.C. app. 535 (1988).

B. Article IV: insurance. A servicemember may apply to the Department of Veterans Affairs for a government guarantee of premium and interest payments on life insurance policies for a total not to exceed $10,000 face value in order to prevent lapse or forfeiture. This protection covers the duration of the servicemember's military service and two years beyond termination of that military service. During the effective period of the protection, unpaid premiums are treated as policy loans. If, at the expiration of the time allowed, the unpaid amount of the policy exceeds the cash surrender value of the policy, the policy lapses and the government pays the difference to the insurer, collecting in turn from the insured. 50 U.S.C. app. 540-548 (1988).

C. Article V: taxes and public land. Article V of the SSCRA deals with the taxation of a servicemember's personal and real property and to the suspension of his/her rights and claims upon certain public lands. For example, payments of Federal income taxes may be deferred if the member's ability to pay such tax is "materially impaired" by such service. 50 U.S.C. app. 573 (1988). Moreover, the sale of property owned by the servicemember prior to military service for the purpose of enforcing the collection of unpaid taxes or assessments is restricted by the Act. 50 U.S.C. app. 560 (1988). By declaring that a servicemember's residence for tax

purposes is not affected by military assignment, the SSCRA reserves the right of taxing military income and personal property to the state of domicile. 50 U.S.C. app. 574 (1988). This exemption does not cover personal property used in or arising from a trade or business and otherwise subject to the taxing jurisdiction of the state where the servicemember is stationed. The section does apply to the taxation of motor vehicles. It requires the servicemember who has not registered and licensed his/her vehicle in his/her home state to do so in the host state, but the "license fee or excise" imposed in connection with such a host state registration and licensing must be limited to "those taxes which are essential to the functioning of the host state's licensing and registration laws in their application to motor vehicles of nonresident servicemen." *See California v. Buzard*, 382 U.S. 386 (1966). Other sections of Article V of the SSCRA preclude forfeiture of rights and claims to public lands as a result of absence due to military service, and suspend for the period of service, and six months thereafter, certain requirements necessary for the preservation of certain rights.

0827 ARTICLE VI: ADMINISTRATIVE REMEDIES. To prevent abuse of the SSCRA, the courts are directed to give no effect to transfers or acquisitions made to delay just enforcement of rights by persons taking advantage of the SSCRA's benefits. 50 U.S.C. app. 580 (1988). For example, in *Radding v. Ninth Federal Savings and Loan Association*, 55 F. Supp. 361 (D.N.Y. 1944), the court precluded relief under the SSCRA where it was found that property was transferred to the applicant on the day of his induction into the military, and the facts and circumstances made it appear that the transfer was for the purpose of obtaining the benefit of the statute. By statute, though, certification of military service by the Chief of Naval Personnel or the Commandant of the Marine Corps constitutes prima facie evidence of a person's military status. 50 U.S.C. app. 581 (1988).

0828 ARTICLE VII: FURTHER RELIEF

A. Anticipatory relief. A servicemember, upon application to a court, may seek anticipatory relief from obligations or liabilities incurred prior to service or taxes falling due before service. The court may, unless the servicemember's ability to satisfy the obligation or tax has not been materially impaired by military service, grant relief by staying enforcement and extending payments over a period equal to the remaining period of military service. Interest accrues at the agreed rate or at a rate prescribed for such taxes or obligations when due. No other fines or penalties accrue so long as the terms and conditions of the stay are met. 50 U.S.C. app. 590 (1988).

B. Health insurance reinstatement. Upon release from military service, persons entitled to SSCRA coverage will be entitled to reinstatement of health insurance coverage that was in effect on the day before active service began. Insurance carriers may not require a waiting period or exclusion of coverage for a preexisting health condition unless the health condition is service-connected. 50 U.S.C. App. § 593.

C. Professional liability protection. Health care providers, and others furnishing "services determined by the Secretary of Defense to be professional services (lawyers)," are eligible to apply to have their liability policies suspended during periods of active service. 50 U.S.C. App. § 582 (1988). To qualify, they must have been ordered to active duty after 31 July 1990, and have had professional liability insurance in effect before beginning active duty. No premiums may be charged during active service and any premiums paid for future coverage or credit toward payment of premiums after active service ends must be refunded. After active service, professionals have 30 days to request reinstatement of insurance and liability insurance carriers must reinstate coverage on the date on which professionals transmit written requests to insurers. The minimum period of reinstatement is the period remaining on the policy when the professional entered active service. No increase in premiums is allowed except for general increases in premiums charged for coverage of other persons in the specialty.

PART F - NOTARY AND NOTARIAL ACTS

0829 GENERAL. The office of notary public originated in the days of the Roman Empire and continues today in basically the same form. The duties of the notary, however, have undergone substantial change. Notarial powers today are governed by both federal and state law. Chapter 9 of the *JAG Manual* is the main reference source in the Navy and Marine Corps for notarial powers. Section 936 of title 10, *United States Code* governs notarial acts for purposes of military justice and administration. Section 1044a of the same title authorizes judge advocates, adjutants, and 0-4's and above to perform any notarial act necessary for legal assistance purposes.

0830 NOTARIAL ACTS

A. Oaths. JAGMAN, § 0902 lists those members authorized to administer oaths under 10 U.S.C. § 936. Oaths under this section are valid only for those situations described in JAGMAN, § 0902. For example, a person designated to conduct an investigation is given the authority to administer oaths to any person when it is necessary in the performance of his duties as an investigating officer. An

oath administered by the investigating officer, which has no connection with the investigation, would be invalid unless authorized by some other provision of chapter 9.

B. Acknowledgements. An acknowledgement is a formal declaration to an authorized official that a certain act or deed was the free and knowing act of the declarant. Primarily used in relation to deeds of real property, the acknowledgement affirms the genuineness of the owner's intent to convey title to property and that the execution of the deed is the free and knowing act of the owner. Acknowledgments entitle the instrument to be recorded or authorize its introduction into evidence without further proof of its execution. JAGMAN, § 0906.

C. Sworn instruments. Sworn instruments are written declarations signed by a person who declared under oath before a properly authorized official that the facts set forth in the document are true to the best of his knowledge and belief. They normally include affidavits, sworn statements, and depositions. The purpose of sworn instruments is to make a formal statement under oath of certain facts which are known to the person making the statement. JAGMAN, § 0907.

D. Authority to perform. The authority granted under 10 U.S.C. § 1044a is separate and apart from any authority provided by state law. Persons performing notarial acts under 10 U.S.C. § 1044a derive their authority from Federal law which may be exercised without regard to geographic limitation. All fifty states, the District of Columbia, and the U.S. possessions have granted limited notarial powers to all commissioned officers (0-1 or above) of the armed forces. State notarial authority may only be exercised in the state concerned. The statutes are listed in JAGMAN, § 0910. Another excellent reference source is the *Notarial Guide* published by The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia.

E. Effectiveness of the notarial acts. Notarial acts performed under the authority of 10 U.S.C. § 1044a are legally effective for all purposes. Oaths administered under the authority of 10 U.S.C. § 936 are legally effective for the purposes for which the oath is administered. Federal notarial authority may be exercised without regard to geographic limitations and is not dependent on any state or local law. If the somewhat ritualistic procedure is meticulously followed for each notarial act, the document or oath should be legally effective in the vast majority of cases.

F. Proof of authority. The signature of any person administering an oath or acting as a notary under the authority of 10 U.S.C. §§ 936 or 1044a, together with the title of his or her office, is prima facie evidence that the signature is genuine, that the person holds the office designated, and that he or she has the authority to so act. No seal is required.

PART G - UNIFORMED SERVICES FORMER SPOUSE'S PROTECTION ACT (USFSPA)

0831 GENERAL. The Uniformed Services Former Spouse's Protection Act [hereinafter the Act] was passed on 8 September 1982, took effect on 1 February 1983, and is codified at 10 U.S.C. § 1408 (Supp. II 1984). The Act was a reaction by Congress to the case of *McCarty v. McCarty*, 453 U.S. 210 (1981), where the Supreme Court held that Congress intended a military pension to be the separate property of the retiree and not a property interest subject to division by the states upon dissolution of the retiree's marriage. The Act does not mandate that former spouses be given a portion of a military retiree's pension but, rather, permits state courts to treat the pension either as separate property of the retiree or as divisible property of the marriage.

0832 PROVISIONS OF THE ACT

A. Jurisdiction. In many cases, the member and the spouse may have a choice of states in which to file an action for dissolution of marriage. The question then becomes whether the chosen state can acquire jurisdiction over the other spouse in order to enter a lawful order. In the case of the member, the Act requires that the state attempting to divide a military pension gain jurisdiction over the member by: (1) the member's consent to the jurisdiction of the court; (2) the member's domicile within the state; or (3) the member's residence within the state other than because of his military orders. This jurisdiction provision does not apply to retirees. Seeking relief under the Soldiers' and Sailors' Civil Relief Act can unwittingly subject the requestor to a court's jurisdiction regarding pension division.

B. Division of a "vested" and/or potential pension. It is important to realize that there is a trend among some sta[illegible]urts to award a spouse an interest in the potential pension of the military mem[illegible] This interest is valid, but payments will not be made directly to the spouse unless she qualifies for a direct payment as discussed below and then only after the member retires. Many other courts will award a spouse an interest in a pension that has "vested" with the member -- in other words, he is past twenty years of service and is eligible to retire. The member may be ordered to pay that interest to the spouse even though he has not yet retired. The Act specifically prohibits states from ordering a member to retire so that the spouse can collect a portion of the pension. Even if the spouse is awarded such an interest and qualifies for a direct payment, it will not begin until 90 days after the member retires.

C. Direct payment. Certain former spouses are entitled to have their court-ordered portion of a retiree's pension paid directly to them from the applicable military finance center. If the award to the spouse is made as a separate property award and if the former spouse was married to the member or retiree for at least ten years, during which time the servicemember performed at least ten years of service creditable toward retirement, the spouse is entitled to a direct payment. The Act places a limit of 50 percent on the amount of gross pay that can be paid under this provision.

D. Garnishment. The Act gives the former spouse the right to garnish a retiree's pension where the retiree has failed to comply with a court-ordered property settlement.

E. Medical, commissary, and exchange privileges. The Act has granted to unremarried former spouses who were married to a servicemember or retiree for at least twenty years, during which time the servicemember or retiree served at least twenty years of creditable service toward retirement, or the servicemember was in the service for at least 15 years while married to this former spouse if divorced before 1 April 1985 (divorces after this date for other qualified former spouses carry military benefits for up to 2 years from the date of the divorce), the right to medical (if the spouse does not have an employer-sponsored health plan), commissary, and exchange privileges.

F. Retroactivity of the Act. Considerable interest focused on the retroactive application of the Act. Following the *McCarty* decision, a number of state courts reopened orders before 26 June 1981 that did not divide military retired pay and proceeded to divide the retired pay. Section 555 of the National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, now clearly prohibits reopening pre-*McCarty* divorce decrees unless the decree was reopened prior to the date of the 1991 Authorization Act.

PART H - SURVIVOR BENEFIT PLAN (SBP)

0833 GENERAL

The Survivor Benefit Plan was enacted by Pub. L. No. 92-425 on 21 September 1972, codified at 10 U.S.C. §§ 1447-1455, and replaces two former plans -- the Retired Serviceman's Family Protection Plan and the U.S. Contingency Option Act. The SBP provides all members of the uniformed services who are entitled to retired pay with the opportunity, in the event of their death, to provide up to 55 percent of their gross retired pay (reduced to 35 percent when the survivor reaches age 62, unless an election for Supplemental SBP was made) as an annuity

payable to their designated beneficiaries. The primary references are NAVMILPERSCOMINST 1750.2, Subj: SURVIVOR BENEFITS, INCLUDING THE RETIRED SERVICEMANS FAMILY PROTECTION PLAN (RSFPP) (10 USC 1431 ET SEQ.) AND THE SURVIVOR BENEFIT PLAN (SBP) (10 USC 1447 ET SEQ.) AS AMENDED; and NAVEDTRA 4660D, Subj: Survivor Benefit Plan for the Uniformed Services (stock number 0503-LP-003-0290).

0834 PROVISIONS OF THE SURVIVOR BENEFIT PLAN

A. Automatic enrollment. Unless a retiree elects not to participate in SBP, or elects to participate at less than the maximum level (full gross retired pay) before the first day on which he or she becomes entitled to retired pay, each member with a spouse and/or a dependent child or children on the date of retirement will automatically be enrolled at the maximum rate. The DOD Authorization Act for Fiscal Year 1986 (Pub. L. No. 99-145) provided in pertinent part that consent of the present spouse is required in order for the member: (1) To opt out of the program; (2) to participate at less than the maximum amount; or (3) to provide an annuity for a dependent child, but not for the spouse.

B. Former spouses. The Uniformed Services Former Spouse's Protection Act provides that former spouses may be beneficiaries under SBP. The election to provide SBP coverage for former spouses, as well as revocation, are each subject to several rigid and complicated requirements. *See The Retired Officers' Association SBP Made Easy*, app. D (1992 ed).

C. Amount of annuity. The monthly annuity payments shall normally equal 55 percent of the retiree's base pay. If the spouse becomes ineligible due to remarriage before age 55 or death, the annuity is payable to the eligible children. Dependency and indemnity compensation (DIC) or social security payments received by the beneficiaries will reduce the annuity.

D. Tax consequences. The amount deducted from the retiree's gross retired pay for participation in this plan is not included as gross income derived from retired pay for Federal income tax purposes; however, payments to beneficiaries after the death of the retiree are included in gross income for Federal income tax purposes. The value of the survivor annuity shall not, in most cases, be included as part of the estate in the computation of Federal estate tax.

PART I - STATE TAXATION

0835 GENERAL

Under 50 U.S.C. App. § 574, a servicemember neither acquires nor loses residence or domicile solely by residing in a given state pursuant to military orders. Military income is deemed to be earned in the state of domicile. A servicemember's personal property is deemed to be located in the state of domicile.

A. Authority to tax. A state can tax all income, from whatever source derived, of domiciliaries and statutory residents. A domicile is that place where a man has his true, fixed, permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. The definition of "resident" varies from state-to-state. New York Tax Law § 605 (McKinney), for example, provides: "A resident individual means an individual: (1) who is domiciled in this state, unless he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state." Some states treat certain domiciliary military members as nonresidents for tax purposes (as long as they are stationed outside the state) and they are not required to pay state taxes.

B. Fixing domicile. Since domicile involves a question of intent, circumstantial factors indicating a chosen domicile include: expressed intent, oral or written; physical presence, past and present; residence of immediate family; location of schools attended by children; payment of nonresident tuition for education; payment of income and personal property taxes; ownership of real property; leasehold interests; situs of personal property; voter registration; vehicle registration; driver's license; location of bank and investment accounts; submission of DD Form 2058 (change of domicile); home of record at the time of entering service; place of marriage; spouse's domicile; place of birth; business interests; sources of income; outside employment; declarations of residence on legal documents such as wills, deeds, mortgages, leases, contracts, etc.; address provided on federal income tax return; membership in church, civil, professional, service, or fraternal organizations; ownership of burial plots; and location of finances or charitable contributions.

C. Nonmilitary income. 50 U.S.C. App. § 574 protects only military income from double taxation. A servicemember's nonmilitary income is not protected from double taxation by section 574. When persons are taxed by multiple states, they usually receive relief in the form of taxation credit. Nonmilitary income can be taxed by:

1. The servicemember's state of domicile which can tax all income from whatever source derived; and / or

2. the state in which the income is earned (the legal fiction that a servicemember's income is earned in the state of domicile applies only to military compensation).

D. Spouse's income. The rule of consequential domicile (i.e., the wife acquires the domicile of the husband upon marriage) is fading in favor of less comprehensive protection of the spouse's income. In any event, spouses are not protected by 50 U.S.C. App. § 574. Consequently, they may be taxed by:

1. The spouse's state of domicile which can tax all income from whatever source derived;

2. the spouse's current host state if the spouse has become a statutory resident under that state's law; and / or

3. the state in which the spouse earned the income because the state in which nonmilitary income is earned can tax that income.

E. Taxation of real and personal property

1. Real property. The taxation of real property is not affected by section 574 because real property is taxed by the state in which it is located.

2. Personal property. A servicemember's solely owned personal property, however, is deemed to be located in the servicemember's state of domicile, and only the state of domicile can tax it. The member is absolutely immune from taxation of nonbusiness personal property by the host state, regardless of whether the member pays personal property tax on the property to the state of domicile. This section 574 protection does not apply to property used by the servicemember for business or income-producing purposes. With respect to such property, the situs controls.

a. Spouse's solely owned property. Personal property solely owned by the member's spouse may be taxed by the state in which the property is located. If, however, the property is located on a military reservation subject to exclusive federal jurisdiction, the property cannot be taxed by the state. The property can, however, be taxed by the spouse's state of domicile.

b. Joint property. Personal property which is jointly owned or is community property may be subject to double taxation. The property can be taxed by the member's state of domicile because it is deemed to be located in that state for purposes of personal property taxation. In addition, the property can be taxed by the state in which it is physically located because situs governs taxation of the spouse's personal property.

F. Motor vehicles fees. Taxation of motor vehicles follows the rules stated above for personal property. With respect to motor vehicle fees, members may enjoy a conditional immunity; if the vehicle is solely owned by a nonresident member, the member is immune from "licenses, fees, or excises" imposed by the duty state with respect to motor vehicles. The member is entitled to this immunity only after meeting the license, fee, and excise requirements of the state of domicile. Immunity from fee assessment by the duty state may be lost with respect to vehicles jointly titled in both spouses' names. In determining whether a charge assessed by the duty state is a personal property tax or a license, fee, or excise tax, look behind the label attached to the charge. *United States v. City of Highwood*, 712 F. Supp. 138 (N.D. Ill. 1989) (city fee was a disguised tax which couldn't be imposed on nondomiciliary member). The taxation of house trailers and mobile homes depends on whether they are classified as real or personal property under state law. Once that classification is determined, the rules above apply. *United States v. Illinois*, 525 F.2d 364 (7th Cir. 1975). States can require compliance with pollution abatement and inspection laws, even for vehicles only temporarily located within the state pursuant to military orders.

0836 TAX REFUND INTERCEPT

A. Purpose. Tax refunds may be intercepted to offset any debt owed to the Federal Government.

B. References

1. 31 U.S.C. § 3720A
2. 31 C.F.R. part 5 (Department of Treasury regulations implementing tax refund intercept)
3. 32 C.F.R. § 90.6N.3 (DOD-IRS MOU concerning DOD participation in tax refund intercept program)
4. Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (extended authority for interceptions until 10 January 1994)

C. Procedural protections. No federal agency may take action to intercept tax refunds to satisfy a debt owed to the government until such agency (32 C.F.R. § 90.6N.4):

1. Notifies the debtor that a debt is past due;

2. notifies the debtor that the government intends to refer the debt to the IRS for offset unless the debt is paid within 60 days;

3. advises the debtor of action the debtor may take to defer or prevent offset;

4. considers the debtor's response, if any, and determines that the debt is still enforceable;

5. determines that the debt has been delinquent for at least three months, but not more than ten years;

6. concludes that the debt cannot be collected under the salary offset provisions of the Debt Collection Act (DOD regulations require DOD to use salary offset against debtors, when available. 32 C.F.R. § 90.6N4);

7. determines that the debts are either ineligible for administrative offset under the Debt Collection Act or cannot be collected by administrative offset from amounts payable to the debtor;

8. discloses the debt to a consumer reporting agency; and

9. ensures that the debt is for at least $25.00.

D. Time limit. Although the statute of limitations for judicial enforcement of debts to the government is 6 years, the statute of limitations for administrative enforcement, such as tax refund intercept, is 10 years. 31 U.S.C. § 3716(c). The statute of limitations for intercept of student loans does not begin to run until a college assigns them to the Department of Education.

0837 VETERANS' REEMPLOYMENT RIGHTS

A. General. The 1991 amendments to 38 U.S.C. § 2024(g) leave no doubt that reemployment rights for Reserve component servicemembers called to active duty under 10 U.S.C. § 673b are available regardless of length of active service. The Veterans' Reemployment Rights Law (VRRL) applies to all employers, regardless of the organization's size. It protects the job and benefits of a servicemember participating in military training or giving up a civilian job to enter active duty, whether voluntary or involuntary, in peacetime or wartime. Members are entitled to return to their civilian jobs and receive pay raises, promotions, pension credit, and other seniority benefits as if they had been continually employed, provided certain eligibility criteria are met. If a member is unable to settle a disputed reemployment

case, the U.S. Attorney must provide legal representation at no cost and on a priority hearing basis.

B. Recall for training. Members called to active duty (or inactive duty for training only) must "request" a leave of absence from their civilian employer. The employer cannot refuse.

1. The employer is not required to pay the servicemember for time spent on military obligations, but cannot require the use of sick leave or earned vacation.

2. The member-employee must return to their civilian job at the first scheduled shift following the completion of military duties.

3. The member is entitled to be put back to work immediately without loss of seniority, status, or rate of pay. Credit towards pension benefits is not interrupted by military service.

C. Recall to extended active duty. If called to extended active duty, the member is not required to request a leave of absence from the employer. Protection under the VRRL applies if:

1. The member held a job that was "other than temporary";

2. the member left this job for the purpose of entering active duty;

3. the period of active duty is less than four years;

4. the member is later discharged under honorable conditions; and

5. the member applies for reemployment within the applicable time limit.

D. Protections. The VRRL provides the following protections:

1. The member is entitled to the former job with the same seniority, benefits, and pay, together with any promotion or raise the member could reasonably have expected had he remained continuously in the civilian job.

2. The employer is required to offer disabled veterans the "nearest approximation" of the job the servicemember could have reasonably expected with continuous employment.

3. The member is protected from being discharged by the employer for a certain time period following active duty, unless the employer can show misconduct. The protected time period varies with the time served on active duty.

E. Additional information. For additional details, contact the Veterans' Employment and Training Service, Department of Labor, at (202) 523-8611.

CHAPTER IX

FAMILY ADVOCACY PROGRAM

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CHAPTER IX

FAMILY ADVOCACY PROGRAM

0901 INTRODUCTION. The Department of Defense (DOD) has established Family Advocacy Programs (FAP's) DOD-wide. Each service must have its own program and provide Family Service Centers (FSC's) to help minimize further trauma to the victims of family violence. DOD policy encourages each service to:

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

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

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

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

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

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

0902 OBJECTIVES OF THE FAMILY ADVOCACY PROGRAM

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

or child maltreatment. Along with the training, commands need to ensure that members are aware of what programs the FSC and state and local agencies provide.

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

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

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

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

2. encouraging voluntary self-referral;

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

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

5. applying disciplinary or administrative sanctions, when appropriate.

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

1. All cases must have a completed DD 2486 (Child/Spouse Abuse Incident Report) forwarded to the Commanding Officer, Naval Medical Data Services Center (Code 42) within 15 days of the date the CRS makes a status determination or closes, transfers, or reopens the case. Enclosure (9) of NAVMEDCOMINST 6320.22, Subj: FAMILY ADVOCACY PROGRAM, provides directions for completion of the form. Cases with a status determination of "suspected" must be updated

within 12 weeks to either substantiated, unsubstantiated -- did not occur, unsubstantiated -- unresolved, or at risk.

2. Spouse or child maltreatment cases resulting in death require special DOD-mandated reporting procedures. Suspected and substantiated cases involving death must be reported, in writing, to BUMED-343, with a copy sent to Commanding Officer, Naval Medical Data Services Center, as soon as possible after the CRS makes its initial status determination regarding the case. Enclosure (11) of NAVMEDCOMINST 6320.22 outlines the information the FAR must gather and type, or legibly write, on a separate sheet of paper. This report, labeled "Family Advocacy Report of Death," will be attached to the completed DD 2486. The FAR should be aware that, in these cases, it is possible the only source of initial information regarding such cases may be the local newspaper. Rather than awaiting a referral in these cases, the FAR will have to take the initiative in seeking the necessary information. Each death case, if not involved in an already active case, must be opened as any other case.

3. Cases which involve suspected child sexual abuse in a DOD-sponsored or -sanctioned child care facility of DOD-sponsored or -sanctioned program of any kind (e.g., church group, scouting program, recreational activity, child care home, etc.) involve an additional reporting requirement per DOD Directive 6400.2. These cases must be reported to BUMED-343 not later than 72 hours after receipt of the referral. Also, in cases on Navy installations, CHNAVPERS (Pers 661D) must be notified. In cases occurring on Marine Corps installations, the Commandant of the Marine Corps (Code MHF) must be notified. The FAR must gather all possible information before reporting; the report can be made by telephone or message.

0903 DEFINITION OF CHILD MALTREATMENT AND SPOUSE ABUSE

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

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

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

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

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

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

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

0904 POLICY

A. The Family Service Center (FSC) is a line-managed program -- the FAR and FAP are coordinated through the medical treatment facility. In the Marine Corps, the FAP is implemented through the FSC.

B. Adverse personnel actions. FAP does not have disciplinary authority over members of other commands, but they may make 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, but the following must be considered:

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

2. disciplinary/administrative action is most appropriate when:

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

b. the behavior is compulsive;

c. the victim is seriously injured;

d. there is sufficient evidence for a conviction; and

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

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

4. often disciplinary actions are taken, but the punishment may be wholly or partially suspended to encourage rehabilitation and deter further maltreatment of offenses.

C. Voluntary self-referral. Such referral is encouraged since the goal of FAP is to prevent or break the cycle of abuse. An admission of abuse is sufficient to substantiate a FAP case and requires notification of the member's CO and the FAR, unless the admission is made as a privileged communication to an attorney or clergyman. If the CO determines the self-referral was voluntary, the servicemember's disclosures may not be the sole basis for disciplinary action or characterizing a discharge as OTH. (In the Coast Guard, the CO must seek the guidance of a law specialist.) If it is considered to be a voluntary self-referral, it cannot be used as the sole source for disciplinary action under the UCMJ, nor as the basis (in whole or in part) for characterizing a discharge as "OTHER THAN HONORABLE" (OPNAVINST 1752.2). In other words, processing after voluntary self-referral should be for a type warranted by service record (TWSR) characterization of service. Disciplinary action and use in characterization may be made from acts that are not derivative of the information provided from the self-referral. A self-referral is not voluntary if the member does so knowing that the victim has or will be reporting the matter. Thus, the self-referral policy under the FAP is similar to that in the drug abuse area. Self-referrals should be made to the FAR, CAAC/DAPA, FSC counselor, CO, or XO. Due to the potential privilege problem, chaplains should not be used for self-referral purposes but should be involved in other aspects of the FAP. Unfortunately, few cases of abuse are self-referrals. A majority of cases come to the CO's attention through police or hospital

reports, allowing the information provided (even by the perpetrator) to be used in a court action.

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

E. Identification and referral. All personnel have a duty to report suspected or known cases of abuse and neglect in accordance with local reporting laws and military instructions. Military personnel will report such matters to the FAR, who in turn will report the incident to the appropriate civilian agencies -- usually child protective services (CPS). If the FAR is not available, the report should be made directly to the CPS. MTF's must also report the abuse to the sponsor's CO within 48 hours. The FAR serves as the point of contact between the reporting source (the FAR subcommittee) and the local agencies. The applicable subcommittee reviews each case and reaches a consensus on its status. Each installation must have a written Memorandum of Understanding (MOU) with the local CPS agency defining investigative responsibilities.

F. Coordination. Since family violence is a complex and multidimensional problem, it requires the involvement and coordination of many agencies and services. The Family Advocacy Officer (FAO) is responsible for the coordination of all the nonmedical aspects of the FAP. This may include a lawyer, a chaplain, a counsellor, CAAC / DAPA, financial assistance, and a criminal investigator.

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

1. Temporary removal of the military member from the home (if the CO restricts the person to the barracks or the ship, it must be clear that this is not for UCMJ purposes but for "protection" of the victim to avoid speedy-trial problems; in other words, putting the member on restriction orders starts the speedy-trial clock, but ordering the member to stay away from the home and/or victim is more like a restraining order for the interest of safety.)

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

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

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

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

a. In child maltreatment, have an emergency FAC subcommittee review the situation and recommend appropriate action (such actions may include having 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);

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

c. in 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-661D and BUMED-343 make recommendations to BUPERS-40 as to where the servicemember should be assigned in the United States.

H. Rehabilitation

1. 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 FSC. The primary goal of the FAP is to protect the victim and provide treatment for **ALL** involved family members. Treatment is generally subject to a one-year limitation.

2. Some cases are not amenable to treatment (such as extrafamilial pedophiles, who are considered far less capable of rehabilitation). In these cases, discipline or ADSEP processing is mandatory.

3. Counseling/treatment is recommended when the member has a positive record of performance and good potential for treatment. At the same time, appropriate disciplinary action 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.

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

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

6. Dependents and retirees who are victims or perpetrators should be offered appropriate intervention and encouraged to participate voluntarily. Victims must be informed of their rights and provided counseling as set forth in SECNAVINST 5800.11, Subj: PROTECTION AND ASSISTANCE OF CRIME VICTIMS AND WITNESSES. Marines: *see also* White Letter 4-93 dated 11 May 93.

0905 IMPLEMENTATION OF THE BASE FAP

A. Medical Treatment Facility/Family Advocacy Representative. The CO of the MTF cooperates with the installation CO to establish local policies and directives necessary to implement the FAP. A representative for the MTF co-chairs the area FAC and the MTF CO appoints the FAR. The FAR, usually a social worker, is responsible for implementing and managing the FAP in the MTF. The MTF must also have a photographer available for the photographing of victims. NAVMEDCOMINST 6320.22 provides in-depth explanations on how the MTF and FAR are to carry out their duties.

> **NOTE**: Marine Corps White Letters 3-93 and 4-93, Marine Corps Family Advocacy Program (dated 5 Apr 93 and 11 May 93) have modified their program from jointly implementing the FAP through the FSC and MTF to

having the FAP a command-sponsored program with all social service aspects delivered through the FSC.

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

C. Area Family Advocacy Committee

1. Provides recommendations for FAP policy and procedures;

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

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

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

5. recommends new resources and programs;

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

7. serves as an advocate for families and children.

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

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

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

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

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

0906 MANAGEMENT OF INCEST CASES

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

B. Administrative discharge processing in incest cases

1. Navy. All incest cases must be reported to CHNAVPERS, who will then determine disposition of the case in conjunction with the member's CO and GCMCA. The option to retain is the result of both the FAP and a change to the MILPERSMAN, art. 3610200, which requires mandatory processing for sexual

perversion for commission of series of offenses. In incest cases, CHNAVPERS makes the final determination as to processing for separation or retention and treatment, and the commanding officer of the servicemember may not commence processing for separation without BUPERS approval. BUPERS will base its decision on the following:

a. The CO's recommendation;

b. the member's record of performance;

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

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

e. the fact that the perpetrator self-referred;

f. the facts of the case;

g. court action;

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

i. the treatment progress.

2. Marine Corps. The Marine Corps has a similar policy to that of the Navy in incest cases, BUT there is no requirement that the initial processing determination be decided at headquarters level (it will be decided at the GCMA level). The same criteria for determining whether to process for separation or retain and treat, however, applies.

3. 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 Commandant (G-PE) or (G-PO) who will review the matter and consider the recommendations of Commandant (G-PS). The Coast Guard requires this review in **ALL** abuse cases.

4. Relapses. If the member fails to complete the year-long treatment program or commits new offenses, treatment will be suspended and initiation of processing for separation and possible UCMJ action may also take place.

5. If the member has been accepted into the FAP rehabilitation program, the member may not be processed for the incident(s) leading to admission to the program; however, the member may be processed for independent and separate misconduct.

0907 STATE CHILD ABUSE REPORTING LAWS. All state child abuse reporting laws require the local CPS agency to receive and investigate reports of suspected child maltreatment and offer rehabilitation services to CPS families. State law specifies who is required to report suspected maltreatment, who is exempt from reporting and/or testifying, and the penalties for not reporting. The military is required to comply with these laws when such abuse is discovered 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, creating a situation where, although the military is precluded from prosecuting, the civilian authorities could prosecute if they so desired.

0908 JUDGE ADVOCATE ROLE IN THE FAMILY ADVOCACY PROGRAM. Effective prevention and intervention in family violence requires a cooperative and collaborative effort on the part of all command professionals. Each can make a significant contribution to the FAP. Attorneys in the military have a key role in the program. 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 as leverage to engage perpetrators in treatment;

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 Family Advocacy Case Review Subcommittees;

F. employ special procedures to protect child victims during the legal process (*The Navy Family Advocacy Program: Legal Deskbook* and *The Navy Family Advocacy Program: Curriculum for Attorneys*, both developed by Robert Horowitz,

J.D., provide a wealth of ideas in this area as well as in the area of prosecution of such cases); or

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

0909 REFERENCES

A. DOD Dir. 6400.1, Subj: FAMILY ADVOCACY PROGRAM
B. SECNAVINST 1752.3, 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 1752.2, Subj: FAMILY ADVOCACY PROGRAM
F. OPNAVINST 1752.1, Subj: RAPE PREVENTION AND VICTIM ASSISTANCE
G. MCO 1752.3, Subj: MARINE CORPS FAMILY ADVOCACY PROGRAM
H. MCO 1710.30, Subj: CHILD CARE CENTER POLICY AND OPERATIONAL GUIDELINES
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
L. *The Navy Family Advocacy Program: Legal Deskbook*, developed by Robert Horowitz, J.D.
M. *The Navy Family Advocacy Program: Curriculum for Attorneys*, developed by Robert Horowitz, J.D.
N. Marine Corps White Letter No. 3-93, Marine Corps Family Advocacy Program (5 Apr 93)
O. Navy sponsor:
   Bureau of Naval Personnel (BUPERS 661D)
   Commercial (703) 614-5892 / 5893
   DSN 224-5892
P. Marine sponsor:
   Marine Family Programs (Code MFP)
   Commercial (703) 696-1188
   DSN 224-2895
Q. Coast Guard sponsor:
   Commandant (G-PS) -- (202) 267-2237

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CHAPTER X

FREEDOM OF EXPRESSION IN THE MILITARY

1001 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

1002 FIRST AMENDMENT

-- Specific freedoms. The first amendment to the U.S. Constitution states:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

There are five freedoms explicitly listed: (1) religion, (2) speech, (3) press, (4) assembly, and (5) petition for redress of grievances. In addition to these five freedoms, other provisions of the Bill of Rights (such as the requirement for due process, the privilege against self-incrimination, and the prohibition against unreasonable search and seizures) are significant elements in maintaining a system of freedom of expression. Nevertheless, the first amendment is considered the main source of constitutional protection in this area.

1003 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).

1004 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. 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.

1005 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.

1006 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.

1007 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.

1008 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).

1009 "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

1010 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 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).

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, art. 80);

b. conspiracy to commit an offense (UCMJ, art. 81);

c. soliciting desertion, mutiny, sedition, etc. (UCMJ, art. 82);

d. any commissioned officer using contemptuous words against the President, Vice President, Congress, Secretary of Defense, Secretary of a military department, Secretary of the Treasury, or the governor or legislature of the state, territory, commonwealth, or possession in which the officer is present (UCMJ, art. 88);

e. disrespect toward a superior commissioned officer (UCMJ, art. 89);

f. willfully disobeying a lawful command of a superior commissioned officer (UCMJ, art. 90);

g. disrespect toward a warrant officer, noncommissioned officer, or petty officer (UCMJ, art. 91);

h. failure to obey a lawful order or regulation (UCMJ, art. 92);

i. mutiny or sedition (UCMJ, art. 94);

j. betrayal of a countersign (UCMJ, art. 101);

k. corresponding with the enemy (UCMJ, art. 104);

l. causing or participating in a riot or breach of peace (UCMJ, art. 116);

m. provoking speeches or gestures (UCMJ, art. 117);

n. extortion (UCMJ, art. 127);

o. use of writing knowing it to contain false statements (UCMJ, art. 132);

p. conduct unbecoming an officer (UCMJ, art. 133); and

q. conduct undermining good order, discipline, and loyalty (e.g., criminal libel, disloyal statements) (UCMJ, art. 134).

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].

1011 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, then on to Sweden, Turkey, or India.
>
> It sounds silly to you? Let me ask you this: do you like the Marine Corps? The American policy or foreign affairs. [sic]
>
> Have you ever read the constitution of the United States? IT'S A FARCE. Everything that is printed there is contradicted by 'amendments'. is [sic] this fair [to] the U.S. people? I believe not. Why sit [sic] back and take these unjust Rules and do nothing about it. If you do nothing will change.
>
> This is what I'm doing, *A Struggle for Humanity*. But it takes more than myself. We must all fight.
>
> /s/ Mr. Gray

The accused later surfaced at a church near the University of Hawaii, where he and ten others made speeches and handed out a leaflet generally derogatory of the Marine Corps and the war in Vietnam. The accused was thereafter convicted under Article 134 of the Uniform Code of Military Justice of having made statements disloyal to the United States. The Court of Military Appeals upheld the conviction insofar as it pertained to the entry in the Crash Crew log, but set aside the conviction based on the leaflet handed out at the church. In reply to the accused's assertion of his right to freedom of speech, the Court stated:

> [The] public making of a statement disloyal to the United States, with the intent to promote disloyalty and disaffection among persons in the armed forces and under circumstances to the prejudice of good order and discipline, is not speech protected by the First Amendment and is conduct in violation of Article 134. . . .

Id. at 66, 42 C.M.R. at 258.

c. In *United States v. Daniels*, 19 C.M.A. 529, 42 C.M.R. 131 (1970), the accused was convicted at trial for interference with the morale, discipline, or loyalty of members of the armed forces in violation of 18 U.S.C. § 2387 (1970) when he exhorted other Marines to refuse orders to Vietnam. The conviction was reversed by the Court of Military Appeals due to the failure of the military judge to instruct the members of the court that they must find beyond a reasonable doubt that the accused's statements had created a clear and present danger of impairing the loyalty, morale, or discipline of the servicemembers involved before they could reach a finding as such. Again, the court adopted the "clear and present danger" rule. The court did, however, affirm a conviction for a lesser offense of soliciting the commission of a military offense (e.g., refusal of the performance of duty). In *United States v. Harvey*, 19 C.M.A. 539, 42 C.M.R. 141 (1970), a companion case to *Daniels*, a conviction for making disloyal statements was set aside due to instructional error (the term "disloyal statement" was too broadly defined), but a conviction for the lesser offense of soliciting the commission of an offense was affirmed.

d. In *United States v. Levy*, 39 C.M.R. 672 (ABR 1968), *petition denied*, 18 C.M.A. 627 (1969), the accused was convicted in part for publicly uttering statements with the design to promote disloyalty and disaffection among troops. The Army Board of Review affirmed the conviction and rejected the contention that the accused's statements were protected by the first amendment. In so doing, the board applied a "reasonable tendency" test regarding the likelihood that the accused's statements would cause disaffection and disloyalty among the troops. *Id.* at 677-78.

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 (ABR 1958), where the Army Board of Review disapproved a conviction under Article 134, UCMJ, based on evidence showing only that some obscene photographs were found during a routine inspection of the accused's belongings. There was no evidence of any effort by the accused to either show the photographs to anyone or to distribute them. The court held that such evidence does not show conduct either directly or inherently prejudicial to good order and military discipline.

C. Distribution of printed material

1. Prior restraints. DOD Directive 1325.6 distinguishes between distribution through official channels (such as base exchanges or libraries) and "other" channels (such as handing out materials on the sidewalks).

a. Official outlets. Paragraph III.A.1. of DOD Directive 1325.6 states: "A Commander is not authorized to prohibit the distribution of a specific issue of a publication distributed through official outlets such as post exchanges and military libraries." This provision is designed to preclude the possibility of a commander becoming embroiled in a controversy over supposed censorship of materials that have been accepted for distribution through official outlets. Article 4314f of the *Navy Exchange Manual* contains very broad guidelines for screening pornographic or other offensive materials not acceptable for sale within the military establishment. The DOD Directive does not prohibit the commander from completely removing a publication from an outlet as opposed to censuring a specific issue.

However, a commander 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 1007, 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 (ABR 1961), the Army Board of Review, citing no authority, held that the showing of an obscene photograph to a fellow officer friend in the privacy of the accused's house did not constitute conduct unbecoming an officer in violation of article 133. On the other hand, the court did approve the conviction and dismissal from the service of the accused for having loaned a lewd and lascivious book to another.

(b) In *United States v. Jewson*, 1 C.M.A. 652, 5 C.M.R. 80 (1952), the Court of Military Appeals upheld an officer's conviction under Article 133, UCMJ, where he permitted and assisted in the showing of an obscene film to officers and senior noncommissioned officers in his command. *See also United States v. White*, 37 C.M.R. 791 (AFBR 1965) (affirming a conviction under article 134 for showing an obscene film).

2. Subsequent punishment. Written materials could violate any of the criminal statutes listed 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.

1012 RIGHT TO PEACEABLE ASSEMBLY

A. Demonstrations. DOD Directive 1325.6 distinguishes between on-base and off-base demonstrations:

1. On base

a. Prior restraint. A commanding officer should prohibit an on-base demonstration which "could result in interference with or prevention of orderly accomplishment of the mission of the installation, or present a clear danger to loyalty, discipline, or morale of the troops." DOD Directive 1325.6, para. III.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 taking part in public demonstrations, recruiting or training members, or organizing or leading such organizations) in organizations that overtly discriminate on the basis of race, creed, color, sex, religion, or national origin (such as Neo-Nazi or white supremacy groups).

b. In uniform. DOD Directive 1334.1, 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 1620.2, Subj: ARMED FORCES DISCIPLINARY CONTROL BOARDS / OFF BASE MILITARY LAW ENFORCEMENT ACTIVITIES / JOINT LAW ENFORCEMENT OPERATIONS, and MCO 1620.2, Subj: ARMED FORCES DISCIPLINARY CONTROL BOARDS AND OFF-INSTALLATION MILITARY ENFORCEMENT, armed forces disciplinary control boards, operating under the cognizance of the area coordinator, have the authority to declare places "off-limits" where conditions exist that are detrimental to the good discipline, health, morals, welfare, safety, and morale of armed forces personnel. The commanding officer also has authority to act independently in emergency situations. The Federal courts will consider the decision to declare an establishment "off-limits" as final and not subject to review by the courts, providing the command has followed the procedures established in the regulations. *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. In *United States v. Robel*, 389 U.S. 258 (1967), the Supreme Court set aside a conviction, under the Subversive Activities Control Act of 1950, which made it unlawful for members of Communist-action organizations to engage in any employment in any defense facility. The Court struck down the statute as too broad, finding that it prohibited employment by members of organizations without regard to whether the particular member concerned subscribed to any illegal goals the organization might have, and without regard to whether the employee's membership in a proscribed organization in fact threatened the security of a defense installation. This was considered too broad an incursion into the freedom of association protected by the first amendment.

Organizational activities (such as distributing materials, recruiting new members, or on-base meetings) may, however, be proscribed by a commanding officer when they present a clear danger to security of the installation, orderly accomplishment of the command's mission, or preservation of morale, discipline, and readiness. Organizations which actively advocate racially discriminatory policies with respect to their membership (such as the Ku Klux Klan) may be restricted by the commanding officer from the formation of affiliations aboard a naval ship or shore facility and the attendant solicitation of members.

2. Servicemembers' unions. Membership in, organizing of, and recognition of military unions is criminally proscribed by section 976 of title 10, *United States Code*, and SECNAVINST 1600.1, 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.

1013 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 wronged by his commanding officer, and who, upon due

> application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

Proceedings on the complaint held by the officer exercising general court-martial jurisdiction will depend on the seriousness of the allegations; the whereabouts of the complainant, the respondent, and witnesses; the available time; and the exigencies of the service. Implementing instructions are set forth in chapter III of the *JAG Manual*.

2. Against another superior. Article 1150 of *U.S. Navy Regulations*, 1990, provides that a servicemember who considers himself wronged by a person superior in rank or command, not his commanding officer, may report the wrong to the proper authority for redress. The officer exercising general court-martial jurisdiction shall inquire into the matter and take such action as may be warranted, including generally adhering to chapter III of the *JAG Manual*.

C. Relief in Federal court. A servicemember may seek relief from a Federal court if he believes his constitutional or statutory rights have been infringed by the military. An example would be the servicemember who petitions for a writ of habeas corpus when he feels the military authorities have improperly denied his application for conscientious objector status. Normally, Federal courts are reluctant to become involved in military affairs 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*, 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.

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, art. 30.

1014 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*, art. 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).

1015 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, art. 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.

1016 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

4. SECNAVINST 1730.8, Subj: ACCOMMODATION OF RELIGIOUS PRACTICES

5. DOD Dir 1300.17, Subj: ACCOMMODATION OF RELIGIOUS PRACTICES WITHIN THE MILITARY SERVICES

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 commanding officers to "cause divine services to be conducted on Sunday." 10 U.S.C. § 6031(b). 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. 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.

2. 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.

3. 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. 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.

4. For example, within the guidelines given above, a skullcap (yarmulke) may be worn:

a. whenever a military cap, hat, or other headgear is not prescribed; or

b. underneath military headgear as long as it does not interfere with the proper wearing, function, or appearance of the prescribed headgear.

5. 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).

6. Under SECNAVINST 1730.8, commanding officers may consider the following 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.

7. 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.

8. 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.

CHAPTER XI

ENLISTED ADMINISTRATIVE SEPARATIONS

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CHAPTER XI

ENLISTED ADMINISTRATIVE SEPARATIONS

1101 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) provide policy guidance and procedure pertaining to enlisted administrative separations and serve as the basis for the material in this chapter.

1102 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.

1103 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).

1104 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, art. 3610220 sets forth CA's and SA's for each basis. In the Marine Corps, the GCMA is usually the SA.

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, art. 3610300.3a.

(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, Combat Action Ribbon) during the period of service or prior service.

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.

2. General (under honorable conditions). MILPERSMAN, art. 3610300.3b 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. The member, however, 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.

-- 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, art. 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 a pattern of adverse behavior or for one or more acts which constitute a significant departure from the conduct expected from members of the naval service.

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, art. 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, art. 3610100.3; MARCORSEPMAN, para. 6103.

(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. 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. 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. MILPERSMAN, art. 3610100.3e; MARCORSEPMAN, paras. 6104 and 1101.4g.

(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, art. 3630650; MARCORSEPMAN, para. 6419.

(b) A member may <u>unconditionally</u> 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. In the Navy, BUPERS is the separation authority for administrative boards with <u>potential</u> OTH's regardless of whether the member waives the board or not.

(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, art. 3640200.1c; MARCORSEPMAN, para. 6312.

(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, art. 3640200.2b(5); MARCORSEPMAN, para. 6303.4a.

D. Uncharacterized separations

1. Entry level separation (ELS). A member in an entry level status (as defined in section 1104B 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). By the same token, a member in entry level status is not precluded from receiving an honorable discharge when clearly warranted by unusual circumstances and approved on a case-by-case basis by the Secretary of the Navy. MILPERSMAN, art. 3610300.5a; MARCORSEPMAN, paras. 6107 and 1004.5a.

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, art. 3610300.5b; MARCORSEPMAN, paras. 6107 and 1004.5b.

1105 COUNSELING

A. In many cases, before a member may be processed for separation, the member must first be counseled concerning his / her behavior. 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 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, art. 3610260 and MARCORSEPMAN, para. 6105.

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, Art. 128 (simple assault), Art. 117 (provoking speech, gestures)."

(2) Incorrect

(a) "Borderline personality disorder, chronic [illegible]."

(b) "Immature personality disorder, failure to adjust."

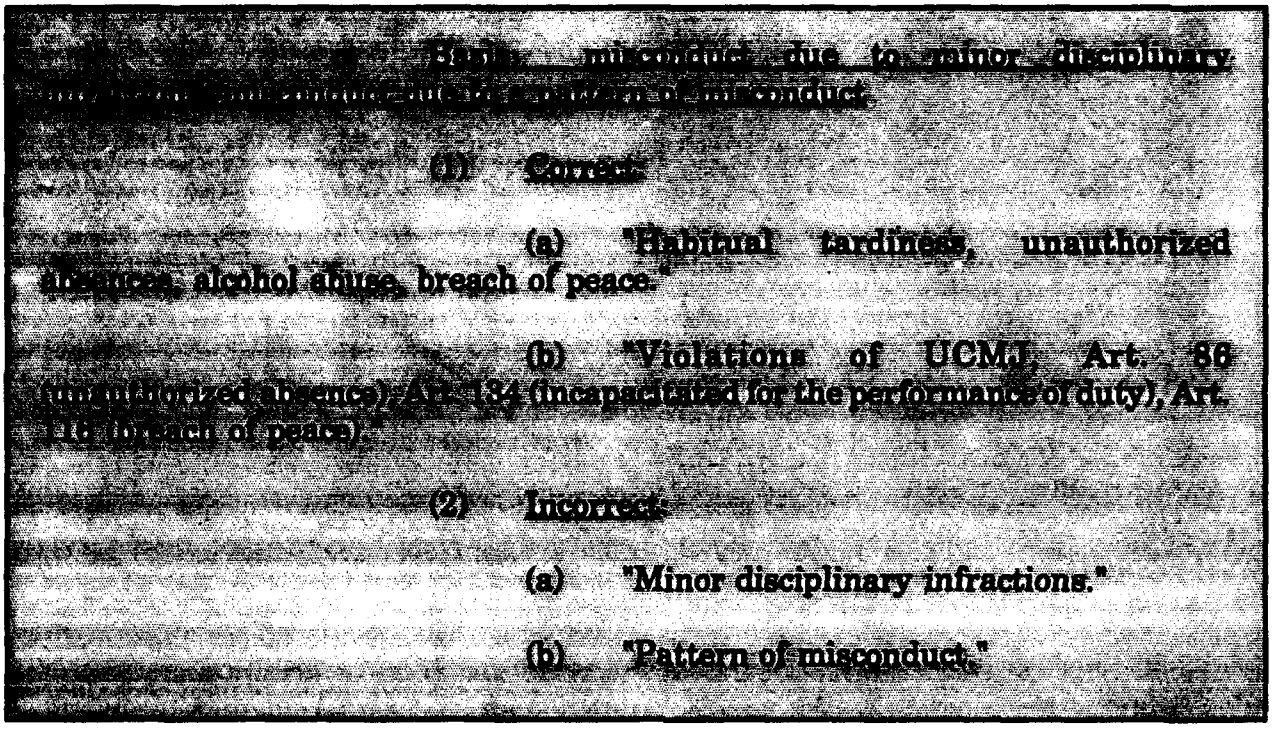
b. Basis: entry level performance and conduct; unsatisfactory performance

(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."



B. Once counseled, the member may not be processed for separation without first violating the counseling warning. Counseling must be documented in the service record of the member, 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 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. The counseling must be accomplished **by the member's current parent command within the current enlistment.**

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.**

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, arts. 3620200, 3620215 and 3620225; MARCORSEPMAN, para. 6203);

2. entry level performance and conduct (MILPERSMAN, art. 3630200.4b; MARCORSEPMAN, para. 6205);

3. unsatisfactory performance (MILPERSMAN, art. 3630300.1; MARCORSEPMAN, para. 6206);

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

5. weight control failure (MILPERSMAN, art. 3620260; MARCORSEPMAN, para. 6203).

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.

5. Counseling formats

a. Marine Corps: sample form in MARCORSEPMAN, para. 6106.3d

__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

1. You are being retained in the naval service, however, the following deficiencies in your performance and / or conduct are identified: _____

_____.

2. The following are recommendations for corrective action: _____

_____.

3. Assistance is available through: _____

_____.

4. Any further deficiencies in your performance and / or conduct will terminate the reasonable period of time for rehabilitation that this counseling / warning entry infers and may result in disciplinary action and in processing for administrative separation. All deficiencies and / or misconduct during your current enlistment, both prior to and subsequent to the date of this action, will be considered. Subsequent violation(s) of the UCMJ or conduct resulting in civilian conviction could result in an administrative separation under other than honorable conditions.

5. This counseling / warning entry is made to afford you an opportunity to undertake the recommended corrective action. Any failure to adhere to the guidelines cited above, which is reflected in your future performance and / or conduct, will make you eligible for administrative action.

_____ _____

(Signature of Sailor) (Signature of Witness) / (Date)

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.

1106 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.

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 BUPERS awards.

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, art. 3620150; MARCORSEPMAN, para. 1005.

-- Honorable, general, or ELS.

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

a. Honorable, general, or ELS.

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

3. Convenience of the government

a. Honorable, general, or ELS.

b. Notification procedure 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. (MILPERSMAN, art. 3620210; MARCOR-SEPMAN, 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) Genuine dependency on immediate family or undue hardship on member;

(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.

(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, art. 3620220; MARCORSEPMAN, para. 6408.

(3) Conscientious objection. Persons who, by reason of religious training or belief, have a firm, fixed, and sincere objection to participate in war in any form or 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, arts. 3620200.1e, 1860120; MARCORSEPMAN, para. 6409.

(4) Surviving family member. DOD Directive 1315.5; MILPERSMAN, art. 3620240; and MARCORSEPMAN, para. 6410.

(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, art. 3620250. Marines do not process or separate for this basis.

e. Involuntary convenience of the government. The government informs the members of processing by the notification procedure.

(1) Parenthood. MILPERSMAN, art. 3620215; MARCORSEPMAN, para. 6203.1. 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 Form 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. MILPERSMAN, arts. 3620200, 360200.1g, 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, art. 3620200.

(b) Enuresis (bed-wetting) / somnambulism (sleepwalking). The Navy and Marine Corps process only such individuals whose behavior has been medically confirmed. MILPERSMAN, art. 3620200.

(c) Allergies (e.g., uniform material, bee stings). MILPERSMAN, art. 3620200.

(d) Excessive height.

4. Weight control failure. OPNAVINST 6110.1; MILPERSMAN, art. 3620260; NAVADMIN Physical Readiness Program Changes, 29 APR 93 (071/93); MARCORSEPMAN, paras. 6203, 6206; and MCO ALMAR 57/93 (Revised Enlisted Separation Policy for Weight Control.)

a. Members who continually fail to meet body fat, weight control standards and / or physical readiness test (PRT) standards may be separated for weight control failure. Counseling and an opportunity to resolve the failures are required.

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.

5. Physical disability. MILPERSMAN, art. 3620270; MARCORSEPMAN, chapter 8.

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.

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, art. 3620285; MARCOR-SEPMAN, para. 6204.1.

(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, art. 3620280; MARCORSEPMAN, para. 6204.2.

-- 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.

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.

d. Defective enlistment. MILPERSMAN, art. 3620283; MARCORSEPMAN, para. 6402.

(1) Honorable, ELS, or OOR.

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

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

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

(c) the enlistment was involuntary.

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

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

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

(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.

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

a. ELS.

b. Notification procedure utilized.

c. Counseling required.

d. This basis for separation is only applicable to members in an entry level status (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, art. 3630300; MARCORSEPMAN, para. 6206.

a. Honorable or general.

b. Notification procedure utilized.

c. Counseling required.

d. A member may be separated for unsatisfactory performance 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).

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. Homosexuality. MILPERSMAN, art. 3630400; MARCOR-SEPMAN, para. 6207.

a. Policy

(1) Homosexuality is considered to be incompatible with military service. Members are to be separated administratively if one or more of the following three approved findings is made:

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

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

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

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

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

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

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

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

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

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

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

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

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

(d) openly in public view;

(e) for compensation;

(f) aboard a military vessel or aircraft; or

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

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

c. Procedure. The administrative board procedure is utilized for all homosexual cases regardless of whether an OTH is appropriate or not.

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

(2) Disposition. If, upon completion of the inquiry, the commanding officer determines that there is not probable cause to believe that one or more of the circumstances for which separation is authorized has occurred, the commander should promptly terminate all action on the case. Otherwise, the commanding officer shall initiate administrative separation proceedings.

(3) When a case involves only homosexual status and the member involved requests a discharge, the member will be released from active duty.

(4) The Statement of Awareness, signed by the respondent, must state "I do / do not request discharge."

(5) There are no local separations. All cases, regardless of the board's recommendation, must be forwarded to BUPERS.

(6) In the Navy, if the basis for homosexuality is evidenced solely by a court-martial conviction, and the court-martial convening authority has remitted or suspended a punitive discharge, the case should be

forwarded to that court-martial convening authority for endorsement prior to forwarding the case to the Chief of Naval Personnel. MILPERSMAN, art. 3630400.4a.

(7) A member may be administratively processed for separation from the naval service on the basis of preservice, prior service, or current service homosexual conduct or statements.

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

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.

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

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 or MCO 5370.6, 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.

12. Misconduct. MILPERSMAN, arts. 3630600 and 3630620; MARCORSEPMAN, para. 6210.

a. Honorable, general, OTH, or ELS.

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

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

d. Subcategories under misconduct include: minor disciplinary infractions, pattern of misconduct, commission of a serious offense, and civilian convictions.

(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) 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).

(b) 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.

(c) Counseling is required.

(d) The notification procedure is used. 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 with a misconduct commission of a serious offense and the administrative board procedures must be used.

(e) 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, art. 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, three or more punishments under the UCMJ (NJP's or courts-martial), or any combination of three 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). MILPERSMAN, art. 3630600.1a);

(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, art. 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 requires a page 13 counseling / warning from the current 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; or

-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.

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, art. 3610260.12.

(b) Processing is mandatory (MILPERSMAN, art. 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); and

-3- for aggravated sexual harassment (*see* SECNAVINST 5300.26B).

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, art. 3630600.1(b)(3).

(c) 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- physical contact of a sexual nature which, if charged as a UCMJ violation, could result in a punitive discharge.

-- "Substantiated incident" means there has been an NJP or court-martial, or the CO is convinced by a preponderance of the evidence that sexual harassment occurred.

(d) 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.

(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.

(d) For separation of reservists for a civilian conviction, see MILPERSMAN, art. 3610300.4c and MARCORSEPMAN, 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.

(a) Notification procedure.

(b) Characterization: Honorable, General.

13. Misconduct due to drug abuse. MILPERSMAN, art. 3630600; MARCORSEPMAN, para. 6210.

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 and Marine Corps drug incidents. OPNAVINST 5350.4; MCO P5300.12.

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.

(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);

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

(c) medical tests for general diagnostic purposes.

(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;

(b) competence-for-duty exams per BUMEDINST 6120.20;

(c) drug rehabilitation tests;

(d) mishap / safety investigation tests; 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.

(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 CHNAVPERS (Pers-83). MILPERSMAN, art. 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.

14. Separation in lieu of trial by court-martial. MILPERSMAN, art. 3630650; MARCORSEPMAN, para. 6419. Both the Navy and Marine Corps 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, art. 3630650; MARCORSEPMAN, para. 6419);

-- 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 also requires that the member's request, when forwarded by the command to the separation authority, include the results of a medical exam attesting to the member's mental competence or a medical officer's statement that a psychiatric evaluation is not necessary. MILPERSMAN, art. 3630650.3c(1). 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.

The general court-martial authority may approve or disapprove such requests, direct charges, and direct reduction to paygrade E-3 where applicable. In the Navy, CO's with SPCM authority 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.

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

a. Honorable, general, OTH, or ELS.

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

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

16. Unsatisfactory participation in the Ready Reserve. MILPERSMAN, art. 3630800; BUPERS 1001.39A; MARCORSEPMAN, para. 6213.

a. Honorable, general, or OTH.

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

c. A member may be separated by reason of unsatisfactory performance under criteria established in BUPERSINST 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. MILPERSMAN, art. 3630900; MARCORSEPMAN, para. 6214.

a. Honorable, general, or ELS.

b. The notification procedure is utilized, and the member has no right to an administrative board regardless of time on active duty.

c. 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.

1107 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. Homosexuality;

B. minority under the age of 17;

C. fraudulent enlistment, unless a waiver is obtained from BUPERS / CMC;

D. drug abuse;

E. certain civilian convictions (Navy only) (MILPERSMAN, art. 33630600);

F. commission of certain serious offenses (MILPERSMAN, arts. 3630600, 3610200.2, 3620285.1a; MARCORSEPMAN, paras. 1104, 6204, 6207, 6210); and

G. sexual harassment.

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.

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

1108 **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	A	A	E	E
Pensions to widows and children	NE	NE	A	A	E	E
Hospital and domiciliary care	NE	NE	A	A	E	E
Medical and dental care	NE	NE	A	A	E	E
Prosthetic appliances	NE	NE	A	A	E	E
Seeing-eye dogs, mechanical and electronic aids	NE	NE	A	A	E	E
Burial benefits (flag, 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	
2. CONVENIENCE OF GOVERNMENT	HON/GEN/ELS	3620200	(N);(A) if 6 yrs
Hardship		3620210 / 6407	
Parenthood		3620215 / 6203	
Pregnancy or Childbirth		3620220 / 6408	
Personality Disorder		3620225 / 6203	
Further Education		3620235 / None	
Surviving Family Member		3630240 / None	
Being an Alien		3620250 / None	
Physical Disability		3620270 / 6203	
Conscientious Objection		1860120/6409 [MCO 1306.16 DOD Dir 1300.6]	
3. DEFECTIVE ENLISTMENTS			
Minority		3620285 / 6204	
Under 17	OOR		(N)
Age 17	ELS		(N)
Defective Enlistment	HON/ELS/OOR	3620283 / 6204	(N)
Erroneous Enlistment	HON/ELS/OOR	3620280 / 6204	(N);(A) if 6 yrs
Fraudulent Enlistment*	HON/GEN/ELS OTH/OOR	3630100 / 6204	(N);(A) if 6 yrs or OTH
New Entrant Drug / Alcohol Testing	OOR	OPNAVINST 5350.4 / 6211	(N)

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	
5. ENTRY LEVEL PERFORMANCE AND CONDUCT	ELS	3630200 / 6205	(N);(A) if 6 yrs
6. UNSATISFACTORY PERFORMANCE	HON/GEN	3630300 / 6206	(N);(A) if 6 yrs
7. HOMOSEXUALITY [Mandatory Processing]	HON/GEN/OTH ELS	3630400 / 6207	(A)
8. SECURITY	HON/GEN/OTH ELS	3630700 / 6212	(N);(A) if 6 years or OTH
9. DRUG / ALCOHOL ABUSE REHAB FAILURE	HON/GEN/ELS	3630500 / 3630550 6208 / 6209	(N);(A) if 6 yrs
10. MISCONDUCT	HON/GEN/ELS OTH		
Minor Disciplinary Infractions		3630600 / 6210	(N);(A) if 6 yrs or OTH
Pattern of Misconduct		3630600 / 6210	(N);(A) if 6 yrs or OTH
Commission of Serious Offense*		3630600 / 6210	(A)
Civilian Conviction*		3630600 / 6210	(A)
Misconduct due to Drug Abuse*		3630620 / 6210	(N);(A) if 6 yrs or OTH
11. SEPARATION IN LIEU OF COURT-MARTIAL	HON/GEN/ELS OTH	3630650 / 6419	(N);(A) if 6 yrs or OTH

REASON FOR SEPARATION	CHARACTERIZATION OF SERVICE	MILPERSMAN/ MARCORSEPMAN	ADMIN BOARD (A)/ NOTIFICATION (N)
12. SEPARATION IN BEST INTEREST OF SERVICE	HON/GEN/ELS	3630900 / 6214	(N)
13. UNSATISFACTORY PERFORMANCE IN READY RESERVE	HON/GEN/ELS OTH	3630650 / 6213	(N);(A) if 6 yrs or OTH
14. DISABILITY	HON/GEN/ELS	3620270 / 8401-8512 SECNAVINST 1850.4C	(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 XII

ENLISTED ADMINISTRATIVE SEPARATION PROCESSING AND REVIEW

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CHAPTER XII

ENLISTED ADMINISTRATIVE SEPARATION PROCESSING AND REVIEW

1201 NOTIFICATION AND ADMINISTRATIVE BOARD PROCEDURES. The primary references for administrative separation processing are the MILPERSMAN (for the Navy) and the MARCORSEPMAN (for the Marine Corps).

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 homosexuality; or (c) an other than honorable (OTH) discharge is possible.

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, art. 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.

Examples of this notification may be found in MILPERSMAN, art. 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.

2. Counsel. MILPERSMAN, art. 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. 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.

c. 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.

d. 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, art. 3640200; MARCORSEPMAN, paras. 6303 and 6304.

3. Response. MILPERSMAN, art. 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, art. 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.

4. Additional notification requirements

a. Member confined by civil authorities. MILPERSMAN, art. 3640200.2b; MARCORSEPMAN, para. 6303.4a. If separation proceedings have been initiated against a respondent confined by civil authorities, the case may be processed in the absence of the respondent. 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 1201B or 1201C 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.

b. Certain reservists. MILPERSMAN, art. 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 1201B or 1201C 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 homosexuality; 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, arts. 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, arts. 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 homosexuality, the respondent must be notified of the following:

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

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

(3) if the 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, art. 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, art. 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, art. 3640300.8 and MARCORSEPMAN, fig. 6-3.

6. Waiver. MILPERSMAN, art. 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, art. 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, art. 3640200.

1202 ADMINISTRATIVE BOARDS

A. Convening authority. MILPERSMAN, art. 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 a line officer serving in the grade of O-4 (not frocked) or higher. In the Navy, if an O-4 line officer is not available at the command, an O-4 staff corps officer may be used; however, this substitution must be completely and adequately explained by the commanding officer in the letter of transmittal. MILPERSMAN, art. 3640350; MARCORSEPMAN, para. 6315.1.

1. Active-duty respondent. The senior member must be on the active-duty list of the service.

-- Navy. When an active-duty list officer is not available, the convening authority may substitute a USNR-TAR (Training and Administration of Reserves) officer who has been on continuous active duty for over 12 months immediately prior to the board appointments. The explanation as to why an O-4 USN was not available should be included in the letter of transmittal.

2. 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.

3. 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, art. 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, art. 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, art. 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, art. 3640350.3h; MARCOR-SEPMAN, 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, art. 3640350.4c(1).

2. Preliminaries. MILPERSMAN, art. 3640350.3; MARCOR-SEPMAN, 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.

(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, art. 3640350.5b; MARCORSEPMAN, paras. 6316.10 and 6316.11.

G. Witness requests. MILPERSMAN, arts. 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, art. 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 homosexuality, 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, art, 3630400; MARCORSEPMAN, para. 6207(3)(b)(1)];

-- Note: There are no local separations for homosexuality; 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, art. 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 CHNAVPERS, as long as they are provided a copy prior to submission. A statement of deficiencies can be submitted separately via the convening authority to CHNAVPERS. The Report of Administrative Board must still be signed by the board members and counsel for 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, art. 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 CHNAVPERS 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 CHNAVPERS for action. At no time may the convening authority recommend a discharge characterization less favorable than the board's recommendation.

c. MILPERSMAN, art. 3610220, authorizes the special court-martial convening authority to also be the separation authority in the following situations:

(1) When the member does not object to the processing for separation and is being processed for parenthood, pregnancy / childbirth, surviving family member, weight control failure, erroneous enlistment, fraudulent enlistment

(where OTH not authorized), entry level performance, unsatisfactory performance, drug rehabilitation failure, alcohol rehabilitation failure, misconduct-minor disciplinary infractions, misconduct-drug abuse (but only where it cannot be used to characterize service), and medical or physical disorders under convenience of the government but NOT motion sickness, airsickness, or allergies. No homosexual or sexual harassment cases may be separated by the commanding officer.

(2) If the member elects a board, the SPCMA can be the separation authority if the board recommends an honorable or general discharge and the member now states he / she no longer objects to being processed. This exception does not apply to misconduct-drug abuse where the drug incident (or one of, if more than one) found by the board could have been used to characterize service. All such drug cases must be submitted to CHNAVPERS for approval.

(3) If a member is being processed for homosexuality -- even if they will be getting a TWSR -- CHNAVPERS is still the separation authority. All homosexuality cases must be forwarded; none may be separated locally. If the member waives a board, the case must be sent to CHNAVPERS for approval in ALL cases.

(4) In those cases where the SPCMA may separate a member under MILPERSMAN, art. 3610220, the DD-214 and allied paperwork must be sent to CHNAVPERS after separation has been completed.

d. CHNAVPERS is the separation authority in cases involving conscientious objectors, EAOS, fraudulent enlistments involving matters that can be used to characterize service, change in enlistment obligation, motion / airsickness, allergies, alien, disability, defective enlistment, minority, misconduct-drug abuse that can be used to characterize service, security, unsatisfactory performance in the Reserves, and in the best interest of the service. If the administrative board recommends an OTH, no matter what the basis of processing, CHNAVPERS is the separation authority.

e. Besides situations where the board has recommended an OTH, the case must be sent to CHNAVPERS if the board recommends retention or suspension of the discharge, the member has over 18 years of service, the member protests being processed, or the member is being processed for misconduct-drug abuse that can be used to characterize service.

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 homosexuality cases). When the separation authority receives the record of the board's proceedings and report, he may take one of the following actions (MILPERSMAN, art. 3640370; MARCORSEPMAN, para. 6309.2):

a. Approve the board's recommendation for retention;

b. disagree with the administrative board's recommendation for retention and refer the entire case to the Secretary of the Navy for authority to direct a separation under honorable conditions with an honorable or general discharge or, if appropriate, entry level separation or, if eligible, transfer to the Fleet Reserve / retired list in the current or next inferior paygrade;

c. approve the board's recommendation for separation and direct execution of the recommended type 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, art. 3610200.14; MARCORSEPMAN, para. 6310.

a. Except when the bases for separation are fraudulent enlistment or homosexuality and, in the Marine Corps, when the approved separation is an OTH, a separation may be suspended by the separation authority or higher authority for a specified period of not more than 12 months if the circumstances of the case indicate a reasonable likelihood of rehabilitation. 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.

e. If a convening authority recommends against the board's recommendation for a suspended separation, BUPERS will usually concur with the convening authority and discharge the member -- thereby disapproving the suspension.

3. Homosexuality. ALNAV 0417372 Feb 93 and ALMAR 0478062 Feb 93 direct that all cases of homosexuality be referred to CHNAVPERS and CMC for review and action as separation authority. Guidance on this subject is currently under revision.

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 homosexuality 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.

1203 PROCESSING GOALS. Every effort should be taken to meet the Secretary of the Navy's processing time goals. MILPERSMAN, art. 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.

1204 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, art. 5040200; MARCORSEPMAN, fig. 1-2. The NDRB is composed of five-member panels of active-duty Navy and Marine Corps officers in grades O-4 or higher. The NDRB panels sit regularly in Washington, 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

1205 THE BOARD FOR CORRECTION OF NAVAL RECORDS

A. General. The Board for Correction of Naval Records (BCNR) was established pursuant to 10 U.S.C. § 1552 (1982). MILPERSMAN, art. 5040200; MARCORSEPMAN, fig. 1-2. It consists of at least three civilian members and

considers all applications properly before it for the purpose of determining the existence of an error or an injustice and making appropriate recommendations to the Secretary of the Navy.

B. Petition. Application may be made by a former member or any other person considered by the board to be competent to make an application. When a "no change" decision has been rendered by the NDRB, and a request for reconsideration by that board has been denied, a petition may then be filed with the BCNR. The law requires that the application be filed with the BCNR within three years of the date of discovery of the error or injustice. The board is authorized to excuse the fact that the application was filed at a later date if it finds it to be in the interest of justice. The board is empowered to deny an application without a hearing if it determines that there is insufficient evidence to indicate the existence of probable material error or injustice.

C. Scope of review

1. Applications to BCNR are subject to several qualifications which should be stressed in the advice given to members being processed for OTH discharges. First, in addition to its power to consider applications concerning discharges adjudged by GCM's -- something the NDRB may not do -- the BCNR may also review cases involving inter alia:

a. Requests for physical disability discharge and, in lieu thereof, retirement for disability;

b. requests to change character of discharge or eliminate discharge and restore to duty;

c. removal of derogatory materials from official records (such as fitness reports, performance evaluations, nonjudicial punishments, failures of selection, and marks of desertion);

d. changing dates of rank, effective dates of promotion or acceptance / commission, and position on the active-duty list for officers;

e. correction of "facts" and "conclusions" in official records (such as lost time entries or line of duty / misconduct findings);

f. restoration of rank; and

g. pay and allowances items (such as special pays, incentive pay, readjustment pay, severance pay, and basic allowance for quarters).

2. In no event will an application be considered before other administrative remedies have been exhausted.

3. In determining whether or not material error or an injustice exists, the board will consider all evidence available -- including, among other things:

a. All information contained in the application;

b. documentary evidence filed in support of th plication;

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 servicemember 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. Upon 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. 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.

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CHAPTER XIII

OFFICER PERSONNEL MATTERS

1301 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. art. II, § 2, cl. 2. The Constitution further provides that the President shall "Commission all the Officers of the United States." *U.S. Const.* art. II, § 3. The *appointment and commissioning* of officers in the armed forces is prescribed by title 10, *United States Code*, which includes the Defense Officer Personnel Management Act [hereinafter DOPMA]. The transition provisions of DOPMA can be found in small print immediately following section 611 of title 10, *United States Code*.

B. Chapter content. This chapter is divided into 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

1302 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 each -- the Navy and the Marine Corps. An officer's position on the active-duty list is fixed based on: (a) Grade; (b) date of rank within that grade; and (c) tie-breaker rules set forth in

SECNAVINST 1427.2, 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.

1303 PROMOTIONS. The basic reference source for promotions is SECNAVINST 1420.1, 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, art. 2220210.

F. Promotion timing

1. Promotion to O-2. Two years' time in grade is required for promotion to O-2 under SECNAVINST 1412.6. 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 OF THE NAVY AND MARINE CORPS. It should be pointed out that this instruction is prospective only in nature and applies only to errors or omissions which occurred under DOPMA after 15 September 1981. There is no provision in law for special selection boards for Reserve inactive-duty promotions.

2. Grounds. The Secretary of the Navy must convene a special promotion-selection board when an eligible officer who was in, above, or below the promotion zone was not considered, through administrative error, for promotion by a regularly scheduled promotion-selection board for his competitive category and grade. In addition, the Secretary may convene a special promotion-selection board when an officer who was an in- or above-zone eligible was considered, but not selected, by a regularly scheduled selection board and:

a. The action of the board was contrary to law;

b. the action of the board involved material error of fact or material administrative error; or

c. the board did not have material information before it for its consideration.

Special-promotion-selection-board procedures basically involve comparing the record of an officer seeking relief from a selection-board error or omission to a sampling of records of officers who were selected and not selected by the regularly scheduled selection board before whom the error or omission occurred.

H. Reserve officers not on the active-duty list

1. Running mates. Reserve officers not on the active-duty list, serving in a Reserve component in grades O-2 or above, are assigned running mates from the active-duty list in the same competitive category and are placed on a Reserve precedence list comparable to the active-duty list.

2. Competitive categories. Reserve competitive categories, in addition to those which match the competitive categories for active-duty-list officers, include TAR's and Special Duty Officers (Merchant Marine).

1304 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, art. 3830340 or MARCORSEPMAN, paras. 5002-5004, as appropriate. The reasons for voluntary separation include: Expiration of obligated service; change of career intentions; and convenience of the government (dependency or hardship, pregnancy or childbirth, conscientious objector, surviving family member, alien status, and separation to accept public office or to attend college). Requests for resignation may be denied if the officer has not completed all obligated service or has not met established procedures as regards tour lengths, contact relief, timeliness of requests, etc.

1305 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, arts. 3860100, 3860260-3860300; MARCORSEPMAN, paras. 2003-2004.

1306 PHYSICAL DISABILITY SEPARATION/RETIREMENT. Officers in the naval service found unfit for continued active service may be separated with severance pay or retired, by reason of their physical disability, in accordance with the *Disability Evaluation Manual*. *See also* MARCORSEPMAN, ch. 8; MILPERSMAN, arts. 3860340-3860400.

1307 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).

1308 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(d) ("The Secretary of Defense shall prescribe regulations for continuation on active duty.") and DOD Dir. 1320.8, Subj: CONTINUATION OF REGULAR COMMISSIONED OFFICERS ON ACTIVE DUTY (mandating the continuation on active duty of all O-4's within six years of qualifying for retirement) with 10 U.S.C. § 637(a)(1)(C) (reserving to the Secretary of the Navy, whenever the needs of the service require, continuation on active duty of officers otherwise subject to discharge or retirement) and SECNAVINST 1920.7, 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

1309 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, art. 3410100.5

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 Commander, Naval Military Personnel Command, via the addressees listed in MILPERSMAN, art. 3410100.5. The request shall contain, inter alia, a reasonably detailed statement of the specific incidents of misconduct or performance; corrective action taken to improve inadequate performance including counseling; any disciplinary action taken, in progress, or contemplated. A special report of fitness is no longer submitted in conjunction with a request for detachment for cause. *See* NAVMILPERSCOMINST 1611.1.

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, art. 3410100.5h(2).

5. Review. Adherence to the regulations on detachment for cause is mandatory in order to safeguard the individual officer's rights and preclude judicial challenges by the officer concerned to the detachment for cause. *See Arnheiter v. Ignatius*, 292 F. Supp. 911 (N.D. Cal. 1968), *aff'd*, 435 F.2d 691 (9th Cir. 1970).

PART C - ADMINISTRATIVE SEPARATION OF OFFICERS

1310 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, art. 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.

1311 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.

1312 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.

1313 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 420, *Manual for Courts-Martial*, 1984.

F. Removal of ecclesiastical endorsement. Officers on the active-duty list in the Chaplain Corps, who can no longer continue professional service as a chaplain because an ecclesiastical endorsing agency has withdrawn its endorsement of the officer's continuation on active duty as a chaplain, shall be processed for separation (in accordance with SECNAVINST 1900.10, 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.

1314 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 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).

1315 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 any separate, minority reports.

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.

1316 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. nintey (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.

1317 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.

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CHECKLIST FOR SHIPBOARD INVESTIGATIONS

1. Personnel
   - a. Allowance
   - b. Manning level
   - c. Stability
   - d. General personnel appearance
   - e. Safety hazards
   - f. Any history of accidents for person(s) involved
2. Equipment
   - a. History of failures
   - b. Proper design or jury rigged
   - c. COSAL, open purchase, substitute
   - d. Complete operating instructions
   - e. Safety precautions
   - f. Properly labeled: Compartments, piping, ducts
   - g. Piping systems
   - h. PMS / MDCS coverage, documentation
   - i. Clocks synchronized, time-check log maintained and, if appropriate, any time check in affected spaces
   - j. Communication circuits adequate: IMC and other intercom systems, sound-powered phones
   - k. Age of ship in years
   - l. Firefighting and damage control equipment and techniques used to control or reduce damage, operative or inoperative, effective or ineffective

3. Location of accident (where most damage occurred)

   a. Compartment number

   b. Compartment noun name

   c. In what compartment did primary accident cause occur?

4. Logs, records and reports - Review and check for corrective action taken / contemplated

   a. Deck log

   b. Sonar logs

   c. Watch, quarter and station bill

   d. Navigation center log

   e. Engineering smooth log

   f. Engine bell book

   g. Engineering operating logs

   h. Damage control closure log

   i. Tag-out log

   j. Standing orders: Unit commander, commanding officer, engineering officer, navigator

   k. Night orders: Unit commander, commanding officer, engineering officer, navigator

   l. Training records: Shipboard, plan of the day, team, watch qualification, equipment qualification, ship qualification, individual personnel

   m. Quartermaster's notebook

   n. Radio log

   o. Personnel records

   p. Ship's operating schedule

   q. INSURV, command inspections, combined trials

r. Monthly hull reports, 2000 reports, zone inspections

s. Significant outstanding CASREPTS

t. Machinery out-of-commission logs

u. Ships procedures adequate, followed

5. Morale

a. Liberty / leave

b. Number of duty sections / watch sections

c. Working hours, as indicated in plan of the day and deck logs

d. Habitability (air conditioning, ventilation, laundry facilities, lighting system, general housekeeping, heads, living quarters, working spaces, recreational spaces)

6. Condition of ship's boats

7. Availability of shore services

a. Electricity

b. Shore steam

c. Potable and firefighting water

d. High pressure air

8. Illumination

a. Exterior

b. Interior

c. At scene

9. Full description of damage sustained to ship and equipment, including:

a. Material costs to Navy

b. Navy manhours required to repair damage

c. Off-ship labor costs

d. Outside assistance costs (drydock, etc.)

10. Primary and contributing causes

LINE OF DUTY / MISCONDUCT

1. Injured person's / deceased's / witness' identifying data

   a. Name

   b. Sex and age

   c. Military

      (1) Grade or rate

      (2) Service number, if applicable

      (3) Regular or Reserve

      (4) Organization

      (5) Armed force

      (6) Experience or expertise, i.e., training, licenses, etc.

   d. Civilian

      (1) Title

      (2) Business or occupation

      (3) Address

      (4) Experience or expertise, i.e., training, licenses, etc.

2. Injury / death

   a. Date / time / place of occurrence

   b. Nature / extent of injury including description of body parts injured

   c. Place, extent, and cause of hospitalization of injured / deceased

   d. Status of injured / deceased vis-a-vis leave, liberty, unauthorized absence (UA), active duty, active duty for training, or inactive duty for training at time of injury / death

   e. Whether any UA status at time of injury materially interfered with his military duty

f. Servicemember unable to perform duties for over 24 hours

g. Servicemember's injury possibly permanent

h. Training

(1) Formal / on the job

(2) Adequacy

(3) Engaged in tasks different from those in which trained

(4) Engaged in tasks too difficult for skill level

(5) Emergency responses / reaction time

i. Supervision

(1) Adequate / lax

(2) Absent

j. Physical factors

(1) Tired

(2) Working excessive hours

(3) Hungry

(4) Medication prescribed or unauthorized

(5) Ill or experiencing dizziness, headaches, or nausea

(6) Suffering from exposure to severe environmental extremes

(7) Periods of alcohol or habit-forming drug impairment

(a) Individual's general appearance, behavior, rationality of speech, and muscular coordination

(b) Quantity and nature of intoxicating agent used

(c) Period of time in which consumed

(d) Results of blood, breath, urine, or tissue tests for intoxicating agents

(e) Lawfulness of intoxicating agent

k. Mental factors

(1) Emotionally upset (angry, depressed, moody, tense)

(2) Inattention due to preoccupation with unrelated matters

(3) Motivation

(4) Knowledge of standard procedures and adherence to them

(5) Mental competence

(a) Presumption of sanity

(b) Attempted suicide (reasonable, adequate motive or not)

(c) Mental disease or defect

l. Design factors

(1) Equipment's condition, e.g., vehicle's mechanical condition

(2) Operating unfamiliar equipment / controls

(3) Operating equipment with controls that function differently than expected due to lack of standardization

(4) Unable to reach all controls from his work station and see and hear all displays, signals and communications

(5) Provided insufficient support manuals

(6) Using support equipment which was not clearly identified and likely to be confused with similar but noncompatible equipment

m. Environmental factors

(1) Harmful dusts, fumes, gases without proper ventilation

(2) Working in a hazardous environment without personal protective equipment or a line-tender

(3) Unable to hear and see all communications and signals

(4) Exposed to temperature extremes that could degrade efficiency or cause faintness, heart stroke or numbness

(5) Suffering from eye fatigue due to inadequate illumination or glare

(6) Visually restricted by dense fog, rain, smoke or snow

(7) Darkened ship lighting conditions

(8) Exposed to excessive noise / vibration levels

n. Personnel protective equipment

(1) Using required equipment for the job, e.g., seatbelts, safety glasses

(2) Not using proper equipment due to lack of availability (identify)

(3) Not using proper equipment due to lack of comfort or "sissy" connotations (identify)

(4) Using protective equipment that failed and caused additional injuries (identify)

o. Hazardous conditions

(1) Inadequate / missing guards, handrail, ladder treads, protective mats, safety devices / switches, skid proofing

(2) Jury-rigged equipment

(3) Utilization of improper noninsulated tools

(4) Incorrectly installed equipment

(5) Defective / improperly maintained equipment

(6) Slippery decks or ladders, obstructions

(7) Improper clothing (leather heels, conventional shoes vice steel-toed shoes, loose-fitting clothes, no shirt, conventional eyeglasses vice safety glasses)

3. No LOD / Misconduct determination in death cases

CLAIMS FOR / AGAINST GOVERNMENT

1. Names / addresses of witnesses / passengers, if any
2. Names, grades, organizations, addresses, and ages of all civilian / military personnel injured or killed
3. Claim prospects and name and address of claimant or potential claimant
4. Owner of damaged property, if any
5. Basis of claimant's alleged right to file a claim, e.g., owner, renter, etc.
6. Scope-of-employment status of Government employee(s)
7. Description of government property involved and nature and amount of damage, if any
8. Nature and extent of injuries, degree of permanent disability, prognosis, period of hospitalization, quality of medical care provided
9. Name and address of attending physician and hospital
10. Amount of medical, hospital and burial expenses actually incurred
11. Occupation and wage or salary of civilians injured or killed
12. Names, addresses, ages, relationships and extent of dependency of survivors of any person fatally injured
13. Violation of state or Federal statutes, local ordinances or installation regulations by a party
14. Police investigation results
15. Arrests made, or charges preferred, and result of any trial or hearing in civil or military courts
16. Comments and recommendations of investigating officer as to:
    a. Amount of damages, loss, or destruction; and
    b. extent of liability.

17. **Statements in convening order and investigative report that the investigation has been prepared for the purpose of assisting attorneys representing the interests of the United States in this matter**

FIRE

1. Items in addition to the Forces Afloat Accident / Near Accident Report (OPNAV Form 3040/1) and general checklist

   a. Location of fire

      (1) Compartment noun name

      (2) Compartment number

   b. Class of fire (A-B-C-D)

   c. Time fire detected

   d. Means of detection

   e. Time fire started (estimated)

   f. Time fire alarm sounded

   g. Time fire located

   h. Time started fighting fire

   i. Time general quarters sounded

   j. Time assistance was requested

   k. Time assistance arrived

   l. Time boundaries set

   m. Time fire extinguished

   n. Fire did / did not reflash

   o. Extinguishing agents used (indicate effectiveness)

      (1) Fire main water (submarines: trim / drain system water)

      (2) Light water

      (3) Foam (portable / installed)

      (4) CO2 (portable / installed)

(5) PKP

(6) Steam smothering

(7) Flooding

(8) Other

p. Extinguishing equipment (indicate availability and operability)

(1) Pumps (portable / installed) size and number (quantity)

(2) Nozzles / applicators (LC and HC)

(3) Foam maker

(4) Vehicles

(5) Eductors

(6) Type and size of hoses

(7) Other

q. Firefighting organization used

(1) Nucleus fire party

(2) Repair party (condition I or II watches)

(3) Inport fire party

(4) Outside assistance (explain)

(5) Fire party / repair locker personnel assigned in accordance with appropriate publications, ships organization and regulations manual, battle bill, etc.

(6) Personnel duties and responsibilities assigned in writing

(7) Fire / repair locker organization charts properly maintained

(8) Damage control system diagrams up to date and available for use

(9) Communications effectively established between control stations

r. Protective equipment used (Indicate availability, operability, and effectiveness)

(1) OBA's

(2) EAB masks

(3) Fire suits

(4) Boots

(5) Gloves

(6) Helmets

(7) Other

s. Alarm system

(1) CO2 flooding

(2) High temperature

(3) Other

t. Fire contained / spread

u. How it spread

(1) Through hot deck / bulkhead

(2) Through hole in deck / bulkhead

(3) By explosion (type)

(4) Through vent ducts

(5) By liquid flow

(6) By wind

(7) Other (explain)

v. Electric power in area

w. Jettison bill

(1) Current

(2) Used

x. If ship underway, course changes (snorkeling, surfaced)

y. Automatic vent closures

z. Magazines flooded

aa. Operational problems

(1) OBA's / canisters effective

(2) EAB's effective

(3) Sufficient water and pressure

(4) Flooding problems

(5) Drainage problems (installed / portable)

(6) Desmoking problems (installed / portable)

(7) Lighting (explain)

(8) Adequate equipment readily available

(9) Adequate intra-ship communications

(10) Other (explain)

bb. Material discrepancies of any equipment used (list and explain)

cc. Determine all heat / ignition sources possible then eliminate those that are improbable

dd. Operating personnel qualified in accordance with PQS requirements for the systems operation and maintenance

FLOODING

1. Items in addition to the Forces Afloat Accident / Near Accident Report (OPNAV Form 3040/1) and the general checklist

   a. Location of flooding

      (1) Compartment noun name

      (2) Compartment number

   b. Type of flooding (fresh or salt water, oil, JP-5, etc.)

   c. Source of flooding (internal or external)

      (1) Pipe rupture or valve failure

      (2) Tank rupture / hull rupture / shaft seal failure

      (3) Open to sea through designed hull penetration

      (4) Other

   d. Time flooding was detected

   e. Flooding detection method

   f. Time duty emergency party called away

   g. Time general quarters sounded

   h. Time assistance requested (from whom)

   i. Time assistance arrived

   j. Appropriate equipment used to dewater

   k. Dewatering equipment used (effective, available, operative)

   l. Time required to dewater

   m. Time flooding was stopped or under control

   n. Time space was last inspected prior to flooding

   o. Cause of flooding

p. Flooding contained within set boundaries

q. Amount of flooding (effect on list, trim or depth control)

r. Damage (list all items)

(1) Material costs

(2) Labor costs

(3) Outside assistance costs

s. Injuries (list and submit NAVJAG Form 5800/15)

t. Ship's procedures and safety precautions

COLLISION

1. Items in addition to the Forces Afloat Accident / Near Accident Report (OPNAV Form 3040/1) and the general checklist

   a. Tactical situation existing at time of collision

   b. Personnel manning and qualification

      (1) CDO

      (2) OOD / diving officer

      (3) Helmsman, planesman

      (4) Lookouts

      (5) CIC team (including sonar team, fire control tracking party and navigation team)

      (6) Phone talkers

      (7) Location of conning officer

      (8) Line handlers

      (9) Personnel qualified in accordance with PQS requirements for the system operation and maintenance

   c. Material factors

      (1) Radar

      (2) Sonar

      (3) Navigational lights

      (4) Periscopes

      (5) Compasses

      (6) Ship control systems

      (7) Ballast, blow and vent systems

      (8) UNREP special equipment

d. Communication factors

(1) Radio

(2) Telephone

(3) Oral (audibility / understanding)

(4) Signal systems

(5) Interferences (e.g., background noise level)

e. Rules-of-the-road factors

f. Operating area factors

(1) Adherence to op area boundaries

(2) Existence of safety lanes

(3) Depth constraints

(a) Depth separation

(b) Depth changes

(c) Out-of-layer operations

g. Environment and visibility

h. Unique local practices

i. Assistance factors

(1) Pilot - experience / language barrier

(2) Tugs

(3) Line handlers

j. For collisions in restricted waters or with fixed geographic features (including buoys) refer also to the checklist for groundings

GROUNDING

1. Items in addition to the Forces Afloat Accident / Near Accident Report (OPNAV Form 3040/1) and the general checklist

   a. Tactical situation

   b. Navigational factors

      (1) Charts (available / correct / in use)

      (2) Sailing directions / coast pilot

      (3) Fleet guide

      (4) Tide / current condition (computed / displayed / recorded)

      (5) Track laid out / DR plot indicated / fixes plotted / track projected

      (6) Notices to mariners

      (7) Compass errors / application

      (8) Navigation fix errors

      (9) Navigation reset errors

      (10) Depth of water

      (11) Type of bottom

      (12) Navigation reference points coordinated (radar / visual, points logged / plotting teams coordinated)

   c. Material factors

      (1) Radar

      (2) Fathometer

      (3) Compasses

      (4) Ship's depth indicators

      (5) Ship's speed log

(6) Alidades, bearing circles, peroruses, periscopes, bearing repeaters

(7) Sounding lead

(8) Ship's draft / submerged keel depth

(9) Ship's anchor

(10) Ship's control system

d. Personnel factors (posted / qualified)

(1) CDO

(2) OOD

(3) Diving officer

(4) Navigator

(5) Piloting officer

(6) Fathometer operator

(7) Lookouts

(8) Helmsman

(9) Planesman

(10) Bea[illegible]akers

(11) CIC team

(12) Leadsman

(13) Line handlers

(14) Local pilot

(15) Location of conning officer

(16) Personnel qualified in accordance with PQS requirements for the systems operation and maintenance

e. Communications factors

(1) Radio

(2) Telephone

(3) IC systems

(4) Oral (audibility / understanding)

f. Environment

(1) Light conditions

(2) Visibility

(3) Wind, current, tide condition (actual vs. predicted)

g. Assistance factors (tugs)

h. Organizational factors

(1) Ship organization directives

(2) Watch organization directives

i. Action taken after grounding

(1) Ship secured to prevent further damage

(a) Anchors kedged out

(b) Ballast shifted

(c) Cargo shifted

(2) Draft readings / soundings taken

(3) Damage surveyed

(4) Excess machinery secured

PRIVACY ACT STATEMENTS FOR INJURED SERVICEMEMBERS IN JAG MANUAL INVESTIGATIONS FOR LOD/MISCONDUCT AND CLAIMS PURPOSES

NAME: _____ **RANK/RATE:** _____

ACTIVITY: _____ **UNIT:** _____ **TEL. NO:** _____

Today, _____, 19__, I acknowledge that I have received the following advisement statements from _____.

PRIVACY ACT STATEMENT

This statement is provided in compliance with the provisions of the Privacy Act of 1974 (Public Law 93-579) which requires that Federal agencies must inform individuals who are requested to furnish personal information about themselves as to certain facts regarding the information requested below.

1. Authority. 5 U.S.C. § 301; 10 U.S.C. §§ 972(5), 1201-1221, 2733, 2734, 2734a, 2737, 5131-5153, 5947, 6148, 7205, 7622-7623; 28 U.S.C. §§ 1346, 2671-2680; 31 U.S.C. §§ 71-75, 240-243, 951-953; 37 U.S.C. § 802; 38 U.S.C. § 105; 42 U.S.C. §§ 2651-2653; 44 U.S.C. § 3101; 49 U.S.C. § 1901.

2. Principal Purposes. The information which will be solicited is intended principally for the following purposes:

a. Determinations on the status of personnel regarding entitlements to disability pay, disability benefits, severance pay, retirement pay, increases of pay for longevity, survivor's benefits, involuntary extensions of enlistments, dates of expiration of active obligated service, and accrual of annual leave;

b. determinations on disciplinary or punitive action;

c. determinations on liability of personnel for losses of, or damage to, public funds or property;

d. adjudication, pursuit, or defense of claims for or against the Government or among private parties;

e. other determinations, as required, in the course of naval administration;

f. public information releases; and

g. evaluations of procedures, operations, material, and designs by the Navy and contractors, with a view to improving the efficiency and safety of the Department of the Navy.

3. Routine Uses. In addition to being used within the Departments of the Navy and Defense for the purposes indicated above, records of investigations are routinely furnished, as appropriate, to the Department of Veterans' Affairs for use in determinations concerning entitlement to veterans and survivors benefits; to Servicemen's Group Life Insurance

administrators for determinations concerning payment of life insurance proceeds; to the U.S. General Accounting Office for purposes of determinations concerning payment of relief of accountable personnel from liability for losses of public funds and related fiscal matters; and to the Department of Justice for use in litigation involving the Government. Additionally, such investigations are sometimes furnished to agencies of the Department of Justice and to State or local law enforcement and court authorities for use in connection with civilian criminal and civil court proceedings. The records of investigations are provided to agents and authorized representatives of persons involved in the incident, for use in legal or administrative matters. The records are provided to contractors for use in connection with settlement, adjudication, or defense of claims by or against the Government, and for use in design and evaluation of products, services, and systems. The records are also furnished to agencies of the Federal, State, or local law enforcement authorities, court authorities, administrative authorities, and regulatory authorities, for use in connection with civilian and military criminal, civil, administrative, and regulatory proceedings and actions.

4. Mandatory/Voluntary Disclosure/Consequences of Refusing to Disclose. Disclosure is voluntary. You are advised that you are initially presumed to be entitled to have the (personal determinations) (disciplinary determinations) (pecuniary liability to the Government) (medical claims liability assignment) listed above resolved in your favor, but the final determination will be based on all the evidence in the investigative record. If you do not provide the requested information, you will be entitled to a favorable determination if the record does not contain sufficient evidence to overcome the presumption in your favor. If the completed record does contain sufficient evidence to overcome the presumption in your favor, however, your election not to provide the requested information possibly could prevent the investigation from obtaining evidence which may be needed to support a favorable determination.

_____/_____
Signature Date

JAGMAN, § 0215b Warning

NOTE: If the injured party is the subject of the investigation which involves a disease or injury he incurred, the following should be acknowledged.

I have been advised that under section 0215b of the JAG Manual, if the matter under investigation involves disease or injury that I have incurred, I cannot be required to sign any statement relating to the origin, incurrence or aggravation of a disease or injury that I may have acquired.

NOTE: Attach article 31 warning if servicemember is suspected of committing an offense under the UCMJ.

_____/_____
Signature Date

PRIVACY ACT STATEMENTS FOR WITNESS
IN JAG MANUAL INVESTIGATION
FOR LOD/MISCONDUCT AND CLAIMS PURPOSES

NAME: _____ **RANK/RATE:** _____

ACTIVITY: _____ **UNIT:** _____ **TEL. NO:** _____

Today, _____, 19__, I acknowledge that I have received the following advisement statements from _____.

PRIVACY ACT STATEMENT

This statement is provided in compliance with the provisions of the Privacy Act of 1974 (Public Law 93-579) which requires that Federal agencies must inform individuals who are requested to furnish personal information about themselves as to certain facts regarding the information requested below.

1. Authority. 5 U.S.C. § 301; 10 U.S.C. §§ 972(5), 1201-1222, 2733, 2734-2734b, 2737, 5947, 6148, 7205, 7622-7623; 28 U.S.C. §§ 1346, 2671-2680; 31 U.S.C. §§ 71-75, 82a, 89-92, 95a, 240-243, 951-953; 37 U.S.C. § 802; 38 U.S.C. § 105; 42 U.S.C. §§ 2651-2653; 44 U.S.C. § 3101; 49 U.S.C. § 1901.

2. Principal Purposes. The information which will be solicited is intended principally for the following purposes:

a. Determinations on the status of personnel regarding entitlements to pay during disability, disability benefits, severance pay, retirement pay, increases of pay for longevity, survivor's benefits, involuntary extensions of enlistments, dates of expiration of active obligated service, and accrual of annual leave;

b. determinations on disciplinary or punitive action;

c. determinations on liability of personnel for losses of, or damage to, public funds or property;

d. evaluations of petitions, grievances, and complaints;

e. adjudication, pursuit, or defense of claims for or against the Government or among private parties;

f. other determinations, as required, in the course of naval administration;

g. public information releases; and

h. evaluations of procedures, operations, material, and designs by the Navy and contractors, with a view to improving the efficiency and safety of the Department of the Navy.

3. Routine Uses. In addition to being used within the Departments of the Navy and Defense for the purposes indicated above, records of investigations are routinely furnished,

as appropriate, to the Department of Veterans' Affairs for use in determinations concerning entitlement to veterans and survivors benefits; to Servicemen's Group Life Insurance administrators for determinations concerning payment of life insurance proceeds; to the U.S. General Accounting Office for purposes of determinations concerning payment of relief of accountable personnel from liability for losses of public funds and related fiscal matters; and to the Department of Justice for use in litigation involving the Government. Additionally, such investigations are sometimes furnished to agencies of the Department of Justice and to State or local law enforcement and court authorities for use in connection with civilian criminal and civil court proceedings. The records of investigations are provided to agents and authorized representatives of persons involved in the incident, for use in legal or administrative matters. The records are provided to contractors for use in connection with settlement, adjudication, or defense of claims by or against the Government, and for use in design and evaluation of products, services, and systems. The records are also furnished to agencies of the Federal, State, or local law enforcement authorities, court authorities, administrative authorities, and regulatory authorities, for use in connection with civilian and military criminal, civil, administrative, and regulatory proceedings and actions.

4. Mandatory/Voluntary Disclosure, Consequences of Disclosure. Disclosure is voluntary. If you do not provide the requested information, any determinations or evaluations made as a result of this investigation will be made on the basis of the evidence that is contained in the investigative record.

_____/_____

Signature Date

★U.S. GOVERNMENT PRINTING OFFICE: 1993 -700 -071/ 81000