DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
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IN REPLY REFER TO

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Subj: MANUAL OF THE JUDGE ADVOCATE GENERAL

Ref: (a) JAGINST 5219.1G
(b) U.S. Navy Regulations, 1990
(c) SECNAVINST 5430.7Q
(d) SECNAV Green Blazer 8U003687 of 23 Apr 88 (NOTAL)

Encl: (1) JAGMAN
(2) Summary of Major Changes

1. Purpose. In accordance with reference (a), to publish the Manual of the Judge Advocate General (JAGMAN), enclosure (1). The JAGMAN has been approved under the authority of the Secretary of the Navy, and, under references (b)-(d), the Judge Advocate General. Enclosure (2) lists major changes.

2. Cancellation. JAGINST 5800.7E of 20 Jun 07 is cancelled.

3. Action. The JAGMAN is effective on the date of this document and is applicable throughout the Department of the Navy as a regulation. Proposed changes to the JAGMAN should be forwarded to the Office of the Judge Advocate General, Administrative Law Division (Code 13), 1322 Patterson Avenue SE, Suite 3000, Washington Navy Yard, DC 20374.

4. Records Management. Records created as a result of this instruction, regardless of media and format, shall be managed in accordance with SECNAV M-5210.1.

NANETTE M. DeHENZI
Acting

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Electronic only via the DON directives website at http://doni.daps.dla.mil, and the JAG Corps website at http://www.jag.navy.mil.

MANUAL
OF THE
JUDGE ADVOCATE GENERAL
(JAGMAN)

Office of the Judge Advocate General
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[1] The Manual of the Judge Advocate General may be cited as "JAGMAN, 0101a(1)," "JAGMAN, A-1-b," or “JAGMAN, Chapter II.”

Forms, certain reference material, and technical guides are located in the Appendices, which are keyed by section number to the relevant chapter.

The words "Navy" and "Naval" as used in this Manual include the Marine Corps, except where the context indicates differently.

The Uniform Code of Military Justice and the Manual for Courts-Martial, United States, 2002, are referred to as "UCMJ" and "MCM" respectively in this Manual. The Military Rules of Evidence and Rules for Court-Martial are referenced to as “M.R.E.” and “R.C.M.” respectively in this Manual.

The prior Chapter V, Release of Government Information, has been deleted. Instead commands shall rely on SECNAVINST 5720.42 (series), SECNAVINST 5211.5 (series), and SECNAVINST 5820.8 (series), as appropriate. The prior Chapter XI, Customs Requirements, has been deleted. Commands shall rely on DODD 4500.09 and DTR 4500.9-R-Part V, (located at http://www.transcom.mil/dtr/part-v/). In addition, the prior Chapter XIV, Payments Due Mentally Incompetent Members, Physical Examinations of Such Members, and Trustee Designations, has been deleted. Commands shall rely on 37 USC §§ 601-04, MEDMANUAL Chapter 18, and DoD FMR Volume 7B, Chapter 16.

[2] Prior Chapter XIII, Environmental Law, is renumbered as Chapter V.

[3] Prior Chapter XII, Maritime and Admiralty Law, is renumbered as Chapter XI.

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CHAPTER I

REGULATIONS IMPLEMENTING AND SUPPLEMENTING THE MANUAL FOR COURTS-MARTIAL

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CHAPTER I

REGULATIONS IMPLEMENTING AND SUPPLEMENTING THE MANUAL FOR COURTS-MARTIAL

0101 SCOPE

a. The Uniform Code of Military Justice (UCMJ) and the Manual for Courts-Martial (MCM), authorize "the Secretary concerned" or "the Judge Advocate General concerned" to prescribe regulations implementing or supplementing certain provisions of the UCMJ or the MCM. This Chapter provides those regulations and additional regulations relating to military justice.

b. Part A contains regulations and procedures governing nonpunitive corrective measures. Part B contains regulations and procedures relating to nonjudicial punishment. Part C pertains to trial by court-martial and is divided into three subparts, concerning the pretrial, trial, and post-trial stages of the court-martial process. Part D contains miscellaneous provisions, including a table of cross-references between this Chapter and corresponding provisions of the MCM.

PART A -- NONPUNITIVE MEASURES

0102 NONPUNITIVE ADMINISTRATIVE MEASURES GENERALLY

a. Definition of commander. The terms commander and commanding officer (CO), as used in this Part, refer to the same position. The term commander is defined in the MCM, Part V, paragraph 2, and in the U.S. Navy Regulations, Chapter 7. A commander includes the following officers: an officer empowered to convene general and/or special courts-martial; a commander of a joint command; an officer designated pursuant to U.S. Navy Regulation 0722; an officer designated as a commander of a separate and detached command pursuant to U.S. Navy Regulation 0723; and a commissioned or warrant officer exercising command. Marine Corps COs are titled as Commandant, Commander, Commanding General, CO, Director, and Inspector-Instructor. Other titles used to designate Marine Corps commanders shall be made only with the specific approval of the Commandant of the Marine Corps.

b. Types of administrative measures. Commanders are authorized and expected to use administrative corrective measures to further the efficiency of their commands or units. See R.C.M. 306(c)(2), MCM. These measures are not to be imposed as punishment for any military offense(s). They may be administered either orally or in writing. They generally fall into three areas: extra military instruction, administrative withholding of privileges, and nonpunitive censure.

0103 EXTRA MILITARY INSTRUCTION

a. Definition. Extra military instruction (EMI) is defined as instruction in a phase of military duty in which an individual is deficient,

and is intended for and directed towards the correction of that deficiency. It is a bona fide training technique to be used for improving the efficiency of an individual within a command or unit through the correction of some deficiency in that individual's performance of duty. It may be assigned only if genuinely intended to accomplish that result. It is not to be used as a substitute for judicial (court-martial) action or nonjudicial punishment (NJP), and must be logically related to the deficiency in performance for which it was assigned.

b. Limitations. EMI shall be conducted within the following limitations:

(1) EMI normally will not be conducted for more than 2 hours per day.

(2) EMI conducted outside normal working hours should be conducted either immediately before or after the member's workday. However, if the CO or OIC (as defined in section 0106(b)) determines military exigencies do not permit such an arrangement, they may direct EMI at a different reasonable time. Reserve component personnel on inactive duty training, however, may not be required to perform EMI outside normal periods of inactive duty training.

(3) EMI will not be conducted over a period that is longer than necessary to correct the performance deficiency for which it was assigned.

(4) EMI should not be conducted on the member's Sabbath.

(5) EMI will not be used for the purpose of depriving the member of normal liberty to which the member is otherwise entitled. A member who is otherwise entitled thereto may commence normal liberty upon completion of EMI.

(6) Authority to assign EMI that is to be performed during normal working hours is not limited to any particular grade or rate, but is an inherent part of that authority over their subordinates that is vested in officers and noncommissioned/petty officers in connection with duties and responsibilities assigned to them. This authority to assign EMI that is to be performed during normal working hours may be withdrawn by any superior if warranted.

(7) Authority to assign EMI to be performed after normal working hours is vested in the CO or OIC. Such authority may be delegated, as appropriate, to officers and noncommissioned/petty officers, in connection with duties and responsibilities assigned to them, only if authorized by regulations of the Chief of Naval Operations or the Commandant of the Marine Corps, as appropriate. See OPNAVINST 3120.32 (series).

0104 ADMINISTRATIVE WITHHOLDING OF PRIVILEGES

a. Privilege. A privilege is a benefit, advantage, or favor provided for the convenience or enjoyment of an individual. Examples of privileges that may be temporarily withheld as administrative corrective measures are: special liberty; exchange of duty; special command programs; access to base or ship libraries, base or ship movies, or enlisted or officers' clubs; base parking; and base or ship special services events. It may also encompass the withholding of special pay, as well as commissary and exchange privileges,

provided such withholding complies with applicable rules and regulations and is otherwise in accordance with law. In all instances, unless properly delegated, final authority to withhold a privilege, however temporary, must ultimately rest with the level of authority empowered to grant that privilege.

b. Deprivation of liberty. Deprivation of normal liberty as a punishment, except as specifically authorized under the UCMJ, is illegal. Therefore, except as the specific result of punishment imposed under Article 15, UCMJ, or as the result of the sentence of a court-martial, it is illegal to deny to any subordinate normal liberty, or privileges incident thereto, as punishment for any offense, or to take action which has the effect of denying a subordinate normal liberty (e.g. seizing an individual's military ID card, except when taken temporarily to determine the appropriateness of taking lawful measures to deny liberty). Lawful deprivation of normal liberty, however, may result from other lawful actions such as authorized pretrial restraint, or deprivation of normal liberty in a foreign country or in foreign territorial waters, when such action is deemed essential for the protection of the foreign relations of the United States, or as a result of international legal hold restriction. Moreover, it is necessary to the efficiency of the Naval service that official functions be performed and that certain work be accomplished in a timely manner. It is, therefore, not a punishment when persons in the Naval service are required to remain on board and be physically present outside of normal working hours for work assignments that should have been completed during normal working hours, for the accomplishment of additional essential work, or for the achievement of the currently required level of operational readiness.

0105 NONPUNITIVE CENSURE - NONPUNITIVE LETTER OF CAUTION

a. General. "Censure" is a statement of adverse opinion or criticism of an individual's conduct or performance of duty expressed by a superior in the member's chain-of-command. Censure may be punitive or nonpunitive. See section 0114 regarding punitive censure. Censure does not include adverse comments in reports of fitness or performance evaluations, letters of instruction, or administrative remarks entries documenting factual matters such as counseling. Proper use of adverse matter that is not censure is governed by Department of the Navy (DON) regulations and applicable service directives, such as the Naval Military Personnel Manual and the Marine Corps Individual Records Administration Manual.

b. Nonpunitive censure. Nonpunitive censure is provided for in R.C.M. 306(c)(2), MCM. Nonpunitive censure may be issued by any superior in the member's chain-of-command, and may be either oral or in writing. A sample nonpunitive letter is at Appendix A-1-a.

(1) A nonpunitive letter is not considered punishment; rather, the letter is issued to remedy a noted deficiency in conduct or performance of duty. The contents of a nonpunitive letter are not limited to, but may include the following: identification of conduct or performance of duty deficiencies, direction for improvement, language of admonishment, identification of sources of assistance, outline of corrective action, and the consequences of failing to correct the deficiencies.

(2) A nonpunitive letter will be kept a personal matter between the member and the superior issuing the nonpunitive letter. Other than Secretarial letters of censure (see section 0114a), the letter may not be forwarded to the Chief of Naval Personnel or the Commandant of the Marine Corps, quoted in or appended to fitness reports, included as enclosures to investigations pursuant to this Manual or to other investigations, or otherwise included in official departmental records of the recipient.

(3) The facts underlying a nonpunitive letter may be used to support a detachment for cause proceeding, for relief of command, or to support a negative endorsement. If the member submits a rebuttal to those facts alleging inadequate counseling or a failure to warn of deficiencies, a copy of the nonpunitive letter may be included in the correspondence forwarding the member's rebuttal. Under such circumstances, a nonpunitive letter may properly be included in the official service record of the member upon filing of the complete correspondence under the provisions of applicable service regulations. The fact of issuance of a nonpunitive letter may not be mentioned in a fitness report but the underlying facts may be included.

(4) The Department of the Navy has an obligation to ensure senior officials properly discharge the duties and responsibilities of government service. Public disclosure of significant departures by senior officials from expected standards of performance and conduct and the DON holding them accountable for such behavior instills public confidence in the institution and is consistent with principles of open governance. Proven wrongdoing of a serious and intentional nature by a high-level government official is of sufficient public interest to outweigh the privacy interest of the official. Less serious misconduct by lower-level agency employees generally is not considered of sufficient public interest to outweigh the privacy interest of the employee. In general, DON finds the public interest warrants disclosure of accountability action taken in cases of misconduct involving flag and general officers and senior executive service personnel in order to retain the public's confidence and trust in the integrity of the Department, the Navy, and the Marine Corps. Similarly, resolution of misconduct involving commanding officers, executive officers, officers-in-charge, senior enlisted advisors and other personnel of lower rank or grade may also warrant release of information depending on their official position and the nature of the misconduct. The determination to identify an individual with specific wrongdoing meriting the more extensive release of information to the public must be made on a case-by-case basis by a flag or general officer in the chain of command upon balancing the public interest against the privacy interest of the individual. Accordingly, in appropriate cases the fact of the issuance of the nonpunitive letter may be disclosed to the public/media. The actual letter may not be disclosed without the consent of the individual receiving the nonpunitive letter; however, the facts and circumstances underlying the letter may be disclosed. Similarly, the fact of counseling under the same facts and circumstances that is not documented with a nonpunitive letter may also be disclosed. Commands considering public disclosure should consult their staff judge advocate and public affairs officer in their chain of command.

PART B -- NONJUDICIAL PUNISHMENT

0106 AUTHORITY TO IMPOSE

a. Commander. The terms commander and commanding officer (CO), as used in this Part, refer to the same position. The term commander is defined in the MCM, Part V, paragraph 2 as a commissioned or warrant officer who, by virtue of rank and assignment, exercising primary command authority over a military organization or prescribed territorial area, which under pertinent official directives (such as the Standard Naval Distribution List (SNDL)) is recognized as a "command." Note, a title does not by itself indicate authority to impose NJP - instead, the title must be associated with a recognized command (for example, personnel transfer orders indicating that one is being assigned as commanding officer of a unit does not provide NJP authority if that unit is not a recognized command in the SNDL or other official directive). "Commanders" includes an officer empowered to convene general and/or special courts-martial, a commander of a joint command, an officer designated pursuant to U.S. Navy Regulation 0722, and an officer designated as a commander of a separate and detached command pursuant to U.S. Navy Regulation 0723. Other titles (such as "Director") may be used to designate Navy commanders. Marine Corps COs are titled as Commandant, Commander, Commanding General, CO, Director, and Inspector-Instructor. Other titles used to designate Marine Corps commanders shall be made only with the specific approval of the Commandant of the Marine Corps. A commander may impose nonjudicial punishment upon officers and enlisted persons of the command; nonjudicial punishment is not authorized for midshipmen or cadets. This authority to impose nonjudicial punishment extends to Reserve commanders of commissioned units.

b. Officer in Charge (OIC). Any commissioned officer who is designated as OIC of a unit by: departmental orders; tables of organization; manpower authorizations; orders of a flag or general officer in command (including one in command of a joint command to which members of the Naval service are attached); orders of the senior officer present; or designated as a special court-martial convening authority. An OIC may impose upon enlisted persons assigned to the unit admonition or reprimand and one or more of the punishments listed in paragraph 5b(2)(A)(i) to (vi) of Part V, MCM.

c. Principal assistant. With the express prior written approval by the Chief of Naval Personnel or the Commandant of the Marine Corps, as appropriate, a flag or general officer in command may delegate all or a portion of his powers under Article 15, UCMJ, to a senior officer on his staff who is eligible to succeed to command in case of absence of such officer in command. To the extent of the authority thus delegated, the officer to whom such powers are delegated shall have the same authority as the officer who delegated the powers.

d. Joint Commander. A joint commander to whose staff, command, or unit members of the Naval service are assigned may impose nonjudicial punishment upon such individuals. A joint commander, alternatively, may designate, in

writing, one or more Naval units, and shall for each such Naval unit designate a commissioned officer of the Naval service as CO for the administration of discipline under Article 15, UCMJ. A copy of any such designation by the joint commander shall be furnished to the Chief of Naval Personnel and to the Office of the Judge Advocate General (OJAG) (Code 20) or the Commandant of the Marine Corps (JAM), as appropriate.

e. Withholding of nonjudicial punishment authority. Although no commander may direct that a subordinate impose NJP in a particular case, a superior commander may limit or withhold the exercise by subordinate commanders of any disciplinary authority they might otherwise have under MCM, Part V for certain types of offenses or certain categories of persons, in specific cases, or to impose certain types of punishment.

f. Terminology. The terms Captain's Mast and Office Hours refer to Article 15, UCMJ, hearings. Nonjudicial punishment is a term that describes the punishment imposed at the conclusion of an Article 15, UCMJ, hearing.

0107 JURISDICTION

a. Individual.

(1) General rule. When nonjudicial punishment is imposed, the accused must be a member of the command or of the unit of the officer imposing the punishment. A member is "of the command," or "of the unit," if assigned or attached thereto. A member may be "of the command," or "of the unit," of more than one command or unit at the same time and, consequently, be subject to the nonjudicial punishment authority of both commanders. For example, members assigned to or attached to commands or units for the purpose of performing temporary duty (TDY) are subject to the nonjudicial punishment authority of the commanders of both the parent and TDY commands. Similarly, members assigned or attached to a detachment under the operational control of another command or unit by virtue of operational orders, or other authorized means, are subject to the nonjudicial punishment authority of the commanders of both the parent and supported units. Superior operational or administrative commanders may exercise nonjudicial punishment authority upon any subordinate member in their chain-of-command. For purposes of this section, all members of units responsible to the superior commander are considered "of the command." Additionally, any general or special court-martial convening authority who has charges against the accused properly before him for disposition at a court-martial may impose nonjudicial punishment upon the accused, regardless of whether that accused is "of the command" of the convening authority.

(2) Party before a fact-finding body. A person who has been designated a party before a fact-finding body convened under this Manual (see Chapter II) remains thereafter "of the command" of the unit or organization to which assigned or attached at the time of such designation, even though for other purposes he may have been assigned or attached to another command. This status terminates automatically when all action on appeal has been completed.

(3) Action when accused is no longer with command. Except as provided in subsection a(1) and a(2), if the accused is no longer assigned to or

attached to the unit at the time nonjudicial punishment is to be imposed, the alleged offense should be referred for appropriate action to a competent authority in the chain-of-command over the individual concerned.

b. Over Reserve component personnel on active duty or inactive duty training. A member of a Reserve component on active duty or inactive duty training is subject to the UCMJ. Such members are not, by virtue of termination of a period of active duty or inactive duty training, relieved from amenability to jurisdiction of the UCMJ for offenses committed during such periods of active duty or inactive duty training and may be ordered to active duty for disciplinary proceedings. See section 0123 regarding procedures for ordering members to active duty for disciplinary proceedings. Section 0123 also describes procedures for the subsequent release from active duty.

0108 LIMITATIONS ON INITIATION OF ARTICLE 15, UCMJ, PROCEEDINGS

a. Right to demand trial. A person in the Navy or Marine Corps who is not attached to or embarked in a vessel has the right to demand trial by court-martial in lieu of nonjudicial punishment. A person in the armed forces who is attached to or embarked in a vessel does not have the right to demand trial by court-martial.

(1) For purposes of this section, the term "attached to or embarked in a vessel" means that the person is assigned or attached via written or oral orders, either permanent or temporary, to a vessel, is on board for passage, or is assigned or attached to an embarked staff, unit, detachment, squadron, team, air group, or other regular organized body. The orders may apply individually to the person, or they may apply to the unit of which the person is a member. Members of a vessel's off-crew are considered attached to a vessel if they are ordered to the vessel, receiving sea pay, and are subject to recall to the vessel at all times. No one may be ordered to a vessel solely for the purpose of limiting the ability to demand trial by court-martial in lieu of nonjudicial punishment.

b. Units attached to ships. The CO or OIC of a unit attached to a ship for duty will, unless authorized under subsection (1) below, refrain from exercising his powers to impose nonjudicial punishment while the unit is embarked therein. All such matters will be referred to the CO of the ship for initial disposition.

(1) This policy is a necessary corollary to the ship CO's overall responsibility for the safety, well being, and efficiency of the ship. Nevertheless, the CO of a ship is authorized to determine whether, and under what circumstances, he may authorize a CO or OIC of a unit attached to that ship, while embarked therein, to exercise nonjudicial punishment authority.

(2) This policy shall not apply to Military Sealift Command vessels operating under a master, nor does it apply where an organized unit is embarked for transportation only. When an organized unit is embarked for transportation only in a ship, the officer in command of such organized unit shall ordinarily retain the authority possessed over such unit prior to embarkation, including disciplinary authority. Nothing in the foregoing shall

be construed as impairing the paramount authority of the CO of the ship, including disciplinary authority, over all personnel of the Naval service embarked. In the case of units embarked for transportation only, however, the CO of the ship should take disciplinary action under the UCMJ over members of such embarked units only in unusual cases concerning incidents occurring on board the ship.

c. Cases previously tried in civilian courts. See section 0124 for rules governing nonjudicial punishment in cases previously adjudicated in domestic or foreign criminal courts.

0109 ADVICE TO ACCUSED PRIOR TO INITIATION OF ARTICLE 15, UCMJ, PROCEEDINGS

a. Pre-NJP advice.

(1) Prior to the imposition of nonjudicial punishment, the CO or OIC shall ensure that the individual concerned is fully advised of all applicable legal rights and that other required action is taken prior to the hearing; see section 0110 if nonjudicial punishment is to be based on the report of a fact-finding body. There is no right for an accused to consult with counsel prior to nonjudicial punishment; however, COs are encouraged to permit an accused to so consult subject to the immediate availability of counsel, the delay involved, and operational commitments or military exigencies. Failure to provide the opportunity for an accused to consult with counsel prior to nonjudicial punishment does not preclude the imposition of nonjudicial punishment; it merely precludes the admissibility of the record of nonjudicial punishment in aggravation at a later court-martial, unless the accused was attached to or embarked in a vessel at the time of the imposition of nonjudicial punishment. The status of the accused (see subsection b) and the potential use of the record (see subsections c and d) should be considered in determining whether to utilize Appendix A-1-b, Appendix A-1-c, or Appendix A-1-d.

(2) A service member having obligated service arising from receiving advanced education assistance must be advised prior to electing nonjudicial punishment that, if subsequently separated for misconduct, he may be required to reimburse the United States for the cost of advanced education assistance not repaid by active duty service, as specified in the written agreement entered into with the Government prior to accepting advanced education assistance; see section 0171 and Appendix A-1-e.

b. Accused attached to or embarked in a vessel. Appendix A-1-b is the Accused's Notification of Rights for use only in circumstances when an accused is attached to or embarked in a vessel. The record of nonjudicial punishment can be used in aggravation in the event of a later court-martial conviction for other offenses.

c. Accused not attached to or embarked in a vessel; record cannot be used in aggravation. Article 15, UCMJ, and Part V, MCM, afford no right to consultation with a lawyer prior to imposition of nonjudicial punishment. However, when the accused is not afforded the opportunity to consult a lawyer prior to imposition of nonjudicial punishment, the record of nonjudicial punishment may not be used in aggravation at a later court-martial for other

offenses. The only exception to this rule is where a lawyer serves as personal representative at the Article 15, UCMJ, hearing. Appendix A-1-c pertains.

d. Accused not attached to or embarked in a vessel; record may be used in aggravation at a later court-martial. When the accused is afforded the opportunity to consult a lawyer prior to imposition of nonjudicial punishment, the record of nonjudicial punishment may be used in aggravation at a later court-martial for other offenses. Appendix A-1-d pertains.

(1) If the accused elects to consult a lawyer, such lawyer may be a military lawyer, or a civilian lawyer obtained by the accused at his own expense. A military lawyer who provides such advice should be "independent." A military lawyer who, in the course of his regular duties, acts as the principal legal advisor to the officer who would exercise nonjudicial punishment authority, is not "independent."

(2) If the accused does not elect to obtain this advice of rights from a lawyer, the accused should so indicate in the appropriate space and complete the remainder of the form. If the accused states that he desires to obtain advice of rights from a lawyer before deciding whether to demand trial by court-martial in lieu of nonjudicial punishment, Appendix A-1-d shall so indicate, but the remainder of the form shall not be completed until the accused has been given a reasonable opportunity to obtain this advice of rights. Such advice to an accused from a military lawyer should be limited to an explanation of the legal ramifications involved in the right to refuse captain's mast/office hours. These legal ramifications are limited to areas such as: the accused's substantive and procedural rights at a court-martial as opposed to captain's mast/office hours; the respective punishment limitations; the potential uses of courts-martial convictions and captain's mast/office hours records at any subsequent trial by court-martial, or other judicial or administrative proceeding; and that acceptance of nonjudicial punishment may not preclude conviction for the same offense in other civilian jurisdictions. Providing these technical explanations regarding basic principles of military law, while confidential, do not, per se, establish an attorney-client relationship, nor do they constitute an assignment of such a military lawyer as the individual's defense counsel or personal representative for purposes of nonjudicial punishment. Military lawyers making such explanations shall guard against the establishment of an attorney-client relationship unless detailed by proper authority to serve as defense counsel or personal representative of the accused.

(3) Telephone or VTC communication between an accused facing captain's mast/office hours and a military or civilian lawyer is sufficient to satisfy this advice requirement. Appendix A-1-d may be utilized.

(4) In the event that the accused, through no fault of the accused, does not receive the requisite advice of rights, and does not waive the right thereto, Appendix A-1-c may be utilized in lieu of Appendix A-1-d.

e. Service record entries.

(1) In the event punishment is imposed at captain's mast/office hours, and Appendix A-1-d is utilized, or the accused is represented by a lawyer at

the hearing, appropriate service-record entries should be made and signed by appropriate personnel, on page 13 (Navy) or page 11 (Marine Corps), or in such other manner as service directives may require. As an example, if the accused executed Appendix A-1-d, the service record entry should state, after appropriate verification, the following:

> (Grade and name of accused) signed JAGMAN Appendix A-1-d, prior to (his)(her) (captain's mast)(office hours) which was held on (date of captain's mast/office hours).
>
> The accused [talked to a lawyer prior to deciding whether to demand trial by court-martial in lieu of (captain's mast) (office hours)] [elected to give up (his)(her) right to talk with a lawyer prior to deciding whether to demand trial by court-martial in lieu of (captain's mast) (office hours)]. The accused was advised that acceptance of nonjudicial punishment does not preclude further administrative action against (him)(her). This may include being processed for an administrative discharge that could result in an other than honorable discharge. In completing the remainder of the form, the accused did not demand trial by court-martial in lieu of (captain's mast) (office hours).

(2) If the accused is represented by a military or civilian lawyer as a personal representative at captain's mast/office hours, the following example of a service-record entry may be made, after appropriate verification:

> (Grade and name of accused) received nonjudicial punishment on (date). The accused was represented by a lawyer.

0110 PROCEDURES FOR INITIATION OF ARTICLE 15, UCMJ, HEARING

a. Article 15, UCMJ, hearing guide. Servicemembers are afforded the right to a personal appearance before the nonjudicial punishment authority except when appearance is prevented by the unavailability of the nonjudicial punishment authority or by extraordinary circumstances. See paragraph 4.c(1), Part V, MCM. Appendix A-1-f is a guide for a personal hearing at captain's mast or office hours.

(1) Exception. Subject to the provisions of Article 15(a), UCMJ, paragraph 4 of Part V, MCM, and section 0108 regarding demand for trial, a punitive letter may be issued, or its issuance recommended to higher authority, on the basis of an investigation or court of inquiry for acts or omissions for which the individual was accorded the rights of a party or on the basis of nonjudicial punishment prescribed in paragraph 4 of Part V, MCM. When a hearing under Article 15, UCMJ, is conducted, the officer conducting the hearing shall prepare a report thereof. The report shall include a summary of the testimony of witnesses, statements, and affidavits submitted to the officer holding the hearing, and a description of items of information in the nature of physical or documentary evidence considered at the hearing.

b. Standard of proof. Captain's mast/office hours is not a criminal trial; it is a disciplinary proceeding. Its purpose is to determine whether an offense was committed by the member and, if appropriate, to provide punishment therefore. Such punishment is designed for minor misconduct in a

nonjudicial forum, without a record of "federal conviction." As such, the standard of proof by which facts must be established at mast or office hours is a "preponderance of the evidence," rather than "beyond a reasonable doubt," as it is at courts-martial.

c. Observers at captain's mast/office hours. The presence of representative members of the command as observers during personal hearings under paragraph 4 of Part V, MCM, and Article 15, UCMJ, is authorized and encouraged to demonstrate integrity and fairness of the imposition of nonjudicial punishment. Nothing precludes the alleged offender from requesting to confer privately with the officer conducting the hearing to relate matters that, in the opinion of the alleged offender, are of a personal nature.

d. Alternatives to personal appearance. Ordinarily, before nonjudicial punishment may be imposed, the service member shall be entitled to appear personally before the authority imposing nonjudicial punishment. However, when personal appearance is prevented by the unavailability of the nonjudicial punishment authority, or by extraordinary circumstances, the nonjudicial punishment proceedings may be conducted telephonically, via video teleconference, or other similar remote means that provide for two-way voice communication. These alternatives are in addition to those already provided for in paragraph 4(c) of Part V, MCM. The service member shall be notified in writing prior to the imposition of nonjudicial punishment of the circumstances warranting an alternative to personal appearance.

e. Nonjudicial punishment based on report of a fact-finding body. If nonjudicial punishment is contemplated on the basis of the record of a court of inquiry or other fact-finding body, a preliminary examination shall be made of such record to determine whether the individual concerned was accorded the rights of a party before such fact-finding body and, if so, whether such rights were accorded with respect to the act or omission for which nonjudicial punishment is contemplated. If the individual does not exercise his right to demand trial by court-martial, or if he does not have that right, the individual may submit, in writing, any matter in defense, extenuation, or mitigation to the officer considering imposing the nonjudicial punishment. If the individual was accorded the rights of a party with respect to the act or omission for which nonjudicial punishment is contemplated, such punishment may be imposed without further proceedings. If the individual was not accorded the rights of a party with respect to the offense for which punishment is contemplated, the procedure prescribed in paragraph 4 of Part V, MCM, must be conducted. In the alternative, the record of the fact-finding body may be returned for additional proceedings during which the individual shall be accorded the rights of a party with respect to the act or omission for which nonjudicial punishment is contemplated.

f. Advice after imposition of nonjudicial punishment. The officer who imposes punishment under Article 15, UCMJ, shall again ensure that the offender is fully informed of his right to appeal. Appendix A-1-g is an Accused's Acknowledgment of Appeal Rights that should be signed and witnessed if punishment is imposed.

0111 LIMITATIONS ON AND NATURE OF PUNISHMENTS

a. Restriction imposed upon officers and warrant officers. Restriction, with or without suspension from duty, imposed upon commissioned and warrant officers under paragraph 5b(1)(A) of Part V, MCM, may not exceed 15 consecutive days when imposed by a CO below the grade of major or lieutenant commander.

b. Correctional custody. This punishment shall not be imposed on persons in paygrade E-4 and above unless unsuspended reduction below paygrade E-4 is imposed. See SECNAVINST 1640.9 (series) for instructions concerning the administration of correctional custody.

c. Confinement on bread and water or diminished rations. This punishment shall only be imposed on persons who are, (1) attached to or embarked in a vessel per section 0108a, and (2) in paygrade E-3 or below. This punishment is authorized when the punishment also includes an unsuspended reduction to paygrade E-3 or below. Calculating the release date by number of hours or meals served in confinement is not authorized. See DOD 1325-7M.

d. Extra duties. Subject to the limitations set forth in paragraph 5c(6) of Part V, MCM, this punishment shall be considered satisfied when the enlisted person shall have performed extra duties during available time in addition to performing his military duties. Normally the immediate CO of the accused will designate the amount and character of the extra duties to be performed. The daily performance of the extra duties, before or after routine duties are completed, constitutes the punishment whether the particular daily assignment requires 1, 2, or more hours, but normally extra duties should not extend to more than 2 hours per day. Except in cases of members of the Naval or Marine Corps Reserve performing inactive training or annual training for a period of less than 7 days, if reasonable accommodation can be made, extra duty shall not be performed on the member's Sabbath, although the member's Sabbath counts in the computation of the period for which such punishment is imposed. Guard duty shall not be assigned as punishment.

e. Reduction in grade. Under no circumstances may the punishment of reduction in grade be imposed except to the next inferior paygrade. Navy personnel in the paygrade of E-7 or above and Marine Corps personnel in the paygrade of E-6 or above may not be reduced in paygrade. A CO or OIC serving in the grade of W-1 through CWO-5 may not reduce enlisted personnel under any circumstances.

f. Arrest in quarters. An officer or warrant officer undergoing this punishment shall not be permitted to perform duties involving the exercise of authority over any person who is otherwise subordinate to him.

g. No punishment. If no punishment is awarded at an Article 15, UCMJ hearing (Captain's Mast/Office Hours), the effect is the same as if the charges were dismissed at the hearing and no paragraph 0119 record of nonjudicial punishment shall be made in the member's service record. The fact that the member went to an Article 15, UCMJ, hearing may not be referenced in the member's record. There is no restriction on reference to or use of the facts or evidence underlying the offenses alleged at the Article 15, UCMJ, hearing for other authorized purposes. If no punishment is awarded or the

charges were dismissed, a subsequent nonjudicial punishment may be held for the same offenses.

0112 LIMITATIONS ON NONJUDICIAL PUNISHMENTS TO BE IMPOSED ON RESERVE COMPONENT PERSONNEL NOT ON ACTIVE DUTY

a. Punishment involving restraint on liberty.

(1) If imposed on Reserve component personnel on inactive duty training, restriction shall not extend beyond the normal inactive duty training period but may be carried over to subsequent periods of inactive duty training or active duty. A Reserve component member on inactive duty may not be ordered to active duty for the sole purpose of serving such punishment, unless the order to active duty received Secretarial approval, see section 0123.

(2) If imposed on Reserve component personnel who have been ordered to active duty for disciplinary proceedings, the period of active duty may not be extended for the purpose of serving such punishment, unless the order to active duty received Secretarial approval, see section 0123.

(3) Confinement on bread and water may not be imposed, unless the Reserve component member was ordered to active duty with Secretarial approval, see section 0123.

(4) Correctional custody, extra duties, and arrest in quarters may not be imposed on Reserve component personnel on inactive duty training.

b. Punishment involving forfeiture of pay. Pay subject to forfeiture refers only to basic pay, plus sea or hardship duty pay. If punishment also includes reduction in grade, forfeiture shall be based on the grade to which the accused is reduced. For inactive duty training Reserve component personnel ordered to active duty for punishment and released prior to collection of all forfeitures, see DOD 7000.14-R, Volume 7A, Chapter 58, section 5806.

0113 EFFECTIVE DATE AND EXECUTION OF NONJUDICIAL PUNISHMENTS

a. Forfeiture of pay and reduction in grade. These punishments, if unsuspended, take effect when imposed at the nonjudicial punishment proceedings. If suspended, and the suspension is later vacated, these punishments take effect for all purposes on the date the suspension is vacated. If, subsequent to the imposition of a punishment of forfeiture of pay and prior to the execution of this punishment, an accused absents himself without authority, such period of absence shall interrupt the service of this punishment and shall be excluded in computing the service of this punishment. If a forfeiture of pay is imposed, however, while a prior punishment of forfeiture of pay is still in effect, the prior punishment will be completed before the latter begins to run. A punishment to reduction in rate may be executed in the accused's absence.

b. Punishments involving restraint and extra duties.

(1) Generally. The punishments of arrest in quarters, correctional custody, confinement on bread and water or diminished rations, extra duties, and restriction, if unsuspended, take effect when imposed and are executed when served. See paragraph 7 of Part V, MCM, if an appeal is filed.

(2) Interruption by absence or later punishment. If subsequent to the imposition and prior to the execution of these punishments an accused absents himself without authority, the period of absence shall interrupt the service of the unexecuted portion of these punishments. The execution of any previously imposed nonjudicial punishment involving restraint will normally be interrupted by a subsequent nonjudicial punishment involving restraint. Upon execution of the later-imposed nonjudicial punishment involving restraint, the unexecuted portion of the earlier punishment will be executed. The officer imposing the later punishment may, however, order that the earlier punishment be completed prior to execution of the later punishment. A sentence imposed by a court-martial will also interrupt the service of any nonjudicial punishment involving restraint. When the judicially imposed punishment has been served, any unexecuted nonjudicial punishment will be completed.

(3) Deferment of execution. COs and OICs may, when adequate facilities are not available or when the exigencies of the service require, defer execution of restriction, correctional custody or confinement on bread and water or diminished rations, for a reasonable period of time, not to exceed 15 days. Also, COs and OICs may, if the accused is found to be medically unfit for the service of the punishments of correctional custody or confinement on bread and water or diminished rations, defer, for a period not to exceed 15 days, the execution of the punishment until the accused is determined to be medically fit to serve the punishment. If at the end of the deferment period the accused remains medically unfit to serve the punishment of correctional custody or confinement on bread and water or diminished rations, the CO or OIC who imposed the punishment may mitigate the punishment to one no more severe than the original punishment announced. Upon request of the accused, a commander may defer any punishment. Once the period of requested deferment is completed the individual shall complete the awarded punishment in its entirety.

(4) Stay of punishment. In rare instances, e.g., medical emergency, and only upon request of the accused, a Commander may grant a stay of nonjudicial punishment. A stay of punishment occurs when the accused has begun serving the punishment awarded and the Commander exercises his or her discretion to interrupt the punishment for a period that will normally not exceed 15 days. This is done with the intent that the remainder of the punishment will be served beginning at a later date. If the Commander stays the punishment, such a stay should be noted in the accused's service record with a Page 13 signed by the accused acknowledging the remainder of the unexecuted punishment will be completed upon the end of the stay. For the purpose of computing the amount of punishment already served, any portion of the 24-hour day served before the stay is issued or after the accused returns from the stay will count as one full day.

c. Punitive letters. These punishments take effect when imposed. A punitive letter is imposed when announced to the offender. The imposition of

a punitive letter may not be suspended.

0114 PUNITIVE CENSURE

a. General. "Censure" is a statement of adverse opinion or criticism of an individual's conduct or performance of duty expressed by a superior in the member's chain-of-command. Censure may be punitive or nonpunitive. See section 0105 regarding nonpunitive censure. The issuance of punitive censure resulting from nonjudicial punishment may be disclosed to the command in accordance with section 0115. Commands considering public disclosure should consult the legal advisor and public affairs officer in their chain of command. See section 0105(b)(4) for full discussion of senior official and public disclosure.

b. Admonition. Admonition is a form of censure intended to express adverse reflection upon or criticism of a person's conduct. Admonition imposed as nonjudicial punishment is considered punitive. Punitive admonition imposed on enlisted persons may be either written or oral. For officers, punitive admonition must be in writing.

c. Reprimand. Reprimand is a more severe form of censure than admonition. A reprimand issued as nonjudicial punishment or awarded at court-martial is punitive. Punitive reprimand imposed on enlisted persons as nonjudicial punishment may be either written or oral. For officers, any punitive reprimand must be in writing. See R.C.M. 1003 for reprimands awarded at court-martial.

(1) Issuing authority. When an officer has committed an offense that warrants a punitive letter of admonition or reprimand, the officer who imposed nonjudicial punishment may issue the letter or refer the matter through the chain-of-command, normally to the superior GCMCA over the prospective addressee. The degree of severity and effect of a punitive letter increases with the grade of the officer who issues the letter.

d. Official records of admonition or reprimand. Unless withdrawn or set aside by higher authority upon appeal, punitive letters become part of the official service record of the member to whom they are addressed. The issuance of a punitive letter and the facts of the underlying offenses may be mentioned in the member's fitness report or enlisted evaluation and used to support a detachment for cause proceeding, relief of command, or any other administrative action on the part of the service concerned.

e. Internal departmental responsibility. Correspondence, records, and files in the DON that relate to punitive censure are personnel matters under the primary cognizance of the Chief of Naval Personnel or the Commandant of the Marine Corps, as appropriate.

f. Content of letter of admonition or reprimand.

(1) General. A punitive letter issued pursuant to Article 15, UCMJ, may be imposed only for acts or omissions constituting minor offenses under the UCMJ, see paragraph 1e of Part V, MCM. The letter must set forth the facts constituting the offense but need not refer to any specific punitive

UCMJ article, nor satisfy the drafting requirements of court-martial specifications. The letter should contain sufficient specific facts, without reference to other documents, to apprise a reader of all relevant facts and circumstances of the offense. General conclusions, such as "gross negligence," "unofficer-like conduct," or "dereliction of duty," are valueless unless accompanied by specific facts upon which they are based. A sample punitive letter is set forth for guidance in Appendix A-1-h.

(2) References. All punitive letters should refer to all prior proceedings and correspondence upon which they are based, applicable laws and regulations, including the MCM, and this section. Particular reference should be made to the hearing afforded the offender. Where applicable, the letter shall include a statement that the recipient was advised of the right to demand trial by court-martial in lieu of nonjudicial punishment and that such trial was not demanded. See Article 15(a), UCMJ.

(3) Classification. Specific details requiring security classification must be omitted from punitive letters. A letter issued as nonjudicial punishment shall be designated "For Official Use Only."

(4) Notification of right to appeal and right to submit statement. Punitive letters, except letters issued in execution of a court-martial sentence as described in section 0152, shall contain the following:

> You may appeal this action to the next superior authority, the _____ via [insert the official designation of the CO issuing the letter or, if the officer is the immediate CO of the offender, the official designations of the immediate CO of the offender and the officer issuing the letter] under the provisions of Article 15(e) of the Uniform Code of Military Justice, paragraph 7 of Part V, Manual for Courts-Martial, and section 0114 of the Manual of the Judge Advocate General.
>
> If you do not desire to appeal this action, you are directed to so inform the issuing authority in writing within 5 days after the receipt of this letter.
>
> If you do desire to appeal this action, you are advised that an appeal must be made within a reasonable time and that, in the absence of unusual circumstances, an appeal made more than 5 days after the receipt of this letter may be considered as not having been made within a reasonable time. If, in your opinion, unusual circumstances make it impracticable or extremely difficult for you to prepare and submit your appeal within the 5 days, you shall immediately advise the officer issuing this letter of such circumstances and request an appropriate extension of time to submit your appeal. Failure to receive a reply to such request will not, however, constitute a grant of such extension of time to submit your appeal.
>
> In all communications concerning an appeal of this action, you are directed to state the date of your receipt of this letter.
>
> Unless withdrawn or set aside by higher authority, a copy of

this letter will be placed in your official record at [Navy Personnel Command] [Headquarters, U.S. Marine Corps]. You may forward within 15 days after receipt of final denial of your appeal or after the date of your notification of your decision not to appeal, whichever may be applicable, a statement concerning this letter for inclusion in your record. If you do not desire to submit a statement, you shall so state in writing within 5 days. You are advised that any statement submitted must be couched in temperate language and shall be confined to pertinent facts. Opinions shall not be expressed nor the motives of others impugned. Your statement may not contain countercharges. Your reporting senior may note this letter in your next [fitness report] [performance evaluation] submitted after this letter becomes final, either by decision of higher authority upon appeal or by your decision not to appeal. (Omit last sentence in cases involving Marine Corps enlisted personnel in paygrades E-4 or below).

g. Appeals. The following rules apply to appeals of punitive letters, in addition to those rules contained in paragraph 7 of Part V, MCM, and sections 0116 and 0117:

(1) A copy of the report of nonjudicial punishment shall be provided to the individual upon request except where the interests of national security may be adversely affected. A copy shall be made available to the individual for use in preparation of a defense or appeal. See section 0116 for similar rules concerning a copy of the record of an investigation or court of inquiry.

(2) In forwarding an appeal from a punitive letter, see section 0116, the officer who issued the letter shall attach to the appeal a copy of the punitive letter and the record of investigation or court of inquiry or report of hearing on which the letter is based. The appeal shall be forwarded via the chain-of-command to the superior authority to whom the appeal is made. The superior authority to whom the appeal is made may direct additional inquiry or investigation into matters raised by the appeal if such action is deemed necessary in the interests of justice.

(3) Appeals from a punitive letter imposed as nonjudicial punishment shall be forwarded as specified in section 0117.

(4) The standard of review for a punitive letter of censure will be that the language in the letter is "accurate and relevant to the offenses committed and the punishment imposed." The contents of the appeal must be couched in terms that are temperate and factual.

(5) Upon determination of the appeal, the superior authority acting on the appeal shall advise the appellant of the action taken via the immediate CO, with copies of the action to officers in the chain-of-command through whom the appeal was forwarded. The superior authority shall also return all papers to the commander who issued the letter.

h. Forwarding letter. Upon denial of any appeal, the lapse of a reasonable time after issuance, see section 0116, or upon receipt of the addressee's statement that an appeal is not desired, a copy of the punitive letter and other documents required by the Navy Personnel Command or the

Commandant of the Marine Corps, together with the addressee's statement, a written declaration that he does not desire to make a statement, or a written declaration that a reasonable time after issuance has elapsed shall be forwarded to Navy Personnel Command (PERS-834 for officers and PERS-832 for enlisted) or the Commandant of the Marine Corps (JAM for officers and MMRB-20 for enlisted), as appropriate. If the punitive letter is not sustained on appeal, a copy of the letter shall not be filed in the official record of the member concerned. The command issuing a punitive letter has the responsibility of assembling and forwarding at one time all the foregoing documents and of providing a copy of the forwarding letter for each via addressee.

i. Removal and set aside. Material properly placed in an officer's or enlisted member's official record may not normally be removed or destroyed.

(1) If a factual error or other reasons indicate that a punitive letter issued under Article 15, UCMJ, and filed in the addressee's official record, results in a clear injustice, the officer referred to in paragraph 6 of Part V, MCM, and section 0118, may set aside or remove or direct the set aside or removal of the punitive letter. Removal or set aside occurs by issuing a second letter to the officer or enlisted member concerned announcing the cancellation of the punitive letter and setting forth in detail the reason for cancellation.

(2) If a punitive letter is removed or set aside by a superior authority before a copy of the original of such letter is forwarded to the Navy Personnel Command or the Commandant of the Marine Corps, the punitive letter will not be forwarded and copies of the punitive letter will be removed from all files relating to the member and destroyed.

(3) If the removal or set aside occurs after a copy of the punitive letter has been forwarded, a copy of the letter of cancellation shall be forwarded to the Navy Personnel Command or the Commandant of the Marine Corps, as appropriate, as well as to any other addressees to whom copies of the punitive letter were forwarded. Upon receipt of the copy of the letter of removal or set aside, addressees will ensure that copies of the punitive letter shall not be filed in or, if already filed, shall be removed from, the member's official record and destroyed. The order or letter of removal or set aside or a copy thereof shall not be filed in the member's official records.

(4) If a punitive letter is filed inadvertently or by mistake of fact, such document may be removed only by Navy Personnel Command or the Commandant of the Marine Corps, as appropriate. In other cases, only the Secretary of the Navy acting through the Board for Correction of Naval Records may order removal of punitive letters and other documents in official records.

0114a SECRETARIAL LETTER OF CENSURE

a. General. The Secretary of the Navy may administratively censure members, including retirees and reservists, in writing without resorting to Article 15, UCMJ. The Secretary's authority to issue censures is inherent in his office. The Secretary may, within his discretion, when he or she believes it is for the good of the service, send communications to subordinate officers

that may be in the nature of a reprimand. This right is necessarily vested in him as chief officer of that department. Such censure is neither a nonpunitive measure nor a punitive sanction. The Secretary's authority is in its own class. Such censures cannot be delegated.

b. Rebuttal. The member to whom a Secretarial letter of censure is addressed has no right of appeal. Unless otherwise directed, a copy of the letter will be filed in the official record of the person censured. If a copy of the letter is filed in the official record of the member, the individual may submit a rebuttal. Any such rebuttal shall be temperate in language and confined to pertinent facts. Opinions shall not be expressed nor the motives of others impugned. Rebuttals shall not contain countercharges. The issuance of a Secretarial letter of censure and the underlying facts may be mentioned in a fitness report or an enlisted evaluation and used to support a detachment for cause proceeding, relief of command, negative endorsement, or any other administrative action on the part of the service concerned.

0115 ANNOUNCEMENT OF DISPOSITION OF NONJUDICIAL PUNISHMENT

a. Publication. Publication of nonjudicial punishment results is rooted in the reasonable belief that it serves to deter other members of the organization from committing similar offenses and that it has salutary effects upon the morale of the organization. Accordingly, COs may, if the interests of rehabilitation of the offender, good order and discipline, high morale, and perceptions of fairness so warrant, establish a policy whereby the disposition of nonjudicial punishment cases are announced. Announcement may be, for example, by any or all of the methods below.

b. Plan of the Day publication. The name, rate, offense(s), and disposition of the offender may be published in the plan of the day within one month of the imposition of nonjudicial punishment or, if the punishment is appealed, within one month of the date the appeal is denied, provided that the plan of the day is disseminated to military personnel only. If the plan of the day is disseminated to other than military personnel, nonjudicial punishment results may be published without the name of the accused.

c. Bulletin boards. The name, rate, offense(s), and disposition of the individual case may be posted within one month of the imposition of nonjudicial punishment or, if the punishment is appealed, within one month of the date the appeal is denied, on command bulletin boards for military personnel only. If command bulletin boards are accessible to other than military personnel, nonjudicial punishment results may be published without the name of the accused.

d. Daily formation or morning quarters. The name, rate, offense(s), and disposition of nonjudicial punishment cases may be announced at daily formations or morning quarters within one month of the imposition of nonjudicial punishment or, if the punishment is appealed, within one month of the date the appeal is denied.

e. Public censures. COs shall not issue public censures. Oral censures during Article 15, UCMJ hearings do not violate this provision.

f. Release to the public/media. Information on NJP will not normally be disclosed to the public under the Freedom of Information Act. This is because the public interest in the routine administrative disposition of employee misconduct rarely outweighs the individual's privacy interest in the matter. See SECNAVINST 5720.42 (series). In order to protect the personal privacy of individuals receiving NJP, commands receiving requests for individual NJP records should forward the request to their cognizant IDA with the recommendation that the existence of the records be neither confirmed nor denied, except when the requester is the individual upon whom NJP was imposed. In that situation, the request is processed under the Privacy Act. Otherwise, disclosure should only be considered when the events leading to the NJP are particularly newsworthy or the case involves a senior official. See section 0105b(4) for discussion of senior officials. In general, DON finds the public interest warrants disclosure of flag and general officers and senior executive service personnel in order to retain the public's confidence and trust in the integrity of the Department, the Navy and the Marine Corps. Similarly, resolution of misconduct involving commanding officers, executive officers, officers—in-charge, senior enlisted advisors and other personnel of lower rank or grade may also warrant release of information depending on their official position and the nature of the misconduct. In such cases, the fact of the award of the NJP, including a recitation of the charges, findings, and resulting punishment, may be disclosed to the public/media. If the award includes a punitive letter, the actual letter may not be disclosed without the consent of the individual receiving the NJP; however, the facts and circumstances underlying the letter may be disclosed. The determination to release information of NJP to the public must be made on a case-by-case basis by a flag or general officer in the chain of command upon balancing the public interest against the privacy interest of the individual. In these circumstances, commanders should consult with their staff judge advocate and public affairs officer. Publication of the results of NJP under this section are not considered to be a public censure.

0116 COMMAND ACTION ON NONJUDICIAL PUNISHMENT APPEALS

a. Time limit.

(1) In accordance with paragraph 7d of Part V, MCM, an appeal of nonjudicial punishment shall be submitted within 5 working days, excluding weekends and holidays, of the imposition of nonjudicial punishment, or the right to appeal shall be waived in the absence of good cause shown. In computing this appeal period, allowance shall be made for the time required to mail communications pertaining to the imposition and appeal of nonjudicial punishment. The appeal period commences to run from the date of the imposition of the punishment, even though all or any part of the punishment imposed is suspended. When a punitive letter is imposed, an appeal of nonjudicial punishment shall be submitted within 5 working days after the accused receives the letter.

(2) If it appears that good cause may exist which would make it impracticable or extremely difficult for the accused to prepare and submit the appeal within the 5-day period, the accused should immediately advise the officer who imposed the punishment why good cause exists and request an appropriate extension of time within which to submit the appeal. Upon receipt

of such a request, the officer who imposed the nonjudicial punishment shall determine whether good cause was shown and shall advise the offender that an extension of time is or is not granted. Absent such a request for extension, the officer acting on the appeal shall determine whether good cause was shown in an appeal submitted more than 5 days after the imposition of the nonjudicial punishment.

b. Procedures.

(1) When the officer who imposed the punishment is not the accused's immediate CO, the latter may forward the appeal directly to the officer who imposed the punishment for forwarding under section 0117. Similarly, the action of the superior authority on appeal may be forwarded by the officer who imposed the punishment directly to the offender's CO for delivery. Copies of the correspondence should be provided for intermediate authorities in the chain-of-command.

(2) In any case where nonjudicial punishment is imposed on the basis of information contained in the record of a court of inquiry or fact-finding body, a copy of the record, including the findings, opinions, and recommendations, together with copies of endorsements thereon, shall, except where the interests of national security may be adversely affected, be made available to the accused for examination in connection with the preparation of an appeal. In case of doubt as to whether a national security interest would be adversely affected, the matter shall be referred to the Office of the Judge Advocate General (OJAG) (Code 30) for advice.

c. Contents of forwarding endorsement. The contents of the forwarding endorsement of the officer who imposed the punishment should normally include:

(1) Comment on any assertions of fact contained in the letter of appeal that the officer who imposed the punishment considers to be inaccurate or erroneous.

(2) Recitation of any facts concerning the offenses that are not otherwise included in the appeal papers. If such factual information was brought out at the captain's mast/office hours, the endorsement should so state and include any relevant comment(s) made by appellant at the hearing. Any other adverse factual information set forth in the endorsement, unless it recites matters already set forth in official service record entries, shall be referred to the appellant for comment, and he shall be given an opportunity to submit a statement in regard thereto or state that he does not wish to make any statement.

(3) As an enclosure, a copy of the completed mast report form (NAVPERS 1626/7) or Unit Punishment Book (NAVMC 10132).

(4) As enclosures, copies of all documents and signed statements that were considered as evidence at the nonjudicial punishment hearing or, if the nonjudicial punishment was imposed on the basis of the record of a court of inquiry or other fact-finding body, a copy of that record, including the findings of fact, opinions and recommendations, together with copies of any endorsements thereon.

(5) As an enclosure, a copy of the appellant's record of performance as set forth on service record page 9 (Navy) or Record of Service and NAVMC 118(3) (Marine).

0117 AUTHORITY TO ACT ON NONJUDICIAL PUNISHMENT APPEALS

a. When the officer who imposed punishment is in a Navy chain-of-command. Any appeal from nonjudicial punishment in accordance with paragraph 7 of Part V, MCM shall, in the absence of specific direction to the contrary by an officer authorized to convene general courts-martial and superior in the chain-of-command to the officer who imposed the punishment, be forwarded to the Region Commander or to a subordinate commander authorized to convene general courts-martial and designated by the Region Commander for this purpose. When the cognizant Region Commander or a designated subordinate commander is not superior in rank or command to the officer who imposed the punishment or when the punishment is imposed by a CO who is a Region Commander or a designated subordinate commander, the appeal shall be forwarded to the officer authorized to convene general courts-martial and next superior in the chain-of-command to the officer who imposed the punishment. For mobile units, the Region Commander or designated subordinate commander for the above purpose is the Region Commander or designated subordinate commander most accessible to the unit at the time of the forwarding of the appeal.

b. When the officer who imposed punishment is in the chain-of-command of the Commandant of the Marine Corps. Any appeal from nonjudicial punishment in accordance with paragraph 7 of Part V, MCM shall, in the absence of specific direction to the contrary by a general court martial convening authority (GCMCA) and superior in the chain-of-command to the officer who imposed the punishment, be made to the officer who is next superior in the operational chain-of-command to the officer who imposed the punishment. When such review is impracticable due to operational commitments, as determined by the officer who imposed punishment, appeal from nonjudicial punishment shall be made to the Marine GCMCA geographically nearest and senior to the officer who imposed the punishment. That officer may delegate appellate authority to any CO in his organization who is senior in grade and in level of command to the officer who imposed punishment. In no case, however, shall an officer not authorized to convene general courts-martial act on an appeal which, absent the impracticable circumstances, would have been acted on by an officer authorized to convene general courts-martial. The appellant need not be, at the time of his appeal, a member of an organization within the chain-of-command of the officer acting on the appeal. In those cases in which the Commandant of the Marine Corps is the next superior in the chain-of-command and in which the officer who imposed punishment is not a general officer in command, the appeal shall, in the absence of specific direction to the contrary by the Commandant, be made to the Marine Corps general officer in command geographically nearest the officer who imposed the punishment.

c. When punishment is imposed within a joint command or unit.

(1) An appeal from nonjudicial punishment imposed by a joint commander shall, in the case of Navy personnel, be made to the nearest Navy Region Commander or to a subordinate GCMCA designated by the Region Commander for this purpose. However, when such Region Commander or designated

subordinate commander is not superior in rank to the officer who imposed the punishment, the appeal shall, in the absence of specific direction to the contrary by the Chief of Naval Operations, be made to the Naval officer exercising GCMCA geographically nearest and superior in rank to the officer who imposed the punishment. If directed, or in the event that an officer cannot be found who is superior in rank to the officer who imposed the punishment, the appeal shall be made to the Chief of Naval Operations.

(2) In the case of Marine Corps personnel, an appeal from nonjudicial punishment shall, in the absence of specific direction to the contrary by the Commandant, be made to the Marine Corps general officer in command geographically nearest and superior in rank to the officer who imposed the punishment. If directed, or in the event that an officer cannot be found who is superior in rank to the officer who imposed the punishment, the appeal shall be made to the Commandant.

(3) In those cases in which both the officer who imposed the nonjudicial punishment and that officer's immediate superior in command (ISIC) are from the Naval service, and that immediate superior commander has GCMCA, the appeal authority shall be that ISIC.

(4) An appeal from nonjudicial punishment imposed by an officer of the Marine Corps or Navy designated as a CO pursuant to section 0106 shall be made to the commander of the joint command who made the designation if such commander specifically so directs. In the absence of such direction, an appeal from nonjudicial punishment imposed by an officer of the Marine Corps shall be made to the Marine Corps general officer in command geographically nearest and superior in rank to the officer who imposed the punishment unless otherwise directed by the Commandant of the Marine Corps. Absent direction to the contrary from the joint commander, an appeal from nonjudicial punishment imposed by an officer of the Navy shall be made to the nearest Navy Region Commander or to a subordinate GCMCA designated by the Region Commander for this purpose. However, when such Region Commander or designated subordinate commander is not superior in rank to the officer who imposed the punishment, the appeal shall be to the Naval GCMCA geographically nearest and superior in rank to the officer who imposed the punishment.

d. Delegation of authority to act on appeals. Such authority may be delegated in accordance with the provisions of section 0106. An officer who has delegated his nonjudicial punishment powers to a principal assistant under section 0106 may not act on an appeal from punishment imposed by such principal assistant. In such cases and in other cases where it may be inappropriate for the officer designated by subsection a or b to act on the appeal, such fact should be noted in forwarding the appeal to the appropriate authority who may act on the appeal.

e. Rehearing after appeal. A superior authority, when acting on an appeal, may set aside a nonjudicial punishment due to procedural error that materially prejudiced a substantial right of the member on whom punishment was imposed, not amounting to a finding of insufficient evidence. The superior authority acting on the appeal may authorize additional proceedings under Article 15, UCMJ, to be conducted by the officer who imposed the original nonjudicial punishment, or his successor in command, with regard to those offenses for which the appellant received nonjudicial punishment in the

original proceeding. Any punishment imposed during such additional proceedings may be no more severe than that awarded during the original proceedings, unless other offenses that occurred subsequent to the date of the original nonjudicial punishment hearing are included in the offenses for which punishment is imposed. An individual, whether or not attached to or embarked in a vessel, has no right to demand trial by court-martial for those offenses for which the rehearing was authorized, unless the appeal was granted on a claim pertaining to the validity of the accused's prior waiver of the right to demand trial by court-martial, but an individual who is not attached to or embarked in a vessel retains the right to demand trial by court-martial for any added offense that occurred subsequent to the date the nonjudicial punishment was set aside.

0118 SUSPENSION, MITIGATION, REMISSION, SETTING ASIDE, AND VACATION OF SUSPENSION

a. Definition of "successor in command." For purposes of Article 15, UCMJ, and this Chapter, the term "successor in command" refers to an officer succeeding to command by being detailed or succeeding thereto as described in U.S. Navy Regulations (1990). The term is not limited to the officer next succeeding.

b. Authority to suspend, mitigate, remit, set aside. The nonjudicial punishment authority who imposes nonjudicial punishment, the commander who imposes nonjudicial punishment (unless no longer on active duty), or his or her successor in command may, under Article 15(d), UCMJ, and paragraph 6 of Part V, MCM, exercise the same powers with respect to the punishment imposed as may be exercised by the officer who imposed the punishment, provided that the punishment so affected and, in the case of mitigation, the punishment to which such punishment is mitigated, is one within the authority of such new commander to impose.

c. Interruption of probationary period. The running of the period of suspension of the punishment is interrupted by the unauthorized absence of the probationer or by commencement of proceedings to vacate suspension of the punishment.

d. Vacation of suspension. A commander or OIC may only vacate a suspension of punishment if a violation of the conditions of suspension occurs within the period of suspension. Before vacating a suspension, a commander or OIC ordinarily shall notify the service member and give that member the opportunity to respond. Although a hearing is not required to vacate a suspension, if the punishment is of the kind set forth in Article 15(e)(1)-(7), MCM, the service member should, unless impracticable, be given an opportunity to appear before the officer authorized to vacate suspension of the punishment to present any matters in defense, extenuation, or mitigation of the violations on which the vacation action is to be based. The order vacating a suspension must be issued within 10 working days of the commencement of the vacation proceedings. The decision to vacate suspension of nonjudicial punishment is not appealable under paragraph 7 of Part V, MCM, but is a proper subject of an Article 138, UCMJ, complaint, see Chapter III of this Manual. If the reason for vacation involves additional misconduct punishable under the UCMJ, Article 31(b) rights should be read to the accused

before the commander asks if the accused wishes to make a statement on his own behalf at the vacation hearing.

0119 RECORDS OF NONJUDICIAL PUNISHMENT

a. Records. The records of nonjudicial punishment shall be maintained and disposed of in accordance with the implementing regulations issued by Navy Personnel Command (PERS-4834) and the Commandant of the Marine Corps. The forms used for the Unit Punishment Book are NAVPERS 1626/7, S/N 0106-LF-016-2636 and NAVMC 10132 , S/N 0000-00-002-1305. See section 0173 for procurement information for these forms.

b. Report of officer misconduct.

(1) Report of misconduct prior to nonjudicial punishment - Navy officers. Navy officer misconduct must be reported to Navy Personnel Command (PERS-834). Navy officer misconduct shall be reported if:

(a) the suspect is in the grade of captain O-6 or above;

(b) the suspect is a commander in the grade O-5 with special court-martial convening authority; or

(c) in the judgment of the superior commander:

1. the incident in question may generate significant adverse publicity;

2. formal disciplinary action or a recommendation for administrative separation processing may result; or

3. other special circumstances warrant notification.

(2) Report of misconduct after nonjudicial punishment - Navy officers. Once the results of the nonjudicial punishment are final (i.e., the appeal process is completed or waived), a final report will be sent to Navy Personnel Command (PERS-4834). See SECNAVINST 1920.6 (series) and the Military Personnel Manual. If the officer imposing the nonjudicial punishment is not a general or flag officer, the letter report will be submitted via the first general or flag officer in the administrative chain-of-command. Fleet or Type commanders may require the letter report be forwarded through command channels. These required reports are separate and distinct from any reported nonjudicial punishment that may be contained in investigations or other correspondence. See the Military Personnel Manual section 1611-010 for the letter report requirements.

(3) Report of misconduct - Marine Corps officers. Marine officer misconduct must be reported to the Commandant of the Marine Corps (JAM), per MCO 5800.16 (LEGADMINMAN). See Appendix A-1-i for a sample letter with endorsement.

c. Report of enlisted misconduct.

(1) Report of misconduct prior to nonjudicial punishment - Navy enlisted in paygrades E-6 through E-9. Consistent with MILPERSMAN 1616-040, report E-6 through E-9 misconduct prior to nonjudicial punishment if:

(a) the suspect is a Command Master Chief or Senior Enlisted Advisor; or,

(b) in the judgment of the superior commander:

1. the incident in question may generate significant adverse publicity; or,

2. other circumstances which require action by NAVPERSCOM concerning the member's status.

(2) Report of misconduct after nonjudicial punishment - Navy enlisted in paygrades E-6 through E-9. Once the results of the nonjudicial punishment are final (i.e., the appeal process is completed or waived), a final report will be sent to Navy Personnel Command (PERS-832) for all E-6 through E-9 cases, regardless of whether a pre-nonjudicial punishment report was previously submitted. See the Military Personnel Manual section 1616-040 for the letter report requirements.

PART C -- COURTS-MARTIAL

SUBPART C1 - PRETRIAL MATTERS

0120 DESIGNATION OF ADDITIONAL CONVENING AUTHORITIES

a. General courts-martial. The Secretary of the Navy, acting under Article 22(a)(8), UCMJ, has authorized the following officers, when in an active duty or inactive duty training status, to convene general courts-martial. This list is in addition to those officers authorized to convene general courts-martial by Articles 22(a)(5) through (7) and 22(a)(9), UCMJ:

(1) All flag or general officers, or their immediate temporary successors, in command of units or activities of the Navy or Marine Corps. Designation as a separate and detached command, in accordance with U.S. Navy Regulation 0723 (1990), does not, by itself, convey authority to convene general courts-martial. Flag or general officers in command of units or activities that have been designated as separate and detached commands may request such authority in accordance with section 0121.

(2) A list of General Courts-Martial authorities designated by the Secretary is contained in Appendix A-1-y.

(3) The Secretary of the Navy has designated and empowered the CO, Navy-Marine Corps Appellate Leave Activity and the CO, Marine Detachment, U.S. Disciplinary Barracks, Fort Leavenworth, KS, to exercise limited general court-martial jurisdiction necessary to order execution of a sentence to a punitive discharge, take action on the findings or sentence in accordance with

the instructions transmitted by the JAG, and effect clemency action decided by the Naval Clemency and Parole Board. See section 0159 concerning the clemency powers of the CO, Navy-Marine Corps Appellate Leave Activity, and the CO, Marine Detachment, U.S. Disciplinary Barracks, Fort Leavenworth, KS.

(4) Any officer whose nomination for promotion to flag or general officer rank has been confirmed by the Senate and who is serving in a flag or general officer billet and in command of a Naval service unit or activity, or is the immediate temporary successor in command of such an officer.

b. Special courts-martial. Those officers who are empowered to convene general courts-martial may convene special courts-martial. In addition, the Secretary of the Navy, acting under Article 23(a)(7), UCMJ, has empowered the following officers, when in an active duty or inactive duty training status, to convene special courts-martial. This list is in addition to those officers authorized to convene special courts-martial by Article 23(a)(5) and (6), UCMJ:

(1) COs of all battalions and squadrons, including both Regular and Reserve Marine Corps commands.

(2) Any commander whose subordinates in the operational or administrative chain-of-command have authority to convene special courts-martial.

(3) All commanders and COs of units and activities of the Navy, including pre-commissioning units commanded by lieutenant commanders (O-4) or above, but not including inactive duty training Naval Reserve units. Designation as a separate and detached command, in accordance with U.S. Navy Regulation 0723 (1990), does not, by itself, convey authority to convene special courts-martial. Commanders or COs of units or activities that have been designated as separate and detached commands may request such authority in accordance with section 0121.

(4) All directors, Marine Corps Districts.

(5) All administrative officers, U.S. Naval Shipyards.

(6) All inspector-instructors and site COs, Marine Corps Reserve organizations.

(7) COs and OICs of organic combat service support organizations providing combat service support to Marine Expeditionary Brigades, Marine Expeditionary Units, or comparable Marine Air-Ground Task Forces.

(8) COs of Marine Expeditionary Units and Marine Expeditionary Unit Service Support Groups.

c. Summary courts-martial. Those officers who are empowered to convene general and special courts-martial may convene summary courts-martial. In addition, the Secretary of the Navy, acting under Article 24(a)(4), UCMJ, has empowered all commanders, COs, and OICs (if authorized) of inactive duty training Naval and Marine Corps Reserve units and activities of the Navy and Marine Corps, who are in a duty status, to convene summary courts-martial. A

summary court-martial convening authority is authorized to direct a pretrial investigation under Article 32, UCMJ.

0121 REQUESTS FOR AUTHORITY TO CONVENE COURTS-MARTIAL

a. General courts-martial. If authority to convene general courts-martial is desired for an officer who is not empowered by statute or regulation to convene such courts-martial, a letter shall be forwarded to OJAG (Code 20) or the Commandant of the Marine Corps (JAM), as appropriate, with the request that authorization be obtained from the Secretary of the Navy pursuant to Article 22(a)(8), UCMJ. If general courts-martial convening authority is no longer desired or appropriate (e.g., reorganization of commands), a letter should be forwarded to OJAG (Code 20) or the Commandant of the Marine Corps (JAM), as appropriate, with the request that authorization be rescinded by the Secretary of the Navy.

b. Special and summary courts-martial. If authority to convene special or summary courts-martial is desired for COs other than those listed in section 0120, and such COs are not empowered by statute or regulation to convene such courts, a letter shall be forwarded to OJAG (Code 20) or the Commandant of the Marine Corps (JAM), as appropriate, with the request that authorization be obtained from the Secretary of the Navy pursuant to Article 23(a)(7), UCMJ, or Article 24(a)(4), UCMJ, as appropriate.

c. Separate and detached units. The officer designating an organization as separate or detached, pursuant to U.S. Navy Regulation 0723 (1990), may request via OJAG (Code 20) or the Commandant of the Marine Corps (JAM), as appropriate, that the JAG obtain from the Secretary of the Navy the authority for that organization's CO or OIC to convene courts-martial. The request shall state that the organization has been designated as separate or detached and shall reference, Article 23(a)(7), UCMJ, as appropriate. See section 0106 for impact of designation on authority to impose nonjudicial punishment.

d. COs of staff enlisted personnel. If authority to convene special or summary courts-martial is desired for an officer designated as the CO of staff enlisted personnel, under the provisions of U.S. Navy Regulation 0722 (1990), the designating commander shall request via OJAG (Code 20) or the Commandant of the Marine Corps (JAM), as appropriate, that the JAG obtain authorization from the Secretary of the Navy pursuant to Article 23(a)(7), UCMJ.

e. Requests for courts-martial convening authority. Such requests shall contain the following information, if applicable:

(1) The number of cases referred from that command for the type of court-martial for which the convening authority is being sought on a yearly basis for the past five years.

(2) If reorganization or downgrading of a command billet is the reason for such a request, state that fact and describe how the change affects the current and prospective convening authority.

(3) Who would handle military justice matters if the requested convening authority is not approved.

(4) The number of commands and tenant commands the prospective convening authority is responsible for, both operationally and administratively.

(5) The number of personnel, officer and enlisted, the prospective convening authority is responsible for, both operationally and administratively.

(6) The geographical reasons that necessitate the appointment of such authority.

(7) Whether the request is for permanent designation as a convening authority or only for a temporary/interim designation based upon a deployment, contingency, or similar rationale.

(8) If the request is for temporary designation as a convening authority, the request shall contain an acknowledgement that the requestor will send written notification to OJAG (Code 20) or to the Commandant of the Marine Corps (JAM), as appropriate, upon the expiration of the designation.

f. Record maintenance. Copies of all Secretarial letters of authorization are maintained by OJAG (Code 20) or the Commandant of the Marine Corps (JAM), as appropriate.

0122 GENERAL RESTRICTIONS ON EXERCISE OF COURT-MARTIAL JURISDICTION

a. General, special, and summary courts-martial.

(1) The exercise of authority to convene summary, special, and general courts-martial may be restricted by a competent superior commander.

(2) A special court-martial convening authority may not refer a capital offense to trial by special or summary court-martial or dispose of it at non-judicial punishment without providing notice to the officer exercising general court-martial convening authority over the command in order to give him or her an opportunity to withhold jurisdiction in accordance with Rule for Courts-Martial 306.

b. Units attached to ships. The CO or OIC of a unit attached to a ship of the Navy for duty therein will, while the unit is embarked therein, refrain from exercising any power he might possess to convene and order trial by special or summary court-martial, referring all such matters to the CO of the ship for disposition. The foregoing policy does not apply to Military Sealift Command vessels operating under a master, nor is it applicable when an organized unit is embarked for transportation only. When an organized unit is embarked for transportation only in a ship of the Navy, the officer in command of such organized unit shall retain the authority possessed over such unit prior to embarkation, including disciplinary authority. Under ordinary circumstances, the internal control and discipline of a unit embarked for transportation only shall be left to the CO of that unit. Nothing in the foregoing shall be construed as impairing the paramount authority of the CO of the ship, including disciplinary authority, over all personnel of the Naval

service embarked. In the case of units embarked for transportation only, however, the CO of the ship should take disciplinary action under the UCMJ over members of such embarked units only in unusual cases concerning incidents occurring on board the ship.

0123 EXERCISE OF COURT-MARTIAL JURISDICTION OVER RETIRED, RESERVE, FLEET RESERVE, FLEET MARINE CORPS RESERVE, AND DISCHARGED PERSONNEL

a. Policy. In all cases in which jurisdiction is dependent upon the provisions of Article 2(a)(4), (5), or (6) and Article 3(a), (b), or (c), UCMJ, the following policies apply:

(1) Authority to refer charges against a retired member of the regular component of the Navy or Marine Corps not on active duty but entitled to receive pay, a retired member of the Navy Reserve or Marine Corps Reserve not on active duty who is receiving hospitalization from an armed force, or a member of the Fleet Reserve or Fleet Marine Corps Reserve not on active duty is withheld. No such cases will be referred for trial by court-martial without the prior authorization of the Secretary of the Navy. This rule applies to offenses allegedly committed by such persons regardless of whether they were on active duty either at the time of the alleged offense or at the time they were accused or suspected of the offense. Members described in this subsection may not be recalled to active duty solely for trial by court-martial. Such members are amenable to court-martial jurisdiction at all times and, if referred to court-martial, can be directed to appear without being recalled.

(2) No case in which jurisdiction is based on Article 3(a), (b) or (c), UCMJ will be referred for trial by court-martial without prior authorization of the Secretary of the Navy.

(3) If authorization is withheld under subsection (1), the JAG, via OJAG (Code 20), shall indicate alternative action or actions, if any, to the convening authority.

b. Request for authorization. Requests for authorization in cases involving this section should contain the following information:

(1) draft charge(s) and specification(s) (Do not prefer charges until authorization has been received from SECNAV. Care should be exercised to avoid triggering the speedy trial provisions of R.C.M. 707, MCM);

(2) a summary of the evidence in the case;

(3) the facts showing amenability of the accused or suspected person to trial by court-martial;

(4) whether civilian jurisdiction exists, and if so, whether the civilian jurisdiction is amendable to prosecution;

(5) the military status of the accused or suspected person at the present and at the time of the alleged offense; and

(6) the reasons that make trial by court-martial advisable.

Requests shall be addressed to the Secretary of the Navy, via OJAG (Code 20) or the Commandant of the Marine Corps (JAM), as appropriate.

c. Pretrial apprehension and restraint. Specific authorization of the Secretary of the Navy is required prior to apprehension, arrest, or pretrial confinement of any person who is amenable to trial by court-martial solely by reason of the provisions of Article 2(a)(4), (5), or (6) or Article 3(a), (b), or (c), UCMJ.

d. Jurisdiction over Reserve component personnel under Article 3(d), UCMJ. A member of a Reserve component subject to the UCMJ is not, by virtue of termination of a period of active duty or inactive duty training, relieved from amenability to jurisdiction of the UCMJ for an offense against the UCMJ committed during such period of active duty or inactive duty training.

e. Order to active duty in the case of Reserve component personnel not on active duty.

(1) When jurisdiction is based upon Article 3(d), UCMJ, members of a Reserve component not on active duty may be ordered to active duty involuntarily only by an officer described in subsection (4) for the purpose of investigation under Article 32, UCMJ, trial by court-martial, or imposition of nonjudicial punishment for offenses committed while subject to the UCMJ without regard to any change between active and reserve service or within different categories of reserve service subsequent to commission of the offense.

(2) Requests for an order to active duty under this subsection may be submitted only by officers empowered to convene courts-martial. Funding for these orders should be tasked to the appropriation used on the original set of orders during which the event necessitating recall occurred. See section 0145. Decisions regarding funding for recall of a service member do not confer any procedural or substantive rights upon the member.

(3) Requests for an order to active duty under this subsection shall contain the following information:

(a) draft charge(s) and specification(s) (Do not prefer charges until authorization has been received from SECNAV. Care should be exercised to avoid triggering the speedy trial provisions of R.C.M. 707, MCM);

(b) a summary of evidence in the case;

(c) facts showing amenability to trial by court-martial or imposition of nonjudicial punishment;

(d) whether civilian jurisdiction exists, and if so, whether the civilian jurisdiction is amendable to prosecution;

(e) the military status, unit to which assigned and its location, and home address of the accused at the time of submission and at the time of commission of the alleged offenses;

(f) where the accused should be ordered to active duty and why the order to active duty and trial by court-martial is advisable;

(g) the appropriation used on the original set of orders during which the event necessitating recall occurred; and

(h) confirmation that Commander, Reserve Forces Command has been informed of the intention to bring the reservist on active duty for disciplinary purposes.

(4) The request should be addressed to a GCMCA in the chain-of-command of the accused at the time of its submission, as designated in section 0120, and who is superior in grade to the submitting officer, or to the Secretary of the Navy, if confinement authority is requested, see sections 0127 and 0134.

(5) Unless the order to active duty was approved by the Secretary, the accused may not be sentenced to confinement or be required to serve a punishment of any restraint on liberty during a period other than a period of inactive duty training or active duty.

f. Release from active duty of Reserve component personnel described in subsection (e).

(1) Reserve component personnel ordered to active duty without Secretarial approval must be released from active duty no later than the close of business one full work day after completion of disciplinary proceedings, i.e., announcement of the sentence by a court-martial or imposition of punishment under Article 15, UCMJ.

(2) Reserve component personnel ordered to active duty with Secretarial approval may be retained on active duty to serve a punishment of confinement or other restraint on liberty, the execution of which is not precluded by the terms of a pretrial agreement. Unless retention on active duty is authorized by other authority, such persons must be released from active duty no later than the close of business one full work day after completion of disciplinary proceedings or service of the sentence to confinement or other restraint on liberty. See R.C.M. 202(c), MCM and section 0134.

g. Tolling statute of limitations. The foregoing rules shall not impede the preferral and processing of sworn charges under Article 30, UCMJ, when such preferral and processing are necessary to prevent barring of trial by the statute of limitations, see Article 43, UCMJ.

0124 EXERCISE OF COURT-MARTIAL JURISDICTION IN CASES TRIED IN DOMESTIC OR FOREIGN CRIMINAL COURTS

a. Policy. When a person in the Naval service has been tried in a state or foreign court, whether convicted or acquitted, or when a member's case has been "diverted" out of the regular criminal process for a probationary period, or has been adjudicated by juvenile court authorities, military charges shall not be referred to a court-martial or be the subject of nonjudicial punishment

proceedings for the same act or acts, except in those unusual cases where trial by court-martial or the imposition of nonjudicial punishment is considered essential in the interests of justice, discipline, and proper administration within the Naval service. Such unusual cases shall not be referred to trial by court-martial or be the subject of nonjudicial punishment proceedings without specific permission as provided below. This policy is based on comity between the Federal Government and state/foreign governments and is not intended to confer additional rights upon the accused.

b. Criteria. Referral for trial or the imposition of nonjudicial punishment within the terms of this policy shall be limited to cases that meet one or more of the following criteria:

(1) Cases in which punishment by civil authorities consists solely of probation, and local practice, or the actual terms of probation, do not provide rigid supervision of probationers, or the military duties of the probationer make supervision impractical.

(2) Cases in which civilian proceedings concluded without conviction for any reason other than acquittal after trial on the merits.

(3) Other cases in which the interests of justice and discipline are considered to require further action under the UCMJ (e.g., where conduct leading to trial before a State or foreign court has reflected adversely upon the Naval service or when a particular and unique military interest was not or could not be adequately vindicated in the civilian tribunal).

c. Procedure

(1) General, special, summary courts-martial, and nonjudicial punishment proceedings. Permission of the GCMCA is not required for court-martial proceedings if the civilian adjudication or diversion occurs after the military charges have been referred to a court-martial. No case described in subsection b, however, shall be referred for trial by court-martial or be the subject of nonjudicial punishment proceedings without the prior permission of the first GCMCA over the member. Grants of such permission shall be reported by the GCMCA concerned by means of a letter addressed to OJAG (Code 20) for Navy cases or the Commandant of the Marine Corps (JAM) for Marine cases, in which the GCMCA shall describe the offense alleged, the action taken by civil authorities, and the circumstances bringing the case within one or more of the exceptions to the general policy.

(2) Reporting requirements. The provisions of this section do not affect the reporting requirements or other actions required under other regulations in cases of convictions of service personnel by domestic or foreign courts and adjudications by juvenile court authorities.

d. Limitations. Personnel who have been tried by courts that derive their authority from the United States Federal Government, such as U.S. District Courts, shall not be tried by court-martial or be subjected to nonjudicial punishment for the same act or acts.

0125 EXERCISE OF COURT-MARTIAL JURISDICTION OVER MAJOR FEDERAL OFFENSES

a. Background. The Federal civil authorities have concurrent jurisdiction with military authorities over offenses committed by military personnel that violate both Federal criminal law and the UCMJ. The Attorney General and the Secretary of Defense have agreed on guidelines for determining which authorities shall have jurisdiction to investigate and prosecute major crimes in particular cases, see Appendix 3, MCM. The administration of this program on behalf of the Naval service has been assigned to the Naval Criminal Investigative Service Command (NCIS). Guidelines are set forth in SECNAVINST 5430.107 (series).

b. Limitation on court-martial jurisdiction. In order to ensure that actions under the UCMJ do not preclude appropriate action by civilian Federal authorities in cases likely to be prosecuted in U.S. District Courts, convening authorities shall ensure that appropriate consultation under the Memorandum of Understanding between the Department of Defense (DoD) and the Department of Justice (DOJ) has taken place prior to issuance of a grant of immunity, approval of a pretrial agreement, or trial by court-martial; see Appendix 3, MCM. Accordingly, COs receiving information indicating that Naval personnel have committed a major Federal offense, including any major criminal offense as defined in SECNAVINST 5430.107 (series) committed on a Naval installation, shall refrain from taking action with a view to trial by court-martial, but shall refer the matter to the senior resident agent of the cognizant NCIS office for a determination in accordance with SECNAVINST 5430.107 (series). In the event that the investigation of any such case is referred to a Federal civilian investigative agency, the cognizant U.S. Attorney, subject to the exceptions set forth below, normally will conduct any resulting prosecution.

c. Exceptions.

(1) Where it appears that Naval personnel have committed several offenses, including both major Federal offenses and serious, but purely military offenses, Naval authorities are authorized to investigate all of the suspected military offenses, and such of the civil offenses as may be practicable, and to retain the accused for prosecution. Any such action shall be reported immediately to OJAG (Code 20) or the Commandant of the Marine Corps (JAM) as appropriate and to the cognizant GCMCA.

(2) When, following referral of a case to a civilian Federal investigative agency for investigation, the cognizant U.S. Attorney declines prosecution, the investigation normally will be resumed by NCIS and the command may then commence court-martial proceedings as soon as the circumstances warrant.

(3) If, while investigation by a Federal civilian investigative agency is pending, existing conditions require immediate prosecution by Naval authorities, the GCMCA will contact the cognizant U.S. Attorney to seek approval for trial by court-martial. If agreement cannot be reached at the local level, the matter shall be referred to OJAG (Code 20) or the Commandant of the Marine Corps (JAM) as appropriate for disposition.

d. Related matters. See Chapter VI concerning the interview of Naval personnel by Federal investigative agencies and the delivery of personnel to Federal authorities. See sections 0126, 0138, and 0139 regarding grants of immunity in cases involving civilian witnesses or national security.

0126 DETERMINATION OF STATUS OF CASE AS NATIONAL SECURITY CASE, INVESTIGATION OF SUSPECTED NATIONAL SECURITY CASES, AND EXERCISE OF JURISDICTION IN SUCH CASES

a. National security case defined. "National security" is defined at M.R.E. 505(b)(2), MCM, and further defined at Rule for Courts-Martial 305(h)(2)(B), MCM. A case shall be defined and designated as a national security case if, in the opinion of one of the National Security Case Disposition Authorities (NSCDA) listed in subsection 0126f below, it is a case which, to any serious degree, involves the compromise of a military or defense advantage over any foreign nation or terrorist group; involves an allegation of willful compromise of classified information; affects our military or defense capability to successfully resist hostile or destructive action, overt or covert; or involves an act of terrorism. Such cases include an attempt or conspiracy to commit such offenses, as well as conduct aiding and abetting in the commission of such offenses or unlawfully assisting thereafter. Offenses chargeable in national security cases may include, but are not limited to, UCMJ Articles 81, 92 (for violations of SECNAVINST 5510.36 and U.S. Navy Regulations), 104, 106, 106a, 107, 131, and 134; and provisions of the U.S. Code, such as 18 USC §§ 792-93, 798, 1001, 2151-56, 2331-39B, 2381-85, 2388-90; 42 USC §§ 2272-77; and 50 USC § 783.

b. Case not designated as a national security case. A case may involve matters and/or materials relating to the security of the United States, yet need not be designated a national security case if, in the opinion of the cognizant NSCDA, the case does not, to a serious degree, involve compromise of a military or defense advantage over a foreign nation or terrorist group; involve the willful compromise of classified information; substantially affect our military or defense capability to resist hostile or destructive action successfully, covertly or overtly; or constitute an act of terrorism.

c. Referral to the Naval Criminal Investigative Service. Within the DON, NCIS is responsible for the investigation of actual, suspected, or alleged national security incidents including, but not limited to, those offenses enumerated in subsection a above. Commanders and COs shall immediately refer any such incident to NCIS for investigation. SECNAVINST 5430.107 (series) and 5510.36 (series) also pertain. Upon the initiation of any NCIS investigation, NCIS shall notify the appropriate DOJ investigative agency in compliance with DODD 5525.7.

d. Preliminary inquiry. Concurrent with NCIS notification and consistent with the NCIS investigative prerogative, the commander or CO shall initiate a preliminary inquiry in accordance with SECNAVINST 5510.36 (series) and direct the inquiry and required reports be completed within 72 hours. These required 72-hour reports shall not be delayed awaiting a complete assessment of the potential compromise and shall be viewed as a continuing duty to report as details as to possible lost or compromised information are received by the commander or CO. In addition, the commander or CO shall notify CNO (N2) in

all cases involving sensitive compartmented information or intelligence information (i.e., intelligence sources or methods, NOFORN material).

e. Notice to the JAG, CMC, and National Security Case Disposition Authority (NSCDA). If any NCIS investigation or preliminary inquiry described in subsection 0126c or 0126d indicates that the case may meet the criteria of subsection 0126a or that a suspect may have committed any of the offenses enumerated in subsection 0126a, whether or not such violation might also be chargeable under the UCMJ, within the same 72 hours, the commander or CO and NCIS shall notify OJAG (Code 30) and, in Marine cases, shall also notify the Commandant of the Marine Corps (JAM). Within the same 72 hours, the CO shall also notify the appropriate NSCDA listed in subsection 0126f. In the event more than one NSCDA may have cognizance, coordinate with the next NSCDA in the administrative chain-of-command.

f. Limitations on convening courts-martial. Commands authorized under R.C.M. 306(a) and 401(a), MCM, to initially dispose of cases involving national security, as defined in subsection 0126a above, are directed to forward such cases to the appropriate NSCDA in the administrative chain-of-command listed below for disposition unless directed otherwise by competent authority. This provision is not intended to withdraw or limit the actual jurisdictional authority of commands identified under R.C.M. 306(a) and 401(a), MCM. This provision is promulgated for the exclusive benefit of the Government and does not confer any benefit upon an accused. It shall not be construed to support a jurisdictional challenge to a court-martial convened by an officer not listed below, or to afford an accused in such a court-martial any other relief. All officers otherwise empowered to dispose of offenses who receive reports or charges of offenses involving national security shall, after taking action prescribed in subsections 0126c-e, forward the completed investigation of such reports or charges for disposition directly and without delay to an appropriate NSCDA listed below. Second-echelon commanders who report to the Chief of Naval Operations in the administrative chain-of-command who are not themselves NSCDAs shall forward such reports to Commander, Fleet Forces Command. Those NSCDAs listed below may dispose of such reports or charges by any means authorized under R.C.M. 306(c) or 401(c), MCM, to include returning the case for disposition to any convening authority as they may designate. If the NSCDA designates the case as a national security case, the NSCDA will convene the court-martial or forward the case to one of the following officers who are designated NSCDAs:

(1) Chief of Naval Operations;

(2) Commandant of the Marine Corps;

(3) Vice Chief of Naval Operations;

(4) Assistant Commandant of the Marine Corps;

(5) Commanders, Fleet Forces Command, U.S. Pacific Fleet, U.S. Naval Forces Europe, U.S. Naval Forces Central Command;

(6) Commander, U.S. Marine Corps Forces Command;

(7) Commander, U.S. Marine Corps Forces, Pacific;

(8) Commanders, Sixth and Seventh Fleets;

(9) Commanding Generals, Marine Expeditionary Forces;

(10) Commanders, Naval Air Force, Submarine, and Surface Forces;

(11) Commander, Naval Education and Training Command;

(12) Commanding General, Marine Corps Combat Development Command, Quantico, VA;

(13) Commanding General, Marine Corps Bases Japan;

(14) Commanding Generals, Marine Corps Installations East and West;

(15) Commander, U.S. Marine Forces Reserve;

(16) Commander, Naval Special Warfare Command;

See section 0137 regarding pretrial agreements. See section 0159 regarding remission and suspension of sentences in national security cases.

g. Courts-martial involving classified information. See SECNAVINST 5510.36 (series), M.R.E. 505, MCM, and R.C.M. 806, MCM, for procedures relating to trial of cases involving classified information.

h. Reporting requirements by responsible command. Regardless of national security status and in addition to the 72-hour reporting requirement described above or other reporting requirements, in all cases where a possible violation of criminal law involves classified information, whether or not designated a national security case, the responsible command, convening authority, or staff judge advocate shall notify OJAG (Code 30) and Commandant of the Marine Corps (JAM):

(1) when criminal prosecution is contemplated. However, OJAG (Code 30) or JAM notification does not take precedence over, or substitute for, NCIS notification required by subsection 0126;

(2) whenever a major development occurs in the case or investigation (e.g., designation as a national security case, apprehension, involvement of other federal agencies); or

(3) at least once every 30 days, whether or not there has been a major development, unless the case is being reported by the NSCDA. Include CNO (N2) in the notification for all cases involving sensitive compartmented information or intelligence information (i.e., intelligence sources or methods, NOFORN material).

i. Reporting requirements by NSCDA. Once informed of a potential national security case, the NSCDA shall report to CNO WASHINGTON DC/ N09/DNS/N09N/N09N2/N09D and NAVY JAG WASHINGTON DC/30 on the status of the case every 15 days via SITREP until it is determined that the case is not a national security case or until it is resolved by court conviction,

acquittal, or other final disposition. In Marine Corps cases, a copy should also be provided to Commandant of the Marine Corps (JAM). Include CNO(N2) in the report for all cases involving sensitive compartmented information or intelligence information (i.e., intelligence sources or methods, NOFORN material). Each report shall include: the suspect's name and command; date(s) of offense(s) and discovery of the offense(s); date NCIS began investigation; clear description of the nature and sensitivity of the information involved; suspected offense(s); date NSCDA took cognizance; date of preferral and referral of charges, if any; date pretrial confinement or other restraint imposed, if any; a summary of the plan of action and milestones to disposition; NSCDA points of contact; and the official responsible for the next step, as of the time of the report.

j. Pre-trial agreements. An NSCDA who convenes a national security case is authorized to enter into a pretrial agreement.

0127 PRETRIAL RESTRAINT OF ACCUSED

a. Custody and restraint of accused before or during trial. See R.C.M. 304, 305, 804(c)(2) (Discussion), and 804(e)(3), MCM.

b. Counsel. Counsel shall be provided, if requested, to an accused in pretrial confinement prior to the initial review of the confinement; however, the accused has no right to an individual military counsel.

c. Preliminary probable cause review. Within 48 hours of the imposition of pretrial confinement under military control, a neutral and detached official must review the adequacy of the probable cause to believe that the confinee has committed an offense and of the necessity for pretrial confinement.

(1) This review does not require a hearing.

(2) This determination need not be in writing; however, it is highly recommended that a written record be maintained.

(3) The reviewing official must be a neutral and detached officer. The official may be the confinee's CO, but this is not required. Additionally, nothing in this section prohibits the commander who initially orders an accused into pretrial confinement from conducting the 48-hour probable cause review.

(4) The requirement for probable cause review is met, and therefore a separate determination of probable cause is not required, in the following circumstances:

(a) the CO, complying with R.C.M. 305(d), personally orders the accused into confinement;

(b) the 72-hour letter report, as required by R.C.M. 305(h)(2), is signed by the CO within 48 hours of the imposition of confinement; or

(c) the 7-day review of pretrial confinement, as required by

R.C.M. 305(i) and conducted by a neutral and detached initial reviewing officer, occurs within 48 hours of the imposition of confinement.

d. Initial review officer. All GCMCAs have authority to designate one or more officers of the grade of O-4 or higher to act as the initial review officer for purposes of R.C.M. 305(i)(2). The GCMCA exercising jurisdiction over the confinement facility shall coordinate the assignment of initial review officers to specific cases. The initial review officer shall forward a copy of the documents considered and memorandum prepared under R.C.M. 305(i)(6) in each case to the confinee's brig file and appropriate convening authority of the service member confined. The officers designated as initial review officers should be neutral and detached, be selected for their maturity and experience, and have command experience if practicable. Nothing in this rule prohibits the use of an initial review officer designated by one GCMCA from reviewing the confinement of a service member of another command or service.

e. Reserve component personnel. Except as provided in section 0134, Reserve component personnel on inactive duty training shall not be placed in pretrial confinement, unless ordered to active duty with the approval of the Secretary. See section 0123.

0128 FORWARDING OF CHARGES

a. Forwarding of charges by an officer in a Navy chain-of-command.

(1) General court-martial cases. When a CO, in taking action on charges, deems trial by general court-martial to be appropriate but is not empowered to convene a general court-martial or finds the convening of such court-martial impracticable, the charges and necessary allied papers will, in the absence of specific direction to the contrary by a GCMCA superior in the chain-of-command, be forwarded to the Region Commander or to the subordinate commander authorized to convene general courts-martial and designated by the Region Commander for this purpose. For mobile units, the Region Commander or designated subordinate commander for this purpose is the Region Commander or designated subordinate commander most accessible to the mobile unit at the time of forwarding of the charges. See section 0129 for additional provisions in cases in which the forwarding officer is an accuser.

(2) Special and summary courts-martial cases. When a CO or OIC, in taking action on charges, deems trial by special or summary court-martial to be appropriate but is not empowered to convene such courts-martial, the charges and necessary allied papers will be forwarded to the superior in the chain-of-command authorized to convene the type of court-martial deemed appropriate. The GCMCA superior in the chain-of-command to such CO or OIC may, however, on the basis of a local arrangement with the Region Commander or the designated subordinate commander, direct that such cases be forwarded to the Region Commander or the subordinate commander authorized to convene the type of court-martial deemed appropriate and designated by the Region Commander for this purpose. For mobile units, the Region Commander or designated subordinate commander for this purpose is the Region Commander or designated subordinate commander most accessible to the mobile unit at the time of the forwarding of the charges. See section 0129 for additional

provisions in cases in which the forwarding officer is an accuser. Subject to the terms of the local arrangement, forwarding to the Region Commander or designated subordinate commander may also be resorted to even though the immediate or superior CO of the accused is authorized to convene the type of court-martial deemed appropriate but finds such action impracticable.

b. Forwarding of charges by an officer in the chain-of-command of the Commandant of the Marine Corps. When a CO or OIC, in taking action on charges, deems trial by general, special, or summary court-martial to be appropriate but is not empowered to convene a court as deemed appropriate for the trial of the case, the officer will, in the absence of specific direction to the contrary by a GCMCA, superior in the chain-of-command to such officer, forward the charges and necessary allied papers through the chain-of-command to an officer exercising the kind of court-martial jurisdiction deemed appropriate. See R.C.M. 401(c)(2), MCM; see also section 0129 for additional provisions in cases in which the forwarding officer is an accuser.

0129 SUPERIOR COMPETENT AUTHORITY DEFINED

a. Accuser in a Navy chain-of-command. Whenever a CO is an accuser, as defined in Article 1, UCMJ, the "superior competent authority" for purposes of Articles 22(b) and 23(b) is the Region Commander or the subordinate commander authorized to convene general or special courts-martial, as appropriate, and designated by the Region Commander for this purpose, in the absence of specific direction to the contrary by a GCMCA superior in the CO's chain-of-command. For mobile units, the Region Commander or designated subordinate commander for this purpose is the Region Commander or designated subordinate commander most accessible to the mobile unit at the time of forwarding of the charges. When the cognizant Region Commander or designated subordinate commander is not superior in rank or command to the accuser, or when the accuser is a Region Commander or designated subordinate commander, or if it is otherwise impossible or impracticable to forward the charges as specified above, they shall be forwarded to any superior officer exercising the appropriate court-martial jurisdiction; see R.C.M. 401 and 601(c), MCM.

b. Accuser in the chain-of-command of the Commandant of the Marine Corps. Whenever a CO comes within the purview of Articles 22(b) and 23(b), UCMJ, the "superior competent authority" as used in those Articles is defined as any superior officer in the chain-of-command authorized to convene a special or general court-martial, as appropriate. If such an officer is not reasonably available, or if it is otherwise impossible or impracticable to so forward the charges, they shall be forwarded to any superior officer exercising the appropriate court-martial jurisdiction; see R.C.M. 401 and 601(c), MCM.

0130 PERSONNEL OF COURTS-MARTIAL

a. Military judges.

(1) Detailing.

(a) General court-martial judges. General court-martial judges may be detailed for trial of general and special courts-martial by the Chief

Judge, Navy-Marine Corps Trial Judiciary; the circuit military judge; or the circuit military judge's designee.

(b) Special court-martial judges. Special court-martial judges may be detailed for trial of special courts-martial by the Chief Judge, Navy-Marine Corps Trial Judiciary; the circuit military judge; or the circuit military judge's designee.

(2) Qualifications and additional duties. The qualifications for military judges and additional duties to which military judges may be assigned are set forth in JAGINST 5813.4 (series).

(3) Oaths. A military judge, certified in accordance with Article 26(b), UCMJ, may take a one-time oath to perform his duties faithfully and impartially in all cases to which detailed. The oath may be taken at any time and may be administered by any officer authorized by Article 136, UCMJ, and section 0902 of this Manual to administer oaths. Once such an oath is taken, the military judge need not be re-sworn at any court-martial to which subsequently detailed.

b. Counsel.

(1) Detailing. (See section 0131 for procedures relating to requests for individual military counsel).

(a) Judge advocates assigned to Navy commands may be detailed as trial or defense counsel by the judge advocate's CO, OIC, or a designee of the CO or OIC.

(b) Judge advocates assigned to Marine commands may be detailed as trial counsel by the judge advocate's CO, OIC, or Law Center Director or their designee.

(c) Judge advocates assigned to Marine commands may be detailed as defense counsel by the Staff Judge Advocate to the Commandant of the Marine Corps or the SJA to CMC's designees within the Marine Corps Defense Services Organization in accordance with the procedures set forth in the Marine Corps Manual for Legal Administration (LEGADMINMAN).

(2) Oaths. Military counsel, certified in accordance with Article 27(b), UCMJ, may be given a one-time oath. Such oath will customarily be administered when military counsel is certified, though the oath may be given at any time by any officer authorized to administer oaths by Article 136, UCMJ, and section 0902 of this Manual. An officer certified under Article 27(b) who has taken such an oath need not be re-sworn when detailed as counsel or serving as individual military counsel in any subsequent court-martial.

(3) Military counsel not sworn and certified in accordance with subsection b(2) and all civilian counsel must be sworn in each case. Counsel who have taken one-time oaths administered by the Army, Air Force, or Coast Guard need not again be sworn in courts-martial convened in the Naval service. The oaths used for counsel not administered a one-time oath will be those prescribed in R.C.M. 807(b)(2) Discussion, MCM.

(4) The following oath may be used in administering a one-time oath to military counsel:

> I, _____, do swear (or affirm) that I will faithfully perform the duties of counsel in any court-martial to which I am detailed as counsel, or in which I participate as individual military counsel. [So help me God.]

c. Members.

(1) Detailing. See R.C.M. 503(a), MCM.

(2) Oaths. Court members may be given one oath for all cases that are referred to the court in accordance with the convening order which detailed them as members. In the event the convening order is amended, a new member may be sworn when he or she arrives. This oath may be administered by any officer authorized by Article 136, UCMJ, and section 0902 of this Manual to administer oaths. When court members are not sworn at trial, the fact that they have previously been sworn will be recorded in the transcript or record of trial. The oaths used for court members will be those prescribed in R.C.M. 807(b)(2) Discussion, MCM.

d. Reporters, interpreters, escorts, bailiffs, clerks, and guards.

(1) Qualifications of court reporters. Civilian and military court reporters shall be proficient in recording in shorthand or by mechanical, voice, digital, or other means the proceedings of and the testimony taken before the court or commission and shall be able to transcribe accurately the testimony taken.

(2) Appointment of reporters and interpreters.

(a) Reporters. In each case before a general or special court-martial or before a military commission, a court reporter or reporters shall be detailed by competent authority. Detailed reporters shall be proficient in recording in shorthand or by mechanical, voice, or other means the proceedings of and the testimony taken before the court or commission. A reporter may be detailed by the convening authority of a summary court-martial, by the officer who orders an investigation under Article 32, UCMJ, or by the officer who directs the taking of a deposition. As directed by the trial counsel of a general or special court-martial or by the summary court, the reporter shall prepare either a verbatim or a summarized record and shall preserve the complete shorthand notes, mechanical or voice record, or digital record of the proceedings as provided in section 0150. Additional clerical assistants may be detailed when necessary. See R.C.M. 501(c), MCM.

(b) Interpreters. In each case before a court-martial or military commission, in each investigation conducted under Article 32, UCMJ, and in each instance of the taking of a deposition, the convening authority or the officer directing such proceeding shall appoint, when necessary, a properly qualified and sworn interpreter for the court, commission, investigation, or officer taking the deposition.

(c) Manner of appointment. Appointment of reporters and interpreters by the convening authority or authority directing the proceedings may be effected personally by him, or, at his discretion, by any other person. Such appointment may be oral or in writing.

(3) Oaths.

(a) Reporters. Any court reporter, military or civilian, may be given a one-time oath. When the court reporter is not sworn during the trial, the fact that he has been previously sworn will be noted by the trial counsel and recorded in the transcript or record of trial. Reporters will be sworn as provided in R.C.M. 807(b)(2) Discussion, MCM.

(b) Interpreters. Interpreters will be sworn by the trial counsel as provided in R.C.M. 807(b)(2) Discussion, MCM.

(4) Disqualification. Reporters, interpreters, escorts, bailiffs, clerks, and guards shall be disqualified as provided in R.C.M. 502(e)(2), MCM.

(5) Duties. The duties of reporters, interpreters, escorts, bailiffs, clerks, and guards shall be as prescribed in R.C.M. 502(e)(3), MCM, NAVMARTRIJUDICINST 5810.5, and by the military judge or trial counsel. A bailiff should be present at every trial by court-martial unless his presence is excused by the military judge.

(6) Source and expenses of court reporters and interpreters. Whenever possible, reporters, interpreters, and clerical assistants shall be detailed from either Naval or civilian personnel serving under, or at the disposal of the convening authority or officer directing the proceeding, or placed at his disposal by another officer or by other Federal agencies. When necessary, the convening authority or officer directing the proceeding may employ, or authorize the employment of, a reporter or interpreter, at the prevailing wage scale, for duty with a general or special court-martial, a military commission, an investigation under Article 32, UCMJ, or at the taking of a deposition. No expense to the Government shall be incurred by the employment of a reporter, interpreter, or other person to assist in a court-martial, military commission, Article 32 investigation, or the taking of a deposition, except when authorized by the convening authority or officer directing the proceeding. When interpreters are not available locally, the convening authority or officer directing the proceeding may communicate with the Navy Personnel Command or Commandant of the Marine Corps, as appropriate, requesting that such assistance be provided or authorized.

e. Oaths of court-martial personnel. Where no form of oath is specified in this section, the oaths set out in R.C.M. 807(b)(2) Discussion, MCM, shall be used.

f. Rules of practice before courts-martial. All naval service court-martial participants, including counsel, court reporters, interpreters, clerks of court, and bailiffs, military or civilian, will be governed in their courtroom conduct and in their relationships with each other by the Uniform Rules of Practice Before Navy-Marine Corps Courts-Martial.

0131 STANDARDS FOR DETERMINING AVAILABILITY OF REQUESTED INDIVIDUAL MILITARY COUNSEL

a. General. Article 38(b)(3)(B), UCMJ, provides that an accused has the right to be represented before a general or special court-martial or at an investigation under Article 32, UCMJ, by military counsel of his own selection if that counsel is "reasonably available." Counsel serving in the Army, Air Force, or Coast Guard, are "reasonably available" to represent a Navy or Marine Corps accused if not otherwise unavailable within the meaning of R.C.M. 506, MCM, or under regulations of the Secretary concerned for the Department in which such counsel are members. Since an accused has the right to civilian counsel in addition to detailed counsel or individual military counsel, retention of, or representation by, civilian counsel does not extinguish the right to representation by individual military counsel. It is the policy of the Secretary of the Navy that the right to individual military counsel shall be administered so as not to interfere with orderly and efficient trials by court-martial.

b. Definitions.

(1) "Proceeding." As used in this section, "proceeding" means a trial-level proceeding by general or special court-martial or an investigation under Article 32, UCMJ.

(a) Judge Advocates assigned to Navy Commands: For counsel assigned to a legal service office, Detachment, or Branch Office, the determining authority of the requested counsel is defined as the CO of the cognizant office; for counsel assigned to the Naval Civil Law Support Activity, the CO, Naval Civil Law Support Activity; for counsel assigned to the Navy-Marine Corps Appellate Review Activity, the OIC, Navy-Marine Corps Appellate Review Activity; for all other counsel assigned to OJAG, the Assistant Judge Advocate General for Military Justice (Code 02). For all other Navy counsel, the determining authority is defined as the CO or head of the organization, activity, or agency with which requested military counsel will be serving at the time of the proceeding. The detailing authority is not disqualified from acting as the determining authority under this rule solely because the detailing authority is also the convening authority.

(b) Judge Advocates assigned to Marine Commands: The determining authority for judge advocates assigned as defense counsel in Marine Commands is the Staff Judge Advocate to the Commandant of the Marine Corps or his designees within the Marine Corps Defense Organization in accordance with the procedures set forth in the Marine Corps Manual for Legal Administration (LEGADMINMAN). The determining authority for all other judge advocates assigned to Marine commands is the head of the organization, activity, or agency with which requested military counsel will be serving at the time of the proceeding. The determining authority is not disqualified from acting as the determining authority under this rule solely because the detailing authority is also the convening authority.

(2) "Commander." For counsel assigned to a legal service office, Detachment, or Branch Office, the commander of the requested counsel is

defined as the CO of the cognizant legal office; for counsel assigned to the Naval Civil Law Support Activity, the CO, Naval Civil Law Support Activity; for counsel assigned to the Navy-Marine Corps Appellate Review Activity, the OIC, Navy-Marine Corps Appellate Review Activity; for all other counsel assigned to OJAG, the Assistant Judge Advocate General for Military Justice (Code 02). For all other counsel, the commander is defined as the CO or head of the organization, activity, or agency with which requested military counsel will be serving at the time of the proceeding. The commander is not disqualified from acting as the commander under this rule solely because the commander is also the convening authority.

(3) "Attorney-client relationship." For purposes of this section, an attorney-client relationship exists between the accused and requested counsel when counsel and the accused have had a privileged conversation relating to a charge pending before the proceeding, and counsel has engaged in active pretrial preparation and strategy with regard to that charge. A counsel will be deemed to have engaged in active pretrial preparation and strategy if that counsel has taken action on the case which materially limits the range of options available to the accused at the proceeding. But see JAGINST 5803.1 (series) prohibiting a counsel from establishing an attorney-client relationship until properly detailed, assigned, or otherwise authorized.

(a) Actions by counsel deemed to constitute active pretrial preparation and strategy which materially limit the range of options available to the accused include, but are not limited to: advising the accused to waive or assert a legal right, other than simply asserting the right to remain silent, where the accused has followed such advice by waiving or asserting that right; representing the accused at a pretrial investigation under Article 32, UCMJ, dealing with the same subject matter as any charge pending before the proceeding; submitting evidence for testing or analysis; advising the accused to submit to a polygraph examination where the accused has followed such advice by so submitting; offering a pretrial agreement on behalf of the accused; submitting a request for an administrative discharge in lieu of trial on behalf of the accused; or interviewing witnesses relative to any charge pending before the proceeding.

(b) Actions that, in and of themselves, will not be deemed to constitute "active pretrial preparation and strategy" include, but are not limited to: discussing the legal and factual issues in the case with the accused; discussing the legal and factual issues in the case with another person under the protection of the attorney-client privilege, such as another defense counsel; performing legal research dealing with the subject matter of the case; representing the accused in the review of pretrial confinement under R.C.M. 305, MCM; representing the accused in appellate review proceedings under Article 70, UCMJ; or providing counseling to the accused concerning Article 15, UCMJ. These actions should be appraised under a totality of the circumstances test to determine if they constitute "active pretrial preparation and strategy."

(4) "Reasonably available." All counsel serving on active duty in the Navy or Marine Corps, certified in accordance with Article 27(b), UCMJ, and not excluded by subsections b(4)(a) through (e), below, may be determined to be "reasonably available" by the commander of the requested counsel. In making this determination, the commander will assess the impact upon the

command should the requested counsel be made available. In so doing, the commander may consider, among others, the following factors: the anticipated duties and workload of requested counsel, including authorized leave; the estimated duration of requested counsel's absence from the command, including time for travel, preparation, and participation in the proceeding; any unique or special qualifications relevant to the proceeding possessed by requested counsel; the ability of other counsel to assume the duties of requested counsel; the nature and complexity of the charges or the legal issues involved in the proceeding; the experience level and any special or unique qualifications of the detailed defense counsel; and the information or comments of the accused and the convening authority. Counsel described in subsections b(4)(a) through (e), below, are not "reasonably available":

(a) Counsel who are flag or general officers;

(b) Counsel who are performing duties as trial counsel; trial or appellate military judge; appellate defense or government counsel, court commissioner; principal legal advisor to a command, organization or agency having GCMCA, or the principal assistant to such legal advisor; instructor or student at a college, university, service school, or academy; or assigned as a CO, executive officer, or OIC;

(c) Counsel who are assigned to any of the following commands, activities, organizations, or agencies; Executive Office of the President; Office of the Secretary of Defense; Office of the Secretary of the Navy; the Office of the Chairman of Joint Chiefs of Staff and the Joint Staff; Office of the Chief of Naval Operations; Headquarters, U.S. Marine Corps; National Security Agency; Defense Intelligence Agency; OJAG; Navy-Marine Corps Appellate Review Activity; Naval Civil Law Support Activity; Office of Legislative Affairs; Office of the Defense Department or Navy Department Inspectors General; or any agency or department outside the Department of Defense; and

(d) Navy or Marine Corps counsel who are:

(1) permanently assigned to a command or organization outside the Trial Judicial Circuit where the proceeding is to be held, unless the requested counsel is permanently assigned within 500 miles of the situs of the proceedings, determined in accordance with the official Table of Distances; or

(2) permanently assigned OCONUS for proceedings in CONUS and counsel permanently assigned in CONUS for proceedings OCONUS (despite assignment within the same Trial Judicial Circuit). For purposes of this section, commands or organizations located outside of the contiguous 48 states are considered OCONUS.

(e) The foregoing geographic limitations shall not apply in cases in which an Article 32, UCMJ, pretrial investigation is ordered for a preferred charge of a capital offense for which the sentence of death may be adjudged in accordance with R.C.M. 1004, MCM, or for a national security case designated in accordance with section 0126.

(f) Notwithstanding the limitations regarding officers in charge

set forth above, the commander of the requested counsel shall have the discretion to make personnel serving as a commanding officer, executive officer, or OIC available as counsel under exceptional circumstances including, but not limited to, the complexity of a particular case or lack of experienced counsel otherwise available.

c. Submission and forwarding of requests.

(1) Submission. A request for individual military counsel shall be made in writing by the accused, or by counsel for the accused on the accused's behalf, and shall be submitted to the convening authority via the trial counsel. The burden is on the counsel for the accused to state in the request the specific location and duties of requested counsel, if known, and to state clearly whether the accused claims to have an attorney-client relationship with requested counsel regarding one or more charges pending before the proceeding, and the factual basis underlying that assertion. The request shall also state any special qualifications of requested counsel that are relevant to the case.

(2) Action by the convening authority.

(a) If requested counsel is not on active duty in the Armed Forces, the convening authority shall promptly deny the request and so inform the accused, in writing, citing this provision.

(b) If the requested counsel is on active duty in the Armed Forces, the request does not claim an attorney-client relationship regarding any charge pending before the proceeding, and the requested counsel is not "reasonably available" as defined in subsection b(4) above, the convening authority shall promptly deny the request and so inform the accused, in writing, citing this provision.

(c) In all other cases, the convening authority shall forward the request to the commander of the requested counsel, (i.e., the commander responsible for the counsel's daily supervision), providing the following in the forwarding endorsement: the nature of the charges; the convening authority's estimate of the duration of requested counsel's involvement in the proceeding, including time for travel, preparation and participation in the proceeding; and any other information or comments deemed appropriate.

d. Action by the commander of requested counsel.

(1) Determining whether an attorney-client relationship exists. Applying the criteria enumerated in subsection b(3), above, the commander shall determine whether requested counsel has an attorney-client relationship with the accused regarding any charge pending before the proceeding.

(2) When there is an attorney-client relationship. If the commander determines that there is an attorney-client relationship regarding any charge pending before the proceeding, then the requested counsel should ordinarily be made available to act as individual military counsel without regard to whether he or she would otherwise be deemed "reasonably available" as defined in subsection b(4) above, unless there is "good cause" to sever that relationship, and provided that requested counsel is certified in accordance

with Article 27(b), UCMJ. "Good cause" to sever an attorney-client relationship includes, but is not limited to, requested counsel's release from active duty or terminal leave. If requested counsel is not certified in accordance with Article 27(b), UCMJ, the commander shall promptly deny the request and so inform the accused, in writing, citing this provision. If there is "good cause" to sever an attorney-client relationship, the commander shall apply the criteria and procedures in subsection d(3), below.

(3) When there is no attorney-client relationship. If the commander determines that there is no attorney-client relationship regarding any charge pending before the proceeding, the following procedures apply:

(a) If the commander determines that requested counsel is not "reasonably available" as defined in subsection b(4), above, the commander shall promptly deny the request and so inform the accused, in writing, citing this provision.

(b) If the commander determines that requested counsel is "reasonably available," the requested counsel shall be made available to represent the accused at the proceeding, and the commander shall promptly inform the convening authority and the accused of this determination.

e. Administrative review. The decision whether requested counsel will be made available to act as individual military counsel is an administrative determination within the sole discretion of the commander, except as specifically provided below. If the commander declines to make requested counsel available, the accused may appeal that decision via the commander to the commander's immediate superior in command, but appeals may not be made which require action at the departmental or higher level. The accused may appeal the determination on the basis of an abuse of discretion, lack of authority to take action on the request, or action by a commander based on inaccurate or incomplete information. The reviewing authority shall consider those allegations and, if warranted, direct corrective action. The appeal shall be promptly reviewed, and the commander of requested counsel, the convening authority, and the accused shall be promptly informed of the decision.

f. Approval of associate defense counsel. If individual military counsel has been made available to defend an accused at a proceeding, the detailed defense counsel normally shall be excused from further participation in the case unless the authority who detailed the defense counsel, in his or her sole discretion, approves a request from the accused that detailed defense counsel act as associate defense counsel. The seriousness of the charges, the retention of civilian defense counsel, the complexity of legal or factual issues, the detailing of additional trial counsel, trial defense counsel training, and the stage of the proceedings are among the factors that may be considered in the exercise of this discretion. This decision is not subject to administrative review.

0132 [Reserved]

0133 ADDITIONAL MATTERS IN CONVENING ORDERS

Each convening order shall be assigned a court-martial convening order number. The order shall be personally subscribed by the convening authority and shall show his name, grade, and title, including organization or unit. A copy of the convening order shall be furnished to each person named in the order. A convening order is not valid if signed "by direction."

0134 ADDITIONAL MATTERS IN THE CASE OF CERTAIN RESERVE COMPONENT PERSONNEL

a. Holdover of Reserve component personnel on active duty. Reserve component personnel on active duty may be extended involuntarily beyond their normal release date from active duty as a result of apprehension, arrest, confinement, investigation, or preferral of charges that may result in trial by court-martial and execution of any sentence of a court-martial; see R.C.M. 202(c).

b. Holdover of Reserve component personnel on inactive duty training.

(1) Reserve component personnel on inactive duty training may be retained in that status by an officer empowered to convene courts-martial for not more than 2 full working days past the end of inactive duty training if:

(a) There is probable cause to believe the accused committed an offense for which the maximum punishment authorized is confinement for more than 10 years or death;

(b) Approval, either oral or written, for holdover is obtained prior to expiration of inactive duty training from GCMCA in the chain-of-command of the accused, as designated in section 0120, and superior in grade to the requesting officer; and

(c) Immediate action is taken to order the member to active duty for trial by court-martial.

(2) An accused held over under this subsection may be placed in pretrial confinement as circumstances warrant, see R.C.M. 304 and 305. The order to active duty in such a case, however, must be approved by the Secretary, Under Secretary, or Assistant Secretary of the Navy, no later than 2 full working days past the end of inactive duty training. The request for an order to active duty under this subsection shall state the reasons why pretrial confinement is deemed necessary, see section 0123(c).

(3) If necessary, the request to order an accused to active duty may be made directly by message or telephone.

c. Sentences to forfeiture or fine.

(1) Forfeiture. Pay subject to forfeiture refers to the basic pay of the person plus any sea or hardship duty pay. If punishment includes reduction in grade, forfeiture shall be based on the grade to which the accused is reduced. See DOD 7000.14-R, Volume 7A, Chapter 48, for guidance on how forfeiture may be carried over to subsequent periods of inactive-duty

training or active duty pursuant to R.C.M. 204.

(2) Fine. Fines in the case of Reserve component personnel permanently assigned to an inactive duty training unit shall be based on the total amount subject to forfeiture at the time adjudged.

d. Sentence involving restraint on liberty.

(1) Personnel on inactive duty training. If the sentence pertains to Reserve component personnel on inactive duty training, restraint on liberty shall not extend beyond the normal inactive duty training period but may be carried over to subsequent periods of inactive duty training or active duty. A Reserve component member on inactive duty may not be ordered to active duty for the sole purpose of serving such punishment unless the order to active duty receives Secretarial approval, see section 0123.

(2) Personnel on active duty. If the sentence pertains to Reserve component personnel who have been ordered to active duty for disciplinary proceedings, the period of active duty may not be extended for the purpose of serving such punishment, nor may a sentence to confinement be adjudged, unless the order to active duty received Secretarial approval, see section 0123.

SUBPART C2 - TRIAL MATTERS

0135 ARTICLE 39(a), UCMJ, SESSIONS

a. General. Article 39(a), UCMJ, sessions will be called by order of the military judge. Either counsel, however, may make a request to the military judge that such a session be called. The military judge of a general or special court-martial may, at an Article 39(a) session, arraign the accused, hear arguments and rule on motions, and receive the pleas of the accused. If the accused pleads guilty, the military judge may at that time make the appropriate inquiry into the providence of the accused's plea. The military judge may also at that time accept the plea of the accused. Upon acceptance of a plea of guilty, the military judge is authorized to enter a finding of guilty immediately except when the plea is to a lesser included offense and the prosecution intends to proceed to trial on a greater offense.

b. Video-teleconference. Consistent with R.C.M. 804 and 805, the military judge may order the use of audiovisual technology, such as video-teleconferencing technology, among the parties and the military judge for purposes of Article 39(a) sessions. Use of such audiovisual technology will satisfy the "presence" requirement of the accused only when the accused has a defense counsel physically present at his location. Such technology may include two or more remote sites as long as all parties can see and hear each other.

0136 DELEGATION OF AUTHORITY TO EXCUSE MEMBERS

A general court-martial or special court-martial convening authority may delegate authority to excuse members under R.C.M. 505(c)(1), MCM, to the staff

judge advocate or to a principal assistant.

0137 PRETRIAL AGREEMENTS

a. Major Federal offenses. The authority of court-martial convening authorities to refer cases to trial and to approve pretrial agreements extends only to trials by courts-martial. In order to ensure that such actions do not preclude appropriate action by Federal civilian authorities in cases likely to be prosecuted in the U.S. District Courts, court-martial convening authorities shall ensure that appropriate consultation under the Memorandum of Understanding between the Departments of Defense and Justice has taken place prior to trial by court-martial or approval of a pretrial agreement in cases where such consultation is required; see Appendix 3, MCM.

b. Consultation. Convening authorities should consult with the staff judge advocate or trial counsel before acting on an offer to enter into a pretrial agreement. Convening authorities should also consider input from victims.

0138 AUTHORITY TO GRANT IMMUNITY FROM PROSECUTION

a. General. See R.C.M. 704, MCM. The authority to grant immunity to a witness is reserved to GCMCAs. This authority may be exercised in any case, whether or not formal charges have been preferred, and whether or not the matter has been referred for trial. The approval of the Attorney General of the United States on certain orders to testify may be required, as outlined below.

b. Procedure. The written recommendation that a certain witness be granted immunity in consideration for testimony deemed essential to the Government or to the defense shall be forwarded to an officer competent to convene a general court-martial for the witness for whom immunity is requested, i.e., any GCMCA. Such recommendation will be forwarded by the trial counsel or defense counsel in cases referred for trial, the pretrial investigating officer conducting an investigation upon preferred charges, the counsel or recorder of any other fact-finding body, or the investigator when no charges have yet been preferred. The recommendation shall state in detail why the testimony of the witness is deemed so essential or material that the interests of justice cannot be served without the grant of immunity. The GCMCA shall act upon such request after referring it to his staff judge advocate for consideration and advice. If approved, a copy of the written grant of immunity must be served upon the accused or his defense counsel within a reasonable time before the witness testifies. Additionally, if any witness is expected to testify in response to a promise of leniency, the terms of the promise of leniency must be reduced to writing and served upon the accused or his defense counsel in the same manner as a grant of immunity.

c. Civilian witnesses. Pursuant to 18 U.S.C. §§ 6002 and 6004, if the testimony or other information of a civilian witness at a court-martial may be necessary in the public interest, and if the civilian witness has refused or is likely to refuse to testify or provide other information on the basis of a privilege against self-incrimination, then the approval of the Attorney

General of the United States, or his designee, must be obtained prior to the execution or issuance of an order to testify to such civilian witness. The cognizant GCMCA may obtain the approval of the Attorney General by forwarding a Request for Authorization to Apply for Compulsion Order via OJAG Code 20 (via Commandant of the Marine Corps (JAM) in Marine cases and/or Code 30 in national security cases). See Appendices A-1-k and A-1-l. Please allow at least eight weeks for action on such requests.

d. Cases involving national security. In all cases involving national security or foreign relations of the United States, the cognizant GCMCA shall forward, in the form prescribed in Appendix A-1-k, any proposed grant of immunity to OJAG (Code 20) or Commandant of the Marine Corps (JAM), as appropriate (via Code 30) for the purpose of consultation with the Department of Justice. Such cases include, but are not limited to, those enumerated in section 0126. See section 0125 regarding investigations, limitations on dispositional authority, and relations between the Departments of Defense and Justice. See section 0159 regarding remission and suspension of sentences in national security cases.

e. Review. Under some circumstances, the officer granting immunity to a witness may be disqualified from taking convening authority action on the record of the trial at which the immune witness testified. A successor in command who did not participate in granting the immunity would not be disqualified under those circumstances.

f. Form of grant. See Appendix A-1-m (testimonial) and Appendix A-1-n (transactional).

0139 POST-TESTIMONY PROCEDURE WHEN AUTHORITY TO GRANT IMMUNITY WAS OBTAINED FROM THE ATTORNEY GENERAL

a. After a civilian witness immunized in accordance with section 0138 has testified, the following information shall be provided to the U.S. Department of Justice, Witness Immunity Unit, via OJAG (Code 20):

(1) Name, citation, or other identifying information, of the proceeding in which the order was requested.

(2) Date of the examination of the witness.

(3) Name and residence address of the witness.

(4) Whether the witness invoked the privilege.

(5) Whether the immunity order was used.

(6) Whether the witness testified pursuant to the order.

(7) If the witness refused to comply with the order, whether contempt proceedings were instituted, or are contemplated, and the result of the contempt proceeding, if concluded.

0140 RULES FOR APPEALS UNDER ARTICLE 62, UCMJ, AND FOR FILING PETITIONS FOR EXTRAORDINARY RELIEF

a. Government Appeals under Article 62, UCMJ. Trial Counsel shall coordinate with the Appellate Government Division (Code 46) before filing any notice of appeal under R.C.M. 908(b)(3). Initial telephone contact for coordination should be made with the Deputy Director, Appellate Government Division. The Director, Appellate Government Division (Code 46) is the designated representative of the Government under R.C.M. 908(b)(2), and shall decide whether the notice of appeal will be filed with the military judge. Government appeal packages shall be mailed to Director, Appellate Government Division (Code 46) within 15 calendar days of service of the notice of appeal on the military judge. The envelope shall be prominently marked as follows: GOVERNMENT APPEAL—NOTIFY DIRECTOR, APPELLATE GOVERNMENT DIVISION IMMEDIATELY. DO NOT OPEN IN MAIL ROOM. See also Navy-Marine Corps Court of Criminal Appeals Rules of Practice and Procedure. The appeal package shall contain the following:

(1) Notice of Appeal. See R.C.M. 908(b). The 72-hour period referenced in R.C.M. 908(b) does not commence until the military judge renders a ruling or order on the record in accordance with R.C.M. 801(f). The certificate of service of the notice of appeal must reflect the date and time of the military judge's ruling or order from which the appeal is taken, and the date and time of service upon the military judge.

(2) Letter of Justification. The appeal package must contain a letter from trial counsel to the Director, Appellate Government Division (Code 46). The letter shall include a statement of the issues appealed, indicate why the appeal is being taken, and describe the anticipated relevant consequences should the military judge's ruling be permitted to stand. Other issues raised in the letter should include: affect on other pending cases, the unique import of the case to discipline, morale, or the integrity of military justice, and other relevant circumstances not apparent in the record of trial.

(3) Record of Trial. In conjunction with the Notice of Appeal, when required under R.C.M. 905(d) or when necessary to facilitate prompt resolution of the appeal, the military judge shall state his essential findings of fact and conclusions of law in support of the decision being appealed. Except in extraordinary circumstances, an original authenticated record of trial and three copies, including the military judge's essential findings of fact and conclusions of law, will be submitted as part of the appeal package. Only that portion of the record of trial dealing with the alleged errors should be transcribed, authenticated, and forwarded. If any delay involving preparation of the record of trial or authentication is anticipated, the trial counsel shall promptly notify the Director, Appellate Government Division (Code 46), and forward four copies of an unauthenticated record of trial as soon as it is available, to be followed by the authenticated record.

b. Government Petitions for Extraordinary Relief. The Director, Appellate Government Division (Code 46), shall decide whether the Government will petition for extraordinary relief. Trial counsel shall coordinate with the Director, Appellate Government Division (Code 46) before any notice of intent to seek extraordinary relief is provided to a trial judge.

c. Defense Petitions for Extraordinary Relief.

(1) Trial defense counsel shall normally coordinate with the Director, Appellate Defense Division (Code 45) before a petition for extraordinary relief on behalf of an accused is filed.

(2) Petitions for extraordinary relief, which are filed by trial defense counsel, shall be forwarded to the appropriate court, with a copy forwarded to: Director, Appellate Government Division (Code 46).

(3) The Director, Appellate Defense Division (Code 45), as designated by the Judge Advocate General under Article 70, UCMJ, may appoint appellate defense counsel to represent the accused in connection with the petition for extraordinary relief.

d. No rights given. Nothing in this section creates or is intended to create an independent right by an accused to challenge a government appeal.

0141 PERSONAL DATA AND CHARACTER OF PRIOR SERVICE OF THE ACCUSED

If otherwise admissible, trial counsel are authorized to present, and summary court-martial officers are authorized to obtain and introduce into evidence, records of nonjudicial punishment, provided that those records reflect offenses committed during the current enlistment or period of service of the accused. Nothing in this section precludes admission of personnel records otherwise admissible referencing the underlying misconduct that formed the basis for the nonjudicial punishment (e.g., counseling records, fitness reports, and evaluations). See R.C.M. 1001(b)(2), MCM.

0141a PERSONALLY IDENTIFIABLE INFORMATION (PII) IN RECORDS OF TRIAL

a. General. Unless otherwise required by law, the Rules for Courts-Martial, or the Military Rules of Evidence, personally identifiable information (PII) (defined as Protected Personal Information by SECNAVINST 5211.5E, DON Privacy Program), should ordinarily be omitted from all documents, pleadings, and exhibits that counsel intend to use at the Article 32, UCMJ, investigation, or that may otherwise be included in the record of trial (names however may be used). Counsel must be mindful that records of trial become public documents and inclusion of PII in such documents, etc., should be omitted so as not to infringe on the privacy interests of the individuals named in these documents.

b. Matters under seal. When the law, the Rules for Courts-Martial, or the Military Rules of Evidence do not permit omission or redaction, the trial counsel should ordinarily request that such matters be placed under seal.

0142 RELEASE OF INFORMATION PERTAINING TO THE ADMINISTRATION OF MILITARY JUSTICE AND ACCUSED PERSONS

a. General. Public information and access to military judicial proceedings promotes public awareness and confidence in the military justice

system. The task of striking a fair balance among the protection of individuals accused of offenses, improper or unwarranted publicity concerning their cases, public understanding and transparency of the military justice system, and the state of discipline in the military, requires the exercise of sound judgment by both those responsible for administering military justice and those providing information to the public and the media. No statements or other information shall be furnished to the news media or any other source for the purpose of prejudicing the outcome of an accused's trial, or which could reasonably be expected to have such an effect.

b. Applicability of regulations.

(1) Except as provided in subsection (2) below, these regulations apply to all persons who may obtain information as the result of duties performed in connection with the administration of military justice involving accused persons, the investigation of suspected offenses, the imposition of nonjudicial punishment, or the trial of persons by court-martial. These regulations are applicable from the time of apprehension, the preferral of charges, or the commencement of an investigation directed to make recommendations concerning disciplinary action, until the imposition of nonjudicial punishment, completion of trial (court-martial sessions), or disposition of the case without trial. If nonjudicial punishment is imposed, section 0115 governs. These regulations also prescribe guidelines for the release or dissemination of information to public news agencies, to other public news media, or to other nongovernmental persons or agencies. Release of information to victims and witnesses of crime is controlled by the Victim and Witness Assistance Program, SECNAVINST 5800.11 (series).

(2) All attorneys practicing under the cognizance of the Judge Advocate General or otherwise subject to the professional supervision of the Judge Advocate General in accordance with R.C.M. 109, who represent an individual client other than the Government shall consult the applicable provisions of JAGINST 5803.1 series, Professional Conduct of Attorneys Practicing Under the Cognizance and Supervision of the Judge Advocate General, when making any statements concerning an accused or the subject matter of their representation of the accused. See, e.g., Rules 1.6 (Confidentiality of Information), 3.6 (Extra-Tribunal Statements), and 4.1 (Truthfulness in Statements to Others).

c. Release and dissemination of information. The release and dissemination of information pertaining to military justice matters, including accused persons, shall be accomplished via the convening authority's public affairs officer. Requests for information received from representatives of news media shall be referred to the public affairs officer for action. When an individual is suspected or accused of an offense, care should be taken to indicate that the individual is alleged to have committed an offense, as distinguished from stating or implying that the accused has committed the offense or offenses. Where public interest is evident, information in subsection (d). below and other appropriate information about the proceedings may be disseminated to the public.

d. Information to be disseminated without specific request. In order to facilitate public awareness, foster understanding, instill trust, and to

afford access to information about the military justice system, the following may be disseminated to the public via appropriate methods, including public dockets, unless contrary to national security interests. Dissemination shall be coordinated through the cognizant GCMCA and public affairs office.

(1) For cases pending an Article 32, UCMJ investigation, the grade and service of the accused may be released. However, the name of the accused shall not be included in routine disseminations, see also d.(3) and e.(2) below. For cases referred to court-martial, the name of the accused may be included in routine disseminations (e.g., dockets posted on websites).

(2) The scheduling (docketing) of Article 32, UCMJ, investigations and courts-martial, including the time, date, and place of the proceedings.

(3) The names of witnesses and victims will not be included in routine disseminations.

(4) The general nature of the proceeding (e.g., Article 39(a) - arraignment; Article 39(a) - motions; trial).

(5) The general nature of the offense(s) (i.e., Article 86 - Absence without leave) of which individuals are accused, or suspected of, for scheduled investigations or proceedings.

e. Additional information subject to release. Upon inquiry, the following information concerning a person accused of an offense or offenses, in addition to the information in subsection (d). above, may generally be released through the cognizant public affairs officer, without elaboration:

(1) In the case of referred general or special courts-martial, the accused's name, grade, age, unit, duty station, and gender. The fact that an accused has been charged with an offense may be released, but a statement explaining that the charge is merely an accusation and that the accused is presumed innocent until proven guilty must also be included.

(2) In the case of Article 32, UCMJ, investigations, the purpose of which is to develop a pre-decisional recommendation regarding disposition of charges, the accused's name shall not be released except in those cases where the accused's identity has otherwise been made public.

(3) The identity of the apprehending and investigating agency, and the identity of the accused's counsel, if any.

(4) The fact, time, and place of the apprehension of the accused and the nature of any pre-trial restraint imposed.

(5) In the absence of a protective or other order issued by the presiding military judge, information that has been admitted into evidence or has otherwise become a part of the public record of a court-martial in open session.

(6) The result of any stage in the judicial process.

(7) The denial by the accused of any offense or offenses of which he

may be accused or suspected when release of such information is approved by the counsel of the accused.

f. Prohibited information. The following information concerning a person accused or suspected of an offense or offenses may not be released, except as provided in subsection (g). The prohibitions under this section are not meant to be restrictive of information that has otherwise become part of the public record or record of trial under paragraph (e)(5).

(1) Subjective opinions, observations, or comments concerning the accused's character, demeanor, credibility, expected testimony, or guilt of the offense or offenses involved.

(2) The prior criminal record, including other apprehensions, charges, or trials, or reputation of the accused.

(3) The existence or contents of any confession, admission, statement, or alibi given by the accused, or the refusal or failure of the accused to make any statement.

(4) The performance of any examination or test, such as polygraph examinations, chemical tests, ballistics tests, etc., or the refusal or failure of the accused to submit to an examination or test.

(5) The identity or nature of physical evidence expected to be presented, or the identity, testimony, or credibility of possible witnesses, including victims. Particularly objectionable are statements or comments concerning information or evidence which is known, or which reasonably should be known, to be inadmissible before a court-martial.

(6) The possibility of a plea of guilty to any offense charged or to a lesser offense and any negotiation or any offer to negotiate respecting a plea of guilty.

(7) References to confidential sources or investigative techniques or procedures.

(8) Statements or opinions regarding the credibility, reputation, motives, or character of Department of Defense military or civilian officials.

(9) Any other matter when there is a reasonable likelihood that the dissemination of such matter will affect the deliberations of an investigative body or the findings or sentence of a court-martial, or otherwise prejudice the due administration of military justice either before, during, or after trial.

g. Scope. The provisions of this section are not intended to restrict the release of information designed to enlist public assistance in apprehending an accused or suspect who is a fugitive from justice or to warn the public of any danger that a fugitive accused or suspect may present - such release of information is authorized. In addition, release of information that the suspect is under investigation or the accused is pending charges may be provided, regardless of whether a request is made, to other federal, state, local, or foreign agencies, if those agencies are responsible for

investigating or prosecuting the said violation or are responsible for enforcing or implementing the statute, rule, or regulation pursuant thereof. The information to be released must be compatible with the specific purpose for which the information was collected. Prior to releasing information to another agency, the Privacy Act and applicable DoD routine uses should be consulted. For questions regarding the proper release of information to other agencies, consult OJAG (Code 13).

h. Consultation. Consultation with the staff judge advocate or cognizant RLSO concerning interpretation and application of these instructions is encouraged.

0143 SPECTATORS AT PROCEEDINGS

a. Courts-martial. See R.C.M. 806, MCM.

b. Article 32, UCMJ, investigations. Consistent with R.C.M. 405(h)(3) and appellate case law, R.C.M. 806(b)(2) applies to Article 32, UCMJ, investigations. Ordinarily, the proceedings of a pretrial investigation should be open to spectators. Only if R.C.M. 806(b)(2) is satisfied, should the convening authority or investigating officer direct that any part of an Article 32, UCMJ, investigation be held in closed session and that persons be excluded. In cases dealing with classified information, the investigating officer will ensure that any part of a pretrial investigation (e.g., rights advisement and any unclassified testimony) that does not involve classified information will remain open to spectators.

0144 SECURITY OF CLASSIFIED MATTER IN JUDICIAL PROCEEDINGS

a. General. Every precaution shall be taken by convening authorities, military judges, summary courts-martial, investigating officers, and trial counsel to protect the security of classified matter involved in judicial proceedings. If a trial of a case involves classified information, the convening authority, military judge, summary court-martial officer, investigating officer, defense counsel, and trial counsel, as appropriate, are charged with the responsibility of ensuring compliance with applicable provisions of DON Information Security Program Regulation, SECNAVINST 5510.36 (series), DON Personnel Security Program Regulation, SECNAVINST 5510.30 (series), R.C.M. 401(d) and 407(b), MCM, and M.R.E. 505, MCM.

b. Security clearance of personnel. If classified matter is to be used for a judicial proceeding, appropriate personnel security clearances in accordance with SECNAVINST 5510.30 (series) must be granted to all members of the court, members of the prosecution and defense, court reporters, interpreters, and all other persons whose presence is required when classified matter is introduced before the court. If the accused is represented by civilian defense counsel, such counsel must likewise be cleared before classified matter may be disclosed to him. The necessity for clearing the accused and the practicability of obtaining such clearance rests in the sound discretion of the convening authority and may be one of the considerations in the determination to try a particular case. If it appears during the course of a trial that classified matter will be disclosed, and if the provisions of

this subsection have not been complied with, the military judge, investigating officer, or summary court-martial officer shall adjourn the court and refer the matter to the convening authority.

c. Procedures concerning spectators. See R.C.M. 806 and M.R.E. 505, MCM, which prescribe procedures necessary to prevent the dissemination of classified information to other than authorized persons.

0145 FINANCIAL RESPONSIBILITY FOR COSTS INCURRED IN SUPPORT OF COURTS-MARTIAL

a. Travel, per diem, fees, and mileage.

(1) The costs of travel (other than local travel) and per diem of military personnel and civilian employees of the DON, but excluding those of personnel attached to the Navy-Marine Corps Trial Judiciary when acting as military judges of courts-martial, will be charged to the operation and maintenance allotment which supports temporary additional duty travel for the convening authority of the court-martial. Such costs incurred by personnel attached to the Navy-Marine Corps Trial Judiciary when acting as military judges of courts-martial will be charged to the operation and maintenance allotment of the JAG.

(2) The costs of fees and mileage of civilians other than employees of the DON will be charged to the operating budget which supports the temporary additional duty travel funds of the appropriate Navy or Marine Corps convening authority. See the Navy Comptroller Manual, Volume VII, paragraph 075133.

(3) The cost of local travel, as defined by the Joint Federal Travel Regulations, by detailed military counsel will be absorbed by the operation and maintenance allotment of the activity that provides the counsel.

b. Involuntary recall and extension on active duty of members in the Reserve component. Funding for these orders should be tasked to the appropriation used on the original set of orders during which the event necessitating recall occurred. Decisions regarding funding for recall of a service member do not confer any procedural or substantive rights upon the member. The available funding sources include:

(1) Military Personnel Navy (MPN) - Active Duty for Special Work (ADSW) orders primarily supporting regular Navy commands/projects.

(2) Reserve Personnel Navy (RPN) - Inactive Duty Training (IDT), Annual Training (AT), Active Duty for Training (ADT), and ADSW orders primarily supporting Navy Reserve commands/projects.

c. Services and supplies.

(1) The following costs of services and supplies provided by an activity in support of courts-martial will be charged to the operation and maintenance allotment of the convening authority:

(a) In-house costs that are direct, out-of-pocket, identifiable, and that total $100.00 or more in a calendar month; and

(b) Costs that arise under contracts that were entered into in support of courts-martial.

(2) All other costs of services and supplies will be absorbed by the operation and maintenance allotment of the activity that provides the services or supplies.

0146 FEES OF CIVILIAN WITNESSES

a. Method of payment. The fees and mileage of civilian witnesses shall be paid by the disbursing officer of the command of a convening authority or appointing authority, or by the disbursing officer at or near the place where the tribunal sits or where a deposition is taken, when such disbursing officer is presented a properly completed public voucher for such fees and mileage signed by the witness and certified by one of the following:

(1) Trial counsel or assistant trial counsel of the court-martial;

(2) Summary court-martial;

(3) Counsel for the court in a court of inquiry;

(4) Recorder or junior member of a board to redress injuries to property; or

(5) Military or civil officer before whom a deposition is taken.

b. Public voucher. The public voucher must be accompanied by a subpoena or invitational orders, see Joint Travel Regulations, Vol. 2, Ch. 6, and by a certified copy of the order appointing the court-martial, court of inquiry, or investigation. If, however, a deposition is taken before charges are referred for trial, the fees and mileage of the witness concerned shall be paid by the disbursing office at or near the place where the deposition is taken upon presentation of a public voucher, properly completed as prescribed above, and accompanied by an order from the officer who authorized the taking of the deposition, subscribed by him and directing the disbursing officer to pay to the witness the fees and mileage supported by the public voucher. When the civilian witness testifies outside the United States, its territories and possessions, the public voucher must be accompanied by a certified copy of the order appointing the court-martial, court of inquiry, or investigation, and by an order from the convening authority or appointing authority, subscribed by him and directing the disbursing officer to pay to the witness the fees and mileage supported by the public voucher.

c. Obtaining money for advance tender or payment. Upon written request by one of the officers listed in subsection a, the disbursing officer under the command of the convening or appointing authority, or the disbursing officer nearest the place where the witness is found, will, at once, provide any of the persons listed in subsection a, or any other officer or person designated for the purpose, the required amount of money to be tendered or paid to the witness for mileage and fees for one day of attendance. The person so receiving the money for the purpose named shall furnish the

disbursing officer concerned with a proper receipt.

d. Reimbursement. If an officer charged with serving a subpoena pays from his personal funds the necessary fees and mileage to a witness, taking a receipt therefore, he is entitled to reimbursement upon submitting to the disbursing officer such receipt, together with a certificate of the appropriate person named in subsection (a) to the effect that the payment was necessary.

e. Certificate of person before whom deposition is taken. The certificate of the person named in subsection (a) before whom the witness gave his deposition will be evidence of the fact and period of attendance of the witness and the place from which summoned.

f. Payment of accrued fees. The witness may be paid accrued fees at his request at any time during the period of attendance. The disbursing officer will make such interim payment(s) upon receipt of properly executed certificate(s). Upon his discharge from attendance, the witness will be paid, upon the execution of a certificate, a final amount covering unpaid fees and travel, including an amount for return travel. Payment for return travel will be made upon the basis of the actual fees and mileage allowed for travel to the court or place designated for taking a deposition.

g. Computation. Travel expenses shall be determined on the basis of the shortest usually traveled route in accordance with official schedules. Reasonable allowance will be made for unavoidable detention.

h. Non-transferability of accounts. Accounts of civilian witnesses may not be transferred or assigned.

i. Signatures. Two persons must witness signatures of witnesses signed by mark.

j. Rates for civilian witnesses prescribed by law.

(1) Civilian witnesses not in Government employ. A civilian not in Government employ, who is compelled or required to testify as a witness before a Naval tribunal at a specified place, or to appear at a place where his deposition is to be taken for use before a court or fact-finding body, will receive fees, subsistence, and mileage as provided in 28 U.S.C. § 1821. Witness and subsistence fees are not prorated; instead, any fractional part of a calendar day expended in attendance or qualifying for subsistence entitles the witness to payment for a full day. Further, nothing in this subsection shall be construed as authorizing the payment of attendance fees, mileage allowances, or subsistence fees to witnesses for:

(a) Attendance or travel that is not performed either as a direct result of being compelled to testify pursuant to a subpoena or as a direct result of invitational orders; or

(b) Travel that is performed prior to being duly summoned as a witness; or

(c) Travel returning to their places of residence if the travel

from their places of residence does not qualify for payment under this subsection.

(2) Civilian witnesses in Government employ. When summoned as a witness, a civilian in the employ of the Government shall be paid as authorized by Joint Travel Regulations.

k. Supplemental construction of section. Nothing in this section shall be construed as permitting or requiring the payment of fees to those witnesses not requested, or whose testimony is determined not to meet the standards of relevancy and materiality in accordance with R.C.M. 703, MCM.

l. Expert witnesses.

(1) The convening authority will authorize the employment of an expert witness and will fix the limit of compensation to be paid such expert based on the normal compensation paid by U.S. Attorneys for attendance of a witness of such standing in U.S. courts in the area involved. Information concerning such normal compensation may be obtained from the nearest GCMCA having a judge advocate assigned in other than an additional duty, temporary duty, or temporary additional duty capacity. Overseas convening authorities will fix the limit of compensation to be paid the expert witness based on the normal compensation paid by U.S. Attorneys for attendance of a witness of such standing based on the area where the witness is from when the witness is from the United States. See subsection m for fees payable to foreign nationals.

(2) The provisions of subsection (j) are applicable to expert witnesses. However, the expert witness fee prescribed by the convening authority will be paid in lieu of ordinary attendance fees on those days the witness is required to attend the court.

(3) An expert witness employed in strict accordance with R.C.M. 703(d), MCM, may be paid compensation at the rate prescribed in advance by the official empowered to authorize his employment. See 11 Comp. Gen. 504. In the absence of such authorization, no fees other than ordinary witness fees may be paid for the employment of an individual as an expert witness. After an expert witness has testified pursuant to such employment, the certificate of one of the officers listed in subsection a, when presented to the disbursing officer, shall also enclose a certified copy of the authorization of the convening authority.

m. Payment of witness fees to foreign nationals. GCMCAs in areas other than a State of the U.S. shall establish rates of compensation for payment of foreign nationals who testify as witnesses, including expert witnesses, at courts-martial convened in such areas.

0147 WARRANTS OF ATTACHMENT

When any party desires the issuance of a warrant of attachment, trial counsel or the cognizant staff judge advocate shall notify OJAG (Code 20) or the Commandant of the Marine Corps (JAM), as appropriate, at the time of issuance. When practicable, a warrant of attachment should be executed by a civilian law enforcement officer of the United States. This notice requirement does not

confer any procedural, evidentiary, or substantive rights for any party to the proceeding. See R.C.M. 703(e)(2)(G), MCM, and DD 454 (5-00).

0148 POST-TRIAL REPRESENTATION OF A CONVICTED ACCUSED

a. Submission of matters under R.C.M. 1105. When substitute service of the record of trial is made on the defense counsel pursuant to R.C.M. 1104(b)(1)(C), the submission of additional matters under R.C.M. 1105 need not be signed by the accused, but may be signed by the defense counsel.

b. Appellate rights.

(1) A convicted accused is entitled to post-trial representation by a defense counsel qualified in accordance with Article 27(b), UCMJ, until completion of appellate review in his case. Article 70(c), UCMJ, prescribes the detailing of counsel to represent the accused before the Navy-Marine Corps Court of Criminal Appeals (NMCCA), the U.S. Court of Appeals for the Armed Forces (CAAF), or the U.S. Supreme Court. Appellate defense counsel shall represent the accused before NMCCA, CAAF, or the U.S. Supreme Court under Articles 62, 66, 67, 67a, or 73, UCMJ, or for petitions for extraordinary relief when requested by the accused, if the United States is represented by counsel, or if the Judge Advocate General certifies a case originally under his cognizance pursuant to Article 69, UCMJ. An accused may be represented by civilian counsel of his choice at no expense to the Government. Upon request of an appellant, and in the discretion of the Director, Appellate Defense Division (Code 45), appellate defense counsel may be appointed to assist appellants before the Naval Clemency and Parole Board.

(2) Article 38, UCMJ, prescribes counsel rights for the representation of accused before general or special courts-martial or investigations under Article 32, UCMJ. While Article 38, UCMJ, provides that an accused may be represented by military counsel of his own selection if that counsel is reasonably available, no such provision for the selection of individual appellate counsel appears in Article 38 or 70, UCMJ. Accordingly, the Appellate Defense Division (Code 45), Navy-Marine Corps Appellate Review Activity of the Office of the Judge Advocate General will provide all appellate representation of accused in proceedings before NMCCA, CAAF, or the U.S. Supreme Court, with the exception of civilian counsel provided by the accused.

(3) Fulfillment of duties under R.C.M. 502(d)(6) requires that trial defense counsel shall, immediately after a trial which results in a conviction, advise the accused in detail concerning his appellate rights. Included in this explanation shall be advice with regard to the accused's right to post-trial representation, to request clemency, and to request deferment of any sentence to confinement pursuant to Article 57a, UCMJ. Trial defense counsel shall inform the accused of the responsibilities and powers of the convening authority, and as applicable, the possibility of review pursuant to Articles 64 or through 69, UCMJ, including the possibility of review by NMCCA, CAAF, or U.S. Supreme Court.

(4) In order to comply with R.C.M. 502(d)(6), the following procedures apply in cases in which death, a punitive discharge, or confinement for one year or more is adjudged:

(a) The accused in a court-martial in which a punitive discharge or confinement for one year or more is adjudged shall, after being advised of his appellate rights, acknowledge advisement of his appellate rights and provide necessary information for forwarding to his appellate defense counsel by completing Appendix A-1-p. This requirement is separate and distinct from applicable forms executed at the end of trial by court-martial in compliance with R.C.M. 1010.

(b) The original, signed appellate rights statement will be attached to the original court-martial record of trial.

(c) A duplicate original appellate rights statement shall be provided to the accused and duplicate originals or certified copies shall be attached to each copy of the record of trial. The accused shall also be advised of his authority to designate, by power of attorney, an attorney-in-fact as his agent to petition CAAF and the U. S. Supreme Court for review on his behalf. Trial defense counsel should advise the accused of the advantages of granting an attorney-in-fact with this authority and encourage the accused to execute one. A sample power of attorney is provided in Appendix A-1-o. If the accused executes such a power of attorney, the original shall be attached to the original appellate rights statement in the original record of trial and copies attached to the appellate rights statement in each copy of the record of trial. The power of attorney shall be revoked if the accused waives appellate review.

(5) In order to comply with R.C.M. 502(d)(6), the following procedures apply in cases in which the adjudged sentence does not include death, a punitive discharge, or confinement for one year or more:

(a) The accused in a court-martial in which neither a punitive discharge nor confinement for one year or more is adjudged shall, after being advised of his appellate rights, acknowledge advisement of his appellate rights and provide necessary information by completing Appendix-1-p. This requirement is separate and distinct from applicable forms executed at the end of trial by court-martial in compliance with R.C.M. 1010.

(b) The original, signed appellate rights statement will be attached to the original record of trial.

(c) A duplicate original appellate rights statement shall be provided to the accused and duplicate originals or certified copies shall be attached to each copy of the record of trial.

(d) Trial defense counsel shall advise the accused of the right to submit matters under Article 69, UCMJ as set forth in Appendix-1-p.

c. Relief of Trial Defense Counsel. If trial defense counsel is unable to continue representation and an appellate defense counsel has not yet been detailed, a substitute trial defense counsel must be appointed. Trial defense counsel shall continue to perform duties on behalf of the accused until an appropriate detailing authority has detailed either substitute trial defense counsel or appellate defense counsel, at which time trial defense counsel shall be deemed to be relieved. The original correspondence and orders relating to the relief of trial defense counsel and the appointment of successor trial defense counsel or appellate counsel shall be placed in the original record of trial. Copies of all correspondence and

orders relating to the relief of counsel and the appointment of successor counsel shall be placed in each record of trial and provided to the defense counsel concerned and the accused. There is no requirement for defense counsel or his successor in a special court-martial not involving a bad-conduct discharge or confinement for 1 year to request relief from defense counsel duties after review has been completed pursuant to Article 64, UCMJ.

d. Waiver or withdrawal of appellate review. An accused who wishes either to waive appellate review by NMCCA or the Judge Advocate General or to withdraw an appeal has the right to consult with counsel prior to such waiver or withdrawal. The request for waiver of appellate review must be in writing and forwarded for enclosure in the original record of trial. An accused cannot effectively waive appellate review until after service of the convening authority's action. For sample forms, see MCM (2008 ed.), Appendices 19 and 20.

SUBPART C3 - POST-TRIAL MATTERS

0149 REPORT OF RESULTS OF TRIAL

After adjournment of a court-martial, the trial counsel or summary court-martial officer, as appropriate, will promptly notify the convening authority and the accused's CO of the findings and sentence. If the sentence includes confinement, notification shall be in writing in the form prescribed in Appendix A-1-q, completed so as to contain all applicable information, and a copy forwarded to the CO or OIC of the brig or confinement facility in which the accused is to be confined. If the sentence includes forfeitures or reduction in grade, a report of results of trial must be forwarded to the appropriate Personnel Support Detachment or Unit Diary Clerk and include, if applicable, information regarding approved requests for deferments of adjudged or automatic forfeitures and adjudged reductions in grade. Appendix A-1-q may be used in all cases.

0150 RECORD OF TRIAL

a. Authentication of record of trial. The record of trial shall be authenticated by the military judge. Substitute authentication, when required, will be as described in R.C.M. 1104(a)(2)(B), MCM.

b. Retention of trial notes or recordings. The trial counsel in every general and special court-martial shall ensure that any notes, stenographic or otherwise, or any recordings, mechanical or voice, from which the record of trial was prepared are secured for retention until such time as review of the case is final.

c. Security classification. Records of trial containing classified matter shall be properly classified in accordance with the provisions of R.C.M. 1103(h), MCM, and SECNAVINST 5510.36 (series). Copies of such records for delivery to the accused shall be prepared and handled in accordance with R.C.M. 1104(b)(1)(D), MCM. Attention is directed to the fact that, while SECNAVINST 5510.36 (series) requires that matter bear the overall classification of its highest component, that degree of classification is not

then imparted to other components. Rather it authorizes and requires that a component be marked with the classification it warrants, if any. Misunderstanding of these provisions may result in erroneously marking as classified each page of a voluminous record, rendering review for downgrading unnecessarily difficult and excision for delivery to the accused or counsel impossible.

d. Summary court-martial record of trial. A report of summary court-martial shall be completed and attached to the record of trial for all summary courts-martial conducted, except for those that result in not guilty findings or dismissal of all charges and specifications. Use of DD Form 2329 is not required, but is strongly recommended because it fulfills the requirements of R.C.M. 1305, MCM. The format prescribed in Appendix A-1-r may be used to complete this requirement and attached to DD Form 2329. The following documents shall be attached to the report of summary court-martial:

(1) Convening order;

(2) Charge sheet;

(3) Acknowledgement of rights on DD Form 2329, if executed; and

(4) Waiver of right to refuse summary court-martial, if executed (see Appendix A-1-j).

(5) A concise synopsis of the evidence considered by the summary court-martial on any charge and specification of which an accused has been convicted contrary to a plea of not guilty.

(6) A concise synopsis of all matters considered in aggravation and in extenuation and mitigation.

(7) All documentary and physical evidence offered at the summary court-martial, except evidence that relates solely to an offense of which the accused is found not guilty or which is dismissed. Copies, photographs, or descriptions should be substituted when it is not practicable to include the original.

e. Records of trial involving images or material of child pornography. In courts-martial that involve the introduction into evidence of child pornography, as defined by 18 U.S.C. § 2256, or of what appears to be child pornography (hereinafter referred to as child pornography), the trial counsel shall ensure that the record of trial is prepared in a manner consistent with this section.

(1) Images of child pornography, in whatever format, used by military authorities during the investigation and prosecution of criminal activity will be under the care, custody, and control of government authorities at all times. Neither trial nor defense counsel shall retain images or material of child pornography obtained during the course of their representation. The trial counsel shall ensure that all images of, or material containing, child pornography, provided to either the trial or defense team, are returned to the cognizant NCIS or other law enforcement office within 5 days of the final adjournment of the court-martial or

dismissal of the charges related to the child pornography. Under no circumstances shall images of child pornography be duplicated, reproduced, distributed or transferred by any person, except pursuant to 18 U.S.C. § 3509(m).

(2) Images of child pornography, in whatever format, offered during a court-martial will be marked appropriately and handled during the trial in a manner that ensures only those participants of the trial who are required and authorized to view such images have access. The images should be placed on a CD and the CD should be password protected. The password should remain in the files of the Senior Trial Counsel and the NCIS Resident Agent (RA) and a copy provided by the Senior Trial Counsel to the Clerk of the Court for the Navy-Marine Corps Court of Criminal Appeals. The Senior Trial Counsel shall provide all CD passwords to his or her relief as a turnover item upon transfer from the billet. Trial counsel shall request the military judge issue a protective order for the CD and for any exhibits containing images of child pornography that cannot be placed on the CD. A password-protected CD may be left in the record of trial during the authentication and appellate process. If the evidence is not in the form of a password-protected CD, then prior to final adjournment, the military judge, in accordance with R.C.M. 1103(b)(2)(D)(v) and 1103(b)(3)(B), will cause the trial counsel to place in the record of trial, in substitution for the evidence of child pornography offered or admitted, the "Substitute Record for Evidence of Child Pornography" form, Appendix A-1-s, which shall be signed by the military judge, trial, and defense counsel. The form shall bear the same marking as the substitute evidence or appellate exhibit.

(3) If the images of child pornography cannot be placed on a password-protected CD, the trial counsel shall forward those images and a duplicate of the "Substitute Record of Evidence of Child Pornography" form to Code 40 via USPS registered mail using the following procedures. The contraband material shall be enclosed in two opaque, sealed envelopes, wrappings, or containers of sufficient construction to conceal and protect the evidence from inadvertent exposure or tampering. The packaging shall be sealed with tape in a way that will minimize the risk of inadvertent exposure or tampering (ensure that the tape used is capable of retaining the impression of any postal stamp). Both the inner and outer envelope shall be addressed to OJAG (Code 40) - Attn: Administrative Officer - after the sender has contacted OJAG (Code 40) to confirm the address. Both envelopes shall be marked with the complete return address of the sender. The outer envelope shall be marked: "RETURN SERVICE REQUESTED." The outer envelope shall not bear any markings indicating the nature or sensitivity of the contents.

(4) Nothing in this section creates or is intended to create an independent right or authority to compel production or introduction of such evidence; gives rise to a cause of action by an accused against the government; or, as grounds to challenge or object to the offer or admission of such images in a court-martial or other forum.

0151 INITIAL REVIEW AND ACTION

a. Convening authority.

(1) When action may be taken. The convening authority or other

person authorized to act under subsection (b) shall take action as soon as possible after preparation of the record of trial. Timely action on the court-martial is crucial to ensuring due process throughout post-trial review of the case. In all cases the convening authority or other person authorized to act shall act in a case as soon as possible, and not more than 120 days after adjournment of the court-martial.

(2) However, the convening authority, or other person authorized to act under subsection b, may take action only after the applicable time periods under R.C.M. 1105(c), MCM, have expired or the accused has waived the right to present matters under R.C.M. 1105(d), MCM, whichever is earlier. In any case that results in an acquittal on all charges and specifications, the convening authority shall not take any action approving or disapproving the findings of not guilty or any ruling amounting to a finding of not guilty; however, a promulgating order is required in accordance with R.C.M. 1114, MCM, and section 0155 of this Manual.

(3) In all cases, the convening authority shall ensure that actions taken at every step in the post-trial process are properly documented, including justification for any delay that occurs. Consult JAGINST 5814.1 (series).

(4) When the convening authority fails to take action within 120 days of adjournment of the court-martial, the convening authority shall report this fact and the reasons why the action was not taken in a letter signed personally by the convening authority. Copies of the explanation shall be appended to the record of trial and forwarded to OJAG (Code 40) or CMC (JAM) as appropriate.

(5) Companion cases tried separately. In court-martial cases where the separate trial of a companion case is ordered, the convening authority shall so indicate in his action on the record in each case.

(6) Suspension of sentences. Convening authorities are encouraged to suspend, for a probationary period, all or any part of a sentence, when such action would promote discipline, and when the accused's prospects for rehabilitation would more likely be enhanced by probation than by the execution of all or any part of the sentence adjudged.

(7) Matters to be considered. The convening authority shall follow the provisions of R.C.M. 1107(b)(3), MCM.

b. When impracticable for convening authority to act.

(1) For commands in the Navy chain-of-command, if it is impracticable for the convening authority to act, the record of trial shall be forwarded, in the absence of specific direction to the contrary by a GCMCA superior in the chain-of-command to the convening authority, to the Region Commander or a subordinate commander authorized to convene general courts-martial and designated by the Region Commander for this purpose. For mobile units, the Region Commander or designated subordinate commander is the Region Commander or designated subordinate commander most convenient at the time of forwarding of the record. The letter or message which causes the record to be so forwarded shall contain a statement of the reasons why the normal convening

authority could not act on the record and any other matters deemed appropriate by the forwarding officer.

(2) For commands in the chain-of-command of the Commandant of the Marine Corps, unless specifically directed to the contrary by a GCMCA superior in the chain-of-command, if, in the discretion of the officer who would normally take action as convening authority, it is impracticable for him to do so, that person shall cause the record of trial to be forwarded to a GCMCA. For summary and special courts-martial, this will normally be the GCMCA who is superior in the chain-of-command unless, in the discretion of the officer who would normally take action as convening authority, it will also be impracticable for that officer to take the convening authority's action. The letter or message that causes the record to be so forwarded shall contain a statement of the reasons why the normal convening authority could not act on the record and any other matters deemed appropriate by the forwarding officer.

c. Legal officer/staff judge advocate recommendation. In each general court-martial that results in a finding of guilty or each special court-martial that includes a bad-conduct discharge or confinement for one year, the legal officer or staff judge advocate of the convening authority shall prepare a concise written recommendation to assist the convening authority in deciding what action to take on the sentence. The matters to be included in the recommendation shall be as prescribed in R.C.M. 1106, MCM, and may be submitted in a form similar to Appendix A-1-t. The legal officer recommendation may not be signed by a civilian or an enlisted member even if a civilian or an enlisted member is filling the legal officer billet. The staff judge advocate recommendation also may not be signed by an assistant staff judge advocate unless he or she is officially acting for an absent staff judge advocate in making that recommendation. If the convening authority has a legal officer but no staff judge advocate, the convening authority may, as a matter of discretion, and absent alternative direction by a GCMCA superior in the chain-of-command to the convening authority, request the designation of a staff judge advocate to prepare the recommendation.

0152 ACTIONS ON SPECIFIC TYPES OF SENTENCE

a. Summary courts-martial. The convening authority may apportion forfeitures of pay adjudged by a summary court-martial under Article 20, UCMJ, but as a matter of policy the period of apportionment should not exceed three months.

b. Sentences including reprimand.

(1) General. Reprimands issued in execution of courts-martial sentences must be in writing. Except as otherwise prescribed in this section, sections 0114(f) apply to punitive letters issued in execution of a court-martial sentence. Punitive letters issued in execution of court-martial sentences need not be designated "For Official Use Only."

(2) By whom issued. The convening authority shall include in the action any reprimand which the convening authority has ordered executed.

(3) Contents. The punitive letter shall include the time and place of

trial, type of court, and a statement of the specific charges and specifications of which convicted. It shall also contain the following:

> A copy of this letter will be placed in your official record at [the Navy Personnel Command] [Headquarters, U.S. Marine Corps]. You may forward within 15 days after receipt of this action a statement concerning this letter for inclusion in your record. If you elect not to submit a statement, you shall so state officially in writing within the time prescribed. In connection with your statement, any statement submitted shall be couched in temperate language and shall be confined to pertinent facts. Opinions shall not be expressed nor the motives of others impugned. Your statement shall not contain countercharges.

(4) Procedure for issuance. The original letter shall be delivered to the accused and a copy appended to the convening authority's action, or the promulgating order of the officer subsequently directing execution of the sentence. The action, or order, should refer to the letter as follows:

> Pursuant to the sentence of the court as approved, a punitive letter is this date being served upon the accused and a copy is incorporated as part of this action.

(5) Forwarding copy to Department. Upon receipt of the accused's written statement or a written declaration that he does not desire to make a statement, an additional copy of the punitive letter, with the statement or declaration, shall be forwarded to Navy Personnel Command (PERS-834 for officers and PERS-832 for enlisted) or the Commandant of the Marine Corps (JAM for officers and MMSB-20 for enlisted), as appropriate.

(6) Appeals. Review, including appellate review, of punitive letters issued as part of an approved court-martial sentence will be accomplished as provided for by the UCMJ, the MCM, and this Manual. No separate appeal from these letters will be considered.

c. Automatic reduction of enlisted accused. Automatic reduction to the lowest enlisted pay grade under Article 58a, UCMJ, shall be effected in the Naval service only in accordance with this subsection, which is the regulation prescribed by the Secretary of the Navy pursuant to Article 58a(a), UCMJ.

(1) Reduction to the lowest enlisted pay grade will be automatically effected only in a case in which the sentence, as approved by the convening authority, includes, whether or not suspended, either:

(a) A punitive discharge, or

(b) Confinement in excess of 90 days, if the sentence is awarded in days, or three months, if the sentence is awarded in months or years.

(2) In his sole discretion, the convening authority may remit the automatic reduction, or may retain the accused in the pay grade held at the time of sentence or in an intermediate pay grade and suspend the automatic reduction to pay grade E-1 that would otherwise be effected under Article 58a, UCMJ, and this subsection, utilizing the forms in Appendix 16, MCM, as guides. The automatic reduction may be suspended without regard to whether any part of

the approved sentence was suspended. If, however, the adjudged sentence includes a reduction in pay grade that is below the pay grade at which the convening authority desires to have the accused retained, the reduction adjudged in the sentence should be suspended for the same period as the automatic reduction is suspended. Additionally, the convening authority may direct that the accused serve in pay grade E-1 while in confinement but be returned to the pay grade held at the time of sentence or an intermediate pay grade upon release from confinement. Failure of the convening authority to address automatic reduction will result in the automatic reduction to pay grade E-1 on the date of the convening authority's action.

(3) See Appendix 16, MCM, for forms that may be used as guides for suspending automatic reduction without suspending any of the approved sentence, except reduction if included in the sentence, or reducing the accused to E-1 while in confinement and returning the accused to the pay grade held at the time of sentence or an intermediate pay grade upon release from confinement.

d. Sentences extending to dismissal. Under the authority of Article 71(b), UCMJ, the Under Secretary of the Navy and the Assistant Secretaries of the Navy have been designated by the Secretary as empowered to approve that part of a sentence providing for dismissal of an officer or a midshipman, and may commute, remit, or suspend the sentence, or any part of the sentence, as they see fit.

0153 DISPOSITION OF RECORDS FOLLOWING CONVENING AUTHORITY ACTION

a. Summary courts-martial and special courts-martial not involving a bad-conduct discharge or confinement for one year.

(1) Review by a judge advocate. Records of trial requiring review under R.C.M. 1112, MCM, shall be forwarded to the staff judge advocate of the GCMCA designated in subsection (2). The staff judge advocate may review the record pursuant to R.C.M. 1112, MCM, or may cause another judge advocate to perform such review. Upon completion of the review, records requiring action under Article 64(b), UCMJ, and R.C.M. 1112(e)(1) or (3), MCM, shall be forwarded to the authority designated in subsection 0154.

(2) Designation of the authority who may take action under Article 64(b).

(a) For commands in a Navy chain-of-command, the authority who may take action pursuant to Article 64(b), UCMJ, shall be, in the absence of specific direction to the contrary by a GCMCA superior in the chain-of-command to the original convening authority, the Region Commander or a subordinate commander authorized to convene general courts-martial and designated for this purpose, and who could have exercised general court-martial jurisdiction over the accused at the time the court-martial was held, unless that commander was the original convening authority. If the Region Commander or subordinate commander designated was the original convening authority, the next superior authority should take action under Article 64, UCMJ.

(b) For commands in the chain-of-command of the Commandant of the

Marine Corps, the authority who may take action pursuant to Article 64(b), UCMJ, shall be the GCMCA over the accused at the time the court-martial was held unless that GCMCA was the original convening authority. If that GCMCA was the original convening authority, the next GCMCA superior in the chain-of-command should take action under Article 64, UCMJ.

(3) Identification of judge advocate to whom record is forwarded for review. In all cases, the action of the convening authority in forwarding the record for judge advocate review shall identify the judge advocate to whom the record is forwarded by stating their official title, such as "The record of trial is forwarded to the Staff Judge Advocate, Commander, Navy Region Mid-Atlantic, for review under Article 64(a), UCMJ."

b. General courts-martial and special courts-martial that include death, dismissal, dishonorable or bad conduct discharge, or confinement for one year or longer, where the accused has not waived appellate review. In all cases in which the sentence as approved extends to death, dismissal, dishonorable or bad conduct discharge, or confinement for one year or longer, where the accused has not waived appellate review under R.C.M. 1110, MCM, the record of trial shall immediately be forwarded to OJAG (Code 40) for review under Article 66, UCMJ. The record of trial and two complete copies shall be sent directly to OJAG (Code 40), 1254 Charles Morris Street SE, Ste B01, Washington Navy Yard, DC, 20374-5124via the most expeditious means (e.g., express mail, Federal Express, or similar means). Due to the requirements for speedy post-trial processing, set forth in *US v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), regular U.S.P.S. mail service is not authorized for forwarding records of trial to OJAG or to any other addressee in the authentication or review process. Consult JAGINST 5814.1 (series) and appropriate Marine Corps guidance for processing time goals. The convening authority shall provide reasons in writing for any delay in forwarding the record and append them to the record of trial.

c. Forwarding cases where the accused has waived appellate review under R.C.M. 1110, MCM.

(1) General courts-martial. Upon completion of the convening authority's action in any case in which the accused has waived appellate review under R.C.M. 1110, MCM, the record of trial, including the judge advocate review of a case under R.C.M. 1112, MCM, shall immediately be sent directly to the OJAG (Code 40), 1254 Charles Morris Street SE, Ste B01, Washington Navy Yard, DC, 20374-5124 via the most expeditious means (e.g., express mail, Federal Express, or similar means). Consult JAGINST 5814.1 (series) and appropriate Marine Corps Guidance. The convening authority shall provide reasons in writing for any delay in forwarding the record and append them to the record of trial.

(2) Special courts-martial. Upon completion of the convening authority's action, if the approved sentence includes a bad-conduct discharge or confinement for one year, suspended or unsuspended, and the accused has waived appellate review under R.C.M. 1110, MCM, the record of trial shall be forwarded as prescribed in subsection (a)(1).

d. Remanded records. Any case that has been remanded by the Navy-Marine Corps Court of Criminal Appeals shall be forwarded as prescribed in subsection

b, regardless of the final disposition of the case.

e. Copy to the Naval Clemency and Parole Board. If the sentence, as approved by the convening authority, includes an unsuspended punitive discharge, dismissal, or confinement for one year or more, one of the copies of the record of trial prepared in accordance with R.C.M. 1103(g)(1), MCM, shall be forwarded to the Director, Naval Council of Personnel Boards, Attn: Naval Clemency and Parole Board.

0154 FILING AND SUPERVISION OF COURT-MARTIAL RECORDS

a. JAG supervision. Records of all trials by courts-martial in the Naval service are under the supervision of the JAG. The convening authority shall maintain a certified record of trial until appellate review is complete.

b. Authentication of courts-martial records of trial. In the case of any record of trial required to be forwarded to the Navy-Marine Corps Appellate Review Activity under section 0153, authentication of the record of trial shall be completed as soon as possible following the adjournment of the trial. Consult JAGINST 5814.1 (series). The individual authenticating the record shall provide reasons in writing for any delay in authentication and append them to the record of trial.

c. Filing of courts-martial records.

(1) General courts-martial. Records of all trials by general court-martial shall, immediately after completion of final action, be filed at OJAG (Code 40). See section 0153 regarding immediate forwarding of records of trial to the Navy-Marine Corps Appellate Review Activity.

(2) Special courts-martial. Records of trial by special court-martial that involve an officer accused or that include a suspended or unsuspended bad-conduct discharge, confinement for one year, or that have been returned for further action, shall, after completion of final action, be filed in OJAG (Code 40). All other special court-martial records shall be filed in the manner provided below for summary courts-martial.

(3) Summary courts-martial.

(a) Shore activities where records of trial have been reviewed under Article 64, UCMJ, and section 0153 shall retain original records of proceedings for a period of three years after final action. At the termination of such retention period, commands must contact the OJAG (Code 64) records custodian to coordinate the transfer of the original records of proceedings to the National Personnel Records Center, Military Personnel Records, General Services Administration.

(b) Fleet activities, including Fleet Air Wings and Fleet Marine Forces, where records of trial have been reviewed under Article 64, UCMJ, and section 0153 shall retain original records of proceedings for a period of three years after final action. At the termination of such retention period, commands must contact the OJAG (Code 64) records custodian to coordinate the transfer of the original records of proceedings to the National Personnel

Records Center, Military Personnel Records, General Services Administration.

d. Records containing classified information. After first coordinating with the Navy-Marine Corps Appellate Review Activity, the original of any record of trial that contains classified information shall be packaged and transmitted in accordance with the DON Information Security Program, SECNAVINST 5510.36 (series) to OJAG (Code 30), for filing and availability for inspection under section 0166. OJAG (Code 30) will notify OJAG (Code 40) when any classified records of trial have been received.

0155 PROMULGATING ORDERS - GENERAL AND SPECIAL COURTS-MARTIAL

a. Requirements for promulgating orders. Any action taken on the findings or sentence of a general or special court-martial by the convening authority or any other party empowered to take such action shall be promulgated as prescribed in R.C.M. 1114, MCM. The promulgating order and convening authority's action may be contained within the same document, when personally signed by the convening authority. Separate orders shall be issued for each accused in the case of a joint or common trial. In cases that result in an acquittal on all charges and specifications, a promulgating order is required in accordance with R.C.M. 1114(c)(3), MCM, which will indicate that the case resulted in an acquittal and will include the charges and specifications, findings, and appropriate signatures.

b. Supplementary orders in U.S. Navy-Marine Corps Court of Criminal Appeals (NMCCA) cases. If the sentence was ordered executed or suspended in its entirety by the convening authority, and the approved findings and sentence have been affirmed without modification by the NMCCA and, in appropriate cases, the U.S. Court of Appeals for the Armed Forces or the U.S. Supreme Court, no supplementary court-martial order is necessary. A supplementary court-martial order shall be issued in all other cases. Such orders shall be published as follows:

(1) Supplementary orders in cases involving death sentences and dismissals are issued by the JAG by direction of the Secretary of the Navy.

(2) Other supplementary orders shall be issued by the cognizant GCMCA. Court direction to issue a supplementary order shall be forwarded by OJAG (Code 40) to the appropriate convening authority via the cognizant RLSO, LSSS or LC. Once completed the supplementary order shall be returned to the Judge Advocate General via the cognizant RLSO, LSSS or LC. In cases not reviewed by the U.S. Court of Appeals for the Armed Forces (by petition or certification), orders should be issued immediately following the accused's execution of a "Request for Immediate Execution of Discharge" (see section 0165) or upon expiration of 60 days from the date of service of the NMCCA decision upon the accused. In cases considered by the U.S. Court of Appeals for the Armed Forces or the U.S. Supreme Court, supplementary orders should be issued upon notification of completion of review by the court.

(3) All supplementary orders in NMCCA cases shall bear the "NMCCA" number appearing on the NMCCA decision.

c. Form. The form of a promulgating order is prescribed in Appendix 17,

MCM. In copying and including the action of the convening authority in the promulgating order, any synopsis of the accused's record and/or circumstances of the offense contained in the convening authority's action pursuant to section 0151 and/or section 0152 shall also be copied and included in the promulgating order. The order shall be subscribed by the officer issuing the order or by a subordinate officer designated by him. In either case, the name, grade, and title of the subscribing officer, including the organization or unit, shall be given. Where a subordinate officer signs by direction, his name, title, and organization shall be followed by the words: By direction of (name, grade, title, and organization of issuing officer). A duplicate original of a promulgating order is a photo copy as complete as the original in all respects, including the signature of the officer who signed the original, or an identical copy made by photographic or other duplicating process. A certified copy of a promulgating order is a copy bearing the statement "Certified to be a true copy" over the signature, grade, and title of an officer, or of an enlisted person in the legalman rating (Navy), or in the legal occupational field (Marine Corps), of grade E-6 or above, who has been designated in writing by the officer issuing the promulgating order.

d. Number and distribution. All initial and supplementary promulgating orders must be legible and shall be distributed as follows:

(1) Original to be attached to original record of trial. If the original record of trial has been forwarded, the original order, along with the appropriate copies as described below, shall be sent to the command or activity to which the original record of trial was forwarded.

(2) Duplicate original to be placed in the service record of the accused, unless the court-martial proceedings resulted in acquittal of all charges, disapproval of all findings of guilty, or disapproval of the sentence by the convening authority when no findings have been expressly approved by him. In cases involving Navy personnel, if applicable, forward to the Personnel Support Activity Detachment maintaining the accused's service record.

(3) Duplicate originals or certified copies:

(a) One to be attached to the original record of trial.

(b) One to be attached to each copy of the record of trial.

(c) Two to the CO of the accused if a brig or confinement facility is designated as the place of confinement; three if a disciplinary command is designated as the place of confinement. These copies should accompany the records of the accused to the place of confinement.

(d) One to Navy Personnel Command (PERS-834 in the case of officers, or PERS-832 in the case of enlisted).

(e) One to the GCMCA over the accused at the time of trial, and one to the current GCMCA over the accused, if different. The GCMCA shall be identified by the command name.

(f) One to the Directorate of Debt and Claims Management (DFAS).

(4) Duplicate originals, certified copies, or plain copies:

(a) One to the accused.

(b) One to the CO of the RLSO, LSSS or LC at which the accused was tried.

(c) One each to the military judge, trial counsel, and defense counsel of the court-martial before which the case was tried.

(d) One to the convening authority and, if the accused was serving in a command other than that of the convening authority at the time of the alleged offense, one to the command in which he was then serving.

(e) One to each appropriate subordinate unit and any other local distribution desired.

e. Navy officer accused. In addition to the distribution requirements of subsection (d), ensure the following distribution is made when the accused is a Navy officer:

(1) Copy to Officer in Charge, Personnel Support Activity Detachment, Naval Training Center Great Lakes, 315B Bronson Ave, Suite 207, Great Lakes, IL 60088, if U.S. Disciplinary Barracks, Fort Leavenworth, KS is designated as the place of confinement.

(2) Copy to Defense Finance and Accounting Service/Cleveland Center (DFAS/CL), Special Claims Department (Code FMASB), if the sentence includes forfeiture of pay which has been approved by the convening authority. Copies of all supplementary orders promulgating the results of subsequent action taken on that portion of the sentence extending to forfeiture must include DFAS/CL (Code FMASB) as a distributee. Copies of all court-martial orders extending to forfeiture of pay should be submitted through the convening authority's disbursing officer for forwarding to DFAS/CL with other non-scan documents, see MILPERSMAN 1611-010 and DOD 7000.14-R, Volume 7A.

0155a MANDATES

a. All records of trial returned to the Judge Advocate General for further action in accordance with an opinion issued by the Navy-Marine Corps Court of Criminal Appeals or the U.S. Court of Appeals for the Armed Forces shall be forwarded by OJAG (Code 40) to the appropriate convening authority via the cognizant RLSO, LSSS or LC to take the required action on the case. However, if the JAG certifies a case to the U.S. Court of Appeals for the Armed Forces, OJAG (Code 40) shall forward the record to that court; the convening authority may not take action on the case. In those cases where the record has been returned to the convening authority, once further action is completed, or when no further action is contemplated, the record of trial shall be returned to the Judge Advocate General (OJAG Code 40) via the cognizant RLSO, LSSS or LC.

b. In accordance with Article 57a(c), UCMJ, in any case in which a court-martial sentences a person to confinement and the sentence to confinement has been ordered executed, but in which review of the case under Article 67(a)(2), UCMJ, is pending, the Secretary concerned may defer further service of sentence to confinement while that review is pending. Deferment requests pursuant to Article 57a(c) shall be addressed to the Secretary of the Navy via the Judge Advocate General (OJAG Code 20).

0156 PROMULGATING ORDERS - SUMMARY COURTS-MARTIAL

In accordance with R.C.M. 1114(a)(3), MCM, the results of a trial by summary court-martial need be promulgated only to the accused. The results of any review or action on a summary court-martial under section 0153, after the initial action of the convening authority, shall be forwarded to the convening authority and to the CO of the accused for notation in the service record or service record book of the accused.

0157 SERVICE AND EXECUTION OF SENTENCES

a. General. Any part of a court-martial sentence except death, dismissal, or a dishonorable or bad-conduct discharge may be ordered executed by the convening authority when initial action is taken under R.C.M. 1107, MCM, and sections 0151 and 0152. If the accused waives appellate review or has withdrawn the appeal, the officer taking action under R.C.M. 1112(f), MCM, and section 0153 may order a dishonorable or a bad-conduct discharge executed as part of the action approving the sentence. In cases reviewed by the NMCCA, the GCMCA over the accused may order a dishonorable or a bad-conduct discharge executed only after appellate review is completed and the judgment is final within the meaning of R.C.M. 1209, MCM. Dismissal of a commissioned officer or a midshipman may only be ordered executed by the Secretary of the Navy or his designate, see section 0152. Only the President may order the punishment of death to be executed.

b. Place and nature of confinement.

(1) Designation of places of confinement. Subject to section 0169, the convening authority or other person taking the initial action on a court-martial that sentenced an accused to confinement is a competent authority to designate the initial place of confinement of Naval prisoners.

(2) Nature of confinement. See SECNAVINST 1640.9 (series).

c. Punitive discharge - Naval Clemency and Parole Board action.

(1) In general. Notwithstanding the fact that a sentence may have been duly ordered executed, a punitive discharge may not in fact be executed until the provisions of SECNAVINST 5815.3 (series) have been complied with.

(2) Required documents. A complete copy of the record of trial, including the promulgating order and the legal officer's or staff judge advocate's recommendation, shall be forwarded to the Naval Clemency and Parole Board in those cases in which the approved sentence includes an unsuspended

punitive discharge, dismissal, or confinement for 12 months or more. See section 0153.

d. Execution of death penalty. The manner in which a sentence to death is to be carried out shall be determined by the Secretary of the Navy.

e. Hard labor without confinement. R.C.M. 1003(b)(6), MCM, authorizes special and general courts-martial to sentence enlisted members to hard labor without confinement for up to three months. The immediate commander of an accused designates the amount and character of the hard labor to be performed, which should conform to the guidelines governing extra duties imposed as punishment under Article 15, UCMJ; see paragraph 5c(6) of Part V, MCM.

0158 REMISSION AND SUSPENSION

a. Authority to remit or suspend sentences in general courts-martial and special courts-martial in which the sentence includes a bad-conduct discharge. Pursuant to Article 74(a), UCMJ, and subject to the limitations in section 0159, the Under Secretary of the Navy, the Assistant Secretaries of the Navy, the JAG, and all general court-martial convening authorities over the command to which the accused is attached are empowered to remit or suspend any part or amount of the unexecuted portion of any sentence, including all uncollected forfeitures, other than a sentence approved by the President. A sentence to death may not be suspended.

b. Authority to remit or suspend sentences in summary courts-martial and special courts-martial in which the sentence does not include a bad-conduct discharge. Notwithstanding the limitations in section 0159, if the accused's commander has authority to convene a court-martial of the kind that adjudged the sentence, that commander may suspend or remit any part of the unexecuted part of any sentence by summary court-martial or of any sentence by special court-martial that does not include a bad-conduct discharge. See R.C.M. 1108(b), MCM.

c. Probationary period. Suspensions shall conform to the conditions, limitations, and termination requirements of R.C.M. 1108(c)-(e), MCM. See also R.C.M. 1109(b)(4), MCM, which governs interruptions of a period of suspension due to unauthorized absence of the probationer or the commencement of proceedings to vacate suspension. For instructions concerning voluntary extension of enlistment for the purpose of serving probation, see SECNAVINST 5815.3 (series).

d. Liaison with Naval Clemency and Parole Board. Officers taking clemency action pursuant to the authority of this section on any sentence including a punitive discharge or confinement for 12 months or more shall coordinate such action with the Naval Clemency and Parole Board under the provisions of SECNAVINST 5815.3 (series). This obligation to coordinate does not limit the authority any officer otherwise has to take clemency action.

0159 LIMITATIONS ON AUTHORITY TO REMIT AND SUSPEND SENTENCES

a. Cases involving national security. No official of the DON, other than the Secretary of the Navy, may remit or suspend, pursuant to Article 74(a), UCMJ, any part or amount of the approved sentence in any case designated as a national security case in accordance with section 0126.

b. Life without the possibility of parole. The Secretary of the Navy may suspend or remit the unexecuted part of a sentence of confinement for life without eligibility for parole only after the service of a period of confinement of not less than 20 years. R.C.M. 1108, MCM.

c. Flag and general officers. Notwithstanding subsection 0158, the JAG may not remit or suspend, pursuant to Article 74(a), UCMJ, any part or amount of the sentence in any case involving a flag or general officer.

d. Officers and warrant officers. Notwithstanding subsection 0158, GCMCAs may not remit or suspend, pursuant to Article 74(a), UCMJ, any part or amount of the sentence in any case involving an officer or warrant officer.

e. Authority of the CO, Navy-Marine Corps Appellate Leave Activity, and the CO, Marine Detachment, U.S. Disciplinary Barracks, Fort Leavenworth, KS. The CO, Navy-Marine Corps Appellate Leave Activity, and the CO, Marine Detachment, U.S. Disciplinary Barracks, Fort Leavenworth, KS (or its successor command), may:

(1) effect actions directed by the Secretary following clemency review;

(2) remit uncollected forfeitures of court-martial prisoners returning to duty;

(3) remit confinement, not in excess of five days, to facilitate administration, by adjusting dates of transfer upon completion of confinement. Early releases in excess of 5 days may be granted when specifically authorized by the Navy Personnel Command for Navy prisoners, or the Commandant of the Marine Corps for Marine Corps prisoners; and

(4) exercise other authority specifically delegated in writing by the Secretary.

0160 VACATION OF SUSPENSION OF SENTENCE

a. Review of confinement of probationer pending vacation proceedings. The officers appointed under section 0127 shall also conduct reviews of confinement under R.C.M. 1109(c)(4), MCM.

b. Notice of proceedings. In the case of courts-martial under review, immediate notice of the vacation of any punishment shall be made to the command or activity conducting the review. In the case of courts-martial in which the approved sentence includes a punitive discharge, dismissal, death, or confinement of one year or more, and appellate review has not been waived, notice shall be made to both the Navy-Marine Corps Appellate Review Activity

(OJAG (Code 40)) and the NMCCA.

c. Filing of report of proceedings. The original record of any proceedings in connection with vacation of suspension under R.C.M. 1109, MCM, shall be included in the record of trial. See R.C.M. 1103(b)(3)(M). If the authority ordering the vacation is not in possession of the record of trial, that authority shall transmit the record of the vacation proceedings to the command or activity to which the original record of trial was forwarded for inclusion in the record of trial. In the case of vacation of a suspended general court-martial sentence or of a suspended special court-martial sentence including a bad-conduct discharge, two copies of the record of any vacation proceedings shall be forwarded with the original of such vacation proceedings.

d. Execution of vacated punishments. The execution of a vacated punishment is subject to the restrictions of section 0157 and R.C.M. 1113(c), MCM.

0161 REQUEST FOR WITHDRAWAL OF APPELLATE REVIEW

a. Article 66 cases. A request for withdrawal from appellate review of a case forwarded for review under Article 66, UCMJ, shall be carried out in accordance with NMCCA rules. Requests, including a copy of the charge sheet, shall be forwarded to OJAG (Code 40).

b. Article 69(a) cases. A request for withdrawal from appellate review of a case forwarded for examination under Article 69(a), UCMJ, will be decided by the Judge Advocate General. Requests, including a copy of the charge sheet, shall be forwarded to OJAG (Code 20).

0162 APPLICATION FOR RELIEF — ARTICLE 69(b)

a. General. Article 69(b), UCMJ, provides "The findings or sentence, or both, in a court-martial case not reviewed under subsection (a) or under section 866 of this title (Article 66) may be modified or set aside, in whole or in part, by the Judge Advocate General on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence."

b. Time limitations. An application by an accused for such a review must be filed in OJAG (Code 20) on or before the last day of the two-year period beginning on the date of the convening authority's action on the sentence, unless the accused establishes good cause for failure to file within that time. Any command in receipt of an application for Article 69(b), UCMJ, review shall immediately forward an advance copy of the application to OJAG (Code 20) to ensure the timely submission of the application.

c. Submission procedures. Applications for relief shall be submitted in writing to OJAG (Code 20). If the accused is on active duty, the application shall be submitted via the applicant's CO, the command that convened the court, and the command that reviewed the case under Article 64(a) or (b),

UCMJ. If the original record of trial is held by the command that reviewed the case under Article 64(a) or (b), UCMJ, it shall be forwarded as an enclosure to the command's endorsement. If the original record of trial has been filed in the National Personnel Records Center (see section 0154), the endorsement will include all necessary retrieval data (accession number, box number, and shelf location) obtained from the receipt returned from the National Personnel Records Center to the sending activity. This endorsement shall also include information and specific comments on the grounds for relief asserted in the application, and an opinion on the merits of the application. If the applicant is no longer on active duty, the application shall be submitted directly to OJAG (Code 20).

d. Contents of application. All applications for relief shall contain:

(1) full name of the applicant;

(2) applicant's Social Security number and branch of service, if any;

(3) applicant's present grade, if on active duty or retired, or "civilian" or "deceased," as applicable;

(4) applicant's address at time the application is forwarded;

(5) date of trial;

(6) place of trial;

(7) command title of the organization at which the court-martial was convened (convening authority);

(8) command title of the officer exercising Article 64 review authority over the applicant at the time of trial, if applicable;

(9) type of court-martial that convicted the applicant, and sentence adjudged;

(10) general grounds for the requested relief, which must be one or more of the following:

(a) newly discovered evidence;

(b) fraud on the court;

(c) lack of jurisdiction over the accused or the offense;

(d) error prejudicial to the substantial rights of the accused; or

(e) appropriateness of the sentence.

(11) an elaboration of the specific prejudice resulting from any error cited. Legal authorities to support the applicant's contentions may be included, and the format used may take the form of a legal brief if the applicant so desires;

(12) any other matter the applicant desires to submit;

(13) relief requested;

(14) facts and circumstances to establish "good cause" for a failure to file the application within the time limits prescribed in subsection b, if applicable; and

(15) if the application is signed by a person other than the applicant pursuant to subsection (e), an explanation of the circumstances rendering the applicant incapable of making application.

e. Signatures on application. Unless incapable of making application, the applicant shall personally sign the application under oath before an official authorized to administer oaths. If the applicant is incapable of making application, the application may be signed under oath and submitted by the applicant's spouse, next of kin, executor, guardian, or other person with a proper interest in the matter. In this regard, one is considered incapable of making application for purposes of this section when unable to sign the application under oath due to physical or mental incapacity.

0163 PETITION FOR NEW TRIAL - ARTICLE 73

Petitions for a new trial under Article 73, UCMJ, shall comply with the form and procedures set forth in R.C.M. 1210, MCM, and shall be sent directly to OJAG (Code 40).

0163a SUBSTITUTION OF DISCHARGE - ARTICLE 74(b)

a. Statutory Provision. Article 74(b), UCMJ, provides that the "Secretary concerned may, for good cause, substitute an administrative form of discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial."

b. Submission Procedures. Applications for substitution of discharge under Article 74(b), UCMJ, will be submitted to the Secretary through OJAG (Code 20):

If received within five years after the execution of the punitive discharge or dismissal, or within five years after the disapproval of a prior request under Article 74(b), UCMJ, applications for substitution of discharge, except in unusual circumstances, will not normally be considered.

c. Contents of the Application. All applications for substitution of discharge shall contain:

(1) Applicant's full name, social security number, service number (if different), age, and date of birth;

(2) Applicant's branch of service;

(3) Date and place of trial, and type of court-martial that

resulted in the punitive discharge or dismissal;

(4) Command title of the court-martial convening authority;

(5) Offense(s) of which the applicant was convicted and the sentence approved by the court-martial convening authority;

(6) Date the punitive discharge or dismissal was executed;

(7) Applicant's current marital status and number and ages of dependents, if any;

(8) Applicant's civilian criminal record (arrest(s) with disposition and conviction(s)), if any, both prior and subsequent to the court-martial that resulted in the punitive discharge or dismissal. If an applicant has no civilian criminal record, he or she should affirmatively state that fact in the application;

(9) Any military administrative discharge proceedings (circumstances and disposition) initiated against the applicant;

(10) Applicant's full employment record since the punitive discharge or dismissal was executed;

(11) The specific type and character of administrative discharge requested under Article 74(b), UCMJ (a more favorable administrative discharge than that requested will not be approved);

(12) At least three, but no more than six, character affidavits (the character affidavits must be notarized, indicate the relationship of the affiant as well as specific reasons why the affiant believes the applicant to be of good character). The affidavits should discuss the applicant's character primarily as reflected in the civilian community since the applicant's punitive discharge or dismissal;

(13) Any matters, other than character affidavits, supporting the considerations described in paragraph (12);

(14) A statement by the applicant, setting forth the specific considerations the applicant believes constitute "good cause" sufficient to warrant the substitution of an administrative form of discharge for the punitive discharge or dismissal previously executed. Article 74(b), UCMJ, does not provide an extraordinary procedure for the review of a court-martial. Questions of guilt or innocence, or legal issues attendant to the court-martial that resulted in the punitive discharge or dismissal, are neither relevant nor appropriate for consideration under Article 74(b), UCMJ. As used in the statute, "good cause" was envisioned by Congress to encompass a Secretarial exercise of clemency and ultimate control of sentence uniformity. Accordingly, in determining what constitutes "good cause" under Article 74(b), UCMJ, the primary concern will be with the applicant's record in the civilian community subsequent to his punitive separation from the naval service.

d. Signature on Application. Unless incapable of applying himself, the applicant shall personally sign the application, under oath, before a notary or other official authorized to administer oaths. If the applicant is incapable of executing the application, the application may be signed

under oath and submitted by the applicant's spouse, next-of kin, executor, guardian, or other person recognized as a personal representative by the law of the applicant's domicile. One is considered incapable of executing an application for purposes of this paragraph only when the applicant is unable to sign the application under oath due to physical or mental incapacity. When an application is signed by a person other than the applicant, the circumstances rendering the applicant incapable of executing the application, with appropriate documentation, shall be set forth in the application.

0164 NOTIFICATION TO ACCUSED OF COURT OF CRIMINAL APPEALS DECISION

a. Current address of the accused. Upon receipt of the decision of the NMCCA, and when in accordance with the provisions of R.C.M. 1203(d)(1), MCM, the JAG elects not to certify the case to the U.S. Court of Appeals for the Armed Forces, OJAG (Code 40) will use the address provided by the accused if the accused is on appellate leave, or, if the accused has not provided an address and is on appellate leave or is on active duty, will request from the GCMCA over the command to which the accused is attached the current address of the accused. The GCMCA will provide the current military address of the accused if the accused is on active duty, or the latest address listed for the accused in the accused's official service record or service record book. If requested, the address shall be provided to OJAG (Code 40) by the most expeditious means.

b. Promulgation package. Using the address obtained as detailed above, a "promulgation package" consisting of the accused's copy of the NMCCA decision containing the endorsement notifying the accused of his right to petition for review by the U.S. Court of Appeals for the Armed Forces will be forwarded directly to the accused by first-class certified mail. If the accused is in a military confinement facility, absent contrary directions from the accused, the package will be forwarded to the CO or OIC of the confinement facility for delivery to the accused. The CO or OIC of such facility shall ensure personal service on the accused and that the certificate of personal service is completed and returned to OJAG (Code 40).

c. Copies of decision. Copies of the NMCCA decision will be forwarded by OJAG (Code 40) to the RLSO, LSSS, and LC.

d. Change in address. Notice of any change in address of the accused due to transfer, appellate leave, or any reason shall be immediately given to OJAG (Code 40).

e. Completion of appellate review. Notification of the completion of appellate review, i.e., expiration of the 60-day appeal period if no petition for review is filed, or final review by the U.S. Court of Appeals for the Armed Forces or the U.S. Supreme Court, will be forwarded by OJAG (Code 40) to the cognizant GCMCA for compliance with sections 0157 and 0164, if applicable.

0165 REQUEST FOR IMMEDIATE EXECUTION OF DISCHARGE

a. General. Prior to completion of appellate review, an accused may

request immediate execution of the unexecuted portion of his sentence, following completion of the confinement portion thereof, if any, in those cases in which the sentence as affirmed by the NMCCA:

(1) includes an unsuspended punitive discharge; and

(2) either does not include confinement, or the confinement portion thereof has been or will be completed prior to 60 days from the date the accused is served with a copy of the NMCCA decision.

b. Conditions of approval. Such requests may be approved by the GCMCA subject to the following conditions:

(1) that the accused has received a copy of the decision of the NMCCA in his case;

(2) that the accused has had fully explained to him the right to petition the U.S. Court of Appeals for the Armed Forces for grant of review;

(3) that the accused does not have a petition or case pending before the U.S. Court of Appeals for the Armed Forces;

(4) that the accused does not intend to petition the U.S. Court of Appeals for the Armed Forces but, nevertheless, understands that the request for immediate release does not affect the right to petition the U.S. Court of Appeals for the Armed Forces;

(5) that the accused has consulted counsel of his own choice; and

(6) that Naval Clemency and Parole Board review, under the provisions of SECNAVINST 5815.3 (series), if applicable, has been completed.

c. Execution of unexecuted portion of sentence. Upon approval of such requests, the GCMCA shall order the unexecuted portion of the sentence to be duly executed.

d. Form of request for immediate execution of discharge. The prescribed form is set forth in Appendix A-1-u. Three signed copies of the request shall be transmitted to OJAG (Code 40).

0166 INSPECTION OF RECORD OF TRIAL CONTAINING CLASSIFIED INFORMATION

In any court-martial where classified information has been deleted or withdrawn from the accused's copy of the record of trial, the accused may personally inspect the original record of trial in OJAG after final review in the case has been completed, subject to the requirements of SECNAVINST 5510.36 (series). Applications for such inspections may be submitted to OJAG (Code 40) via OJAG (Code 30).

0167 SETOFF OF INDEBTEDNESS OF A PERSON AGAINST PAY

a. Courts-martial decisions. When the United States has suffered loss of

money or property through the offenses of selling or otherwise disposing of, or willfully damaging or losing military property, willfully and wrongfully hazarding a vessel, larceny, wrongful appropriation, robbery, forgery, arson, or fraud for which persons, other than accountable officers as defined in DOD Financial Management Regulation, DOD 7000.14-R, Volume 5, Chapter 2, section 0203, have been convicted by court-martial, the amount of such loss constitutes an indebtedness to the United States that will be set off against the final pay and allowances due such person at the time of dismissal, discharge, or release from active duty.

b. Administrative determinations. In addition, when the Government suffers a loss of money and competent authority has administratively determined the loss occurred through the fraud, forgery, or other unlawful acts of such persons as described in subsection (a), the amount of such loss shall be set off as described in subsection (a). "Competent authority," as used herein, shall be the CO of such persons and the administrative determination shall be made through an investigation pursuant to the JAGMAN and approved on review by a GCMCA.

c. Army and Air Force property. When the money or property involved belongs to the Army or the Air Force, and such service determines liability through the procedures provided by the authority of 37 U.S.C. § 1007 and demands setoff against the final pay and allowances of any Naval service personnel, setoff shall be effected in accordance with subsection (a).

d. Voluntary restitution. Immediate recovery action may be instituted on the basis of a voluntary offer of the member to make restitution of all or part of any indebtedness to the Government. The voluntary offer constitutes assumption of pecuniary responsibility for the loss and, as such, is sufficient to authorize checkage of current pay, if required, to collect the amount of the indebtedness. See also 10 U.S.C. § 6161 and SECNAVINST 7220.38 (series) concerning the possibility of remission or cancellation of an enlisted member's indebtedness. Nothing herein shall be construed as precluding setoff against final pay in other cases when such action is directed by competent authority.

PART D - MISCELLANEOUS

0168 APPREHENSION BY CIVILIAN AGENTS OF THE NAVAL CRIMINAL INVESTIGATIVE SERVICE

Pursuant to the provisions of R.C.M. 302(b)(1), MCM, and under the authority of Article 7(b), UCMJ, any civilian agent of NCIS who is duly accredited by the Director, NCIS, and who is engaged in conducting an investigation, with or without prior approval or a request from a competent command, within the investigative jurisdiction of the NCIS as established in departmental directives, may apprehend, if necessary, persons subject to the UCMJ or to trial thereunder, upon reasonable belief that an offense has been committed and that the person apprehended committed it. A person so apprehended must be taken promptly before his CO or other appropriate military authority. Such a civilian agent may apprehend a commissioned officer or a warrant officer only pursuant to specific orders of a commissioned officer, except where such an

apprehension is necessary to prevent disgrace to the service, the commission of a serious offense, or the escape of one who has committed a serious offense. Such a civilian agent, even though not conducting an investigation relating to the person apprehended, may also apprehend a person subject to the UCMJ upon observation of the commission of a felony or a misdemeanor amounting to a breach of the peace occurring in the agent's presence. A person so apprehended must be delivered promptly to his CO or other appropriate military authority.

0169 AUTHORITY TO PRESCRIBE REGULATIONS RELATING TO THE DESIGNATION AND CHANGING OF PLACES OF CONFINEMENT

Navy Personnel Command and the Commandant of the Marine Corps are authorized to issue joint regulations, as required, relating to the designation and the changing of places of confinement of Naval prisoners, the transfer of Naval prisoners among military confinement facilities, and transfers from military facilities to civilian confinement facilities. See SECNAVINST 1640.9 (series), BUPERSINST 1640 (series), and MCO 1640.3.

0170 FORMS SUPPLEMENTING THE MILITARY RULES OF EVIDENCE

a. Interrogations. See M.R.E. 301-305. Appendix A-1-v contains a suggested format which may be utilized by investigative personnel in cases in which criminal suspects desire to waive their rights concerning self-incrimination, and to make statements.

b. Search and seizure. See M.R.E. 311-316. Appendices A-1-w and A-1-x contain suggested formats for recording information pertaining to authorization for searches, with instructions, and the granting of consent to search.

0171 RECOUPMENT OF ADVANCED EDUCATION ASSISTANCE

a. Authority. Title 10 U.S.C. § 2005 authorizes the Secretary of the Navy to require a service member to enter a written agreement to serve on active duty for a specified period as a condition of that service member's receiving advanced education financial assistance from the Government. If the service member fails to complete, voluntarily or as a result of misconduct, the term of active duty service specified in the agreement, the Secretary of the Navy can require the service member to reimburse the United States for the cost of advanced education assistance not repaid by active duty service as specified in the written agreement. Title 10 U.S.C. § 2005 also requires that a recipient of advanced education assistance be advised of the recoupment possibility before the recipient submits a request for voluntary separation or makes a personal decision regarding administrative, nonjudicial, or judicial action resulting from alleged misconduct.

b. Advisement. Accordingly, a service member having obligated service arising from receiving advanced education assistance must be advised prior to electing to accept nonjudicial punishment or summary court-martial, requesting voluntary separation, waiving an administrative discharge board, or entering a

guilty plea at a court-martial, in accordance with a pretrial agreement or otherwise, that he may be required to reimburse the United States for the cost of advanced education assistance not repaid by active service as specified in the written agreement entered into with the Government prior to accepting advanced education assistance. See Appendix A-1-e.

c. Application. Recoupment applies to those individuals who have received, at Government expense, education or training above the secondary level. Applicable programs may include, but are not limited to, the U.S. service academies, Reserve Officer Training Corps, the Funded Law Education Program, the Armed Forces Health Professions Scholarship Program, other post-graduate programs, and enlisted educational programs such as the Enlisted Education Advancement Program.

d. No additional rights. This requirement is not intended to confer rights on an individual but to preserve for the Government the possibility of recoupment. Failure to advise a member of the possibility of recoupment, as discussed in subparagraphs a and b above, before the member submits a request for retirement or makes a personal decision regarding administrative, nonjudicial, or judicial action shall not create any cause for relief against an otherwise valid nonjudicial, judicial, or administrative proceeding, but may prevent recoupment.

0172 CROSS-REFERENCE TO SECRETARIAL OR JAG REGULATIONS IMPLEMENTING THE MCM

The following section provides a cross-reference of those provisions contained in the MCM, and the sections in this Chapter or other instructions which implement those provisions.

R.C.M.	Implementation
104(b)(2)(B)	JAGINST 5803.1 (series)
106	Chapter VI
108	JAGINST 5810.2 (series)
109	JAGINST 5803.1 (series)
201(d)(2)	0108b, 0124
201(f)(2)(C)(iii)	0122a
204(a)	0107b, 0123
304(f)	SECNAVINST 1640.9 (series)
305(f)	0127b
305(i)(2)	0127d
306(c)(2)	0102-0105
403(b)(5)	0122a
404(e)	0122a
405(c)	0122a
407(a)(5)	0122a
407(b)	0126
501(c)	0130d
502(c)	0130a
502(d)(2)	No implementation
502(e)	0130d
503(b)	0130a(1)
503(c)	0130b
504(b)(1)and(2)	0120, 0121

504(d)(3)	0133
505(c)(1)(B)(i)	0136
506(b)(1)and(2)	0131
703(e)(2)(D)	0146
703(e)(2)(G)	0147
704(c)	0138-0140
705(a)	0137
804(d)(2)	0127a
807(b)(1)(A)	0130
908(b)(2)and(6)	JAGINST 5810.2 (series)
910(a)(2)	No implementation
1001(b)(2)	0141
1103(b)(1)(B)	0150b
1103(g)(1)	0153b
1103(j)	No implementation
1104(a)(2)(A)	0150a
1104(b)(l)(D)(iii)(a)	0166
1107(a)	0151b
1107(b)(2)	0151a(1)
1107(f)(4)(C)	0157b, 0169
1108(b)and(d)	0158a and b
1109(c)(4)	0160a
1110(g)(3)	0161
1111(a) and (b)	0153-0155
1112	0153a, 0161
1112(e)(3)	0153
1112(g)(3)	0154
1113(c)(1)and (2)	0157a and c
1113(d)(1)(A)	0157d
1113(d)(2)(C)	0157b, 0169
1114(a)(1)	0155
1114(b)(2)(A)	0155
1114(f)	0155
1201(b)(3)(B)	0162
1201(c)	0158, 0159
1203(d)(1)	0164
1206(a)	0152d
1206(b)(1)	0158, 0159
1206(b)(2)	JAGINST 5810.2 (series)
1301(a)	No implementation
1301(g)	0122a, 0133
1302(a)(4)	0120c, 0121b
1305(a)	0150
1305(d)(3)	0153
1306(c)	0153a
M.R.E.	**Implementation**
305(d)(2)	0131
312(g)	No implementation
315(d)(1)	No implementation
315(d)(2)	No implementation
315(f)(2)	No implementation
315(h)(2)	No implementation
317(c)(2),(3)	DODD 5505.9
Part V - NJP	**Implementation**

1f(5)	0108b
2a, b, and c	0106
3	0108c
5a	0111, 0112
5c(1)	0114
5c(4) and (5)	0111, 0112
5c(6)	No implementation
5g	0113
7b	0117
7f(5)	0117d
8	0119, 0141

0173 MILITARY JUSTICE FORMS INDEX

a. List. The forms listed below are used in courts-martial by the Naval service:

DD 1351-2	Travel Claim Voucher (7-04)
DD 453	Subpoena for Civilian Witness (5-00), S/N 0102-LF-000-4530
DD 453-1	Travel Order (8-84), S/N 0102-LF-000-4535
DD 454	Warrant of Attachment (5-00)
DD 455	Report of Proceedings to Vacate Suspension (8-84), S/N 0102-LF-000-4550
DD 457	Investigating Officer's Report (8-84), S/N 0102-LF-000-4570
DD 458	Charge Sheet (5-00), S/N 0102-LF-000-4580
DD 490	Record of Trial (5-00), S/N 0102-LF-005-1201
DD 491	Summarized Record of Trial (5-00), S/N 0102-LF-005-1601
DD 494	Courts-Martial Data Sheet (Optional) (10-84), S/N 0102-LF-005-1901
DD 2329	Record of Trial by Summary Court-Martial (8-84), S/N 0102-LF-002-3290
DD 2330	Waiver/Withdrawal of Appellate Rights-Review by Court-of Military Review (8-84), S/N 0102-LF-002-3300
DD 2331	Waiver/Withdrawal of Appellate Rights-Review by Judge Advocate General (8-84), S/N 0102-LF-002-3310
DD 2702	Courts-Martial Information for Victims and Witnesses of Crime
DD 2703	Post-Trial Information for Victims and Witnesses of Crime
DD 2704	Victim/Witness Certification and Election Concerning Inmate Status

b. How to obtain forms. The DD forms are available from the Forms and Publications Segment of the Navy Supply System as cognizance symbol "I" material and may be obtained in accordance with the instructions in Navy Stock List of Forms and Publications, NAVSUP Publication 2002. Marine Corps activities will requisition forms in accordance with instructions contained in Chapter 22 of Marine Corps Unified Material Management System Manual, Marine Corps Order P4400.84. The SF forms are available from GSA Stores, Forms Supply Depots, or at www.dtic.mil/whs/directives. See NAVSO Publication 2345.

c. Forms prescribed by MCM. Where forms are prescribed by the MCM, but are not immediately available, convening authorities may improvise as necessary, using the MCM, and its appendices as guides.

0174 ADDRESS APPENDIX

Office of the Judge Advocate General (OJAG)
International and Operational Law (Code 10)
1322 Patterson Ave SE, Ste 3000
Washington Navy Yard, DC 20374-5066
(703) 697-9161/9162
DSN 227-9161
Fax (703) 695-8073

Admiralty and Maritime Law (Code 11)
1322 Patterson Ave SE, Ste 3000
Washington Navy Yard, DC 20374-5066
(202) 685-5040
DSN 325-5040
Fax (202) 685-5470

Administrative Law Division (Code 13)
1322 Patterson Ave SE, Ste 3000
Washington Navy Yard, DC 20374-5066
(703) 614-7415
DSN 224-7415
Fax (703) 614-9400

General Litigation (Code 14)
1322 Patterson Ave SE, Ste 3000
Washington Navy Yard, DC 20374-5066
(202) 685-5450
DSN 325-5450
Fax (202) 685-5472

Claims and Torts Litigations (Code 15)
1322 Patterson Ave SE, Ste 3000
Washington Navy Yard, DC 20374-5066
(202) 685-4600
DSN 325-4600
Fax (202) 685-5484

National Security Litigation and Intelligence Law Division (Code 30)
1322 Patterson Ave SE, Ste 3000
Washington Navy Yard, DC 20374-5066
(202) 685-5470
DSN 325-5470
Fax (202) 685-5467

Criminal Law Division (Code 20)
1254 Charles Morris Street SE, Ste B01
Washington Navy Yard, DC 20374-5124
(202) 685-7060
DSN 325-7060
Fax (202) 685-7084

Navy-Marine Corps Appellate Review Activity
Administrative Support (Code 40)
1254 Charles Morris Street SE, Ste B01

Washington Navy Yard, DC 20374-5124
(202) 685-7070
DSN 325-7070
Fax (202) 685-7066

Appellate Defense Division (Code 45)
1254 Charles Morris Street SE, Ste B01
Washington Navy Yard, DC 20374-5124
(202) 685-7290
DSN 325-7290
(202) 685-7426

Appellate Government Division (Code 46)
1254 Charles Morris Street SE, Ste B01
Washington Navy Yard, DC 20374-5124
(202) 685-7428
DSN 325-7428
Fax (202) 685-7687

Fiscal and Resource Services (Code 64)
1322 Patterson Ave SE, Ste 3000
Washington Navy Yard, DC 20374-5066
(202) 685-5280
DSN 325-5280
Fax (202) 685-5455

Commander, Navy Personnel Command
5720 Integrity Drive
Millington, TN 38055
--For Officer Records
PERS-834
(901) 874-2090
DSN 882-2090
Fax (901) 874-2625
--For Enlisted Records
PERS-832
(901) 874-4432
DSN 882-4432
Fax (901) 874-2624

Naval Criminal Investigative Service
Russell-Knox Building
27130 Telegraph Road
Quantico, VA 22134

Commandant of the Marine Corps
--For Officer Records
Headquarters, U.S. Marine Corps (JAM)
3000 Marine Corps Pentagon, RM 4D558
Washington, D.C. 20350-3000
(703) 614-4250/4197
DSN 224-4250/4197
Fax (703)695-0335
--For Enlisted Records
Headquarters, U.S. Marine Corps (Code MMRB-20)
Quantico, VA 22134-0001

Personnel Support Activity Detachment
Naval Training Center Great Lakes
315B Bronson Ave, Ste 207
Great Lakes, IL 60088
(847) 688-5550
DSN 792-5550
Fax (847) 688-5636

Naval Council of Personnel Boards
Attn: Naval Clemency and Parole Board
720 Kennon Street SE, Room 309
Washington Navy Yard, DC 20374-5023
(202) 685-6632
DSN 325-6632
Fax (202) 685-6629

National Personnel Records Center
Military Personnel Records
General Services Administration
1 Archives Drive
St. Louis, MO 63138

Directorate of Debt and Claims Management
Denver Center (DFAS-POCE/DE)
6760 East Irvington Place
Denver, CO 80279

Defense Finance and Accounting Service/Cleveland Center (DFAS/CL)
Special Claims Department (Code FMASB)
1240 E. 9th Street
Cleveland, OH 44199

Department of Justice
Witness Immunity Unit
1301 New York Avenue NW, Ste 1225
Washington, DC 20530
(202) 514-5541
Fax (202) 514-1468

NONPUNITIVE LETTER OF CAUTION

Date_____

From: Commander, U.S. Pacific Fleet
To: ENS _____ L. _____, SC, USN/3100

Subj: NONPUNITIVE LETTER OF CAUTION

Ref: (a) Report of investigation into discrepancies in the ship's store returns for the first quarter of fiscal year 20__, in USS _____ (_____)
(b) R.C.M. 306, MCM
(c) JAGMAN 0105

1. Reference (a) is the record of an investigation by _____ to inquire into certain discrepancies in the ship's store returns for the first quarter of fiscal year 20__ in USS _____.

2. [Here insert a precise statement of the relevant events and circumstances for which the letter of caution is issued.] From the foregoing, it is apparent that you performed your duties in a careless manner. Such carelessness contributed to the improper operation of the ship's store on board USS _____. Accordingly, you are hereby administratively cautioned pursuant to references (b) and (c).

3. This letter, being nonpunitive, is addressed to you as a corrective measure. It does not become a part of your official record. You are advised, however, that in the future you will be expected to exercise greater care in the performance of your duties in order to measure up to the high standard of performance of duty required of all officers in the Surface Force. Commander, U.S. Pacific Fleet, trusts that the instructional benefit you will receive from the experience will cause you to become a more proficient Naval officer.

[Signature]

(CAPTAIN'S MAST) (OFFICE HOURS)
ACCUSED'S NOTIFICATION AND ELECTION OF RIGHTS
ACCUSED ATTACHED TO OR EMBARKED IN A VESSEL
(See JAGMAN 0109)

Notification and election of rights concerning the contemplated imposition of nonjudicial punishment in the case of _____, SSN _____, assigned or attached to _____.

NOTIFICATION

1. In accordance with the requirements of paragraph 4 of Part V, MCM, [insert current edition], you are hereby notified that the commanding officer is considering imposing nonjudicial punishment on you because of the following alleged offenses:

(Note: Here describe the offenses, including the UCMJ Article(s) allegedly violated.)

2. The allegations against you are based on the following information:

(Note: Here provide a brief summary of that information.)

3. You may request a personal appearance before the commanding officer or you may waive this right.

a. Personal appearance waived. If you waive your right to appear personally before the commanding officer, you will have the right to submit any written matters you desire for the commanding officer's consideration in determining whether or not you committed the offenses alleged, and, if so, in determining an appropriate punishment. You are hereby informed that you have the right to remain silent and that anything you do submit for consideration may be used against you in a trial by court-martial.

b. Personal appearance requested. If you exercise your right to appear personally before the commanding officer, you shall be entitled to the following rights at the proceeding:

(1) To be informed of your rights under Article 31(b), UCMJ;

(2) To be informed of the information against you relating to the offenses alleged;

(3) To be accompanied by a spokesperson provided or arranged for by you. A spokesperson is not entitled to travel or similar expenses, and the proceedings will not be delayed to permit the presence of a spokesperson. The spokesperson may speak on your behalf, but may not question witnesses except as the commanding officer may permit as a matter of discretion. The spokesperson need not be a lawyer;

(4) To be permitted to examine documents or physical objects considered as evidence against you that the commanding officer has examined in the case and on which the commanding officer intends to rely in deciding whether to impose nonjudicial punishment and if so, how much;

(5) To present matters in defense, extenuation, and mitigation orally, in writing, or both;

(6) To have witnesses attend the proceeding, including those who may be witness(es) against you, if their statements will be relevant and the witness(es) are reasonably available. A witness is not reasonably available if the witness requires reimbursement by the U.S. for any cost incurred in appearing, cannot appear without unduly delaying the proceedings, or, if a military witness, cannot be excused from other important duties; and

(7) To have the proceedings open to the public unless the commanding officer determines that the proceedings should be closed for good cause. However, this does not require that special arrangements be made to facilitate access to the proceeding.

ELECTION OF RIGHTS

4. Knowing and understanding all of my rights as set forth in paragraphs 1 through 3 above, my desires are as follows:

a. Personal appearance. (Check one)

_____ I request a personal appearance before the commanding officer.

_____ I waive my right to a personal appearance. (Check one below)

_____ I do not desire to submit any written matters for consideration.

_____ Written matters are attached.

b. Elections at personal appearance. (Check one or more)

_____ I request that the following witnesses be present at my nonjudicial punishment proceeding:

_____

_____

_____

_____

_____ I request that my nonjudicial punishment proceeding be open to the public.

_____ _____
(Signature of witness and Date) (Signature of accused and Date)

_____ _____
(Name of witness) (Name of accused)

(CAPTAIN'S MAST) (OFFICE HOURS)
ACCUSED'S NOTIFICATION AND ELECTION OF RIGHTS
ACCUSED NOT ATTACHED TO OR EMBARKED IN A VESSEL
RECORD CANNOT BE USED IN AGGRAVATION IN EVENT OF LATER
COURT-MARTIAL UNLESS LAWYER SERVES AS PERSONAL REPRESENTATIVE
(See JAGMAN 0109)

Notification and election of rights concerning the contemplated imposition of nonjudicial punishment in the case of _____, SSN _____, assigned or attached to _____.

NOTIFICATION

1. In accordance with the requirements of paragraph 4 of Part V, MCM, [insert current edition], you are hereby notified that the commanding officer is considering imposing nonjudicial punishment on you because of the following alleged offenses:

(Note: Here describe the offenses, including the UCMJ Article(s) allegedly violated.)

2. The allegations against you are based on the following information:

(Note: Here provide a brief summary of that information.)

3. You have the right to demand trial by court-martial in lieu of nonjudicial punishment. If you refuse nonjudicial punishment, charges could be referred for trial by summary, special, or general court-martial. If charges are referred to trial by summary court-martial, you may not be tried by summary court-martial over your objection. If charges are referred to a special or general court-martial you will have the right to be represented by counsel. Regardless of whether you accept or refuse nonjudicial punishment, you could be processed for administrative separation based on your misconduct. The maximum punishment that could be imposed if you accept nonjudicial punishment is:

_____

_____

4. If you decide to accept nonjudicial punishment, you may request a personal appearance before the commanding officer or you may waive this right.

a. Personal appearance waived. If you waive your right to appear personally before the commanding officer, you will have the right to submit any written matters you desire for the commanding officer's consideration in determining whether or not you committed the offenses alleged, and, if so, in determining an appropriate punishment. You are hereby informed that you have the right to remain silent and that anything you do submit for consideration may be used against you in a trial by court-martial.

b. Personal appearance requested. If you exercise your right to appear personally before the commanding officer, you shall be entitled to the following rights at the proceeding:

(1) To be informed of your rights under Article 31(b), UCMJ;

(2) To be informed of the information against you relating to the offenses alleged;

(3) To be accompanied by a spokesperson provided or arranged for by you. A spokesperson is not entitled to travel or similar expenses, and the proceedings will not be delayed to permit the presence of a spokesperson. The spokesperson may speak on your behalf, but may not question witnesses except as the commanding officer may permit as a matter of discretion. The spokesperson need not be a lawyer;

(4) To be permitted to examine documents or physical objects considered as evidence against you that the commanding officer has examined in the case and on which the commanding officer intends to rely in deciding whether and how much nonjudicial punishment to impose;

(5) To present matters in defense, extenuation, and mitigation orally, in writing, or both;

(6) To have witnesses attend the proceeding, including those that may offer testimony or evidence against you, if their statements will be relevant and the witness(es) are reasonably available. A witness is not reasonably available if the witness requires reimbursement by the U.S. for any cost incurred in appearing, cannot appear without unduly delaying the proceedings, or if a military witness, cannot be excused from other important duties; and

(7) To have the proceedings open to the public unless the commanding officer determines that the proceedings should be closed for good cause. However, this does not require that special arrangements be made to facilitate access to the proceeding.

ELECTION OF RIGHTS

5. Knowing and understanding all of my rights as set forth in paragraphs 1 through 4 above, my desires are as follows

a. Right to refuse nonjudicial punishment. (Check one)

_____ I refuse nonjudicial punishment. I understand that, upon refusal of nonjudicial punishment, charges could be referred against me for trial by summary, special, or general court-martial, and that I also have the option of refusing trial by summary court-martial. I also understand that my refusal of nonjudicial punishment does not preclude administrative action against me.

_____ I accept nonjudicial punishment. I am advised that acceptance of nonjudicial punishment does not preclude further administrative action against me. This may include being processed for an administrative discharge which could result in an other than honorable discharge.

(Note: If the accused does not accept nonjudicial punishment, the matter should be submitted to the commanding officer for disposition.)

b. Personal appearance. (Check one)

_____ I request a personal appearance before the commanding officer.

_____ I waive my right to personal appearance. (Check one below)

_____ I do not desire to submit any written matters for consideration

_____ Written matters are attached.

c. Elections at personal appearance. (Check one or more)

_____ I request that the following witnesses be present at my nonjudicial punishment proceeding:

_____

_____

_____

_____

_____

_____ I request that my nonjudicial punishment proceeding be open to the public.

_____ _____

(Signature of witness and Date) (Signature of accused and Date)

_____ _____

(Name of witness) (Name of accused)

(CAPTAIN'S MAST) (OFFICE HOURS)
ACCUSED'S NOTIFICATION AND ELECTION OF RIGHTS
ACCUSED NOT ATTACHED TO OR EMBARKED IN A VESSEL
RECORD MAY BE USED IN AGGRAVATION IN EVENT OF LATER COURT-MARTIAL
(See JAGMAN 0109)

Notification and election of rights concerning the contemplated imposition of nonjudicial punishment in the case of _____, SSN _____, assigned or attached to _____.

NOTIFICATION

1. In accordance with the requirements of paragraph 4 of Part V, MCM, [insert current edition], you are hereby notified that the commanding officer is considering imposing nonjudicial punishment on you because of the following alleged offenses:

(Note: Here describe the offenses, including the UCMJ Article(s) allegedly violated.)

2. The allegations against you are based on the following information:

(Note: Here provide a brief summary of that information.)

3. You have the right to demand trial by court-martial in lieu of nonjudicial punishment. If you refuse nonjudicial punishment, charges could be referred for trial by summary, special, or general court-martial. If charges are referred to trial by summary court-martial, you may not be tried by summary court-martial over your objection. If charges are referred to a special or general court-martial you will have the right to be represented by counsel. Regardless of whether you accept or refuse nonjudicial punishment, you could be processed for administrative separation based on your misconduct. The maximum punishment that could be imposed if you accept nonjudicial punishment is:

_____

_____

4. If you decide to accept nonjudicial punishment, you may request a personal appearance before the commanding officer or you may waive this right.

a. Personal appearance waived. If you waive your right to appear personally before the commanding officer, you will have the right to submit any written matters you desire for the commanding officer's consideration in determining whether or not you committed the offenses alleged, and, if so, in determining an appropriate punishment. You are hereby informed that you have the right to remain silent and that anything you do submit for consideration may be used against you in a trial by court-martial.

b. Personal appearance requested. If you exercise your right to appear personally before the commanding officer, you shall be entitled to the following rights at the proceeding:

(1) To be informed of your rights under Article 31(b), UCMJ;

(2) To be informed of the information against you relating to the offenses alleged;

(3) To be accompanied by a spokesperson provided or arranged for by you. A spokesperson is not entitled to travel or similar expenses, and the proceedings will not be delayed to permit the presence of a spokesperson. The spokesperson may speak on your behalf, but may not question witnesses except as the commanding officer may permit as a matter of discretion. The spokesperson need not be a lawyer;

(4) To be permitted to examine documents or physical objects considered as evidence against you that the commanding officer has examined in the case and on which the commanding officer intends to rely in deciding whether and how much nonjudicial punishment to impose;

(5) To present matters in defense, extenuation, and mitigation orally, in writing, or both;

(6) To have witnesses attend the proceeding, including those that may offer testimony or evidence against you, if their statements will be relevant and the witness(es) are reasonably available. A witness is not reasonably available if the witness requires reimbursement by the U.S. for any cost incurred in appearing, cannot appear without unduly delaying the proceedings, or if a military witness, cannot be excused from other important duties; and

(7) To have the proceedings open to the public unless the commanding officer determines that the proceedings should be closed for good cause. However, this does not require that special arrangements be made to facilitate access to the proceeding.

5. In order to help you decide whether or not to demand trial by court-martial or to exercise any of the rights explained above should you decide to accept nonjudicial punishment, you may obtain the advice of a lawyer prior to any decision. If you wish to talk to a lawyer, a military lawyer will be made available to you, either in person or by telephone, free of charge, or you may obtain advice from a civilian lawyer at your own expense.

ELECTION OF RIGHTS

6. Knowing and understanding all of my rights as set forth in paragraphs 1 through 5 above, my desires are as follows:

a. Lawyer. (Check one or more, as applicable)

_____ I wish to talk to a military lawyer before completing the remainder of this form.

_____ I wish to talk to a civilian lawyer before completing the remainder of this form.

_____ I hereby voluntarily, knowingly, and intelligently give up my right to talk to a lawyer.

_____ _____
(Signature of witness) (Signature of accused)

_____
(Date)

(Note: If the accused wishes to talk to a lawyer, the remainder of this form shall not be completed until the accused has been given a reasonable opportunity to do so.)

_____ I talked to _____ , a lawyer, on _____.

_____ _____
(Signature of witness) (Signature of accused)

_____
(Date)

b. Right to refuse nonjudicial punishment. (Check one)

_____ I refuse nonjudicial punishment. I understand that, upon refusal of nonjudicial punishment, charges could be referred against me for trial by summary, special, or general court-martial, and that I also have the option of refusing trial by summary court-martial. I also understand that my refusal of nonjudicial punishment does not preclude administrative action against me based on my misconduct. This may include being processed for an administrative discharge which could result in an other than honorable discharge.

_____ I accept nonjudicial punishment. I understand that acceptance of nonjudicial punishment does not preclude further administrative action against me. This may include being processed for an administrative discharge which could result in an other than honorable discharge.

(Note: If the accused does not accept nonjudicial punishment, the matter should be submitted to the commanding officer for disposition.)

c. Personal appearance. (Check one)

_____ I request a personal appearance before the commanding officer.

_____ I waive my right to personal appearance. (Check one below)

_____ I do not desire to submit any written matters for consideration.

_____ Written matters are attached.

d. Elections at personal appearance. (Check one or more)

_____ I request that the following witnesses be present at my nonjudicial punishment proceeding:

_____

_____

_____

_____

_____

_____ I request that my nonjudicial punishment proceeding be open to the public.

_____ (Signature of witness and Date)

_____ (Signature of accused and Date)

_____ (Name of witness)

_____ (Name of accused)

ACKNOWLEDGEMENT OF ADVANCED EDUCATION ASSISTANCE REIMBURSEMENT

I understand that, in accordance with 10 U.S.C. § 2005, I may be required to reimburse the United States for the cost of advanced education assistance provided to me by the Government, if I voluntarily or as a result of misconduct fail to complete the required period of active duty service specified in the written agreement I entered into with the United States prior to accepting advanced education assistance.

_____
Signature

_____
Date

_____
Witness

NONJUDICIAL PUNISHMENT GUIDE

(Note: The formalities prior to and at the termination of the nonjudicial punishment normally are determined by custom and tradition in the Navy and Marine Corps.)

CO: You are suspected of committing the following violation(s) of the Uniform Code of Military Justice:

_____

_____

_____

You do not have to make any statement regarding the offense(s) of which you are accused or suspected, and any statement made by you may be used as evidence against you.

(Note: If it is reasonably foreseeable that the accused's statements during the nonjudicial punishment proceedings may be considered for introduction in evidence in a later court-martial, an explanation of rights and a waiver, in the format of Appendix A-1-v of the JAGMAN, will have to be obtained from the accused, prior to or during the hearing, before proceeding further.)

CO: You are advised that a nonjudicial punishment is not a trial and that a determination of misconduct on your part is not a conviction by a court. Further, you are advised that the formal rules of evidence used in trials by court-martial do not apply at nonjudicial punishment.

CO: I have a statement signed by you acknowledging that you were fully advised of your legal rights pertaining at this hearing. (Note: This statement will be either JAGMAN Appendix A-1-b, A-1-c, or A-1-d.)

CO: Do you understand this statement and do you understand the rights explained therein?

ACC: _____.

CO: Do you have any questions about them or do you wish to make any requests?

ACC: _____.

_____.

CO: [To witness (if any are present)] What can you tell me about the accused's involvement in (these) (this) offense(s)?

WIT: _____.

OR

CO: [To witness(es) who has/have previously provided written statement(s) when accused and commanding officer both have copies of the statement(s).] Do you adopt your statement(s) as your testimony here today?

WIT: _____.

CO: Do you have anything to add to or change in your statement?

WIT: _____ .

CO: (To accused) Would you like me to ask any further questions of this witness?

ACC: _____.

CO: (After all witnesses are questioned) I have before me the following (documents) (statements) (other physical evidence) that will be considered by me. Have you been given the opportunity to examine them?

ACC: _____.

CO: (If the answer is "no," offer the accused the opportunity to examine the evidence.)

CO: Is there anything that you wish to offer? (If the answer is "yes," permit the accused the opportunity to call his witnesses, make a personal statement in defense, and present other evidence.)

ACC: _____.

CO: Are there any other witnesses you would like to call or any other evidence you would like to present?

ACC: _____.

CO: Is there anything that you wish to offer that would lessen the seriousness of (this) (these) offense(s) or mitigate them?

ACC: _____.

CO: (To witness) What can you tell me about (accused's name) performance of duty?

WIT: _____.

CO: (To accused) Is there anything else you would like to present?

ACC: _____.

CO: I find that you have committed the following offenses:

_____

I impose the following punishment:

_____.

You are advised that you have the right to appeal this punishment to (identify the superior authority by name and organizational title). Your appeal must be made within a reasonable time, which is normally 5 days. Following this hearing, _____ will advise you more fully of this right to appeal. Do you understand?

ACC: _____.

CO: You are dismissed.

NONJUDICIAL PUNISHMENT
ACCUSED'S ACKNOWLEDGEMENT OF APPEAL RIGHTS

I, _____, SSN _____, assigned or attached to _____, have been informed of the following facts concerning my rights of appeal as a result of nonjudicial punishment held on _____:

a. I have the right to appeal to (specify to whom the appeal should be addressed).

b. My appeal must be submitted within a reasonable time. Five working days, excluding weekends and holidays, after the punishment is imposed is normally considered a reasonable time, in the absence of unusual circumstances. Any appeal submitted thereafter may be rejected as not timely. If there are unusual circumstances that I believe will make it extremely difficult or not practical to submit an appeal within 5 working days, I should immediately advise the officer imposing punishment of such circumstances and request an appropriate extension of time to file my appeal.

c. The appeal must be in writing.

d. There are only two grounds for appeal; that is:

(1) The punishment was unjust; or

(2) The punishment was disproportionate to the offense(s) for which it was imposed.

e. If the punishment imposed included reduction from the pay grade of E-4 or above, or was in excess of: arrest in quarters for 7 days, correctional custody for 7 days, forfeiture of 7 days' pay, extra duties for 14 days, restriction for 14 days, then the appeal must be referred to a military lawyer for consideration and advice before action is taken on my appeal.

_____ _____
(Signature of Accused and Date) (Signature of Witness and Date)

PUNITIVE LETTER OF REPRIMAND

(Date)

From: Commander, U.S. Fleet Forces Command
To: Lieutenant _____ T. _____, U.S. Navy, _____/1100
Via:

Subj: PUNITIVE LETTER OF REPRIMAND

Ref: (a) Report of investigation of collision between USS _____ (___), and SS _____, which occurred, on ____ April 20____
(b) Article 15, UCMJ [or results of trial, as appropriate]
(c) Para. 5 of Part V, MCM, [or R.C.M. 1003, as appropriate
]
(d) JAGMAN 0114 [or JAGMAN 0152, as appropriate]

1. Reference (a) is the record of an investigation convened by Commander, U.S. Fleet Forces Command, to inquire into the collision between USS _____ (_____) and SS _____ on ____ April 20_____. The collision occurred in the Atlantic Ocean about 60 miles east of Norfolk, Virginia. You were a party to the investigation and were accorded your rights as such. [As applicable, except in the case of a member attached to or embarked in a vessel, add: You have been advised that you have the right to refuse imposition of nonjudicial punishment and you have elected to accept nonjudicial punishment.]

2. [Here insert a precise statement of all relevant events and circumstances of the offense or offenses in violation of an Article or Articles of the Uniform Code of Military Justice for which the letter of reprimand is issued.]

3. Your actions clearly show that you were derelict in the performance of your duties as Officer of the Deck, USS _____, on the morning of ____ April 20____ in that you negligently failed to:

a. Maintain USS _____ on a safe course as required by U.S. Navy Regulations (1990).

b. Employ all means and devices available to you for detecting and avoiding danger from collision as required by USS _____ Standing Night Orders and U.S. Navy Regulations (1990).

c. Inform your commanding officer when you made a course and speed change at about 6 minutes before the collision as required by U.S. Navy Regulations (1990).

4. Pursuant to references (b), (c), and (d) you are hereby reprimanded for your negligence in the performance of duty as set forth above.

[Here insert final paragraphs prescribed by 0114f(3)(d).]

[Signature]

OFFICER NJP REPORT

(See JAGMAN 0119)

[LETTERHEAD]

1621
17
[Date]

From: Commanding General, 1st Marine Aircraft Wing
To: Commandant of the Marine Corps (JAM)/Commander, Navy Personnel Command (PERS-834)
Via: (1) Commanding General, III Marine Expeditionary Force
(2) Commanding General, Fleet Marine Forces Pacific

Subj: REPORT OF NONJUDICIAL PUNISHMENT ICO FIRST LIEUTENANT JOHN J. JONES, USMC, 123 45 6789/1369

Ref: (a) MCO P5800.8B (LEGADMINMAN)/NAVPERS 15560D
(b) FMFPAC2O 5810.1[insert appropriate series letter]
(c) UCMJ, Article 15
(d) Part V, MCM
(e) JAGMAN, Chapter 1, Part B
(f) Article 1122, U.S. Navy Regulation (1990)

Encl: (1) Record of Hearing under Article 15, UCMJ
(2) Punitive Letter of Reprimand
(3) 1stLt Jones' ltr 1621 17 of [date]
(4) 1stLt Jones' statement regarding adverse matter

1. This report is forwarded for inclusion in 1stLt Jones' official records per paragraph 4003 of reference (a) via intermediate commanders, as directed by paragraph 3d(2) of reference (b).

2. On 4 December 2010, in accordance with references (c), (d), and (e), nonjudicial punishment was imposed on 1stLt Jones for conduct unbecoming an officer. As a result, he was awarded a punitive letter of reprimand and a forfeiture of $400.00 pay per month for two months.

3. Details of the hearing and the circumstances of the offense(s) are set forth in enclosure (1). A copy of the punitive letter of reprimand is attached as enclosure (2).

4. As reflected in enclosure (3), 1stLt Jones did not appeal the punishment. Accordingly, the nonjudicial punishment is now final and will be reflected in the fitness report that includes the date it was imposed, 4 December 2010.

5. I recommend that 1stLt Jones be retained on active duty until the expiration of his obligated active service. (I recommend he/she (not) be required to show cause for retention in the U.S. Naval Service.

FOR OFFICIAL USE ONLY

6. By copy hereof, 1stLT Jones is notified of his right, per reference (f), to submit his comments, within 15 days of receipt, concerning this report of nonjudicial punishment and the letter of reprimand which will be included as adverse material in his official records. His comments, if any, will be attached as enclosure (4).

[Signature]

Copy to:
Commanding Officer, MAG-32
Commanding Officer, MALS-32
1stLt Jones

SAMPLE FIRST ENDORSEMENT

FIRST ENDORSEMENT on CG, 1stMAW ltr 1621 17 of [DATE]

From: Commanding Officer, Marine Wing Aircraft Squadron 1

To: First Lieutenant John J. Jones, USMC, 123 45 6789/1369

Subj: PUNITIVE LETTER OF REPRIMAND

1. Delivered.

[Signature]
By direction

SUMMARY COURT-MARTIAL ACKNOWLEDGEMENT OF RIGHTS AND WAIVER

I, Joe Sailor, assigned to USS NEVERSAIL (CVN 007), understand the following facts and rights regarding summary courts-martial:

1. I have the right to consult with a lawyer prior to deciding whether to accept trial by summary court-martial. Should I desire to consult with counsel, I understand that a military lawyer may be made available to advise me free of charge, or in the alternative I may consult with a civilian lawyer at my own expense.

2. I realize that I may refuse trial by summary court-martial, in which event the commanding officer may refer the charge(s) to a special or general court-martial. My rights at a summary court-martial would include:

a. the right to confront and cross-examine all witnesses against me;

b. the right to plead not guilty and the right to remain silent, thus placing upon the government the burden of proving my guilt beyond a reasonable doubt;

c. the right to have the summary court-martial call, or subpoena, witnesses to testify in my behalf;

d. the right, if found guilty, to present matters which may mitigate the offense or demonstrate extenuating circumstances as to why I committed the offense; and

e. the right to be represented at trial by a civilian lawyer provided by me at my own expense, if such appearance will not unreasonably delay the proceedings and if military exigencies do not preclude it.

3. I understand that the maximum punishment that may be imposed at a summary court-martial is:

On E-4 and below
Confinement for 1 month, 45 days hard labor without confinement, or 60 days restriction; and
Forfeiture of two-thirds pay for 1 month; and
Reduction to the lowest paygrade.

On E-5 and above
60 days restriction, and
Forfeiture of 2/3 pay for 1 month, and
Reduction to the next inferior paygrade.

4. Should I refuse trial by summary court-martial, the commanding officer may refer the charge(s) to trial by special or general court-martial. At a special or general courts-martial, in addition to those rights set forth above with respect to a summary court-martial, I would also have the following rights:

a. The right to be represented at trial by a military lawyer, free of charge, including a military lawyer of my own selection if that lawyer is

reasonably available. I would also have the right to be represented by a civilian lawyer at my own expense.

b. The right to be tried by a member panel composed of at least three (special court-martial) or five (general court-martial) officers or, at my request, at least one-third of the members would be enlisted personnel. If tried by a court-martial with members, two-thirds of the members, voting by secret written ballot, would have to agree in any finding of guilty, and two-thirds of the members would also have to agree on any sentence to be imposed should I be found guilty.

c. The right to request trial by a military judge alone. If tried by a military judge alone, the military judge alone would determine my guilt or innocence and, if found guilty, he alone would determine the sentence.

5. I understand that the maximum punishment for the offense(s) presently charged against me is the following:

Special Court-Martial - a bad-conduct discharge; confinement for 12 months, forfeiture of two-thirds pay per month for 12 months; fine, and reduction to the lowest enlisted pay grade.

General Court-Martial - *[insert maximum punishment here]*

Knowing and understanding my rights as set forth above, I (do) (do not) desire to consult with counsel before deciding whether to accept trial by summary court-martial.

Knowing and understanding my rights as set forth above (and having first consulted with counsel), I hereby (agree) (object) to trial by summary court-martial.

Signature of witness	Signature of accused and date
Print name	Print name

SUMMARY COURT-MARTIAL
WAIVER OF THE APPEARANCE OF COUNSEL

I have been advised by the summary court-martial officer that I cannot be tried by summary court-martial without my consent. I have also been advised that if I consent to trial by summary court-martial I may be represented by civilian counsel provided at my own expense (if such appearance will not unreasonably delay the proceedings, if military exigencies do not preclude it, and if counsel is qualified under Rule for Courts-Martial 502(d)(3)). If I do not desire to be represented by civilian counsel provided at my own expense, a military lawyer may be appointed to represent me upon my request (if such appearance will not unreasonably delay the proceedings and if military exigencies do not preclude it). It has also been explained to me that if I am represented by a lawyer (either civilian or military) at the summary court-martial, the summary court-martial will be considered a criminal conviction and will be admissible as such at any subsequent court-martial. On the other hand, if I am not represented by a lawyer, the summary court-martial may still be considered a criminal conviction, but the results of the court-martial will not be admissible as a prior conviction at any subsequent court-martial. By my signature below, I hereby waive the appearance of a lawyer, military or civilian, to represent me at the summary court-martial.

Signature of Summary Court-Martial	Signature of Accused
Type Name and Rank	Date

REQUEST FOR GRANT OF IMMUNITY AND ORDER TO TESTIFY

INSTRUCTIONS: Answer each question as accurately and completely as possible. (Especially Date of Birth and Social Security Number)

From: Commander, Navy Region XX
To: Witness Immunity Unit, Criminal Division, U.S. Department of Justice
Via: Office of the Judge Advocate General (Code 20)

Subj: REQUEST FOR GRANT OF IMMUNITY ICO UNITED STATES V. JONES

Ref: (a) JAGMAN, 0138
(b) JAGMAN, 0139

Encl: (1) As necessary

1. This request for a grant of immunity is submitted in accordance with reference (a). The following information is provided in support:

(1) Name of Witness:
(2) Location:
(3) Nature of Proceeding:
( ) Trial
( ) Preliminary Hearing
( ) Other
(4) Name of Subject/Accused
(5) Date of Testimony:
(6) Proffer of Anticipated Testimony:
( ) None Obtained ( ) Proffer by Witness ( )Debriefing of Witness
( ) Proffer by Counsel ( ) Pursuant to Plea Agreement

(7) Summary of Case or Proceeding:

(8) Witness' Background and Role in Case or Matter and Summary of Anticipated Testimony or Information:

(9) Witness' Family Relationship, if any, to the Subject(s) or Accused(s):

(10) Assurances or Promises, if any, to Witness in Return for his/her Testimony:

(11) Acts of Witness Considered as a Waiver of Fifth Amendment Privilege:

(12) Means Other than Immunity to Obtain this Testimony:

(13) Basis Other than Proffer for Summary of Anticipated Testimony:

(14) Relative Culpability of Witness Compared to Subject(s) or Accused(s):

(15) Why Immunity is Necessary to the Public Interest: State Facts.

(16) Basis for Belief that Witness Will Assert Fifth Amendment Privilege:

(17) Likelihood that Witness Will Testify if Immunity is Granted:

(18) Prosecution of Witness in this Case or Matter:
( ) Yes ( ) No ( ) Acquitted ( ) Convicted ( ) Plea
If not indicted, why not? If convicted, has the witness been sentenced?

(19) Witness' Privilege Survives Because:

(20) Witness is Presently Incarcerated: ( ) Yes ( ) No
If yes, give details:

(21) Pending Federal or Local Charges against Witness:
( ) Yes ( ) No If yes, give details:

(22) Federal and State Offenses by Witness that His Testimony Could Disclose:

(23) Opposition, if any, to Granting Immunity by State or Local Prosecuting Officials:

(24) Effect, if any, of Granting Immunity to the Witness Upon Any Other Federal District:

(25) Conviction of Witness Possible on Evidence Other than His Own Testimony?
( ) Yes ( ) No If yes, give details:

(26) Violations (Statutes & Descriptions) by Subject(s) and Accused(s):

(27) Witness Previously Immunized? ( ) Yes ( ) No If yes, give details:

(28) Witnesses for whom Immunity has been Authorized in this Proceeding:

(29) Date Investigation Began:

(30) Witness Subject to Electronic Surveillance? ( ) Yes ( ) No If yes, give details:

(31) Birth date of Witness:
(32) FBI I.D. No.: (if known)
(33) Birthplace:
(34) Social Security No:
(35) Alias:
(36) Address of Witness:

(37) Has United States Attorney Been Notified? ( ) Yes ( ) No
Who is the point of contact at the U.S. Attorney's Office?

_____
GCMCA Signature

PRIVACY ACT NOTIFICATION

Authority: 18 U.S.C. § 6004; Executive Order 12473; R.C.M. 704, MCM
Principal Purpose: The requested information will be provided to law enforcement agencies in order to expedite review of this request for immunity, and is requested for the purpose of allowing those agencies the opportunity to review the propriety of granting immunity to you in this case.
Routine Use: This information will be provided to law enforcement agencies, both State and Federal, in the performance of their duties under law to review this request for immunity.
Disclosure is Voluntary: Your provision of this information is voluntary; however, your failure to provide the requested information may result in delay or denial of the granting of immunity to you in this case.

_____ _____
Signature Date

_____
Witness

GRANT OF TESTIMONIAL IMMUNITY AND ORDER TO TESTIFY

IN THE MATTER OF

U N I T E D S T A T E S v. JOE SAILOR RATE SERVICE	GRANT OF TESTIMONIAL IMMUNITY AND ORDER TO TESTIFY

To: (Witness to whom immunity is to be granted)

1. You are a material witness in the matter United States v. [Insert Accused], U.S. Navy involving charges of [insert UCMJ alleged violations].

2. As an officer empowered to convene general courts-martial and pursuant to 18 U.S.C. §§ 6002 and 6004, I hereby make the following findings:

a. That you possess information relevant to the trial by court-martial in the matter described in paragraph (1), and that the presentation of your testimony at the trial is necessary to the public interest; and

b. That you will likely refuse to testify on the basis of your privilege against self-incrimination if subpoenaed to appear as a witness.

3. Pursuant to Rule for Courts-Martial 704, MANUAL FOR COURTS-MARTIAL and JAGMAN § 0138, you are hereby granted immunity from the use of your testimony or other information given by you (including any evidence directly or indirectly derived from your testimony or from the other information you provide) against you in any criminal case, except a prosecution for perjury, giving a false statement, or wrongful failure to testify.

4. This grant of immunity from the use of your testimony is effective only upon the condition that you testify truthfully and under oath in the matter described in paragraph (1).

5. On the basis of facts above and pursuant to 18 U.S.C. § 6004, I hereby order you to appear and testify before the court-martial convened for the trial in the matter described in paragraph (1).

[6. This order is issued with the approval of the Attorney General of the U.S. set forth in enclosure 1 annexed hereto.]

I. M. ADMIRAL
Commander, Navy Region _____

GRANT OF TRANSACTIONAL IMMUNITY AND ORDER TO TESTIFY

IN THE MATTER OF

U N I T E D S T A T E S v. JOE SAILOR RATE SERVICE	GRANT OF TRANSACTIONAL IMMUNITY AND ORDER TO TESTIFY

To: (Witness to whom immunity is to be granted)

1. You are a material witness in the matter United States v. [Insert Accused], U.S. Navy involving charges of [insert UCMJ alleged violations].

2. As an officer empowered to convene general courts-martial and pursuant to 18 U.S.C. §§ 6002 and 6004, I hereby make the following findings:

a. That you possess information relevant to the trial by court-martial in the matter described in paragraph (1), and that the presentation of your testimony at the trial is necessary to the public interest; and

b. That you will likely refuse to testify on the basis of your privilege against self-incrimination if subpoenaed to appear as a witness.

3. In consideration of your testimony as a witness in the matter described in paragraph (1), you are hereby granted immunity from prosecution for any offense connected with the offenses(s) described in paragraph (1) about which you testify truthfully under oath.

4. This grant of immunity from prosecution is effective only upon the condition that you actually testify as a witness. This grant of immunity from prosecution extends only to the offense(s) described in paragraph (1) in which you were implicated and about which you testify under oath, and does not extend to prosecution for perjury, giving a false statement, or wrongful failure to testify.

5. On the basis of the facts above and pursuant to 18 U.S.C. § 6004, I hereby order you to appear and testify before the court-martial convened for the trial in the matter described in paragraph (1).

[6. This order is issued with the approval of the Attorney General of the U.S. set forth in enclosure 1 annexed hereto.]

I. M. ADMIRAL
Commander, Navy Region _____

APPELLATE POWER OF ATTORNEY

KNOW ALL PERSONS BY THESE PRESENTS:

That I,_____,

_____, _____, having been
(SSN) (Branch of Service)

convicted by_____ court-martial on _____,
(Type of Court) (Date)

do hereby make, constitute, and appoint my appellate defense counsel of record, appointed pursuant to Article 70, UCMJ, 10 U.S.C. § 870 (2007), and R.C.M. 1202, MCM (2008 ed.), as my true and lawful attorney-in-fact for me in my name, place, and stead, and for my use and benefit, and, as my act and deed, to accept service of the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA) decision in my case and thereby start the running of the 60-day appeal period within which I may petition the U.S. Court of Appeals for the Armed Forces (CAAF) for a grant of review and, in the event that any part of my conviction is affirmed by NMCCA, to execute, file, and prosecute a petition for grant of review before CAAF pursuant to Article 67, UCMJ, or, when in the judgment of my attorney-in-fact, my attorney-in-fact deems further review of my conviction is unwarranted due to lack of meritorious grounds to be urged upon appeal, to waive my right to petition CAAF; in the event that any part of my conviction is affirmed by the CAAF, to execute, file, and prosecute a petition for writ of certiorari for grant of review before the U.S. Supreme Court.

Giving and granting to my attorney-in-fact full power and authority to do and perform every act and thing requisite and necessary to be done in the premises, as fully to all intents and purposes as I might or could do if personally present at the doing hereof, with full power in me of substitution and revocation, hereby ratifying and confirming all that my said attorney-in-fact may or shall lawfully do or cause to be done by virtue hereof. This power of attorney shall remain in full force and effect unless I waive or withdraw from appellate review.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this _____ day of _____, 20_____.

_____
(Signature of Accused)

Witnessed by:

_____
(Signature of Counsel)

_____
(Name of Counsel)

APPELLATE & POST-TRIAL RIGHTS STATEMENT

You are advised that your trial defense counsel is required by law to fully explain to you the following post-trial and appellate rights and that you have the right to request that the military judge explain all or any portion of your appellate rights in open court prior to the adjournment of your court-martial.

Record of trial (ROT)

A copy of the ROT will be prepared and given to you. You may request that your copy of the ROT be delivered to your trial defense counsel.

Staff Judge Advocate or Legal Officer's Recommendation (SJAR)

If you received a punitive discharge or were sentenced by a general court-martial, the convening authority (CA)'s staff judge advocate or legal advisor will submit an SJAR to the CA. Before forwarding the SJAR and the ROT to the CA, this legal advisor will serve a copy of the SJAR upon your trial defense counsel. A separate copy will be served on you.

If it is impracticable to serve the SJAR on you for reasons including your unauthorized absence, your copy will be forwarded to your defense counsel. You may also request on the record at this court-martial, or in writing, that your copy be sent to your trial defense counsel instead of yourself.

Submission of Matters to the Convening Authority

You have a right to submit matters to the CA before that officer takes action on your case. In this regard, you have the right to request deferment of any sentence to confinement. These matters may be submitted any time after adjournment but must be submitted within 10 days after a copy of the authenticated ROT or if applicable, after the SJAR is served on you or your defense counsel, whichever is later. The CA may extend these periods for good cause, but not for more than an additional 20 days. Failure to submit matters within the time prescribed waives the right to submit matters later.

Action by the Convening Authority

The CA will take action on the sentence adjudged and may, in his discretion, take action on findings of guilty. The action to be taken on the findings and sentence is within the sole discretion of the CA and is a matter of command prerogative. The CA is not required to review the case for legal errors or factual sufficiency.

In taking action on the sentence, the CA may approve, disapprove, commute, or suspend the sentence in whole or in part. **The CA may never increase the severity of the sentence adjudged.** The CA is not empowered to reverse a finding of not guilty; however, the CA may change a finding of guilty to a charge or specification to a finding of a lesser included offense included within that charge or specification, may disapprove a finding of guilty and order a rehearing, or may set aside and dismiss any charge or specification.

Review

If you were tried by a special court-martial and your sentence, as finally

approved by the CA, does not include a punitive discharge, your case will be reviewed under the direction of the staff judge advocate for the CA's superior general court-martial convening authority (GCMCA). You may suggest, in writing, possible legal errors for the judge advocate to consider and that judge advocate must file a written response to legal errors noted by you. After such review, and completion of any required action by the GCMCA, you may request that the Judge Advocate General of the Navy (JAG) take corrective action. Such a request must be filed within two years of the CA's action, unless the time is extended for good cause.

If you were tried by a general court-martial and your sentence, as finally approved by the CA, does not include a punitive discharge or at least one year of confinement, your case will be forwarded to JAG. You may suggest, in writing, possible legal errors or other matters that JAG should consider. The ROT may be examined for any legal errors and to determine whether the sentence was proper. If appropriate, JAG may take corrective action.

If your sentence, as finally approved by the CA, includes a punitive discharge (regardless of the type of court-martial), death, dismissal, or confinement for one year or more, your case will be examined by the Navy-Marine Corps Court of Criminal Appeals (NMCCA). NMCCA will review your case for legal errors, factual sufficiency, and appropriateness of sentence. This review is automatic. Following this process, your case may be reviewed by the United States Court of Appeals for the Armed Forces (CAAF), and ultimately may be reviewed by the United States Supreme Court. CAAF review is discretionary unless your case is certified by the Judge Advocate General or the sentence extends to death.

Waiver of Review

You may waive appellate review, giving up the foregoing rights, or you may withdraw your case from appellate review at a later time. Once you file a waiver or withdrawal, your decision is final and appellate review is barred. If you waive or withdraw appellate review, your case will be reviewed by a judge advocate for certain legal errors. You may submit, in writing, suggestions of legal errors for consideration that the judge advocate must individually respond to in writing. The judge advocate's review will be sent to the GCMCA for final action. Within two years after such final action, you may request that JAG take corrective action in your case. The two year period may be extended for good cause. You also have the right to the advice and assistance of counsel in exercising or deciding to waive your post-trial and appellate rights.

Right to Counsel

It is your trial defense counsel's responsibility to represent you during the CA's action stage of your court-martial conviction. Your trial defense counsel is responsible for examining the ROT for error and, where applicable, the SJAR for errors or omissions. It is your trial defense counsel's obligation to advise and assist you in preparing clemency and other matters for submission to the CA for consideration prior to action being taken on the ROT.

If your case is reviewed by NMCCA, military appellate counsel will be appointed to represent you at no cost to you. If you choose, you may engage a civilian counsel at no expense to the United States. If your case should be reviewed by CAAF or by the United States Supreme Court, you continue to

have similar appellate counsel rights before these courts as provide in Art 70, UCMJ.

Acknowledgement

I acknowledge (1) that prior to adjournment of my court-martial, I was provided with the above written advice; (2) that I have read and I understand my post-trial and appellate rights; (3) that I discussed my rights with my trial defense counsel prior to signing this form; (4) that the military judge will discuss my appellate rights with me on the record prior to adjournment of the court, if I so desire.

I specifically request that my copy of the ROT be delivered to:

_____ me or _____ my counsel, LT X. X. XXXXX

I specifically request that my copy of the SJAR be delivered to:

_____ me or _____ my counsel, LT X. X. XXXXX

If applicable, civilian counsel's name, address, email and telephone numbers are:

Email: _____
Telephone (_____)_____;(_____)_____

Detailed defense counsel's address, email and telephone numbers are:

Email: _____
Telephone (_____)_____;(_____)_____

I understand that in order for my defense counsel or any successor counsel properly to represent me, I must keep counsel informed of my current mailing address until my appellate process is complete. In this regard, I may be contacted at the following permanent address, email and phone numbers:

Email: _____
Telephone (_____)_____;(_____)_____
Additional address, email and phone numbers are:

_____

Forward any change of address or phone number to:

Navy-Marine Corps Appellate Review Activity
Administrative Support (Code 40)
1254 Charles Morris Street SE, Ste B01

Washington Navy Yard, DC 20374-5124

_____
Date

_____ _____
XXXXX XXXXX
Defense Counsel Accused

REPORT OF RESULTS OF TRIAL

From:

Subj: REPORT OF RESULTS OF TRIAL

1. Pursuant to R.C.M. 1101(a) and 1304(b)(2)(f)(v), MCM, [INSERT CURRENT EDITION], notification is hereby given in the case of U.S. v. [RANK] [FIRST] [LAST] [SSN], a trial by [GENERAL] [SPECIAL] courts-martial occurring at [LOCATION], convened by [COMMAND] [UIC].

2. Offenses, pleas, and findings:

a. Charges & Specifications / Pleas & Findings
(with description of offense(s), including whether convicted of lesser included offenses)

b. Any preferred charge withdrawn before or at trial: __NO __YES
(include a brief description)

_____
_____
_____

c. Partial acquittal based on mental incompetence: __NO __YES
(include a brief description of offenses charged)

_____
_____
_____

[Note: If an accused is found incompetent to stand trial or not guilty of all charges and specifications by reason of lack of mental responsibility and a Report of Results of Trial would not otherwise be completed, then the trial counsel must inform the OJAG (Code 40), 716 Sicard Street, SE, Suite 1000, Washington Navy Yard, DC 20374-5047.]

3. Forum: Judge alone _____ Members _____ Enlisted Members _____

4. Sentence adjudged (if specific sentence provision does not apply indicate "NA"):

Discharge (Dismissal, DD, BCD)	
Confinement	
Hard Labor w/out confinement	

Reduction	
Forfeiture	
Reprimand	
Other	

5. Date sentence adjudged: _____. Adjudged forfeitures, adjudged reduction in grade, and automatic forfeitures, if any, become effective _____ (14 days after date sentence was announced) unless indicated otherwise in paragraph 8, below, or unless written notice of deferment by the Convening Authority is received by authorities with responsibility for the accused's service and pay records. Absent pertinent direction to the contrary in paragraph 8, below, or such written notice of deferment, action by those authorities in this case giving effect to the adjudged and automatic sentence, when applicable, must occur by the second date in this paragraph. Trial counsel must be provided the originals of such written approved deferments for inclusion in the record of trial (R.C.M. 1103, MCM).

6. Automatic forfeitures apply: Yes ____ No____. See paragraph 8, below, for the specific sentence to be given effect in this case, consistent with paragraph 5, above.

a. General court-martial _____ (forfeiture of all pay and allowances while confined)

b. Special court-martial _____ (2/3 pay while confined)

7. Credits to be applied to confinement, if any:

a. Pretrial Confinement: _____ days (see note below)

b. Judicially-ordered credits: _____ days

c. Total credits: _____ days

8. Terms of pretrial agreement concerning sentence, if any (YES/NO response only):

MJ alone:	Confinement limitation:
Non-capital referral:	Forfeiture limitation:

Restitution:	Reduction in grade limitation:
Referral to lower forum:	Allotment to family:
Cooperation:	Allotment to victim:
Deferment of confinement:	Other: (brief description)

9. Upon completion of the Convening Authority's action in this case, sex offender notifications may be required per 42 U.S.C. § 14071: ____ No ____ Yes

See DODI 1325.7, Administration of Military Correctional Facilities and Clemency and Parole Authority, Enclosure 27, for a list of offenses requiring sex offender notifications.

10. Collection of a DNA sample from the accused is required per 10 U.S.C. § 1565, _____No _____Yes. If collection is required, collection may be effected before the Convening Authority acts pursuant to Under Secretary of Defense for Personnel and Readiness memo of 18 April 2005.

(Signature)
Trial Counsel

Distribution:
Convening Authority
Commanding Officer of accused
CO/OIC of brig (if confinement adjudged)
PDS/Unit Diary Clerk
Disbursing Office
Record of trial
Officer exercising general courts-martial jurisdiction

[Note: Each day of pretrial confinement shall be counted as a day of pretrial confinement, except that, if the sentence includes confinement, the day on which sentence is announced shall not be counted as a day of pretrial confinement. Notwithstanding the foregoing, authorities responsible for sentence computation will count the day of sentencing as a day of pretrial confinement, when the accused was in pretrial confinement on the day that a sentence including confinement was announced and, for any reason (e.g., immediate deferment), that day does not count towards service of the sentence to confinement.]

REPORT OF SUMMARY COURT-MARTIAL

Instruction: The following information shall be included in the summary court-martial record of trial. Use of DD Form 2329 is not required, but is strongly recommended because it fulfills the requirements of R.C.M. 1305, MCM.

1. Location, date(s) conducted, persons present (with title and role, e.g., witness, accused, summary court-martial, etc.), and findings.

2. List of documents attached to report of summary court-martial, including:

a. Convening order

b. Charge sheet

c. Documents and physical evidence, where practicable

d. Acknowledgement of rights advisory, including waiver of right to refuse summary court-martial.

3. Summary of evidence on the merits (required for each charge and specification of which the accused is found guilty contrary to his/her plea):

a. Pleas

b. Offense of which convicted

c. Evidence supporting guilt

(1) Witness testimony

(2) Documents presented (notation as to whether admitted or denied, description if not attached)

(3) Other physical evidence (notation as to whether admitted or denied, description if not attached)

(4) Stipulations

(5) Other

d. Evidence supporting defense:

(1) Testimony of accused

(2) Witness testimony

(3) Documents presented (notation as to whether admitted or denied, description if not attached)

(4) Other physical evidence (notation as to whether admitted or denied, description if not attached)

(5) Stipulations

(6) Any other matters submitted by the defense

4. Matters submitted in aggravation, and extenuation and mitigation:

a. Matters in aggravation

(1) Documents presented (notation as to whether admitted or denied, description if not attached)

(2) Witness(es) testimony

(3) Any other matters

b. Matters in extenuation and mitigation:

(1) Statement of accused

(2) Documents presented (notation as to whether admitted or denied, description if not attached)

(3) Witness(es) testimony

(4) Any other matter submitted by the defense

5. Sentence adjudged:

6. Clemency or suspension recommendation:

SUBSTITUTE RECORD FOR EVIDENCE OF CHILD PORNOGRAPHY

Case Name:

Date of Trial:

Place of Trial:

Convening Authority:

Military Judge:

Trial Counsel:

Defense Counsel:

NCIS case tracking number (If NCIS has not assumed jurisdictional authority over the case and has not recorded a case tracking number for this case, designate the specific law enforcement agency exercising primary jurisdiction, lead law enforcement agent handling the case, and any other relevant tracking data particular to that law enforcement agency in order to allow easy reference if required.)

Evidence marked as:

Detailed description of Evidence including format, number of images, and statement of whether images were published to members. This description should be sufficient for purposes of R.C.M. 1103(b)(2)(D)(v) and R.C.M. 1103(b)(3)(B).

Statement of Certification:

The Military Judge, Trial Counsel and Defense Counsel hereby certify that the description of the evidence as contained above accurately conveys the substance of the evidence offered and/or admitted at trial.

UNITED STATES NAVY/MARINE CORPS
SAMPLE SJAR
(See JAGMAN 0151)

From: Staff Judge Advocate
To: Convening Authority

Subj: STAFF JUDGE ADVOCATE'S RECOMMENDATION ICO UNITED STATES V. SN/LCPL ACCUSED USN/USMC

Ref: (a) Manual for Courts-Martial (2008 ed.)
(b) 10 U.S.C. § 1565
(c) JAGMAN

Encl: (1) TC ltr 5814/xx XXX of date (Report of Results of Trial)
(2) Pretrial Agreement
(3) Vacation Hearing ICO SN/LCpl Accused
(4) DC ltr (1105/1106 Matters)
(5) Record of Service Information
(6) Deferment Request and Response
(7) Record of Trial

1. **Purpose of Recommendation**. This recommendation is to assist you in deciding what action to take on the sentence in the Court-Martial of SN/LCpl Accused. While action on the guilty findings or sentence is a matter within your discretion, you must consider the results of trial (enclosure (1)), this recommendation and any addendum thereto, and any post-trial matters submitted by the defense. You may also consider the record of trial and personnel record of the accused as well as any other matters you deem appropriate. If, however, these other matters are adverse to the accused and not included in the record of trial, the defense must be given the opportunity to comment. Reference (a).

2. **Results of Trial**. I have reviewed the results of trial, enclosure (1), and it accurately reflects the charges, findings, and sentence adjudged in this case, as well as any applicable confinement credit.

3. **Pretrial Agreement**. **(if applicable, required)**

a. (*Option 1*) There is no pretrial agreement in this case. ***OR***

a. (*Option 2*) Enclosure (2) is a copy of the pretrial agreement. *and*

(1) (Alt A) That agreement had no effect on the sentence adjudged. ***or***

(1) (Alt B) A review of the record of trial indicates that the accused has complied with the terms of the agreement and is entitled to the agreed upon benefit. Accordingly, you are required to . . . . [1] ***OR***

[1] A better practice is to summarize the benefit mandated by the PTA. While this is not required under the current rule, if a copy of the PTA is provided to the convening authority, we should not expect him to sift through the agreement in search of the sentencing limits. Recognizing this, SJAs should be accurate but avoid repeating the overly complicated language of the PTA when describing the required benefit to the accused.

a. (*Option 3*) Enclosure (2) is a copy of the pretrial agreement; however, on *(date)* the accused breached the terms of the pretrial agreement by *(generic description of the basis for vacating the agreement and the nexus between that conduct and a specific requirement within the PTA)*. Enclosure (3) pertains. Therefore, you are not obligated to fulfill the terms of the agreement. However, you may, as a matter of clemency or otherwise, take whatever action you deem appropriate in approving or executing the findings and sentence.

4. **Recommendation of the Sentencing Authority**.

a. (Option 1) I have reviewed the record of trial and there is no clemency recommendation by the sentencing authority made in conjunction with the announced sentence. ***OR***

a. (Option 2) The sentencing authority, in conjunction with the announced sentence, recommends the following clemency: *(if possible, quote exact language from the record)*.

5. **Legal Error**.

a. (Option 1) The defense has not yet raised any allegations of legal error, but may do so in response to this recommendation. ***OR***

a. (Option 2) The defense has raised allegations of legal error. Having reviewed these allegations, I disagree with the defense's assertion of error. Thus, no corrective action on the findings or sentence is warranted. Enclosure (4). ***OR***

a. (Option 3) The defense has raised allegations of legal error. Upon review of these allegations, I assume, without conceding, that *(specify)* constitutes error; however, because these errors did not materially prejudice the substantial rights of the accused, no corrective action on the findings or sentence is warranted. *(I disagree with the defense's remaining allegations of error.)* Enclosure (4). ***OR***

a. (Option 4) The defense has raised allegations of legal error. Upon review of these allegations, I agree that *(specify)* constitutes error and corrective action is warranted. *(I disagree with the defense's remaining allegations of error.)* Enclosure (4)[2].

6. **Post-Trial Matters Submitted by the Accused**.

a. (Option 1) Post-trial matters by the defense will be provided when received. You are required to consider these matters in determining whether to approve or disapprove any of the findings of guilty and the action you take on the sentence. If, however, the defense does not submit matters within the time allowed, they will have waived this right. ***OR***

---

[2] A better approach is to view the defense's submission of errors as a whole and render a general statement of disagreement, unless circumstances dictate otherwise. One notable exception is if you agree with the defense over one or more of several issues raised. In that case, it is necessary to precisely identify the error you believe is legitimate in order to ensure appellate authorities give credit to any consideration or corrective action taken to address that particular issue. You should then comment that you disagree with the remaining claims of error, if there are any.

a. (Option 2) Post-trial matters submitted by the defense are contained in enclosure (4). You are required to consider these matters in determining whether to approve or disapprove any of the findings of guilty and the action you take on the sentence.

7. **DNA Collection**. Federal law and service regulations require authorities, upon conviction of certain qualifying offenses, to collect a sample of the offender's DNA. The order promulgating your action in those cases must contain certain notice requirements. Reference (b).

a. (Option 1)This case does not involve a qualifying offense. ***OR***

a. (Option 2) This case requires DNA collection, thus the order promulgating your action must comply with applicable notice requirements.

8. **Post-Trial Processing**.

a. (Option 1) Service regulations require that you take action within 120 days from the completion of trial. This post-trial processing objective will be met. Reference (c). ***OR***

a. (Option 2) Service regulations require that you take action within 120 days of the completion of trial. There is *(There will likely be)* delay in the post-trial processing of this case. This delay is caused by *(be specific, "administrative error" is not acceptable.* ***Specific reasons*** *and* ***dates*** *must support the narrative. If the delay is caused by negligence, admit the error and assess for prejudice, which may or may not require some corrective action on the sentence.)* In the event that your action occurs more than 120 days from the completion of trial, you are required to report to CMC (JAM), in writing and under your personal signature, that delay has occurred in this case and the reasons for the delay. A copy of the letter must be included in the record of trial. Reference (c); *and*

(1) Despite the delay, no corrective action is warranted. *or*

(1) As a result of the delay, corrective action is appropriate[3].

9. **Companion Cases**. In order to make an informed decision in this case, service regulations require you to note in your action the separate trial of any companion cases. Reference (c). Companion cases are other cases referred to trial by you and involve servicemembers who, along with the accused, engaged in criminal conduct in a concerted effort to achieve a common goal.

a. (Option 1) There are no companion cases to this case. ***OR***

a. (Option 2) United States v. ACCUSED II, is a companion case and should be considered in determining the appropriate action. ***OR***

a. (Option 3) United States v. ACCUSED II is a companion case. That case is pending court-martial.

---

[3]This is not required to be included in the SJAR, however it is a good opportunity to address the issue for appellate review and provides an avenue for corrective action.

10. **Requests for Deferment**.

a. (Option 1) There have been no requests to defer any part of the sentence, either as adjudged or as mandated under the UCMJ. ***OR***

a. (Option 2) On *(date)(pursuant to the pretrial agreement)*, you *(approved) (denied)* the defense's request to defer *(specify)*. The deferment period was from (*date*) to (*date*). Enclosure (6) contains the matters related to the deferment request and action.[4]

11. **Personnel Records**. The accused's personnel records are provided for your review, enclosure (5).

12. **Recommendation**.[5]

a. (Option 1) Having reviewed the record of trial *(and the matters submitted by the defense)*, I recommend that you approve the sentence as adjudged and order the sentence executed in accordance with the UCMJ, MCM, and applicable regulations. ***OR***

a. (Option 2) Having reviewed the record of trial (*and the matters submitted by the defense*), pursuant to the pretrial agreement, I recommend that you (*specify)* and order the sentence executed in accordance with the UCMJ, MCM, and applicable regulations. ***OR***

a. (Option 3) Having reviewed the record of trial (*and the matters submitted by the defense*), as a matter of clemency, I recommend that you approve the sentence as adjudged, however, *(specific action recommended)* and order the sentence executed in accordance with the UCMJ, MCM, and applicable regulations. ***OR***

a. (Option 4) Having reviewed the record of trial (*and the matters submitted by the defense*), in order to address the legal error noted above, I recommend you approve the sentence as adjudged but take the following corrective action: *(specific actions recommended)*. Then order the sentence executed in accordance with the UCMJ, MCM, and applicable regulations. ***OR***

a. (Option 5) Having reviewed the record of trial (*and the matters submitted by the defense*), in order to address potential prejudice caused by post-trial delay, I recommend you approve the sentence as adjudged but take the following corrective action: *(specific actions recommended)*. Then order the sentence executed in accordance with the UCMJ, MCM, and applicable regulations

b. ***AND*** The punitive discharge awarded cannot be ordered executed until the case is deemed final on appeal.

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[4] This is not specifically required; however, C.A.A.F. has suggested that there may be due process notice and comment concerns if the defense is not served with the SJA's legal advice addressing a request for deferment.

[5] The SJA's recommendation is preliminary if the SJA does not yet have the benefit of the defense's submission when drafting the original SJAR. An SJAR addendum can be used to address any issue raised by the defense's later submissions that require comment. Addendums are only necessary to address legal error raised by defense after the original SJAR or when some matter is raised that requires comment in order to avoid an issue, such as allegations of command influence.

I. M. SJA[6]

Acknowledgement of Service

From: Defense Counsel
To: Staff Judge Advocate

Subj: STAFF JUDGE ADVOCATE'S RECOMMENDATION ICO UNITED STATES V. SN/LCPL ACCUSED USN/USMC

1. I acknowledge that I received the Staff Judge Advocate's recommendation in the subject case on _____ and, unless I request and am granted additional time, that I have ten days to submit post-trial matters in accordance with R.C.M. 1105 and 1106, MCM (2008 ed.). If, after ten days, I have not submitted such matters that right will be deemed waived and the case will be forwarded to the Convening Authority for action.

2. I understand that I have an obligation to inform and consult with the accused concerning the submission of post-trial matters. Failure to do so maybe the basis of ineffective assistance of counsel claims. Although comment to this recommendation and on matters submitted under R.C.M. 1105, may be waived, such waiver can only be undertaken at the express direction of the accused.

I. M. DEFENSE

[6] The SJA must sign personally- DSJA's may not sign unless they are officially acting as the SJA and then must sign as the acting SJA.

FIRST ENDORSEMENT on DC's Acknowledgement of Service

DATE

From: Defense Counsel
To: Staff Judge Advocate

Subj: RCM 1105/1106 MATTERS ICO US v ACCUSED

1. (Option 1) I have advised the accused of the purpose and advantages of submitting matters under R.C.M. 1105, and the accused expressly desires to waive the right to submit matters. Further, I have no matters to submit in accordance with R.C.M. 1106.

OR

1. (Option 2) I have already submitted matters on date, and I do not have additional matters to submit in accordance with R.C.M. 1105. I (*have*) (*have no*) matters to submit in accordance with R.C.M. 1106, (*which are enclosed*).

OR

1. (Option 3) Per R.C.M. 1105 and 1106 the enclosed matters are submitted.

I. M. DEFENSE

From: Staff Judge Advocate
To: Convening Authority

Subj: STAFF JUDGE ADVOCATE'S ADDENDUM (*MEMORANDUM*) TO THE RECOMMENDATION ICO UNITED STATES V. SN/LCPL ACCUSED USN/USMC[7]

Ref: (a) SJA ltr 5814 SJA of date (SJAR)

Encl: (1) DC ltr 5814 DEF of date (Post-trial matters)
(2) DC ltr XXXX of date (Response to Addendum)

1. This is an addendum (*memorandum*) to the Staff Judge Advocate Recommendation dated xxx. Reference (a).

2. **Post-Trial Matters Submitted by the Accused**. Post-trial matters submitted by the defense are contained in enclosure (1). You are required to consider these matters in determining whether to approve or disapprove any of the findings of guilty and the action you take on the sentence.

3. **Legal Error**.

a. (Option 1) The defense has not raised any allegations of legal error. ***OR***

a. (Option 2) The defense has raised allegations of legal error. Having reviewed these allegations, I disagree with their assertions of error. Thus, no corrective action on the findings or sentence is warranted. ***OR***

a. (Option 3) The defense has raised allegations of legal error. Upon review of these allegations, I assume, without conceding, that *(specify)* constitutes error; however, because these errors did not materially prejudice the substantial rights of the accused, no corrective action on the findings or sentence is warranted. *(I disagree with the defense's other allegations of error).* ***OR***

a. (Option 4) The defense has raised allegations of legal error. Upon review of these allegations, I agree that *(specify)* constitutes error and corrective action is warranted. *(However, I disagree with the defense's other allegations of error.)*

4. **New Matters**.[8]

a. (Option 1) As no new matters, as defined under R.C.M. 1106(f), have been raised by this addendum (*memorandum*), the case is now ready for your action. ***OR***

---

[7] If the addendum does not raise new matters, there is no requirement to wait 10-days for defense response. The MCM uses the term "addendum" to refer to anything after the initial SJAR, but the title itself does not trigger an "opportunity to respond" requirement.

[8] New matters are broadly interpreted and C.A.A.F. will remand for a new action in close cases. See U.S. v. Fredrickson, 63 M.J. 55 (C.A.A.F. 2006).

a. (Option 2) Because new matters have been raised by this addendum, the defense has been provided the opportunity to submit additional comments. The defense (*had, as set out in enclosure (2),*) (*had no*) further comment. As with all other defense submissions, you must consider these when taking your action.

5. **Recommendation. (if applicable)**

a. (Option 1) Having reviewed the record of trial, (*as well as the matters submitted by the defense)*, my recommendation remains the same: approve and execute the sentence (*as adjudged*) (*in accordance with the pretrial agreement*). ***OR***

b. (Option 2) Having reviewed the record of trial, as well as matter submitted by the accused, as a matter of clemency, I recommend that you approve the sentence as adjudged, however, (*specific action recommended*). ***OR***

c. (Option 3) In order to address the legal error (*as noted in the original recommendation*), I recommend you approve the sentence as adjudged but take the following corrective action: (*specific action recommended).* ***OR***

d. (Option 4) (*As addressed in the original recommendation,*) In order to address potential prejudice caused by post-trial delay, I recommend you approve the sentence as adjudged but take the following corrective action: *(specific action recommended).*

I. M. SJA

Cc I.M. DEFENSE

Acknowledgement of Service of Addendum to the SJAR (*ONLY IF NEW MATTERS RAISED*)[9]

From: Defense Counsel
To: Staff Judge Advocate

Subj: STAFF JUDGE ADVOCATE'S ADDENDUM TO THE RECOMMENDATION ICO UNITED STATES V. SN/LCPL ACCUSED USN/USMC

1. I acknowledge that I received the Staff Judge Advocate's addendum to the recommendation in the subject case on _____. Since the addendum raises new matters, I understand I have ten days to submit comments addressing those matters.

I. M. DEFENSE

[9] If the recommendation changes, even though it is in favor of the accused, it should be considered a new matter and defense counsel should have the opportunity to comment.

FIRST ENDORSEMENT on DC's Acknowledgement of Service of Addendum to the SJAR

From: Defense Counsel
To: Staff Judge Advocate

1. I do (*not*) have matters in response to the addendum.[10]

I. M. DEFENSE

[10] Any matters in response to the addendum should be listed as an enclosure to forwarding endorsement for all the SJAR material.

REQUEST FOR IMMEDIATE EXECUTION OF DISCHARGE

(See JAGMAN 0165)

U.S.	)	[SPCM] [GCM] NCM _____
	)	REQUEST FOR IMMEDIATE EXECUTION
v.	)	OF [BAD CONDUCT][DISHONORABLE]
	)	DISCHARGE ADJUDGED ON _____
[Name, SSN, grade or	)	BY [SPECIAL] [GENERAL] COURT-MARTIAL
rate and armed service]	)	CONVENED BY _____
	)	[AT] [ON BOARD] _____

To: [Officer exercising general court-martial jurisdiction]

1. I, the undersigned, the accused in the above-captioned case, hereby request the immediate execution of the above-described [dishonorable] [bad conduct] discharge and my release from the Naval service.

2. Naval Clemency and Parole Board review pursuant to SECNAV Instruction 5815.3 (series) [has been completed] [is not required].

3. I received a copy of the decision of the U.S. Navy-Marine Corps Court of Criminal Appeals in my case on _____.

4. I have had fully explained to me, and I understand my right, under Article 67(c), Uniform Code of Military Justice, to petition the U.S. Court of Appeals for the Armed Forces for grant of review within 60 days from the date I received my copy of the decision of the U.S. Navy-Marine Corps Court of Criminal Appeals.

5. I do not have an appeal pending before the U.S. Court of Appeals for the Armed Forces at this time, nor do I now intend to appeal; however, I understand that, if this request is granted, it will not affect my right to appeal if I later change my mind and decide to appeal.

6. I have discussed this matter with _____ [Name, grade], counsel of my own choice.

_____

[Signature of Accused]

CERTIFICATE

I, the undersigned officer of the grade, and branch of service below stated, certify that the above-named accused personally appeared before me this _____ day of _____, 20___, at _____[place]; I explained to him his right, under Article 67(c), Uniform Code of Military Justice, to petition the U.S. Court of Appeals for the Armed Forces for grant of review; I read aloud to him the foregoing request; and he thereafter signed the same in my presence and acknowledged that he did so as his free and voluntary act.

[Signature]
Name, grade

SUSPECT'S RIGHTS ACKNOWLEDGEMENT/STATEMENT

(See JAGMAN 0170)

SUSPECT'S RIGHTS AND ACKNOWLEDGEMENT/STATEMENT

FULL NAME (ACCUSED/SUSPECT)	SSN	RATE/RANK	SERVICE(BRANCH)
ACTIVITY/UNIT			DATE OF BIRTH
NAME (INTERVIEWER)		RATE/RANK	SERVICE(BRANCH)
ORGANIZATION		BILLET	
LOCATION OF INTERVIEW		TIME	DATE

RIGHTS

I certify and acknowledge by my signature and initials set forth below that, before the interviewer requested a statement from me, he warned me that:

(1) I am suspected of having committed the following offense(s):

_____

_____

_____ ☐

(2) I have the right to remain silent; ---------- ☐

(3) Any statement I do make may be used as evidence against me in trial by court-martial; ---------- ☐

(4) I have the right to consult with lawyer counsel prior to any questioning. This lawyer counsel may be a civilian lawyer retained by me at my own expense, a military lawyer appointed to act as my counsel without cost to me, or both; ---------- ☐

(5) I have the right to have such retained civilian lawyer and/or appointed military lawyer present during this interview; and ------ ☐

(6) If I decide to answer questions now without a lawyer present, I will have the right to stop this interview at any time. ---------- ☐

WAIVER OF RIGHTS

I further certify and acknowledge that I have read the above statement of my rights and fully understand them, and that, ---------- ☐

(1) I expressly desire to waive my right to remain silent. ---- ☐

(2) I expressly desire to make a statement. ---------- ☐

(3) I expressly do not desire to consult with either a civilian lawyer retained by me or a military lawyer appointed as my counsel without cost to me prior to any questioning. ---------- ☐

(4) I expressly do not desire to have such a lawyer present with me during this interview. ---------- ☐

(5) This acknowledgement and waiver of rights is made freely and voluntarily by me, and without any promises or threats having been made to me or pressure or coercion of any kind having been used against me. ☐

(6) I further understand that, even though I initially waive my rights to counsel and to remain silent, I may, during the interview, assert my right to counsel or to remain silent. ---------- ☐

NOTE: IF THE SUSPECT INDICATES HE IS WILLING TO MAKE A STATEMENT, HE SHOULD FIRST BE ASKED WHETHER HE HAS MADE A STATEMENT IN RESPONSE TO QUESTIONS ABOUT THE SUSPECTED OFFENSE TO ANYONE HE BELIEVED WAS ACTING IN A LAW ENFORCEMENT CAPACITY PRIOR TO THE PRESENT INTERVIEW. IF THE SUSPECT INDICATES HE HAS PREVIOUSLY MADE SUCH A STATEMENT, ADVISE THE SUSPECT AS FOLLOWS:

PREVIOUS STATEMENTS

I certify and acknowledge by my signature and initials set forth below that, before the interviewer requested a statement from me, he warned me that:

(1) My previous statement may not be admissible at courts-martial and may not be usable against me. (It may not be possible to determine whether a previous statement made by the suspect will be admissible at some future court-martial; this suggests it may be wise to treat it as inadmissible and provide the cleansing warning).

(2) Regardless of the fact that I have talked about this offense before, I still have the right to remain silent now.

SIGNATURE (ACCUSED/SUSPECT)	TIME	DATE
SIGNATURE (INTERVIEWER)	TIME	DATE
SIGNATURE (WITNESS)	TIME	DATE

The statement which appears on this page (and the following _____page(s), all of which are signed by me), is made freely and voluntarily by me, and without any promises or threats having been made to me or pressure or coercion of any kind having been used against me.

_____
SIGNATURE (ACCUSED/SUSPECT)

RECORD OF AUTHORIZATION FOR SEARCH
(See JAGMAN 0170)

RECORD OF AUTHORIZATION FOR SEARCH

1. At _____ [time] on _____ [date], I was approached by _____ [name] in his capacity as _____ [duty] who having been first duly sworn, advised me that he suspected _____ [name] of _____ [offense] and requested permission to search his _____ [object or place] for _____ _____ [items].

2. The reasons given to me for suspecting the above named person were:

_____
_____
_____
_____
_____
_____
_____

3. After carefully weighing the foregoing information, I was of the belief that the crime of _____ [had been] [was being] [was about to be] committed, that _____ was the likely perpetrator thereof, that a search of the object or area stated above would probably produce the items stated and that such items were [the fruits of crime] [the instrumentalities of a crime] [contraband] [evidence].

4. I have therefore authorized _____ to search the place named for the property specified, and if the property be found there, to seize it.

_____ _____
[Name/Grade/Title] Date and Time

INSTRUCTIONS

1. Although the person bringing the information to the attention of the individual empowered to authorize the search will normally be one in the execution of investigative or police duties, such need not be the case. The information may come from one as a private individual.

2. Other than his own prior knowledge of facts relevant thereto, all information considered by the individual empowered to authorize a search on the issue of probable cause must be provided under oath or affirmation. Accordingly, prior to receiving the information which purports to establish the requisite probable cause, the individual empowered to authorize the search will administer an oath to the person(s) providing the information.

An example of an oath is as follows: "Do you solemnly swear (or affirm) that the information you are about to provide is true to the best of your knowledge and belief, so help you God?" This requirement does not apply when all information considered by the individual empowered to authorize the search, other than his prior personal knowledge, consists of affidavits or other statements previously duly sworn to before another official empowered to administer oaths.

3. The area or place to be searched must be specific, such as wall locker, wall locker and locker box, residence, or automobile.

4. A search may be authorized only for the seizure of certain classes of items: (1) fruits of a crime (the results of a crime such as stolen objects); (2) instrumentalities of a crime (example: search of an automobile for a crowbar used to force entrance into a building which was burglarized); (3) contraband (items, the mere possession of which is against the law - marijuana, etc.); or (4) evidence of crime (example: bloodstained clothing of an assault suspect).

5. Before authorizing a search, probable cause must exist. This means reliable information that would lead a reasonably prudent and cautious man to a natural belief that:

a. An offense probably is about to be, or has been committed;

b. Specific fruits or instrumentalities of the crime, contraband, or evidence of the crime exist; and

c. Such fruits, instrumentalities, contraband, or evidence are probably in a certain place.

6. In arriving at the above determination it is generally permissible to rely on hearsay information, particularly if it is reasonably corroborated or has been verified in some substantial part by other facts or circumstances. However, unreliable hearsay cannot alone constitute probable cause, such as where the hearsay is several times removed from its source or the information is received from an anonymous telephone call. Hearsay information from an informant may be considered if the information is reasonably corroborated or has been verified in some substantial part by other facts, circumstances, or events. The mere opinion of another that probable cause exists is not sufficient; however, along with the pertinent facts, it may be considered in reaching the conclusion as to whether or not probable cause exists. If the information available does not satisfy the foregoing, additional investigation to produce the necessary information may be ordered.

CONSENT TO SEARCH
(See JAGMAN 0170)

CONSENT TO SEARCH

I, _____, have been advised that inquiry is being made in connection with _____ _____. I have been advised of my right not to consent to a search of [my person] [the premises mentioned below]. I hereby authorize _____ and _____, who [has] [have] been identified to me as _____ [position(s)] to conduct a complete search of my [person] [residence] [automobile] [wall locker] [computer and electronic media, to include a forensic search of all electronic files thereon] [_____] located at _____ _____.

I authorize the above listed personnel to take from the area searched any letters, papers, materials, or other property which they may desire. Any computer or electronic media files may be forensically reviewed at a time that is convenient for the government.

This written permission is being given by me to the above named personnel voluntarily and without threats or promises of any kind.

_____
[Signature]

WITNESSES

_____
Name Signature Date

_____
Name Signature

List of Secretarial Designated General Courts-Martial Convening Authorities

(See JAGMAN 0120)

(a) Chief of Naval Operations

(b) Commandant of the Marine Corps

(c) Vice Chief of Naval Operations

(d) Deputy Commander, U.S. Naval Forces, Europe

(e) Commander, Navy Personnel Command

(f) Commanders, Fleet Air Commands

(g) Commander, Navy Reserve Forces

(h) Commander, Navy Reserve Forces Command

(i) Commander, Naval Air Forces Reserve

(j) Navy Region Commanders

(k) CO, U.S. Naval Support Activity, Naples

(l) Commander, Naval Air Warfare Center Weapons Division, China Lake

(m) Commander, Naval Service Training Command, Great Lakes

(n) CO, Naval Air Station, Key West

(o) Commander, U.S. Naval Forces, Marianas

(p) CO, Marine Corps Logistics Base Barstow

(q) CO, Naval Air Station, Sigonella

(r) CO, Naval Air Station, Whidbey Island

(s) CO, Naval Air Station, Lemoore

(t) Commandant, Naval District Washington

(u) Commander, Combat Logistics Squadron TWO

(v) Commander, Strategic Communications Wing ONE

(w) Commander, Marine Corps Base Quantico

(x) Commander, Naval Installations Command

(y) Deputy Commander, U.S. Marine Corps Forces Central Command

(z) Commander, Marine Corps Air Station Miramar

(aa) Commander, Marine Corps Air Station Yuma

(bb) Commander, Marine Corps Air Station Cherry Point

(cc) Commander, Marine Corps Air Station New River

(dd) Commander, Marine Corps Air Station Beaufort

(ee) Commander, Marine Corps Base Camp Pendleton

(ff) Commander, Marine Corps Base Camp Lejeune

(gg) Commander, Marine Corps Logistics Base Albany

(hh) Commander, Marine Corps Air Ground Combat Command Twentynine Palms

(ii) Deputy Commander, U.S. Naval Forces Africa

(jj) Director, Navy Staff

(kk) Deputy Commander, U.S. Fleet Forces Command

CHAPTER II

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CHAPTER II

ADMINISTRATIVE INVESTIGATIONS

PART A -- OVERVIEW

0201 SCOPE

a. General. This chapter sets forth principles governing the convening, conduct, review, and storage of administrative investigations conducted in or by the Department of the Navy (DON) under the authority of this Manual. The term "commander" generally refers to both commanding officers and officers in charge, but in the case of a major incident, see section 0203b(2). The commander who directs an investigation, other than a preliminary inquiry, is referred to as the convening authority (CA).

b. Relation to UCMJ investigations. If the only basis for an investigation is disciplinary action, a preliminary inquiry under Rule for Courts-Martial (R.C.M.) 303, Manual for Courts-Martial (MCM), or a pretrial investigation under R.C.M. 405, MCM, and Article 32, UCMJ, should be conducted without a separate investigation under this Manual.

c. Relation to other investigations. In addition to the investigations governed by this Manual, investigations may be required by other regulations. These investigations have different purposes and both may be appropriate. Examples of investigations required by other regulations:

(1) situation reports prescribed by Articles 0831, 0851 and 0852, U.S. Navy Regulations (1990), OPNAVINST 3100.6 (series), or other situation reports prescribed by operational commanders, bureau manuals or departmental regulations;

(2) investigations conducted by an inspector general under SECNAVINST 5430.57 (series);

(3) investigations of aviation mishaps under OPNAVINST 3750.6 (series);

(4) reports concerning security violations prescribed by SECNAV M-5510.36;

(5) safety and mishap investigation reports required by OPNAVINST 5102.1 (series) or by MCO P5102.1 (series);

(6) investigations conducted by the Naval Criminal Investigative Service (NCIS) under SECNAVINST 5430.107 (series);

(7) investigations of allegations against senior DON officials conducted pursuant to SECNAVINST 5800.12 (series); and

(8) quality assurance reviews required by BUMEDINST 6010.13 (series).

d. Coordination with other investigations. To avoid potential conflicts among investigations, commanders must remain cognizant of the progress made by other investigative bodies. Before conducting a preliminary inquiry or convening an investigation under this chapter, the commander shall liaison with the Naval Criminal Investigative Service (NCIS) or the Naval Safety Center (NSC), as appropriate, regarding any pending law enforcement (military, federal, or state) or safety investigation.

(1) If a law enforcement investigation is pending, the commander should determine whether the law enforcement investigation will serve to appropriately document the matter without further investigation under this chapter. If the commander determines that a preliminary inquiry or investigation needs to be conducted in addition to the law enforcement investigation, the commander shall coordinate any preliminary inquiry or investigation with the cognizant law enforcement agency through NCIS. If NCIS declines, direct liaison may be made.

(2) If a safety investigation is pending, the commander shall ensure that any preliminary inquiry or investigation convened does not interfere with the safety investigation. If, in the course of conducting an investigation under this chapter, misconduct by naval personnel is discovered, the commander shall immediately notify the senior member of any on-going safety investigation.

(3) Refer to the Region Commander, his designee, or, in the case of the Marine Corps, to the general court-martial convening authority (GCMCA), via the chain-of-command, any conflicts between the law enforcement agency or NSC and the commander that cannot be resolved locally.

0202 ASSISTANCE

a. Commanders are encouraged to seek guidance from the cognizant judge advocate (see Appendix A-2-a for definition) or, if that judge advocate is not immediately available, the Command Services Department of the local Region Legal Service Office (RLSO) prior to convening an investigation. In addition, guidance for all types of investigations, except litigation reports, may be obtained from the Office of the Judge Advocate General (OJAG), Administrative Law Division (Code 13) at DSN 224-7415 or 703-614-7415, or the Research and Civil Law Division (Code JAR), Headquarters, Marine Corps (HQMC) at 703-614-2510 or DSN 224-2510. Guidance on interpretation and application of policy for litigation reports may be obtained from OJAG, Claims and Tort Litigation Division (Code 15) at DSN 325-4600 or 202-685-4600, or, in the case of Admiralty investigations, from OJAG, Admiralty and Maritime Law Division (Code 11) at DSN 325-5040 or 202-685-5040.

b. In order to help the investigating officer and the CA prepare an accurate and complete report, the Appendix to this chapter includes guidance on specific types of incidents.

PART B -- PRELIMINARY CONSIDERATIONS

0203 PRELIMINARY INQUIRY

a. Purpose. A preliminary inquiry serves as an analytical tool to help a commander determine whether an investigation is warranted and, if so, how it should be conducted. A preliminary inquiry is not intended to develop extensive findings of fact. Commanders should discuss the findings and recommendations of the preliminary inquiry with a judge advocate to determine the appropriate option detailed in section 0204 of this Manual.

b. Responsibility

(1) Generally, a commander is responsible for initiating preliminary inquiries into incidents occurring within, or involving personnel of, the command. The reporting command of a member who is injured or dies during permanent-change-of-station transfer shall ensure that appropriate inquiries are conducted.

(2) In the event of a major incident (see Appendix A-2-a for definition), however, the GCMCA over the command involved, if a flag or general officer, or the first flag or general officer in the chain-of-command, or any superior flag or general officer in the chain-of-command, will immediately take cognizance over the case as the "commander." See subsection f(2) below.

c. Method. A commander may conduct a preliminary inquiry personally or through designees. While the preliminary inquiry may be accomplished in any manner considered sufficient by the commander, normally it will be directed in writing by an appointing order and the outcome documented in writing (see Appendix A-2-c). Evidence gathered during a preliminary inquiry shall be preserved by the investigating officer or in the Command General Administration and Management files in the event the commander later initiates an investigation.

d. Preliminary inquiries into incidents involving potential claims or litigation. An incident may occur in which there is a potential for claims or litigation against the DON or the United States for damage to personal property, personal injury or death, or for claims on behalf of the DON as an affirmative claim for damage to DON property. Although in most cases, a litigation-report investigation will be required, absent a preliminary inquiry, the commander will not know whether the matter is more appropriately the subject of a command investigation, litigation-report investigation, or court or board of inquiry. In such situations, a preliminary inquiry under the direction and supervision of a judge advocate should be conducted, using an appointing order and including language as described in section 0210(c).

e. Time limitations. Generally, the preliminary inquiry should be completed within three calendar days of the commander learning of the incident in question. The commander may grant extensions as necessary on a case-by-case basis and with the limited nature of the preliminary inquiry in mind. A preliminary inquiry into a major incident will usually take longer (see

subsection f below).

f. Major incidents

(1) Investigation of major incidents is sometimes complicated by premature appointment of a court of inquiry. Failure to first ascertain the sequence of incident events and identify essential witnesses can unnecessarily prolong and complicate subsequent proceedings.

(2) A commander will normally find it valuable to immediately appoint an officer to conduct a preliminary inquiry. Such officer should promptly begin to locate and preserve evidence and identify and interview witnesses. A commander may direct such officer to submit oral reports, which would permit the commander to make a timely decision as to how to proceed with the investigation.

0204 COMMAND OPTIONS

a. General. A preliminary inquiry is concluded when the commander who initiated the inquiry has sufficient information to exercise one of the options listed below. Although the natural instinct of a commander is to seek out and document facts quickly, doing so without judge advocate involvement may not only be counterproductive but may actually work against the interests of the commander, the command, and DON. Subject to the factors set forth below, determining which option to exercise is, in the first instance, a matter of command discretion. Superiors in the chain-of-command may, however, direct a commander to reconsider or to take a different course.

b. Options

(1) take no further action (see subsection (d) below);

(2) make appropriate medical or dental record Line of Duty (LOD) determination (see section 0222);

(3) conduct a command investigation (see section 0209);

(4) convene a litigation-report investigation to be conducted under the direction and supervision of a judge advocate (see section 0210). The merits of any potential claim are irrelevant in determining whether to initiate a litigation report; or

(5) in cases involving a major incident, convene a court or board of inquiry. If not authorized to do so, then the commander may request, via the chain-of-command, an officer with such authority to convene the court or board (see section 0211).

c. Factors to consider

(1) Purpose of the investigation. Generally, the primary manner in which the investigation will be used will determine which option should be exercised. If, for example, an investigation will be used primarily to

investigate the circumstances surrounding a claim filed against the United States, defend against a civil lawsuit, or to pursue an affirmative claim against a third party for damage to government property, then a litigation-report investigation or an Admiralty Letter Report should be conducted to ensure that the DON's legal interests are protected (see Chapter XI of this Manual for discussion on admiralty investigations). However, the fact that a potential claim exists is not the only consideration in determining the nature of the investigation. When the incident being investigated involves large scale property damage, loss of life, or raises issues concerning the management of Naval activities, there may be sound policy reasons, such as openness and transparency of process or results, that warrant the convening of a command investigation or court or board of inquiry instead of a litigation-report investigation. In such cases, consult Code 15 before making a decision on the type of investigation to be conducted.

(2) Powers of the investigative body. In choosing an option, a commander should consider the power that an investigative body will require. For example, if a hearing is required to either resolve significant issues of fact or the commander believes that the individual whose conduct or performance of duty is called into question and their interest should be protected by being designated a party, a court or board of inquiry should be convened. If subpoena power will be required, a court of inquiry is the only option.

(3) Resource and time concerns

(a) Generally, the more formal the investigation, the more resources and time required. Nonetheless, conducting a command investigation when a court or board of inquiry is warranted is not advisable, since the less formal format will often fail to adequately address the issues.

(b) Under circumstances where a court-martial might arise from the incident, a court of inquiry may prove to be efficient because it may be a valid substitute for the Article 32, UCMJ, investigation.

d. Commander's action

(1) No further action. Not every incident or event warrants an investigation. A commander who concludes that further investigation would serve no useful purpose may decide not to conduct one, unless superior authority directs otherwise or unless an investigation is required under this Chapter. This option is appropriate if there are no potential claims for or against the U.S. or the DON, and the preliminary inquiry reveals that the event is likely to be of little interest to anyone outside the immediate command or that the event will be adequately investigated under some other procedure (e.g., a mishap investigation or NCIS investigation; see section 0201). In such cases, a commander should nonetheless endorse the preliminary inquiry as an internal "memorandum for the record" or "To: File." See Appendix A-2-c for a sample format.

(2) Reporting the decision. Ordinarily, when a commander determines which of the options discussed in subsection b above will be exercised, a report of that decision will be made to his immediate superior in command.

Superior commanders may modify this reporting requirement by limiting the categories of incidents that should or should not be reported. However, if a commander concludes that an incident initially considered major does not fit within the definition of that term or concludes that a court of inquiry is not warranted, the commander shall, prior to convening another type of investigation, report such conclusion and the reasons therefore to the next superior officer in the chain-of-command.

e. Review. A superior in the chain-of-command may direct a subordinate to reconsider a decision or to exercise a specific option under subsection b.

PART C - ADMINISTRATIVE INVESTIGATIONS

0205 COMMAND RESPONSIBILITIES

a. Generally, a commander is responsible for initiating investigations into incidents occurring within, or involving personnel of, the command.

b. Circumstances such as pending deployments, geographical separation, or military exigencies may prevent the command from conducting or completing a thorough investigation. If a commander believes that it is impractical or inappropriate for the command to investigate an incident, another command may be requested to conduct the investigation. Requests for assistance should be directed to superiors in the chain-of-command. Requests should contain all available information, such as time, place, and nature of the incident; full names, grades, and leave status of members; names and addresses of all known witnesses; and copies of all relevant statements, written evidence, or reports.

c. Whenever more than one command is involved in an incident requiring investigation, a single investigation should be conducted. The commander of one of the concerned activities should convene the investigation. However, all the activities shall cooperate in the investigation. If difficulty arises in determining the appropriate CA, then the matter shall be referred to the Region Commander or common superior. If the conduct or performance of duty of one of the officers in the command may be subject to inquiry, then the Region Commander or common superior shall convene the investigation.

d. Whenever an incident or event involves only members of another Military Department, the nearest command of the members' parent service shall be notified and requested to contact the cognizant authority. If requested to do so by the other Military Department, a DON command shall convene and forward an investigation per the direction of the other Military Department. No further action need be taken within DON.

e. Incidents involving Marine Corps personnel

(1) When an investigation of a training or operational incident causing serious injury or death (other than a major incident or aviation accident) is required, the senior commander in the chain-of-command of the organization involved will consider convening the investigation and appointing

the investigating officer at that level. No member of the organization suffering the incident, nor any member of the staff of a range or other training facility involved in the incident, shall be appointed to conduct the investigation without the concurrence of the next senior commander.

(2) If Marine Corps personnel are involved in a non-major incident requiring an investigation while in an area geographically removed from the parent command, the commanding officer shall request investigative assistance from a GCMCA Marine commander in the immediate area where the incident occurred or, in the absence of such an officer, from the Commanding General, Marine Forces Reserve.

f. Incidents involving Reservists. The Region Commander or designated subordinate commander in whose geographic area of responsibility the incident occurred has the responsibility to ensure that investigations are conducted into incidents involving Naval reservists. The Commanding General, 4th Marine Division, the Commanding General, 4th Marine Logistics Group, and the Commanding General, 4th Marine Aircraft Wing, are responsible for ensuring that investigations are conducted into incidents involving reservists within their commands.

g. Costs. The costs of travel, per diem, consulting fees, or other related expenses of conducting or participating in an administrative investigation conducted under the authority of this Manual will be charged to the operation and maintenance budget of the CA (see Chapter I of this Manual regarding fees of civilian witnesses).

0206 CONVENING ORDERS

a. General. When circumstances warrant, a CA may utilize a verbal order or naval message to initially direct an investigating officer to initiate an investigation. In such circumstances, the CA must memorialize the convening order in writing. Written convening orders issued from the CA to the investigating officer must be signed and appended to the investigative report. See Appendices A-2-d and A-2-f for sample convening orders.

b. Designation. Convening orders must designate the investigating officer(s) or members of the board of inquiry or court of inquiry, as applicable.

(1) Member and investigating officer qualifications. Personnel detailed to conduct an investigation shall be individuals who, in the opinion of the CA, are best qualified by reason of their age, education, training, experience, length of service, and temperament. Most command or litigation-report investigations will be conducted by a commissioned officer, but a warrant officer, senior enlisted person, or civilian employee may also be used when the CA considers it appropriate. If necessary, more than one investigating officer may be appointed. Whenever practical, an investigating officer should be senior in rank to any individual whose conduct is subject to inquiry. See Appendix A-2-n for statutory membership qualifications in conducting Class A aviation mishap JAGMAN investigations.

(2) Assistance and technical support. A CA may direct the investigating officer to obtain any necessary assistance from specific persons or entities, such as reporters, interpreters, experts, etc, and may detail members of the command to provide clerical, technical, or logistical support. See section 0211 regarding appointment of advisors to boards and courts of inquiry.

c. Elements of a convening order. A convening order:

(1) should recite the specific purposes of the investigation and contain explicit instructions about its scope;

(2) should require findings of fact that fully explain all the circumstances surrounding the event, i.e., who, what, where, when, how, why;

(3) should identify potential witnesses and sources of information, and otherwise provide such direction as the CA determines necessary or proper, including specifying the format in which the report will be submitted. Normally, a letter report supported by enclosures will be specified.

(4) may assign certain issues, witnesses, or specific matters to individual members of the investigation if more than one investigating officer is appointed, and hold later meetings to review the information collected for completeness;

(5) may, unless a litigation-report investigation is being convened, require opinions and recommendations;

(6) should direct the investigating officer to seek the assistance of a judge advocate;

(7) shall contain directions for complying with the Privacy Act, the Health Insurance Portability and Accountability Act (HIPAA), Article 31, UCMJ, sections 0201 (coordinating with law enforcement authorities) and 0212 (concerning statements about origin of disease or injury), as necessary;

(8) shall direct, in applicable cases, per section 0201, investigators to coordinate the JAGMAN investigation with NCIS/Security personnel who may be conducting criminal investigations, requiring the report of any conflict to the CA for resolution;

(9) shall specify when the investigative report is due, normally within 30 calendar days; and

(10) may not designate parties unless the investigation being convened is a Court of Inquiry.

d. Amendments

(1) A CA may amend a convening order at any time to change membership, limit or increase the scope of the inquiry, or provide additional instructions. During the investigation, if it appears to the fact-finders, or to the supervisory judge advocate in the case of a litigation-report

investigation, that the CA might consider it advisable to enlarge, restrict, or modify the scope of the inquiry or to change in any material respect an instruction provided in the convening order, a report shall be made to the CA. The CA may take any action on this report deemed appropriate.

(2) Once convened, a command investigation may not be converted into a litigation-report investigation.

(3) As necessary, the CA may grant extensions of a reasonable amount of time as the CA deems appropriate. Requests and authorizations for extensions need not be in writing but must be memorialized in the preliminary statement and/or endorsement, as applicable.

0207 STANDARDS OF PROOF AND EVIDENCE

a. Standards of proof

(1) General. An administrative investigation need not be conducted in accordance with the formal rules of evidence applicable to courts-martial. It should use the most effective methods for collecting, analyzing, and recording all relevant information and should include in its investigative report any relevant matter that a reasonable person would consider to be believable or authentic.

(2) Preponderance of evidence. Except for facts of which a court may take judicial notice (see M.R.E. 201 and 201a, MCM), an administrative investigation shall arrive at findings of fact only if supported by a preponderance of the evidence, i.e., more likely than not. For line of duty determinations, see Part E.

(3) Inferences. An investigation may not speculate on the causes of an incident. Reasonable inferences drawn from evidentiary enclosures or personal observations, however, are permissible. For example, an investigation may determine, through competent evidence, the likely chain of events relative to the subject of investigation. However, it is generally improper to theorize about the thought processes of an individual that resulted in certain courses of conduct.

b. Evidence

(1) Safekeeping. To the extent consistent with mission requirements, the investigating officer and the CA will ensure that all evidence is properly preserved and safeguarded until the investigation is complete and all relevant actions have been taken.

(a) Failure to properly safeguard and account for evidence may result in its inadmissibility in subsequent legal proceedings and therefore prejudice the interests of the Government.

(b) Original items with evidentiary value must be retained or adequate steps taken to ensure their safe storage. Operational commands are encouraged to make satisfactory storage arrangements with supporting elements

ashore in this regard. The CA's forwarding endorsement must indicate where the evidence is maintained, what arrangements have been made for its safekeeping, and report the name and telephone number of the responsible official. In addition, chain-of-custody documents must be preserved together with the evidence to which they relate. Consult a judge advocate for assistance. OPNAV Form 5580/22 is the "Evidence/Property Custody Receipt" form and includes space for chain-of-custody documentation.

(2) Physical Evidence

(a) Whenever the condition, location, or other characteristic of an item of tangible evidence has probative value, include the item or a photograph, description, chart, map, or suitable reproduction in the investigative report. If an investigator or board member observes an item and gains relevant sense impressions (e.g., noise, texture, smells, or any other impression not adequately portrayed by a photograph, chart, map, or other representation), the impressions should be recorded and included as an enclosure to the report.

(b) Perishable or unstable items of evidence, such as tire tracks, should be promptly photographed or otherwise preserved, preferably by trained personnel. Evidence should not be handled by untrained personnel, unless absolutely necessary to preserve its integrity.

(3) Documentary evidence. Examples of documentary evidence include records, logs, documents, letters, diaries, video or audio recordings, reports, photographs and statements. Documents should indicate their source and specify any special restrictions on their disclosure to third parties. Originals or authenticated copies should be obtained when possible. Completion and forwarding of investigations will not be delayed to await final reports, originals, or similar documents unless their inclusion is absolutely essential to the completion of the investigative report. Instead, the investigating officer should note the unavailability of such items in the report.

(4) Photographs or Videos

(a) When photographs or video recordings are included as part of the investigation, the following information should be included on the reverse side of the photograph, or label of the video recording: the hour and date they were taken; a brief description of the location or area photographed or recorded; the full name and rank or rate of the photographer or videographer; and full names and addresses of persons present when the photographs or video were taken.

(b) In addition, the investigation report should provide details surrounding the taking of the photographs or video (e.g., type of camera, distance from object, etc.).

(c) Discretion should be exercised in enclosing graphic photographs or video recordings. When including such materials, place them in a separate envelope marked: "CAUTION, CONTAINS GRAPHIC MATERIAL. VIEWER DISCRETION ADVISED."

c. Witnesses and warnings

(1) Witnesses not suspected of misconduct or improper performance of duty. Ordinarily, witnesses should provide statements in informal interviews, except in the course of litigation-report investigations. (See section 0210d for specific instructions on the interviewing of witnesses while conducting a litigation-report investigation.) Probing questions as to "who," "what," "where," "when," "how," and "why" should be pursued.

(a) The investigator may assist a witness to prepare his or her written statement. The investigator shall not tell a witness what to say, but can ensure the witness addresses all relevant facts known to the witness. The investigator should help the witness exclude irrelevant material and ensure important facts are not omitted.

(b) Investigators may document oral statements in summary or verbatim form, subject to the restrictions set forth in section 0210 for litigation report witness statements. When an investigator takes an oral statement, it should be reduced to writing and signed by the witness or certified by the investigator to be either an accurate summary or verbatim transcript.

(c) Military witnesses may be required to swear or affirm that their statement is truthful or to provide recorded testimony under oath. Civilians may not be required to provide a sworn statement or recorded testimony but may be requested to do so.

(2) Witnesses suspected of misconduct, or improper performance of duty. Ordinarily, an investigation should collect relevant information from all other sources before interviewing persons suspected of an offense, misconduct, or improper performance of duty. Also, prior liaison with the cognizant judge advocate is advised to ensure investigators have coordinated with law enforcement officials and to ensure investigators will not impede any criminal investigations into the same incident (see section 0201). Before the interview, military personnel suspected of a criminal offense must be advised of Article 31, UCMJ, warnings; see Chapter I of this Manual. Department of Defense (DoD) civilian personnel offices should be consulted about applicable collective bargaining requirements before interviewing DoD civilian employees suspected of misconduct. Law enforcement personnel must be consulted if the witness is in custody. If defense counsel has been retained, further coordination may be required through the cognizant judge advocate.

(3) Cautioning witnesses. To reduce the possibility that disclosure of witness statements or interviews may influence the statements of future witnesses, an investigating officer may direct witnesses subject to Naval authority not to discuss their statements. Witnesses not subject to Naval authority may be requested not to discuss their statements.

d. Witness statements from other investigations

(1) Safety investigations. Statements gathered in the course of safety investigations may not be used by the investigating officer nor be

included in administrative investigation reports, nor shall any witness who provided a statement to a safety investigation board under a promise of confidentiality be questioned regarding the information provided to that safety investigation board. The investigating officer may, however, interview those same witnesses and either obtain statements or use those interviews to prepare a summary of interview.

(2) NCIS investigations. Witness statements contained as enclosures to NCIS investigations may be included in administrative investigation reports. See section 0208g(2) for further discussion on NCIS investigations as enclosures.

e. Personally Identifiable Information (PII) and the Privacy Act. Steps should be taken to ensure that personally identifiable information (see Appendix A-2-a for the definition of "Personally Identifiable Information") is protected from inappropriate release. Only the minimum amount of personal information necessary to investigate the matter concerned should be included in the investigative report (for guidance regarding the Privacy Act see SECNAVINST 5211.5(series)). The following procedures apply to administrative investigations conducted under this Manual:

(1) Advice required. Requests for information about what a Government officer, employee, or member did, observed, or thought while performing official duties does not require a Privacy Act statement. However, when an individual is requested to supply personal information about himself in a statement to be maintained in a system of records retrievable by the individual's name or personal identifier, the individual shall be provided a Privacy Act statement containing the particular information prescribed in SECNAVINST 5211.5. The requirement for a Privacy Act statement is separate from other applicable warnings or advisement (see Appendix A-2-h).

(2) Social Security numbers. A Privacy Act statement must be used if a member or employee is asked to voluntarily provide his Social Security number for an investigation. If Social Security numbers are obtained from other sources (e.g., service records), the individual need not be provided a Privacy Act statement. If Social Security numbers are obtained from other sources, this should be noted in the preliminary statement of the investigation. Social Security numbers should not be included unless they are necessary to identify precisely the individuals in question, such as in cases involving serious injury or death.

(3) Records of disclosure. Appendix A-2-i is recommended for use in recording and accounting for disclosures of information about identifiable individuals from records that are collected, used, or maintained under the authority of this Manual.

0208 INVESTIGATION REPORT FORMAT

a. General. Investigative reports shall be submitted in the format prescribed by the CA or, in the case of a litigation-report investigation, by the supervisory judge advocate. Normally, the CA will direct the report be provided in a letter format. Appendices A-2-e and A-2-g are sample

investigative reports.

b. Classification. Since investigative reports may be circulated widely, classified information should be omitted unless inclusion is absolutely essential. If unclassified information is important to the report's accuracy but is contained in a classified document, then the unclassified information should, if possible, be extracted from the classified document and included in the investigative report. When classified matter must be included, the report shall be classified at the highest level of any classified matter contained therein. Encrypted versions of messages shall not be included or attached to investigative reports where the content or substance of such message is divulged elsewhere in the report. See SECNAV M-5510.36.

c. Preliminary statement

(1) A preliminary statement informs convening and reviewing authorities of the bottom line up-front of the investigation results. It also indicates that all relevant evidence was collected or is forthcoming and that the investigating officer met each of the CA's directives. After setting forth the nature of the investigation, the preliminary statement details difficulties encountered, extensions requested and granted, limited participation by any member or advisor, and any other information necessary for a complete understanding of the case. The itinerary of an investigator or board in obtaining information is not required.

(2) A preliminary statement does not eliminate the necessity for findings of fact. For example, notwithstanding statements in both the subject line and the preliminary statement that the investigation involves a certain incident, the findings of fact must fully describe the time and place of the incident, what government equipment was involved, identify the personnel involved, and provide other relevant information.

d. Findings of fact. Findings of fact must be as specific as possible as to times, places, persons, and events. Each finding of fact must identify one fact only, and be supported by and cite to at least one enclosure to the report.

e. Opinions. Opinions are reasonable evaluations, inferences, or conclusions based on the facts. Each opinion must cite the finding(s) of fact upon which it is based.

f. Recommendations. Recommendations depend on the nature of the facts found and opinions expressed. Recommendations shall not be offered unless requested, and may be limited to certain subject areas.

g. Enclosures

(1) General. The first enclosure is the signed, written appointing order or signed, written confirmation of an oral or message appointing order. Subsequent enclosures should contain all evidence developed by the investigation. Each statement, affidavit, transcript or summary of testimony, photograph, map, chart, document, or other exhibit should be a separate enclosure. Enclosures should be listed in the order in which they are cited

in the body of the investigation.

(2) NCIS investigations. NCIS investigations consist of the report of investigation (ROI), the narrative summary portion, and enclosures. ROIs shall not be included in administrative investigation reports. Unless a local NCIS office indicates to the contrary, clearance is not required for inclusion of enclosures to the ROI in an administrative investigative report. Neither polygraph reports nor their results may be included in the investigative report; however, the fact that a polygraph examination occurred and the location of the file maintained by the investigative agency administering the polygraph examination may be noted. Comments regarding an individual's refusal to undergo a polygraph examination shall not be included in any administrative investigative reports. If necessary for a full understanding of the incident, the location of the ROI should be cross-referenced in the administrative investigative report.

h. Signatures

(1) The investigating officer or senior member, or in the senior member's absence, the next senior member, respectively, must sign the investigative report. Dissents may be written and, if written, must be attached to the report.

(2) Signatures of board members or of the investigating officer(s) on an investigative report shall be sufficient to authenticate all enclosures.

PART D -- THREE TYPES OF ADMINISTRATIVE INVESTIGATIONS

0209 TYPE ONE: COMMAND INVESTIGATIONS

a. Purpose. A command investigation functions as a tool to gather, analyze, and record relevant information about an incident or event of primary interest to the command. Most investigations will be of this nature. Command investigations may, for example, be used to inquire into:

(1) significant property loss or destruction (minor property losses in most cases will be adequately documented through other means);

(2) aviation mishaps, groundings, floodings, fires, and collisions not determined to be major incidents (see Appendix for guidance on investigating specific types of incidents);

(3) incidents in which a member of the naval service, as a result of possible misconduct, incurs a disease or injury that may result in a permanent disability or a physical inability to perform duty for a period exceeding 24 hours (distinguished from a period of hospitalization for evaluation or observation) (see Part E); and

(4) deaths of military personnel apparently caused by suicide or under other unusual circumstances, or deaths of civilian personnel accompanying military personnel in the field or killed as a result of military-related

activities (see part F for special considerations in death cases).

b. Limitations. This type of investigation **should not** be used to inquire into incidents that have resulted or are likely to result in claims or civil litigation against the DON for damage to real or personal property or personal injury caused by Navy personnel acting within the scope of employment, or on behalf of the DON as an affirmative claim for damage caused to DON property by non-DON personnel or by DON personnel not acting in the performance of their duties.

c. Convening order. See section 0206.

d. Investigatory approach

(1) The investigating officer will comply with the guidance in section 0207 in conducting the investigation. Because a command investigation does not involve hearings, evidence will be collected through personal interviews and statements, telephone inquiries, or written correspondence.

(2) A command investigation, if deemed necessary, may contain sworn statements. In such cases, the investigating officer should consult with the cognizant judge advocate. A person on active duty appointed to perform investigative functions for a command investigation is empowered to administer the following oaths in the performance of duties:

(a) For interpreters: "Do you swear or affirm that you will faithfully perform the duties of interpreter for this proceeding (so help you God)?"; and

(b) For witnesses: "Do you swear or affirm that the statement provided is truthful (so help you God)?"

e. Command Investigation report

(1) The report shall be prepared in accordance with the convening order and the guidance set forth in both section 0207 and this section (see also Appendix A-2-e).

(2) Unless directed by proper authority, an investigator shall not prefer charges or notify an accused of recommended charges. For recommendations pertaining to the issuance of punitive and nonpunitive letters, see subsection (f)(2) below.

f. CA action. Upon receiving a command investigation report from the investigating officer, the CA shall review the report or have the report reviewed. The CA has 30 calendar days from receipt to act on the report, except in death cases where section 0225 requires CA review in 20 calendar days. If the report is incomplete, the CA shall return it to the investigating officer for further investigation. Once satisfied the report is complete, the CA shall either:

(1) determine that the investigation is of no interest to anyone outside the command, and, unless otherwise directed by superior authority, may

treat it as an internal report (see subsection h below for retention guidance), or

(2) endorse the report in writing. In the endorsement, the CA will:

(a) approve, disapprove, modify, or add to the findings of fact, opinions, and recommendations. The CA may also comment on recommendations that the CA cannot implement at his or her level.

(b) state opinions and make recommendations as appropriate.

(c) indicate what corrective action, if any, is warranted and a timeline for implementation.

(d) comment on whether punitive or nonpunitive action is warranted. Whenever punitive or nonpunitive action is contemplated or taken as the result of the incident under inquiry, the action shall be noted in the endorsement of the convening or reviewing authority. For example, the endorsement could read: "Punitive action is not warranted; however, appropriate corrective measures were taken in the case of ENS Smith." Punitive letters, or copies of recommended drafts thereof, shall be included in the investigative report as enclosures. Nonpunitive letters shall not be included as enclosures in the investigative report. In instances involving senior officials and certain other employees depending on their official position, a comment on the specific nonpunitive accountability actions taken (such as the issuance of a nonpunitive letter of caution) may be included (but the actual letter shall not be included). See section 0105(b)(4).

(e) state where any original evidence is preserved and provide the name and telephone number of the responsible official.

(3) The CA shall retain a copy of the report and forward the original, through the chain-of-command, including the Region Commander when appropriate, to the CA's GCMCA.

(a) One complete copy of the investigation shall be forwarded with the original for each intermediate reviewing authority. The GCMCA may direct subordinate commands to use specific forwarding requirements for investigations into certain categories or types of incidents. The CA shall also provide copies of the report to other commands that may have an interest, such as the Naval Safety Center. If one command conducted an investigation upon the request of another, then a copy of the report should be sent to the requesting command.

(b) If an investigation involves a claim under Article 139, UCMJ, see Chapter IV of this Manual.

(c) For cases involving injury or death of Naval personnel or material damage to ship, submarine, or other Government property not involving claims, the CA shall forward an advance copy of the record or report of investigation as soon as practical to: Commander, Naval Safety Center, Naval Air Station, Norfolk, VA 23511-5796. Reviewing authorities shall also forward advance copies of their endorsements as above. In cases of aviation mishaps,

CAs and reviewing authorities will only forward advance copies of investigation reports to the Commander, Naval Safety Center upon his or her request.

(d) See section 0232 for special routing requirements in death cases.

g. Review

(1) A GCMCA superior to the CA must review every command investigation unless a command investigation meets the criteria under section 0209(f)(1) above. Thus, if the first reviewer is not a GCMCA, the investigation will require additional review. Superior commanders may, by regulation or on an *ad hoc* basis, provide direction concerning review and forwarding of investigations consistent with this chapter. The subject matter will dictate the routing of the report for additional review. All investigations are considered final when the last reviewing authority determines that further endorsement is not necessary.

(2) As a general rule, intermediate reviewing authorities should complete their review and forward the investigation within 30 calendar days. In death cases, reviewing authorities shall complete this review within 20 calendar days; see section 0225.

(3) Investigations that involve loss, compromise, or possible compromise of classified information shall be routed per SECNAV M-5510.36.

(4) Copies of the investigation should be made available to all superior commanders who have a direct official interest in the recorded facts. Region Commanders or designated subordinate commanders have a direct official interest in incidents that affect their command responsibility or occur in their geographic area.

(5) For every command investigation conducted pursuant to this Chapter that is subject to review under this section, the final reviewing authority shall collect and maintain information concerning action(s), if any, taken by every command with an interest in the investigation.

(6) In their endorsements, the CA and intermediate reviewing authorities shall comment on the report and state concurrence or non-concurrence with the findings of fact, opinions, and recommendations. If non-concurring, the endorsement shall provide an explanation and shall state, as appropriate, alternate findings of facts, opinions, and recommendations. Additionally, in their endorsements, the CA and intermediate reviewing authorities, as appropriate, shall report to the final reviewing authority, through the chain of command, action they consider is warranted or that has already been taken. If action is taken after their endorsement has been forwarded, the CA or intermediate reviewing authorities, as appropriate, shall report such action taken by them to the final reviewing authority, through the chain of command.

(7) Commands, outside the CA's chain of command, receiving copies of investigative reports may provide comments and recommendations. However,

these comments do not become part of the investigative report unless a reviewing authority expressly incorporates them.

h. Forwarding and retention policies

(1) Generally, copies of investigations are not forwarded to the Chief of Naval Operations or to the Commandant of the Marine Corps. However, copies of investigations into the following types of incidents shall be forwarded to the following codes:

(a) incidents that may result in extensive media exposure (N09C or CMC(JA));

(b) training incidents causing death or serious injury (Naval Safety Center or CMC(JA));

(c) operational incidents causing death or serious injury (N3/5 or CMC(JA));

(d) incidents involving significant fraud, waste, abuse, or significant shortages of public property or funds (N09G or CMC(JA));

(e) incidents involving lost, missing, damaged, or destroyed property of significant value (N09G or CMC (JA));

(f) incidents involving officer misconduct (N1 or CMC(JAM));

(g) incidents that are required to be reported to Headquarters by other directives or regulations, as appropriate;

(h) incidents or investigations that may require action by CNO or CMC, as appropriate; and

(i) cases involving significant postal losses or offenses (N4 or CMC (MHP-50)).

(2) All command investigations shall be retained by the CA, GCMCA, or by the last commander to whom they are routed for a period of 2 years from the time that they are received. After 2 years, the entire command investigation shall be sent to the Office of the Judge Advocate General (Code 15), Investigations Branch, 1322 Patterson Avenue SE, Suite 3000, Washington Navy Yard, DC 20374-5066 for archiving consistent with the DON Records Management Manual, SECNAV M-5210.1.

(3) If the CA or GCMCA receives a request for an investigative report after it has been sent, that command shall submit a request for the investigation to the Investigations Branch (Code 15). The Investigations Branch will return the investigation to the requesting command as the originator of the report and the responsive party to the request for action. Once the command has responded to the inquiry, the command shall return the investigation to Code 15 for storage. See section 0207 on storing and protecting original evidence.

i. Release of command investigations. Release of investigation reports outside DON is governed by SECNAVINST 5720.42 (series), FOIA Program, and SECNAVINST 5211.5 (series), Privacy Act Program, and HIPAA.

(1) As a general rule, no investigative report, evidence, or documents compiled by investigating officials may be released until the report is final.

(2) The Chief of Naval Operations (N09N) is the release authority for investigations involving actual or possible loss or compromise of classified information.

(3) For command investigations, other than those dealing with possible compromise of classified information, the GCMCA to whom the report is forwarded is ultimately the release authority.

0210 TYPE TWO: LITIGATION-REPORT INVESTIGATIONS

a. Purpose. A litigation-report investigation is used to investigate an incident or event that may potentially result in claims or civil litigation against the DON for damage to real or personal property, personal injury or death caused by Navy personnel acting within the scope of their employment, or on behalf of the DON as an affirmative claim for damage caused to DON property by non-DON personnel or DON personnel not acting in the performance of their duties. The primary purpose of a litigation report is to document facts and gather evidence to protect the legal interests of the DON and the United States.

(1) Litigation-report investigations **will not** be conducted in any incident where either an active-duty death has occurred or when a civilian has died when accompanying military personnel in the field or as a result of military-related actions.

(2) Litigation-report investigations **will not** be used to investigate major incidents (as defined in Appendix A-2-a); **may not** have designated parties; and **will not** involve hearings.

b. General

(1) The directions and guidance contained in this Chapter are designed to ensure that litigation reports are protected from disclosure under the attorney work product and attorney-client privileges. In order to maintain these privileges, the litigation-report investigation must be conducted under the direction and supervision of a supervisory judge advocate (see definition of "Supervisory Judge Advocate" in Appendix A-2-a), protected from disclosure to anyone without an official need to know, and otherwise handled in strict compliance with this section. Failure to do so may result in waiver of the privilege.

(2) The CA must contact a judge advocate or OJAG Code 15 before convening a litigation-report investigation to ensure that it is the

appropriate type of investigation to be conducted. See JAGINST 5890.1 (series) for more information on claims and/or Chapter XI, section 1105, concerning admiralty incident investigations when litigation is anticipated.

(3) The supervisory judge advocate may request the assistance of the CA or ask the CA to request help from superiors in the CA's chain-of-command when circumstances such as pending deployments, geographic separation, or military exigencies prevent or hinder the completion of a thorough investigation. Such requests should contain all relevant information and indicate that the investigation is being conducted in contemplation of litigation, and should be processed accordingly.

(4) Whenever more than one command is involved in an incident requiring a litigation-report investigation, a single investigation under the supervision of a single judge advocate should be conducted. All concerned activities shall cooperate in the investigation. If difficulty arises in determining the appropriate CA, then the matter shall be referred for resolution to the common superior having a judge advocate on staff.

(5) Questions regarding the investigation of health care incidents should be directed to Bureau of Medicine and Surgery Risk Management Department (M3/5HCS5).

c. Convening order. In addition to the guidance contained in section 0206, the convening order:

(1) shall identify the supervisory judge advocate under whose direction and supervision the investigation is to be conducted. The convening order shall direct the investigating officer to report to that judge advocate before beginning to collect evidence, and to comply with the judge advocate's direction and supervision thereafter;

(2) **will not** direct the inclusion of opinions or recommendations. Although the supervisory judge advocate should include appropriate opinions in the litigation report (see section (d)(5) below and Appendix A-2-m), opinions and recommendations should not be made by the investigating officer;

(3) shall state specifically: "This investigation is being convened and your report is being prepared in contemplation of litigation and for the express purpose of assisting attorneys representing the interests of the United States in this matter;"

(4) shall caution the investigating officer that the investigation's conduct and results may be discussed only with personnel having an official need to know;

(5) may identify potential witnesses and other sources of information;

(6) will not assign experts, reporters, interpreters, etc.;

(7) will direct a completion date, normally within 30 calendar days.

The CA may grant extensions as necessary. Requests and authorizations for

extensions need not be in writing but must be memorialized in the preliminary statement and/or endorsement, as applicable. If the litigation-report investigation was convened at the request of OJAG Code 15 to assist in the adjudication of a pending claim, extensions of time beyond 60 days from the date of the convening order should be granted only in extraordinary circumstances.

A sample convening order is in Appendix A-2-f.

d. Investigatory approach. The investigating officer will comply with the guidance in section 0207 in conducting the investigation. In addition, during the course of gathering information, the investigating officer shall comply with the following:

(1) Before interviewing witnesses, the investigating officer will determine (with guidance from the supervisory judge advocate) when and if rights advisements may be required. When a military member is suspected of committing a criminal offense, Article 31 UCMJ warnings are required. When interviewing a service member concerning his/her injury, warning under JAGMAN 0212(c) is required. If the witness is asked for personal information (as opposed to information pertaining to performance of duty), Privacy Act advice is necessary.

(2) Witnesses will be asked probing questions. They will not, except as noted below, be asked to make a written statement or to sign a statement that the investigator has prepared, nor will audio or video recorded statements be obtained. Such statements are subject to discovery and release to opposing parties in civil litigation even if provided to an attorney. Rather, the investigator should summarize the results of the interview, using care to be as accurate and complete as possible, and authenticate the summary with the investigator's own signature. If, however, a witness with interests clearly adverse to the government's, i.e., a claimant or opposing party to litigation, is willing to provide a signed statement, the investigator, after consultation with the supervisory judge advocate, may obtain a signed and sworn statement.

(3) The investigating officer will fully identify and provide complete personal information for every witness, including his/her full name, social security number, command, job title, work and home addresses, telephone numbers, and email addresses. See section 0207(e) to ensure compliance with any requirements for collecting personally identifiable information. If the witness is likely to transfer or leave the military in the foreseeable future, the investigating officer should provide a timeframe and future contact information, if available.

(4) During the course of a litigation-report investigation, the investigating officer shall be guided by the supervisory judge advocate and shall consult frequently with that judge advocate as the investigation progresses. When it is necessary to obtain evidence such as expert analyses, outside consultant reports, and so forth, the supervisory judge advocate should sign the necessary requests.

(5) The investigating officer shall present the preliminary report to

the supervisory judge advocate for review for accuracy and completeness. The supervisory judge advocate should also include any required opinions or recommendations, including, at a minimum, an opinion regarding the scope of employment of any government employee whose alleged actions may be the basis for a claim or litigation.

e. Litigation-Report Investigation

(1) The report shall be prepared in accordance with the convening order and the guidance set forth in sections 0207 and 0208. A sample litigation-report investigation is at Appendix A-2-g.

(2) The report **shall not** contain statements signed by witnesses or video or audio recordings of witness statements unless the statement is from a claimant or opposing party to litigation.

(3) Photographs

(a) When photographs are included as part of the investigation, the following information should be included on the reverse side: the hour and date they were taken; a brief description of the location or area photographed; the full name and rank or rate of the photographer; and full names and addresses of persons present when the photographs were taken.

(b) In addition, the photographer should be asked to provide details surrounding the taking of the photographs such as type of camera, distance from object, etc. Similar information should be on a label affixed to any videotape included in the investigation.

(c) If digital photography is used, the following additional requirements must be met. Safeguard the source of the media that shows the original directory with dates, file size and file names automatically generated by the digital camera, and retain both the source media (original directory with dates, file size and file names automatically generated by the digital camera) and image in a secure area. In addition, evidentiary considerations require the following information be included with respect to the digital images included in the litigation report: document the name of the person who took the digital image; the type of digital camera used to create the image and the type of medium used to store the image (i.e., internal or removable storage); the type of computer to open the stored digital image and software used to convert the image to a photograph (including software edition); the name of the person who operated the computer that transformed the image to a digital photograph; and the date and time the digital image was converted into a digital photograph and the type of printer used (make, model).

(4) If original evidence is contained in a litigation-report investigation, neither the investigating officer nor any reviewing authority shall alter or mark the original evidence, other than as required for verifying photographs as described in paragraph 3 above.

(5) When the report is compiled, it shall be marked on every page: "FOR OFFICIAL USE ONLY: LITIGATION/ATTORNEY WORK PRODUCT." The report must

be signed by both the investigating officer and the supervisory judge advocate, or in the case that they cannot agree on a particular portion of the report, the supervisory judge advocate alone shall sign the report. The investigating officer may, but is not required to, separately document the basis for any disagreement.

(6) An advance copy of the litigation-report investigation should be sent to the Office of the Judge Advocate General (Code 15), Investigations Branch, 1322 Patterson Avenue SE, Suite 3000, Washington Navy Yard, DC 20374-5066. Waiting until endorsements have been obtained before providing a copy of the investigation to Code 15 is neither required nor desired as the facts of the incident must be made known to cognizant claims personnel as soon as possible.

(a) If the investigation involves a potential affirmative claim on behalf of the government, this should be noted on the cover page of the advanced copy.

(b) For investigations where the adequacy of medical care is reasonably at issue, an advance copy of the investigation shall be provided to the Chief, Bureau of Medicine and Surgery (M3B21 - Risk Management).

f. CA action

(1) Upon receiving a litigation-report investigation, the CA shall review the report or have it reviewed, and either endorse the report in writing within 30 calendar days or return it to the supervisory judge advocate for further inquiry.

(a) The CA shall not normally approve or disapprove the findings of fact. If the CA is dissatisfied with the findings, the CA may return the report to the supervisory judge advocate for additional information.

(b) The CA may comment on those aspects of the report that bear on the administration or management of the command. The CA should, for example, indicate what corrective action, if any, is warranted and a timeline for implementation.

(c) The CA shall state in the endorsement where the original evidence is preserved and provide the name and telephone number of the responsible official.

(d) The CA's endorsement, on every page, shall be marked: "FOR OFFICIAL USE ONLY: LITIGATION/ATTORNEY WORK PRODUCT."

(2) The CA shall retain a copy of the report and forward the original plus one copy to the Office of the Judge Advocate General (Code 15), Investigations Branch, 1322 Patterson Avenue SE, Suite 3000, Washington Navy Yard, DC 20374-5066, via the staff judge advocate of the GCMCA in the chain-of-command. The copy must be kept in a file marked "FOR OFFICIAL USE ONLY: LITIGATION/ATTORNEY WORK PRODUCT" and be safeguarded against improper disclosure. The CA will provide superiors in the chain-of-command, and other commands that have a direct official need to know the results of the

investigation, with a copy of the report but shall not otherwise disseminate the report without consulting a judge advocate.

(a) Copies of litigation-report investigations in which the adequacy of medical care is reasonably at issue shall be provided to the Chief, Bureau of Medicine and Surgery (M3B21 - Risk Management).

(b) If an investigation involves a claims matter or redress of injuries to property under Article 139, UCMJ, see Chapter IV of this Manual.

g. Review

(1) Superiors in the chain-of-command who receive a copy of a litigation-report investigation may, but are not required to, comment on the report. They should, however, take such action as may be warranted. They will not normally approve or disapprove the findings of fact. Comments shall be marked "FOR OFFICIAL USE ONLY: LITIGATION/ATTORNEY WORK PRODUCT" and copies must be kept in files marked "FOR OFFICIAL USE ONLY: LITIGATION/ATTORNEY WORK PRODUCT" and safeguarded against improper disclosure. Copies may be provided to other commands that have an official need to know the results of the investigation, but the report shall not be otherwise disseminated without consulting a judge advocate.

(2) Staff judge advocates through which litigation-report investigations are routed shall review the report for accuracy and thoroughness, coordinate any further investigation with the supervisory judge advocate or OJAG (Code 15), and forward the report not later than 30 calendar days after it is received. The report need not be forwarded to OJAG (Code 15), Investigations Branch, via formal endorsement.

h. Release of Litigation-Report investigations. For all litigation-report investigations, OJAG Code 15 is the sole denial/release authority. For Admiralty Letter Reports, OJAG Code 11 is the sole denial/release authority. Convening and reviewing commands are not authorized to release litigation-report investigations or their contents.

0211 TYPE THREE: COURTS AND BOARDS OF INQUIRY

a. Overview. Courts and boards of inquiry use a hearing procedure and should be reserved for the investigation of major incidents, as defined in Appendix A-2-a, or serious or significant events. Specific guidance on conducting courts and boards of inquiry is set forth in JAGINST 5830.1 (series). If there is a conflict with that instruction, this Manual controls.

b. Court of Inquiry characteristics

(1) Convened by a GCMCA, or a person designated by the Secretary of the Navy (see Article 135, UCMJ).

(2) Convened by written appointing order, which should direct that all testimony be taken under oath and all open proceedings, except counsel's argument, recorded verbatim.

(3) Consists of at least three commissioned officers as members and has appointed legal counsel for the court. It may also include advisors appointed to assist the members and non-voting members. See subsection (d) below for additional information on advisors and non-voting members.

(4) Uses a hearing procedure.

(5) Designates as parties persons subject to the UCMJ whose conduct is subject to inquiry. See Appendix A-2-b.

(6) Designates as parties persons subject to the UCMJ or employed by the DoD and who have a direct interest in the subject under inquiry and request to be so designated. See Appendix A-2-b.

(7) Has the power to order military personnel to appear, testify, and produce evidence, and the power to subpoena civilian witnesses to appear, testify, and produce evidence. Article 47, UCMJ, provides for prosecution of civilian witnesses in U.S. district court for failing to appear, testify, or produce evidence.

c. Board of Inquiry characteristics

(1) Convened by a GCMCA.

(2) Convened by written appointing order, which should direct that all testimony be taken under oath and all open proceedings, except counsel's argument, recorded verbatim.

(3) Consists of one or more commissioned officers as members and has appointed legal counsel for the board. It may also include advisors appointed to assist the members. See subsection (d) below for additional information on advisors and non-voting members.

(4) Uses a hearing procedure.

(5) May designate as parties persons whose conduct is subject to inquiry or who have a direct interest in the subject of the inquiry. The CA may also authorize the board to designate parties during the proceedings. See Appendix A-2-b.

(6) Does not possess power to subpoena civilian witnesses unless convened under Article 135, UCMJ, but can order Naval personnel to appear, testify, and produce evidence.

d. Advisors and non-voting members

(1) The CA may appoint to a court or board of inquiry full-time Federal personnel, military or civilian, to participate in the proceedings and advise the members. The CA may select such advisors because of their background, training, or experience. Advisors may be present at all board or court sessions, are subject to challenge to the same extent as members, and

may suggest courses of inquiry or recommend such other action to the board or court as they consider appropriate. Moreover, persons with technical knowledge may be appointed for either full participation or the limited purpose of utilizing their special expertise. If appointed for a limited purpose, they need not participate in any aspect of the inquiry that does not concern their expertise. The investigative report must clarify any limited participation by advisors.

(2) The CA may appoint one or more non-voting members, whose level of participation in the proceedings will be as determined by the CA or the senior member of the court when so authorized by the CA. An example of when it may be appropriate to appoint a non-voting member is when a court is convened to investigate an incident in which a friendly nation or ally has a significant interest and the CA determines that it will serve the interests of the United States to invite a representative from the friendly nation or ally to participate in a non-voting capacity.

e. Responsibilities

(1) The GCMCA over the command most involved in a major or serious incident, if a flag or general officer, or the first flag or general officer in the chain-of-command, or any superior flag officer in the chain-of-command, will immediately take cognizance over the case as the CA.

(2) Whenever more than one command is involved in a major or serious incident requiring formal investigation, a single investigation shall be conducted. The common superior commander shall convene the investigation in such cases, unless that officer's conduct or performance of duty may be subject to inquiry, in which case the next superior in the chain-of-command shall convene the investigation.

f. Convening order. See JAGINST 5830.1 (series) for the requirements for convening orders for courts and boards of inquiry.

g. Method. See JAGINST 5830.1 (series) for information on how courts and boards of inquiry are conducted.

h. Participation by non-parties. Other than the official members, counsel, advisors, non-voting members, and administrative support personnel, only parties may, as a general rule, participate in the proceedings of a court or board of inquiry. The CA, or the president in the case of a court of inquiry, may, however, permit the participation of an individual or organization that has an interest in the subject under inquiry. For example, the Federal Aviation Administration may be permitted to participate in an investigation inquiring into the circumstances surrounding an aircraft crash. Appropriate limits on the degree of participation should be specified in advance.

i. Time limitations. The CA shall prescribe when the report is due according to the complexity and gravity of the incident under investigation. The CA may grant extensions in writing. Requests and authorizations for extensions must be included in the report as enclosures.

j. Action

(1) Upon receiving a report from a court or board of inquiry, the CA shall review it or cause it to be reviewed, and either endorse the report in writing or return it for further investigation. In the endorsement, the CA:

(a) may approve, disapprove, modify, or add to the findings of fact, opinions, and recommendations;

(b) shall indicate what corrective action, if any, is warranted and has been or will be taken;

(c) may comment on whether punitive or nonpunitive action is warranted. Whenever punitive or nonpunitive action is contemplated or taken as the result of the incident under inquiry, the action shall be noted in the endorsement of the convening or reviewing authority. For example, the endorsement could read: "Punitive action is not warranted; however, appropriate corrective measures were taken in the case of ENS Smith." Punitive letters, or copies of recommended drafts thereof, shall be included in the investigative report as enclosures. Nonpunitive letters shall not be included as enclosures in the investigative report. In instances involving senior officials and certain other employees depending on their official position, comment on specific nonpunitive accountability actions taken may be included. See section 0105(b)(4).

(d) shall state where the original evidence is preserved and provide the name and telephone number of the responsible official; see section 0207 for further information on the safekeeping of evidence.

(2) The CA, if not an Echelon II Commander, shall retain a copy of the report and forward the original, via all superior commanders who have a direct official interest in the recorded facts, to the appropriate Echelon II Commander or as otherwise directed. The subject matter and facts found will dictate the routing of the report for review. Reports involving Marine Corps matters shall be forwarded to the Commandant of the Marine Corps. The CA shall provide a copy to other commands that may have an interest in the report, such as the Naval Safety Center.

(3) If a court or board of inquiry is to be used as a pretrial investigation under Article 32(c), UCMJ, and the original report of investigation is desired in connection with trial by general court-martial, it may be retained for such purpose. A complete certified copy shall be forwarded to the Echelon II Commander via appropriate authorities.

(4) The CA's action on the report should be completed within 30 calendar days of receiving the report.

k. Review. Superiors who receive a report from a court or board of inquiry shall have it reviewed, and shall forward it to the cognizant Echelon II Commander, via the chain-of-command. In their endorsements, intermediate reviewing authorities shall comment on the report and state their concurrence or disagreement with the findings of fact, opinions, and recommendations. They shall also state what action, if any, is considered warranted or has been

taken. Reports, as a general rule, should be forwarded within 30 calendar days of receipt.

l. Advance copies of investigations

(1) In all cases where it is appropriate to forward an advance copy of an investigation, the advance copy shall be forwarded by the CA and shall include that officer's endorsement.

(2) All advance copies of Marine Corps investigations shall be forwarded to the Commandant of the Marine Corps after endorsement by the CA.

m. Release. For courts and boards of inquiry, the cognizant Echelon II Commander is the release authority.

PART E -- LINE OF DUTY/MISCONDUCT

0212 WHEN LINE OF DUTY/MISCONDUCT DETERMINATIONS ARE REQUIRED

a. General. If a member incurs a disease or injury that may result in a permanent disability or that results in the member's physical inability to perform duty for a period exceeding 24 hours, as distinguished from a period of hospitalization for evaluation or observation, a determination as to whether the disease or injury was incurred in the line of duty or as the result of misconduct is very important. An injury or disease suffered by a member of the Naval service will, however, be presumed to have been incurred in the line of duty and not as a result of misconduct, unless contrary findings supported by clear and convincing evidence are made.

b. Death cases. A line of duty determination is required whenever an active duty service member of the Naval service dies, in order to make decisions concerning eligibility and annuity calculations under the Uniformed Services Survivor Benefit Program; see Part F, section 0229 of this Manual. In many cases, the death of a reservist will also require a line of duty determination. See section 0224 for additional information on reservist personnel.

c. Warning required. Any person in the Armed Forces, prior to being asked to sign any statement relating to the origin, incidence, or aggravation of any disease or injury suffered, shall be advised of the right not to sign such a statement; see 10 U.S.C. § 1219. The spirit of this section will be violated if a person, in the course of an investigation, obtains the member's oral statements and reduces them to writing, unless the above advice was given first. Compliance with this section must be documented. See Appendix A-2-j for a sample.

0213 WHY LINE OF DUTY/MISCONDUCT DETERMINATIONS ARE REQUIRED

a. General. Line of duty/misconduct determinations are extremely important since they control several personnel actions. Receipt of certain

survivor benefits such as the Survivor Benefit Plan (SBP), Dependency and Indemnity Compensation (DIC), and Dependents' Educational Assistance, are contingent on whether the service member died while in the line of duty. Equally important, the receipt of disability retirement and/or severance pay hinge on this same determination.

b. Disability retirement and severance pay. To be eligible to receive certain retirement and severance pay benefits, members of the Naval service on active duty who sustain injuries resulting in permanent disability must have received those injuries in the line of duty and not due to their own misconduct. 10 U.S.C. §§ 1201, 1203, 1204, 1206, and 1207 require a determination that "the disability is not the result of the member's intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence." Although the degree and permanent nature of the disability will be determined pursuant to SECNAVINST 1850.4 (series), the determination regarding line of duty/misconduct will be made by the line commander in accordance with the provisions of this chapter. The line of duty/misconduct determination made pursuant to this chapter will normally be binding on the Physical Evaluation Board, subject to limitations set forth in SECNAVINST 1850.4.

c. Survivor benefits. Dependents of service members who died in the line of duty are generally eligible to receive certain survivor benefits such as the Survivor Benefit Plan under 10 U.S.C. §§ 1447-1460 (see section 0229 for additional information on the SBP), Dependency Indemnity Compensation under 38 U.S.C. §§ 1301-1323 and Dependent's Educational Assistance under Chapter 35 of Title 38 of the U.S. Code.

0214 STANDARDS OF PROOF FOR LINE OF DUTY/MISCONDUCT DETERMINATIONS

As discussed in section 0207, administrative investigations normally will arrive at findings of fact only if supported by a preponderance of the evidence, i.e., more likely than not. However, in LOD/Misconduct investigations, certain findings require a higher standard, that of clear and convincing. Clear and convincing means that the truth of the facts asserted is highly probable. To be clear and convincing, evidence must leave no serious or substantial doubt as to the correctness of the conclusion in the mind of objective persons, after considering all the facts. It is a higher degree than a preponderance of the evidence standard, but it does not require proof beyond a reasonable doubt as in criminal cases (see also paragraph 3 of Appendix A-2-a). Findings of fact relating to the following issues must be established by clear and convincing evidence:

a. to rebut the presumption that an injury, disease, or death has been incurred in the line of duty;

b. to rebut the presumption of mental responsibility when the question of a member's mental responsibility has been raised by the facts or by the nature of the incident;

c. to rebut the presumption that an unauthorized absence period of less than 24 hours did not materially interfere with the performance of the

member's military duties in line of duty/misconduct cases; or

d. to find that the acts of a deceased service member may have caused harm or loss of life, including the member's own, through intentional acts.

0215 WHAT CONSTITUTES LINE OF DUTY

a. General. For purposes of this Chapter, only the award of disability, retirement and severance pay are bound by separate standards regarding injuries incurred during a period of unauthorized absence; see subsection d(2) below. Injury or disease incurred by Naval personnel while in active service, and death incurred by Naval personnel on active duty, will be considered to have been incurred "in line of duty" except when incurred under one or more of the following circumstances:

(1) as a result of the member's own misconduct as determined under the regulations contained in this chapter;

(2) while avoiding duty by deserting;

(3) while absent without leave and such absence materially interfered with the performance of required military duties; see subsection (d) below;

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

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

b. Active service defined. "Active service" as used in this section includes full-time duty in the Naval service, extended active duty, active duty for training, leave or liberty from any of the foregoing, and inactive duty training. Inactive duty training is duty prescribed for reservists by the Secretary of the Navy and special additional duties authorized for reserves, performed voluntarily in connection with prescribed training or maintenance activities at their units; see SECNAVINST 1770.3 (series).

c. Active duty defined for death cases. Active duty for purposes of line of duty determinations in death cases is defined in 10 U.S.C. § 101(d)(1). It includes active duty for training, even for periods less than 30 days, and inactive duty for training. The term inactive duty training is defined in 37 U.S.C. § 206.

d. Unauthorized absence

(1) 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." Generally speaking, absence in excess of 24 hours constitutes a material

interference unless evidence to the contrary exists. Similarly, an absence of shorter duration will not be considered a material interference unless there is 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.

(2) Per 10 U.S.C. § 1207, a member is ineligible for physical disability retirement or physical disability severance benefits from the Armed Forces if the disability was incurred during a period of unauthorized absence, regardless of the length of such absence and regardless of whether such absence constituted a material interference with the performance of required military duties. Therefore, any injury incurred during a period of unauthorized absence requiring a line of duty/misconduct determination pursuant to the provisions of section 0212, must be the subject of a command investigation.

0216 WHAT CONSTITUTES MISCONDUCT

a. Generally. An injury or disease is the result of a member's misconduct if it is either intentionally incurred or is the result of willful neglect that demonstrates a reckless disregard for the foreseeable and likely consequences of the conduct involved. It is more than just inappropriate behavior. For death cases, see sections 0218 and 0229. Simple or ordinary negligence, or carelessness, standing alone, does not constitute misconduct. The fact that the conduct violates law, regulation, or order, or is engaged in while intoxicated, though relevant, does not alone constitute a basis for a misconduct determination.

b. Presumption. An injury, disease, or death suffered by a member of the Naval service is presumed to have been incurred in the line of duty and not to be the result of misconduct. Clear and convincing evidence, see section 0214, is required to overcome this presumption.

c. Examples. If an individual deliberately shoots off a toe to avoid duty, the injury is due to misconduct since it was intentionally incurred. If an individual shoots off a toe while playing Russian roulette, the injury is due to misconduct since such conduct demonstrates a reckless disregard for the foreseeable and likely consequences. If an individual shoots off a toe while holstering a pistol with the safety off, the injury is not due to misconduct; rather, it is the result of the negligent failure to observe a safety precaution.

0217 RELATIONSHIP BETWEEN MISCONDUCT AND LINE OF DUTY

a. General. For purposes of these regulations, "misconduct" can never be "in line of duty." Hence, a finding or determination that an injury was incurred as a result of the member's own misconduct must be accompanied by a finding or determination that the member's injury was incurred "not in line of duty." It is permissible, however, to find that an injury was incurred "not

as a result of misconduct" and "not in line of duty." As an example, a member who is absent without authority may be injured by a felonious assault or struck by a vehicle driven by a drunken driver. Obviously, the injury was incurred through no fault of the member, but if the unauthorized absence interfered with the performance of the member's required military duties, a finding of "not in line of duty" must result.

b. Possible findings. The only possible combinations of findings are:

(1) "In line of duty" and "not due to the member's own misconduct;"

(2) "Not in line of duty" and "not due to the member's own misconduct;" and

(3) "Not in line of duty" and "due to the member's own misconduct."

0218 MENTAL RESPONSIBILITY

a. General rule. A member may not be held responsible for particular actions and their foreseeable consequences if, as the result of mental defect or disease, the member was unable to comprehend the nature of such acts or was unable to control such actions.

b. Presumption. In the absence of evidence to the contrary, all members are presumed to be mentally responsible for their acts. If a question of the mental responsibility of a member is raised by the facts or by the nature of the incident, this presumption ceases and the investigation must clearly and convincingly establish the member's mental responsibility before an adverse determination can be made.

c. Suicide attempts or suicides. In view of the strong human instinct for self-preservation, suicide and a bona fide suicide attempt, as distinguished from a suicidal gesture, creates a strong inference of lack of mental responsibility. Self-inflicted injury, not prompted by a serious suicidal intent, is at most a suicidal gesture, and such injury, unless lack of mental responsibility is otherwise shown, is deemed to be incurred as the result of the member's own misconduct; see section 0230.

0219 INTOXICATION AND DRUG ABUSE

a. Intoxication. In order for voluntary intoxication alone to be the basis for a misconduct determination, clear and convincing evidence must show that the member was intoxicated sufficiently to impair the rational and full exercise of his mental or physical faculties at the time of the injury and that the impairment was the proximate cause of the injury. Intoxication or impairment may be produced by alcohol, a drug, or inhalation of fumes, gas, or vapor.

b. Presumption

(1) Any member that operates or physically controls any vehicle,

aircraft or vessel while drunk; or, when the alcohol concentration in the person's blood or breath is equal to or exceeds the lesser of .10 percent or the blood or breath alcohol content limit under the law of the state in which the conduct occurred, is presumed to be sufficiently intoxicated to impair the rational and full exercise of his mental or physical faculties. This presumption is rebuttable but, if not rebutted, is of sufficient strength to provide clear and convincing evidence of the member's impairment. The presumption alone, however, does not establish anything about the proximate cause of the injury.

(2) For example, if a sailor is injured while driving with a voluntarily induced blood-alcohol content that is equal to or exceeds the lesser of .10 percent by volume or the blood or breath alcohol content limit under the law of the State in which the conduct occurred, then it may be presumed that the sailor was impaired due to intoxication to the extent that he could not fully exercise his mental or physical faculties at the time of the wreck. To find misconduct, however, it still must be shown that the resulting impairment was the proximate cause of the injury. Thus, if the accident were caused solely by the wrongdoing of another driver, then the sailor's impairment was not the proximate cause of the injury.

(3) Intoxication, as described above, may also be found when there is no blood-alcohol content measurement available or when it measures less than .10 percent by volume or the blood or breath alcohol content limit under the law of the State in which the conduct occurred. In such cases, all relevant information concerning the member's condition at the time of the injury or incident should be considered.

c. Alcohol and drug-induced disease. Inability to perform duty resulting from disease directly attributable to a specific, prior, proximate, and related intemperate use of alcohol or habit-forming drugs is the result of misconduct, see 37 U.S.C. § 802. Time spent in evaluating habituation without specific inability to perform duty shall not be charged as time lost due to misconduct.

0220 REFUSAL OF MEDICAL AND 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; see chapter 18, Manual of the Medical Department.

0221 RELATIONSHIP TO DISCIPLINARY ACTION

An adverse line of duty/misconduct determination is not a punitive measure. If warranted, commanders may take independent disciplinary action. Similarly, a favorable line of duty/misconduct determination does not preclude separate disciplinary action for the underlying act or circumstance which caused or led to the injury. Line of duty and misconduct determinations are not binding at subsequent disciplinary or administrative separation proceedings.

0222 HOW LINE OF DUTY/MISCONDUCT DETERMINATIONS ARE RECORDED

a. General. As noted above, injuries or disease suffered by Naval personnel are presumed to have been incurred in the line of duty and not as a result of a member's misconduct.

(1) Each injury or disease requiring line of duty/misconduct determinations (see section 0212), must be the subject of a preliminary inquiry (see section 0229 for LOD determinations in death cases). If, however, following a preliminary inquiry, the conditions set forth in subparagraph c below are met, then the member's command need not convene an investigation and need not report the line of duty/misconduct determinations separately. Thus, if appropriate entries in the member's health or dental records are made, and the command does not convene an investigation, then the presumption that the member's injuries or disease were incurred in the line of duty and were not a result of the member's misconduct will not be rebutted.

(2) See Appendix A-2-k for a checklist of matters that should be included, as applicable, in any report of an investigation convened to inquire into and make recommendations concerning misconduct and line of duty under the provisions of this chapter.

b. Reporting. If the command completing the preliminary inquiry is not a GCMCA, the command will report the circumstances surrounding the injury and results of the preliminary inquiry to its GCMCA using the Personnel Casualty Report system; see MILPERSMAN 1770-030. Unless the GCMCA directs otherwise, the command will provide a copy of the preliminary inquiry report to the appropriate medical department for review in making a health or dental record entry described in subparagraph c (normally the preliminary inquiry report will not be included within the health or dental record). The GCMCA may review the preliminary inquiry and order an investigation.

c. Entry in health or dental record. An investigation need not be convened and a report need not be forwarded concerning misconduct and line of duty when, in the opinion of the medical officer or senior representative of a medical department, with the concurrence of the member's commanding officer, the injury or disease was incurred "in line of duty" and "not as a result of the member's own misconduct" and appropriate entries to this effect have been made in the member's health or dental record. See Appendix A-2-l for sample line of duty health or dental record entries.

d. Command Investigations. A command must convene an investigation and make findings concerning misconduct and line of duty when:

(1) the injury was incurred under circumstances which suggest a finding of "misconduct" might result. These circumstances include, but are not limited to, all cases in which a qualifying injury was incurred:

(a) while the member was using illegal drugs or abusing prescription drugs;

(b) while the member's blood alcohol content was equal to or

exceeded the lesser of .10 percent by volume or the blood or breath alcohol content limit under the law of the State in which the conduct occurred. This does not preclude the convening of an investigation if the blood-alcohol percentage measured less than .10 percent by volume or the blood or breath alcohol content limit under the law of the State in which the conduct occurred, if the circumstances so indicate; or

(c) as a result of a bona fide suicide attempt.

(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 commander considers the convening of an investigation essential to ensure an adequate official record is made concerning the circumstances surrounding the incident; or

(4) the injured member is in the Naval Reserve or the Marine Corps Reserve and the commander considers an investigation essential to ensure an adequate official record is made concerning the circumstances surrounding the incident. See SECNAVINST 1770.3 (series) for additional information on Reserve Component Incapacitation Benefits and their relationship to line of duty/misconduct findings.

0223 ACTION BY REVIEWING AUTHORITIES

a. Action by convening authority. Unless the report is returned for further inquiry into the circumstances behind the disease or injury, see Part F of this Chapter for death cases, the CA will make a line of duty/misconduct determination by taking one of the following actions:

(1) If the CA concludes that an injury or disease was incurred in line of duty and not due to the member's own misconduct or that clear and convincing evidence is not available to rebut the presumption of in line of duty/not due to misconduct, this conclusion shall be expressed in the action on the record of proceedings. This action may be taken regardless of whether it differs from or concurs with an opinion expressed by the investigating officer.

(2) If, upon review of the report, the CA or higher, believes that the injury or disease of the member was incurred not in line of duty and/or due to the member's own misconduct, then prior to taking action that authority must afford the member, or the member's representative if the member is mentally incompetent to understand the nature of the action, notice of the preliminary determination and an opportunity, not exceeding 10 calendar days, to submit any desired information for the CA's consideration. Additional time may be granted by the CA for good cause. For purposes of this subsection, member’s representative includes a court-appointed conservator (or equivalent) or a duly-appointed attorney-in-fact. In the absence of such a representative, notice may be sent to the member’s primary next-of-kin as designated on the NAVPERS 1070/602 (Page 2). In the event of a conflict between a durable power of attorney and a court-appointed conservator or equivalent, the CA

must reconcile which takes precedence under the relevant state law.

(a) The member will be advised that he does not have to make any statement relating to the origin, incidence, or aggravation of any injury or disease. If any information is obtained from the member, a statement attesting that the above warning was given must be attached; see section 0212 and Appendix A-2-j.

(b) If the member is also suspected or accused of any offense under the UCMJ, then the member should also be advised in accordance with Article 31, UCMJ, and of rights to counsel. Suspect's Rights Acknowledgement/Statement forms should be used for such advice; see Chapter I of this Manual.

(c) Upon request, the member may be permitted to review the investigative report but not to copy it. After the report is final, the member may have a right under the Privacy Act to a copy of the report.

(d) If the member elects to provide any information, it shall be considered by the CA and attached to the record.

(e) If the member elects not to provide any information, or fails to respond within 10 calendar days, that election or failure shall be noted in the CA's endorsement.

(3) Unless the CA is a GCMCA, the report shall be forwarded via the chain-of-command to a GCMCA with an assigned judge advocate.

(a) The CA has 30 calendar days to take action on the report. The endorsement should be prepared as directed in section 0209.

(b) In cases involving death or injury of members, the original shall be forwarded with sufficient copies so that the ultimate addressee receives the original and two copies.

b. Action by general court-martial convening authority

(1) The GCMCA may take any action on the report that could have been taken by the CA. With respect to conclusions concerning misconduct and line of duty, the GCMCA shall indicate approval, disapproval, or modification of such conclusions unless the record is returned for further inquiry. A copy of this action shall be forwarded to the commander of the member concerned, so that appropriate entries may be made in the member's service and medical records, see below. Reviewing authorities subsequent to the GCMCA, if any, need neither comment nor record approval or disapproval of the prior actions concerning line of duty and misconduct.

(2) Copies of the report shall be provided to:

(a) the Naval Safety Center when the report reveals systemic safety problems;

(b) OJAG (Code 15), Tort Claims Unit (TCU), 9620 Maryland Avenue,

Suite 205, Norfolk, VA 23511-2989, if potential claims against the Government or potential affirmative claims by the Government may be involved; if medical care has been furnished and the government may be entitled to recover third party medical claims, provide to OJAG (Code 15) Medical Care Recovery Unit (MCRU), 9053 First St., Suite 100, Norfolk, VA 23511-3605; and

(c) other commands having a direct official interest in the matter.

(3) The GCMCA shall keep the original investigation for 2 years.

c. Follow-up actions. As noted above, after the GCMCA reviews and approves the line of duty/misconduct findings, the commander of the concerned member must cause appropriate service and health record entries to be made to include the GCMCA action. A copy of the GCMCA action will be made an enclosure to all line of duty/misconduct health record entries resulting from command investigations. In this regard, the following information is provided:

(1) Extension of enlistment. When an enlisted service member is unable to perform duties for more than one day because of intemperate use of drugs or alcohol or because of disease or injury resulting from the member's misconduct, his or her enlistment shall be extended to account for the lost time. See 10 U.S.C. § 972.

(2) Longevity and retirement multiplier. An enlisted member who is unable to perform duties for more than one day because of intemperate use of drugs or alcohol or because of disease or injury resulting from misconduct is not entitled to include such periods in computing "creditable service" for purposes of longevity pay or retirement pay. See DoD Financial Management Regulation (DoD FMR), DOD 7000.14-R, Volume 7A, Military Pay Policy and Procedures - Active Duty and Reserve Pay.

(3) Forfeiture of pay. A member of the Naval service on active duty who is absent from regular duties for a continuous period of more than one day because of disease that is directly caused by and immediately follows intemperate use of alcohol, illegal or prescription drugs is not entitled to pay for the period of that absence. If pay is forfeited for more than one month, however, the member is entitled to $5.00 for personal expenses for each month that his pay is forfeited. Pay is not forfeited for absence from duty caused by injuries or diseases that are not directly caused by and immediately following intemperate use of alcohol, illegal or prescription drugs. See DoD FMR, DoD 7000.14-R, Volume 7A, Chapter 1, Basic Pay.

(4) Disability retirement and severance pay. As noted in section 0213, to be eligible for disability retirement or severance pay, a member's injuries must meet the requirements established by applicable statutes. One of these requirements is that the injury/disability not be the result of the member's "intentional misconduct or willful neglect" nor have been "incurred during a period of unauthorized absence." The Physical Evaluation Board in awarding any disability payment in accordance with SECNAVINST 1850.4 (series) is bound by line of duty/misconduct determinations made pursuant to this chapter.

(5) Benefits administered by the Department of Veterans Affairs. In determining whether a veteran or the veteran's survivors or dependents are eligible for certain benefits, the Department of Veterans Affairs makes its own determination with respect to misconduct and line of duty. As a practical matter, these determinations often rest upon the facts that have been officially recorded and are on file within the DON. Statutes governing these benefits generally require that disabling injury or death be "service connected," which means the disability was incurred or aggravated, or, that the death resulted from a disability incurred or aggravated "in line of duty." See 38 U.S.C. § 101. The statutory criteria for making such determinations are contained in 38 U.S.C. § 105.

0224 SPECIAL CONSIDERATIONS IN RESERVE COMPONENT CASES

a. Interim Line of Duty determination. In order to meet the requirements of DoDI 1241.2 (series), CAs must issue "interim" line of duty determinations within seven days of being notified that a reservist not on the active duty list has an incapacitating injury or illness incurred or aggravated while on active duty, including leave and liberty therefrom, active duty for training, inactive duty training, or travel to or from such duty. This interim determination is intended to ensure that the reservist's incapacitation pay can be started without delay. If the final line of duty/misconduct determination is adverse to the member, immediate action must be taken to stop incapacitation benefits; see SECNAVINST 1770.3 (series) for further information.

b. Statutory authority. 10 U.S.C. § 1074a governs entitlement to medical and dental care administered for reserve component members who incurred or aggravated an injury, illness, or disease while performing active duty or annual training for a period of 30 days or less, or inactive-duty training, or while traveling directly to or from such duty.

c. Annual training. The period of annual training extends from the time of reporting to the time of release, and, if the orders to active duty for training provide for travel, the time of travel to and from the duty station not in excess of the allowable constructive travel time as prescribed. DoD FMR, DoD 7000.14-R, Volume 9, Travel Policy and Procedures.

d. Investigation. Incidents involving injury or death of reservists occurring during a period of annual training or inactive duty training (drill), as defined above, or that occur 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, as defined above, should be investigated. See Appendix A-2-k for a checklist of matters that should be included, as applicable, in any report of an investigation convened to inquire into and make recommendations concerning line of duty for reservists.

PART F -- SPECIAL CONSIDERATIONS IN DEATH CASES

0225 GENERAL

a. Special considerations. The circumstances surrounding the death of Naval personnel or DON civilian employees accompanying military personnel in the field or killed as a result of military-related actions, may be recorded in a variety of ways, such as autopsy reports, battlefield reports, and medical reports. Investigations conducted pursuant to this Manual may also focus on such deaths and may incorporate other official reports as enclosures, subject to the guidance contained in this Chapter. Since reports pertaining to deaths of military members are by law generally releasable to family members, special considerations prevail in the investigation of death cases. Due to the special release considerations, litigation-report investigations should never be conducted into the death of active-duty military members, or civilians killed while accompanying military members into the field or as a result of military-related activity.

b. Casualty Office notification. When an investigation into the cause or circumstances surrounding the death of a military member or DoD civilian employee who becomes a fatality while accompanying military personnel in the field or as a result of military-related actions is initiated, the appropriate Military Service Casualty Headquarters Office shall be notified immediately. At a minimum, the Casualty Office shall be provided written confirmation containing the following information:

(1) The name of the DoD organization conducting the investigation;

(2) The type of investigation being conducted;

(3) The existence of any reports by the investigating organization that have been or will be issued as a result of the investigation;

(4) A point of contact within the investigating organization that can provide information on the status of the completion of any investigative reports;

(5) The procedures for family members to obtain a copy of the completed report(s) to the extent such reports may be furnished consistent with sections 552 and 552a of title 5, United States Code, and to obtain assistance in obtaining a copy of the completed report(s); and

(6) The procedures for family members to obtain answers to their questions on the complete investigation from a fully qualified representative.

(7) Investigating agencies will provide an update to the appropriate Military Service Casualty Headquarters office at a 30-day frequency until the investigation is completed.

The contact numbers for providing the Military Service Casualty Headquarters with the required information concerning death investigations are: Navy Casualty Office at 800-368-3202 and Marine Corps Casualty Office at 800-847-1597.

c. Family Member Notification. Per DoDI 1300.18 and applicable service regulations, family members shall be informed in a timely manner of the initiation of an investigation into the death of a service member. The same policy and all related responsibilities and requirements shall be extended to the family members of DoD civilians who have died while accompanying military personnel in the field or as a result of military-related actions.

d. NCIS notification. NCIS must be notified of any death occurring on a Navy vessel or Navy/Marine Corps aircraft or installation, except when the cause of death is medically attributable to disease or natural causes.

e. Time limitations. The period for completing the administrative investigation report/record into a death shall not normally exceed 20 calendar days from the date of the death, or its discovery. For good cause, however, the CA may extend the period. Requests and authorizations for extensions must be coordinated with the next reviewing authority. The CA and subsequent reviewers have 20 calendar days to review and endorse the investigation. Noncompliance with these time requirements must be explained in the endorsement of the deviating command and commented upon by subsequent endorsers. See MILPERSMAN 1770-060 for the requirement to submit Status Investigation Reports.

f. Release of death investigations

(1) Policy for release to next of kin. Normally, death investigation reports/records shall not be released to the public until they are final. However, consistent with 10 U.S.C. § 113 note (Pub. L. 102-484, Div. A, Title X §1072, 23 Oct 92; 106 Stat. 2508), it is DON policy that for service member deaths and civilians who died while accompanying military personnel in the field or as a result of military-related activity, upon completion of the review by the first GCMCA in the chain of command, the reviewer shall release an advance copy of the investigation, upon a request, to the next of kin. The release of an advance copy to requesting next of kin shall be made unless release would violate law (e.g., investigation classified), or the endorser can articulate how release would harm the command's mission, interfere with an ongoing criminal investigation, or why release should not be made for other good cause (e.g., interests of national security). If an endorser does not wish to release an investigation to requesting next of kin, this decision shall be coordinated with OJAG (Code 13), at 703-614-82007415/DSN 224-7415.

(2) Delivery to next of kin. In providing death investigations to the next of kin, consideration should be given to the potential impact of the report on the sensitivities of relatives and others to whom the investigation may be released. Releasing authorities should exercise discretion in enclosing graphic photographs. Such materials should be enclosed separately in an envelope marked: "CAUTION, CONTAINS GRAPHIC PHOTOGRAPHS. DISCRETION ADVISED." Similar procedures should be employed for autopsy reports and other written materials containing graphic details of injury, wounds, mutilation, etc. Releasing authorities should ensure, when reasonable, hand delivery of the report by someone who can discuss it with the family. Normally, the Casualty Assistance Calls Officer(s) would deliver the report, but there may be reasons (technical subject-matter, personal friendships, etc.) for another

individual to do so. In releasing the report, redaction of witnesses' social security numbers and home addresses is appropriate; any other redactions should be kept to a minimum.

(3) Release to general public or media. In determining what to release in response to a request from the general public or media for the investigation, the releasing authority must conduct a careful analysis under the Freedom of Information Act (FOIA). Releasing authorities should look to the guidance provided in section 6.3 of DoD Instruction 1300.18 (DoD Personnel Casualty Matters, Policies, and Procedures). Releasing authorities should also be aware that in some circumstances exemption b(7) to the FOIA, may provide more protection for privacy interests than the b(6) exemption when the investigation was conducted for "law enforcement purposes." The law to be enforced within the meaning of the term "law enforcement purposes" includes the Uniform Code of Military Justice, and other applicable civil and criminal law, as well as those statutes authorizing administrative (i.e., regulatory) proceedings (MILPERSMAN, MARCORSEPMAN, Navy Regulations, etc.). Prior to the release of any part of the investigation, the releasing authority is responsible for ensuring appropriate commanders and next of kin are notified of the pending release. In cover letters accompanying the release of the investigation, the following language may be appropriate: "In making this release to you, we note that some of the material may impact the deceased's family's privacy interest. Although this information is released under the FOIA, we urge discretion in selecting materials for public dissemination."

0226 WHEN INVESTIGATIONS OF DEATH CASES ARE REQUIRED

A preliminary inquiry, see section 0203, shall, as in any other circumstance potentially warranting an investigation, be conducted into the death of a member of the Naval service or into the death of a civilian aboard a place under Naval control. The requirement to conduct a preliminary inquiry or an investigation is independent of the line of duty determination requirement. See section 0228 and Part E. At the conclusion of the preliminary inquiry, the commander must determine which of the options listed in section 0204 will be exercised, and report that decision to the next superior in the chain-of-command. Normally, a command investigation, or a limited investigation (see subparagraph c below), will be appropriate to inquire into a death of a service member. A court or board of inquiry is appropriate in some cases, as discussed below. Litigation-report investigations will never be conducted in any incident where an active duty death has occurred or where civilian personnel have died while accompanying military personnel in the field or as a result of military-related activities. In cases involving the death of other civilians, whether a DON employee or not, potential claims are likely and as a result, commands should consult with OJAG (Code 15). In deciding on the type and necessity of investigation, the commander shall consider the following:

a. No investigation required. An investigation under this Manual will normally not be conducted if the preliminary inquiry shows that the death of a service member:

(1) was the result of a previously known medical condition and the adequacy of military medical care is not reasonably in issue; or

(2) was the result of enemy action, except for "friendly-fire" incidents described in subsection (b)(4) below.

b. Investigation required. An investigation under this Manual shall be conducted if the preliminary inquiry shows:

(1) the case involves civilian or other non-Naval personnel found dead aboard an activity under military control, where the death was apparently caused by suicide or other unusual circumstances;

(2) the circumstances surrounding the death place the adequacy of military medical care reasonably at issue;

(3) the case involves the death of a military member and a probable nexus exists to Naval service, except where the death is as a result of enemy action; or

(4) it is unclear if enemy action caused the death, such as in possible "friendly-fire" incidents.

c. Limited investigation required. If the preliminary inquiry shows that the death of a service member occurred at a location in the United States but not under military control, while the member was off-duty, and the circumstances of the death had no discernable nexus to the Naval service, the command shall obtain the results of the investigation of the incident by civilian authorities and maintain the results as an internal report. The command shall document, in writing, the reasons for making the determination to conduct a limited investigation, attaching the enumerated reasons to the internal report. Completion of these actions shall follow the time constraints noted for the processing of command investigations and will constitute final action on the report. Limited investigations or internal reports are considered investigations for records retention purposes.

0227 STANDARD OF PROOF

To find that the acts of a deceased service member may have caused harm or loss of life, including the member's own, through intentional acts, findings of fact relating to those issues must be established by clear and convincing evidence; see Appendix A-2-a for a definition of that term.

0228 AUTOPSIES

a. General. When the death of a member of the uniformed services on active duty, or active duty for training, occurs under any of the circumstances set forth in chapter 17, Manual of the Medical Department, and when an autopsy is authorized by the member's commander, and in other cases in which authorization from proper authority has been obtained, the preliminary inquiry officer shall provide the medical officer designated to conduct the autopsy with a preliminary report of the circumstances surrounding the death. In those cases in which authorization for autopsy has been granted by other

than the member's commanding officer, the medical officer shall be responsible for advising command authority that such authorization has been granted in order to facilitate the preliminary investigation and report thereof to the medical officer conducting the autopsy. Upon completion of the autopsy, the medical officer conducting the autopsy shall provide the preliminary inquiry officer, or investigating officer, a copy of the preliminary autopsy findings as to the cause of death and, when completed, a copy of the final protocol. The medical officer conducting the autopsy should be provided with a copy of the final investigative report, if an investigation is convened. DoDD 5154.25 (series) and NAVMED P-5065 refer to issues of authorization of autopsies.

b. Unavailability of documents. Notwithstanding the guidance above, completion of a death investigation and its forwarding will not be delayed to await final autopsy reports, death certificates, or similar documents unless their inclusion is absolutely essential to the completion of the investigative report. The unavailability of such documents should be noted and the investigation completed and forwarded. Documents subsequently obtained shall be forwarded by separate correspondence via the review chain, with appropriate reference to the report of investigation/forwarding endorsement.

0229 DETERMINATIONS CONCERNING LINE OF DUTY/MISCONDUCT IN DEATH CASES

a. Modifications to Survivor Benefit Plan programs

(1) With the passage of section 642, National Defense Authorization Act (NDAA) of Fiscal Year 2002 (NDAA 2002), Public Law 107-107, modified the SBP program in two important ways: First, SBP benefits are payable to a qualified survivor when an active duty service member dies in the line of duty, regardless of whether the service member was retirement eligible at the time of death. Second, there is an increase in the calculation of the SBP annuity payable to a qualified survivor, if the active duty service member dies in the line of duty. 10 U.S.C. § 1448(d).

(2) Section 644, NDAA for Fiscal Year 2004 (NDAA 2004), Public Law 108-136, expanded the benefits and coverage of the SBP program to include benefits for surviving spouses of reserve component members not eligible for retirement who die from an injury or illness incurred or aggravated in the line of duty during inactive training. 10 U.S.C. § 1448(f).

b. Calculations of SBP annuities. SBP annuities are calculated as a percentage of the SBP base amount. Normally, the annuity is 55 percent of the SBP base amount. When an active duty death is determined to be in the line of duty, the SBP base amount is equal to retired pay as if the service member retired with total (100 percent) disability, which in turn is equal to 75 percent of the member's base pay (final or high-36 pay). Thus, for an active duty death determined to be in the line of duty, the calculation of the SBP annuity payable to a qualified survivor normally will be 55 percent of 75 percent of the deceased service member's final or high-36 pay.

c. SBP modifications in line of duty determinations. Section 642, NDAA 2002 only affects the SBP eligibility determination or annuity calculation in cases determined to be in the line of duty. For cases determined to be

not in the line of duty, SBP eligibility and annuity calculations remain in effect under the rules that existed prior to Public Law 107-107. If the service member was not retirement eligible at the time of death, then SBP is inapplicable. If the service member was retirement eligible at the time of death, a SBP annuity will be paid to a qualified survivor, but will not be computed on the basis of a nominal total disability retirement. Rather, the SBP base amount will be computed on the retirement for service rules that would have applied if the service member had retired at time of death.

d. Process. Line of duty determinations are now required in all active duty death cases and are made as follows:

(1) Each active duty death shall be subject to, at a minimum, a preliminary inquiry in accordance with section 0203 of this Manual. The preliminary inquiry shall be conducted by the command to which the deceased member was attached, or the gaining command for service members who die in transit. The command conducting the preliminary inquiry, or higher authority, shall decide whether the preliminary inquiry is sufficient to base a line of duty determination or whether there is need for an investigation. In many death cases, a preliminary inquiry, consisting of a basic letter report attached to a medical record entry or accident report, will be sufficient to base a line of duty determination.

(2) If the command completing the preliminary inquiry or investigation is not a GCMCA with an assigned judge advocate, the command will forward the inquiry/investigation to the first GCMCA in its chain of command with an assigned judge advocate. The command will include a written recommendation concerning the line of duty determination.

(3) The GCMCA with an assigned judge advocate is the cognizant official for making the formal line of duty determination, subject to a limited review process described below. The GCMCA shall make the line of duty determination in accordance with the guidance in sections 0215-0220 of this Manual. All line of duty determinations in death cases shall be made in writing by the GCMCA and forwarded to Commander, Navy Personnel Command, (PERS-62), 5720 Integrity Drive, Millington, TN 38055-6220 or Headquarters, U.S. Marine Corps, Manpower and Reserve Affairs (MMSR-6), 3280 Russell Road, Quantico, VA 22134-5103.

(4) Adverse determinations. Before making a determination that an active duty death was not in the line of duty, the GCMCA or his judge advocate shall afford a known potential SBP beneficiary the opportunity to review the report of investigation and provide relevant information to the GCMCA. A “known potential SBP beneficiary” is the person who would otherwise be the recognized qualified survivor if a favorable determination were made. The respective Navy and Marine Corps program managers will provide assistance for Navy and Marine Corps commands in identifying potential SBP beneficiaries. Ordinarily, the known potential SBP beneficiary shall be provided 30 calendar days from receipt of the report of investigation to provide information to the GCMCA. In an adverse determination case in which there is no known potential SBP beneficiary, the GCMCA shall make the line of duty determination following a review of the investigation by the assigned judge advocate.

(5) For adverse determination cases, the GCMCA shall forward a complete copy of the investigation to PERS-62 or MMSR-6, where it will be reviewed by CNP or DC(M&RA). CNP or DC(M&RA) shall review the LOD determination and underlying investigation. The determination of the GCMCA shall be sustained unless CNP or DC(M&RA) determines that a substantial error occurred that could materially affect the determination. In such cases, CNP or DC(M&RA) can make a different determination or return the case to the GCMCA for further investigation. The review and determination of the CNP or DC(M&RA) shall be administratively final.

0230 MAJOR INCIDENTS AND OTHER CASES INVOLVING DEATH WHERE A COURT OF INQUIRY MAY BE APPROPRIATE

a. Death cases within the definition of major incident. For death cases that fall within the definition of major incident in Appendix A-2-a, a court or board of inquiry should be convened. Additionally, and notwithstanding that a death case may not qualify as a major incident, a CA may conclude that a board or court of inquiry is the appropriate forum for conducting the investigation.

b. Deceased service member contributing cause to incident. If, at any time during the course of a court or board of inquiry, it appears that the intentional acts of a deceased service member were a contributing cause to the incident, the CA will be notified by legal counsel assigned to the court. The CA will then notify OJAG (Code 13) or, as appropriate, HQMC (Code JAR), of the preliminary finding of contributing cause by the deceased member. OJAG (Code 13) or HQMC (Code JAR) will advise the CA what additional measures, if any, are necessary to ensure a fair hearing regarding the deceased's actions.

0231 INDEPENDENT REVIEW

a. General. To enhance the investigation process, prior to taking action on an investigative report that calls into question the propriety of a deceased individual's conduct, including all apparent suicide cases, the CA may cause the report to be reviewed by an individual not previously connected with the investigation process and outside the CA's immediate chain-of-command.

b. Qualifications of reviewer. The individual selected pursuant to this section to review the preliminary report should, to the extent feasible, possess such training, experience, and background that he can critically analyze the salient circumstances surrounding the death as documented in the report. For example, if a pilot's death occurred as the result of an aircraft accident, then the individual selected should be a pilot. In all cases, the individual selected should have no official or personal interest in the outcome of the investigation.

c. Duties of reviewer. The individual selected to review the investigative report shall not act as the deceased's representative, but should critically analyze the investigative report from the perspective of the

deceased, tempered by the reviewer's own experience, training, and education. If, after conducting the review, the reviewer believes comment on the thoroughness of the investigation or the accuracy of its findings is warranted, then such comments shall be provided in writing to the CA. The review shall be completed within 10 calendar days of delivery of the report to the reviewer.

d. Action. The CA shall consider the reviewer's comments and take such action as the CA deems appropriate. The reviewer's comments, if any, shall be appended to the investigative report.

0232 SPECIAL ROUTING

Since most death cases are of interest to headquarters activities, an advance copy of all death investigations, other than those where only a preliminary inquiry or limited investigation is required, shall be provided to the Echelon II Commander after the first endorsement. The original report shall note the forwarding of the advance copy, and each subsequent endorser shall provide an advance copy of his endorsement to the Echelon II Commander.

DEFINITIONS

1. Administrative Investigation. Administrative investigations collect and record information. Their reports are advisory. Their opinions, when expressed, do not constitute final determinations or legal judgments, and their recommendations, when made, are not binding upon convening or reviewing authorities.

2. Class A Mishap. A Class A mishap is one in which the total cost of damage to property or aircraft or unmanned aerial vehicle (UAV) exceeds $2,000,000, or a naval aircraft is destroyed or missing, or any fatality or permanent total disability results from the direct involvement of naval aircraft or UAV. Loss of a UAV is not a Class A unless the cost is $2,000,000 or greater.

3. Clear and Convincing Evidence. A degree of proof beyond a preponderance but less than the near certainty of beyond a reasonable doubt. It means that the truth of the facts asserted is highly probable. To be clear and convincing, evidence must leave no serious or substantial doubt as to the correctness of the conclusion in the mind of objective persons after considering all the facts.

4. Cognizant Judge Advocate. The judge advocate (see definition below) who, by regulation or practice, is responsible for providing legal advice to the concerned convening or reviewing authority. This often will be a station, staff, fleet, or force judge advocate, but may also include the command services officer at the servicing Region Legal Service Office.

5. Command Investigation. An administrative investigation conducted into an incident of primary interest to command authorities. It shall be forwarded to OJAG (Code 15) after two years.

6. Intoxication. A state of impairment of the mental or physical faculties that prevents their rational and full exercise. Whether the impairment is caused by ingesting liquor or drugs, or by inhaling fumes or vapors, is immaterial.

7. Judge Advocate. As used in this chapter, the term ordinarily refers to a military lawyer, but may include civilian attorneys under the professional supervision of either the Navy Judge Advocate General or the Navy General Counsel.

8. Litigation-Report Investigation. An administrative investigation conducted under the direction and supervision of a judge advocate in anticipation of litigation or claims. All litigation-report investigations must be forwarded to OJAG (Code 15), Investigations Branch.

9. Major Incident. An extraordinary incident occurring during the course of official duties resulting in multiple deaths, substantial property loss, or substantial harm to the environment, where the circumstances suggest a significant departure from the expected level of professionalism, leadership, judgment, communication, state of material readiness, or other relevant

standard. Substantial property loss or other harm is that which greatly exceeds what is normally encountered in the course of day-to-day operations. These cases are often accompanied by national public and press interest and significant congressional attention. They may also have the potential of undermining public confidence in the Naval service. That the case is a major incident may be apparent when it is first reported or as additional facts become known.

10. Mishap Unit. The unit of the Armed Forces, at the squadron or battalion level or equivalent, to which was assigned the flight crew of the Naval aircraft that was involved in the accident that is the subject of the investigation.

11. Person. For the purposes of this chapter, a person is an individual, not an organization or corporation.

12. Personally Identifiable Information (PII). In the context of Privacy Act requirements, personal information is information about an individual that links, relates, or is unique to, or describes him or her, e.g., a Social Security Number; age; marital status; race; salary; home/office phone numbers; other demographic, biometric, personnel, medical, and financial information.

13. Preponderance of Evidence. A preponderance is created when the greater weight of evidence, or evidence that is more credible and convincing to the mind, is offered in support of, rather than in opposition to, any given fact. Weight of evidence in favor of establishing a particular fact is not to be determined by the sheer number of witnesses or volume of evidentiary matter presented on either side, but by that evidence that best accords with reason and probability.

14. Proximate Cause. That which, in a natural and continuous sequence, unbroken by any significant intervening factor, causes an event, and without which the result would not have occurred. For example, if a sailor voluntarily becomes intoxicated and then willfully exceeds the speed limit by 30 mph, loses control of his vehicle, crashes into a tree and, as a result, suffers severe injury, then his voluntary intoxication may be said to be the proximate cause of his injury. Conversely, if another sailor voluntarily becomes intoxicated, begins to drive home, is struck by another vehicle which failed to yield the right of way at an intersection and, as a result, suffers severe injury, then her voluntary intoxication cannot be said to be the proximate cause of her injury.

15. Supervisory Judge Advocate. An attorney designated by the CA in a litigation-report investigation convening order charged with directing and supervising the investigating officer throughout the investigation. The supervisory judge advocate will also provide advice and guidance to the investigating officer, thoroughly review the draft litigation report, and draft opinions and recommendations, as appropriate. A supervisory judge advocate is most often a member of the Judge Advocate General's Corps or USMC judge advocate assigned to the command convening the investigation, to a large local command, or to RLSO Command Services. However, in certain instances (particularly for incidents involving NAVFAC responsibilities or contract-intensive matters), the supervisory judge advocate may be an Office of General

Counsel (OGC) attorney.

16. System of Records. In the context of the Privacy Act, a system of records is a group of records under the control of the DON from which information is retrieved by an individual's name or some identifying number or symbol.

PARTIES - DEFINITIONS AND RIGHTS

1. Party. A "party" is an individual who has properly been so designated in connection with a court of inquiry or a board of inquiry required to conduct a hearing whose conduct is either the subject of the inquiry or has a direct interest in the inquiry. No individual has a right to demand a court of inquiry.

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

3. Direct Interest. A person has a "direct interest" in the subject of inquiry:

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

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

4. Rights. A person duly designated a party before a fact-finding body shall be advised of and accorded the following rights:

a. To be given due notice of such designation.

b. To be present during the proceedings, but not when the investigation is cleared for deliberations.

c. To be represented by counsel.

d. To examine and to object to the introduction of physical and documentary evidence and written statements.

e. To object to the testimony of witnesses and to cross-examine adverse witnesses.

f. To introduce evidence.

g. To testify as a witness.

h. To refuse to incriminate oneself; and, if accused or suspected of an offense, to be informed of the nature of the accusation and advised of the right not to make any statement regarding the offense of which accused or suspected and that any statement made may be used as evidence in a trial by court-martial.

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

j. To make an argument at the conclusion of presentation of evidence.

k. To be properly advised concerning the Privacy Act.

l. To challenge members.

SAMPLE DOCUMENTATION OF PRELIMINARY INQUIRY

5830
(Date)

From: (Name and rank of individual conducting preliminary inquiry)
To: (Title of authority ordering preliminary inquiry)

Subj: PRELIMINARY INQUIRY INTO (DESCRIPTION OF INCIDENT)

Ref: (a) JAGMAN, Section 0203

Encl: (1) Appointing order (*If any*)
(2) *Any other evidence used by the reviewing official, such as statements, documents, records, pictures, etc.*

1. This reports completion of the preliminary inquiry conducted in accordance with reference (a) into (description of incident).

2. Personnel contacted: (List individuals with name, rank, title, unit, and telephone number).

3. Materials reviewed: (List documents, objects, materials, and tangibles reviewed and, if of probable evidentiary value, where stored together with name of responsible individual and that person's phone number).

4. Summary of findings: (The inquiring official should provide a brief summary of their findings to the commander. While the summary need not extend beyond one paragraph, it should be as long as required to provide the commander with a reasonably good picture of what occurred and should support the recommendations provided below. In addition, it should document what is not known about the event in question).

5. Recommendation: (The inquiring official should provide a recommendation on subsequent command action: consult a judge advocate; no further investigation warranted; command investigation; litigation-report investigation; board of inquiry; or court of inquiry. If the inquiring official: concludes that any injuries may result in a finding of "not in the line of duty" or "misconduct," then it must be accompanied by a recommendation to convene a formal investigation; or, recommends disciplinary action, then such a recommendation should be followed by a recommendation to conduct a formal investigation or a Preliminary Inquiry pursuant to Rule for Courts-Martial 303.

_____
Name, rank, unit, telephone

FIRST ENDORSEMENT

_____Concur with recommendation

_____Other:_____

_____

_____
Name, rank, unit, telephone

(Note: Attachments may be added to the report as desired.)

SAMPLE COMMAND INVESTIGATION CONVENING ORDER

5830
Ser
[Date]

From: Commanding Officer, Headquarters Battalion, Marine Corps Base, Camp Pendleton, CA
To: Capt _____, USMC

Subj: COMMAND INVESTIGATION OF THE FIRE THAT OCCURRED AT _____ ON __ AUGUST 20__

Ref: (a) JAGMAN, Chapter II

1. This appoints you, per reference (a), to inquire into the facts and circumstances surrounding the fire that occurred at _____ on __ August 20__.

2. Investigate the cause of the fire, resulting injuries and damages, and any fault, neglect, or responsibility therefore, and recommend appropriate administrative or disciplinary action. Report your findings of fact, opinions, and recommendations in letter form by __ September 20__, unless an extension of time is granted. If you have not previously done so, read Chapter II of reference (a) in its entirety before beginning your investigation.

3. You may seek legal advice from _____ during the course of your investigation.

4. By copy of this appointing order, Commanding Officer, Headquarters Company, is directed to furnish necessary clerical assistance.

_____
Colonel, U.S. Marine Corps

Copy to:
CG, MCB CamPen, CA
CO, HQCo, HQBn, MCB, CamPen, CA

SAMPLE COMMAND INVESTIGATION REPORT

5830
[Date]

From: Capt _____, USMC
To: Commanding Officer, Headquarters Battalion, Marine Corps Base, Camp Pendleton, CA

Subj: SAME AS SUBJECT ON CONVENING ORDER

Encl: (1) Appointing order and modifications thereto (if any were issued)
(2) Summary (or verbatim) of sworn (or unsworn) testimony of _____ (a witness)
(3) Summary (or verbatim) of sworn (or unsworn) testimony of_____ (a witness)
(4) Statement of_____, signed by witness
(5) Description of _____ (evidence found at scene of the accident)
(6) Photograph of _____ depicting_____

Note: Testimony of each witness, observations of the investigator, photographs, diagrams, and suitable reproductions of tangible evidence should be listed and attached as enclosures to the investigative report. The location of all original evidence, such as logs, charts, tangible items, and so forth, and the name and phone number of the official responsible for its safekeeping must be stated in the report, either on each enclosure or in the preliminary statement.

Preliminary Statement

1. Paragraph 1 of an investigative report must contain information in the form of a "preliminary statement." Contents may require continuation in one or more additional paragraphs. In general, see section 0208(c) for required contents. Where applicable, an investigating officer should indicate the name and organization of any judge advocate consulted. Extensions of time to complete the report should be noted here. Also state in appropriate cases that the matter was first referred to NCIS and NCIS expressed no objection to proceeding with the investigation.

Findings of Fact

1. _____. [Encls ( ), ( )]

2. _____. [Encls ( ), ( )]

3. _____. [Encl ( )]

Note: Findings of fact constitute an investigating officer's description of details of events based on evidence. Findings must be as specific as possible about time, places, and persons involved. Each fact may be made a separate finding. An investigating officer may determine the most effective presentation for a particular case. Each fact must be supported by

testimony of a witness, statement of the investigating officer, documentary evidence, or tangible (real) evidence attached to the investigative report as an enclosure. Each finding of fact should reference each enclosure that supports it.

Opinions

1. _____. [FF ( )]

2. _____. [FF ( ), ( )]

3. _____. [FF ( )]

Note: An opinion is a reasonable evaluation, reference, or conclusion based on facts found. Each opinion must be supported by findings of fact. Determination of line of duty and misconduct is properly stated as an opinion.

Recommendations

1. _____.

2. _____.

3. _____.

Note: If an investigating officer recommends trial by court-martial, a charge sheet drafted by the investigating officer may be prepared and submitted to the convening authority with the investigative report. See R.C.M. 307, MCM. **The charge sheet should not be signed; i.e., charges should not be preferred since preferral starts the "speedy trial clock" running. Before preferring charges, the local legal service office or staff judge advocate should be consulted.** Unless specifically directed by proper authority, an investigating officer must not notify an accused of charges. Notification is the responsibility of the commanding officer of an accused. See R.C.M. 308 and 707, MCM. If a punitive letter of reprimand or admonition is recommended, a draft of the recommended letter must be prepared and forwarded with the investigative report. Proposed nonpunitive letters of caution must not be forwarded with the report; see section 0209f.

_____
(INVESTIGATING OFFICER)

SAMPLE LITIGATION-REPORT INVESTIGATION CONVENING ORDER

5830
Ser
[Date]

From: Commanding Officer, Naval Submarine Base New London
To: LT _____, USN

Subj: LITIGATION-REPORT INVESTIGATION OF THE FIRE THAT OCCURRED AT QUARTERS XYZ, NAVSUBBASE NLON, ON ___ AUGUST 20__

Ref: (a) JAGMAN, Chapter II

1. Per reference (a), you are hereby appointed to investigate the circumstances surrounding the fire that occurred at Quarters XYZ, Naval Submarine Base New London on __August 20__, and to prepare the related litigation-report. During the investigation, you will be under the direction and supervision of LCDR _____, JAGC, USN. Consult LCDR _____ before beginning your inquiry or collecting any evidence. If you have not already done so, you should also read Chapter II of reference (a) in its entirety before consulting LCDR _____.

2. This investigation is being convened and your report is being prepared in contemplation of litigation and for the express purpose of assisting attorneys representing interests of the United States in this matter. As such it is privileged and should be discussed only with personnel who have an official need to know of its progress or results. If you have any doubt about the propriety of discussing the investigation with any particular individual, then you should seek guidance from LCDR _____ before doing so.

3. Investigate all facts and circumstances surrounding the fire, including the cause of the fire, resulting injuries and damages, and any fault, neglect, or responsibility therefore. Report your findings to LCDR _____ by __ September 20__, unless an extension of time is granted. Do not express any opinions or recommendations. Label your report **"FOR OFFICIAL USE ONLY: ATTORNEY WORK PRODUCT,"** and take appropriate measures to safeguard it.

_____

Copy to:
COMSUBGRU TWO

SAMPLE LITIGATION-REPORT INVESTIGATION

FOR OFFICIAL USE ONLY: ATTORNEY WORK PRODUCT

5830
Ser
[Date]

From: LCDR_____, JAGC, USN
LT _____, USN

To: Commanding Officer, Naval Submarine Base New London

Subj: SAME AS SUBJECT ON CONVENING ORDER

Encl: (1) Convening order and modifications thereto (if any were issued)
(2) Summary of statement of [witness] (Do not include signed statements)
(3) Summary of statement of [witness]
(4) Description of _____ (evidence found at scene of fire)
(5) Photograph of _____ depicting _____

Note: Summarized statement of each witness, observations of the investigator, photographs, diagrams, and suitable reproductions of tangible evidence should be listed and attached as enclosures to the investigative report. The location of all original evidence, such as logs, charts, tangible items, and so forth, and the name and phone number of the official responsible for its safekeeping must be stated in the report, either on each enclosure or in the preliminary statement.

Preliminary Statement

1. Paragraph 1 of a litigation report must contain information in the form of a "preliminary statement." Contents may require continuation in one or more additional paragraphs. In general, see section 0208(c) for required contents. The name and organization of the supervisory judge advocate should be listed and the following language must be included: "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."

Findings of Fact

1. _____. [Encls ( ), ( )]

2. _____. [Encls ( ), ( )]

3. _____. [Encl ( )]

Note: Findings of fact constitute an investigating officer's description of details of events based on evidence. Findings must be as specific as possible about time, places, and persons involved. Each fact may be made a separate

finding. An investigating officer may determine the most effective presentation for a particular case. Each fact must be supported by the statement of a witness, statement of the investigating officer, documentary evidence, or tangible (real) evidence attached to the investigative report as an enclosure. Each finding of fact should reference each enclosure that supports it.

Opinions and Recommendations shall not be made by the investigating officer. Before the report is submitted to the convening authority, the supervisory judge advocate should add appropriate opinions and recommendations, including an opinion as to whether the DON tortfeasor was acting within the scope of employment and those opinions and recommendations identified in Appendix A-2-l. Each opinion must be supported by findings of fact, and each recommendation must be supported by an opinion.

_____

(INVESTIGATING OFFICER)

_____

(SUPERVISORY JUDGE ADVOCATE)

SAMPLE PRIVACY ACT STATEMENT FORMAT - JAGMAN INVESTIGATION

1. **AUTHORITY:** 44 U.S.C. § 3101; 5 U.S.C. § 301. Specify, if possible, other statutory authority listed below that is peculiarly applicable to the matter under investigation.

Authorities applicable to various investigations:

a. Requirement that enlisted members make up time lost due to misconduct or abuse of drugs or alcohol. 10 U.S.C. § 972.

b. Retirement or separation for physical disability. 10 U.S.C. §§ 1201-1221.

c. Manual for Courts-Martial.

d. Uniform Code of Military Justice. 10 U.S.C. §§ 815, 832, 869, 873, 935, 936, and 938-940.

e. Military Claims Act. 10 U.S.C. § 2733.

f. Foreign Claims Act. 10 U.S.C. §§ 2734, 2734a, 2734b.

g. Emergency payment of claims. 10 U.S.C. § 2736.

h. Non-Scope claims. 10 U.S.C. § 2737.

i. Duties of Secretary of the Navy. 10 U.S.C. § 5013.

j. Duties of the Office Chief of Naval Operations. 10 U.S.C. §§ 5031-5033, 5035-5036.

k. Duties of the Bureaus and Offices of the Department of the Navy and duties of the Judge Advocate General. 10 U.S.C. §§ 5021-5024, 5131-5133, 5135, 5137-38, 5141-5142a, 5148-5150.

l. Duties of the Commandant of the Marine Corps. 10 U.S.C. § 5043.

m. Reservists' disability and death benefits. 10 U.S.C. § 1074.

n. Requirement of exemplary conduct. 10 U.S.C. § 5947.

o. Promotion of accident and occupational safety by Secretary of the Navy. 10 U.S.C. § 7205.

p. Admiralty claims. 10 U.S.C. § 7622-7623.

q. Federal Tort Claims Act. 28 U.S.C. §§ 1346, 2671-2680.

r. Financial liability of accountable officers. 31 U.S.C. §§ 3521, 3527.

s. Military Personnel and Civilian Employees' Claims Act of 1964. 31 U.S.C. §§ 240-243.

t. Federal Claim Collection Acts. 31 U.S.C. §§ 3521, 3526, 3529, 3701-3702, 3717-3718.

u. Forfeiture of pay for time lost due to incapacitation caused by alcohol or drug use. 37 U.S.C. § 802.

v. Eligibility for certain veterans' benefits. 38 U.S.C. § 105.

w. Postal claims. 39 U.S.C. §§ 406, 2601.

x. Medical Care Recovery Act. 42 U.S.C. §§ 2651-2653.

y. Public Vessels Act. 46 U.S.C. §§ 781-790.

z. Suits in Admiralty Act. 46 U.S.C. §§ 741-752.

aa. Admiralty Extension Act. 46 U.S.C. § 740.

bb. Transportation Safety Act. 49 U.S.C. § 1901.

2. **PRINCIPAL PURPOSE(S)**: The information which will be solicited is intended principally for the following purpose(s):

[Specify each purpose listed below for which the record of the particular investigation could reasonably be used:]

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. Evaluation 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.

h. Evaluation 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 purpose(s) 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 Servicemembers' Group Life Insurance administrators for determinations concerning payment of life insurance proceeds; to the U.S. General Accounting Office for purposes of determinations concerning 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:**

a. Where disclosure is voluntary, <u>as usually is the case</u>, use one of the following statements, or a combination of the following statements, as applicable:

(1) Where an individual is a subject of an investigation for purpose 2a or 2b, above: "Disclosure is voluntary. You are advised that you are initially presumed to be entitled to have the [personnel determinations] [disciplinary determinations] in paragraph 2, 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."

(2) Where an individual is a subject of an investigation for purpose 2c, above: "Disclosure is voluntary, and if you do not provide the requested information, any determination as to whether you should be held liable for repayment of the Government's loss would be based on the other evidence in the investigative record."

(3) Where the individual is a claimant or potential claimant in an investigation for purpose 2e, above: "Disclosure is voluntary, but refusal to disclose the requested information could prevent the investigation from

obtaining sufficient information to substantiate any claim which you have made or may make against the Government as a result of the incident under investigation."

(4) Where the individual was treated at Government expense for injuries caused by third parties in connection with a matter being investigated for purpose 2e, above: "Disclosure is voluntary, but refusal to disclose the requested information could result in a requirement for you to assign to the Government your medical care claims against third parties in connection with the incident, or authorize withholding of the records of your treatment in a Naval medical facilities."

(5) In any other case: "Disclosure is voluntary, and if you do not provide the requested information, any determinations or evaluations made as a result of the investigation will be made on the basis of the evidence that is contained in the investigative record."

b. In the unusual situation where a specific statute, regulation, or lawful order of competent authority requires an individual to disclose particular information for the Government's benefit in furtherance of a Government interest, policy, or objective, the following statement should be used: "Disclosure of (specify the particular relevant information required) is mandatory under (cite the statute, regulation, or order), and refusal to disclose that information will subject you to possible disciplinary or criminal proceedings. Disclosure of any other information requested is voluntary, (and there will be no adverse effects if you elect not to disclose it) (but election not to disclose the information could ... ."

SAMPLE PRIVACY ACT RECORD OF DISCLOSURE

THE ATTACHED RECORD CONTAINS PERSONAL INFORMATION CONCERNING AN INDIVIDUAL. USE AND DISCLOSURE THEREOF IS GOVERNED BY SECNAVINST 5211.5 (SERIES). UNAUTHORIZED DISCLOSURE OF PERSONAL INFORMATION FROM THIS RECORD COULD SUBJECT THE DISCLOSER TO CRIMINAL PENALTIES.

INSTRUCTIONS: This sheet is to remain affixed as a permanent part of the record described below. An appropriate entry must be made below each time the record or any information from the record is viewed by, or furnished to, any person or agency, including the subject of the record, except: (1) disclosures to DoD personnel having a need to know in the performance of their official duties and (2) disclosure of items listed in subparagraph 7a(2) of SECNAVINST 5211.5 (series).

TITLE AND DESCRIPTION OF RECORD

NAME AND ADDRESS OF PERSON OR AGENCY TO WHOM DISCLOSED (AND SIGNATURE IF DISCLOSURE IS MADE IN PERSON)

DATE PURPOSE OF DISCLOSURE

IMPORTANT - READ AND COMPLY WITH THIS PAGE

SAMPLE WARNING ADVISEMENT ABOUT STATEMENTS REGARDING ORIGIN OF DISEASE OR INJURY

COMPLIANCE WITH SECTION 0212 OF THE JAGMAN

I, _____, have been advised that:

-questions have arisen concerning whether or not my injury/disease, sustained or discovered on _____ 20_____, was incurred in the line of duty or as a result of my own misconduct;

-in the event such injury/disease is determined to have been incurred not in the line of duty or as a result of my own misconduct, I will be required to serve for an additional period beyond my present enlistment to make up for the duty time lost;

-lost duty time will not count as creditable service for pay entitlement purposes;

-I may be required to forfeit some pay where absence from duty in excess of one day immediately follows intemperate use of liquor or habit-forming drugs;

-if I am permanently disabled and that disability is determined to have been the result of misconduct or was incurred not in the line of duty, I may be barred from receiving disability pay or allowances, as well as veterans' benefits;

-I may <u>not</u> be required to give a statement relating to the origin, incidence, or aggravation of any disease/injury that I may have.

I do/do not desire to submit a statement.

_____ _____

Date Signature

_____

Witness Signature

_____

Witness Name/Rate/Grade/Unit/Telephone Number

LINE OF DUTY/MISCONDUCT INVESTIGATIONS

The following is a list of matters that should be included, as applicable, in any report of an investigation convened to inquire into and make recommendations concerning misconduct and line of duty under the provisions of this chapter.

a. Identifying information. The complete name, grade or title, service or occupation, and station or residence of all persons, military and civilian, killed or injured incident to the event under investigation; see section 0215 for advice required to be given by the Privacy Act if social security numbers are requested.

b. Facts. All facts leading up to and connected with an injury, disease, or death.

c. Records. Military or civilian police accident reports, pertinent hospitalization or clinical records, death certificates, autopsy reports, records of coroners' inquests or medical examiners' reports, and pathological, histological, and toxicological studies. If originals cannot be included, then the report shall state where the originals are located and the name and telephone number of the official responsible for their safekeeping.

d. Site of incident. Complete information concerning the site and terrain where the incident in question occurred as well as photographs, videotapes, maps, charts, diagrams, or other exhibits that may be helpful to a complete understanding of the incident. When photographs are included as part of the investigation, the following information should be included on the reverse side: the hour and date they were taken; a brief description of the location or area photographed; the full name and rank or rate of the photographer; and full names and addresses of persons present when the photographs were taken. If available, the photographer should be asked to provide details surrounding the taking of the photographs such as type of camera, distance from object, and so forth. Similar information should be on a label affixed to any videotape included in the investigation.

e. Duty status. Include all pertinent facts with respect to the duty, leave, liberty, or unauthorized absence status of an individual at the time of the incident.

f. Reservists. When the person involved is a member of a Reserve component of the Navy or Marine Corps, complete information as to the member's status in relation to extended active duty, active duty for training, or inactive duty training, or travel to and from such duty, at the time of the incident must be stated. An investigation involving Reserve personnel should include:

(1) hour the reservist began travel directly to or from duty or training;

(2) hour the reservist was scheduled to arrive for, or at which he ceased performing, that duty or training;

(3) method of travel used;

(4) actual itinerary and authorized itinerary;

(5) authorized mode of travel and authorized travel time;

(6) manner in which travel was performed; and

(7) place, time, and circumstances of injury or death.

g. Injuries. Complete information as to the nature and extent of all injuries to Naval personnel and the place and extent of any hospitalization resulting therefrom. Include costs when civilian facilities are used. Also include the amount of "lost" time.

h. Impairment. Refer to section 0219 regarding applicable presumption. When relevant, evidence regarding the state of intoxication and the extent of impairment of the physical or mental faculties of any person involved and connected with the incident. Evidence as to the individual's general appearance and behavior, rationality of speech, coordination of muscular effort, and all other facts, observations, and opinions of others bearing on the question of actual impairment shall be obtained and recorded. Efforts shall be made to determine the quantity and nature of the intoxicating agent used and the period of time over which used by the person. Results of any blood, breath, urine, or tissue tests for the intoxicating agent should also be obtained and submitted as exhibits.

i. Mental competence. When material, evidence regarding the mental competence or impairment of the deceased or injured person. In all cases of suicide or attempted suicide, evidence bearing on the mental condition of the deceased or injured person shall be obtained. This will include all available evidence as to social background, actions, and moods immediately prior to the suicide or the suicide attempt, any troubles that might have motivated the incident, and any relevant medical or counseling information.

j. Privacy Act. Document that each enclosure containing personal information solicited from an individual for inclusion in a record system retrievable by name or personal identifier complies with the Privacy Act; see section 0207.

k. Warnings about injury or disease. Document that statements solicited from an injured member respecting the incidence or aggravation of his disease or injury are in compliance with section 0212.

SAMPLE LINE OF DUTY HEALTH OR DENTAL RECORD ENTRY

The following are sample medical or dental record entries regarding line of duty/misconduct determinations:

Example 1: Member fell off ladder while securing line during sea and anchor evolution on (*specify date*) aboard (*specify vessel*). Member sustained injuries to left rotator cuff.

RECORD ENTRY: Member fell off ladder during sea and anchor evolution on (*specify date*) aboard (*specify vessel*). Member sustained the following injuries: (*document injuries)*. Injuries were incurred in the line of duty and not as a result of the member's own misconduct.

_____ _____

Medical/Dental Official Commanding Officer/Command Representative

Concur _____ Non-Concur _____

Example 2: Member was playing volleyball while in a liberty status in Hawaii (homeport) on (*specify date*). Member sustained injuries to left rotator cuff.

RECORD ENTRY: Member was playing volleyball while in a liberty status on (*specify date*) at (*specify location*). Member sustained the following injuries: (*document injuries)*. Injuries were incurred in the line of duty and not as a result of the member's own misconduct.

_____ _____

Medical/Dental Official Commanding Officer/Command Representative

Concur _____ Non-Concur _____

CLAIMS FOR OR AGAINST THE GOVERNMENT

Investigations into incidents which may result in claims must address the following fundamental issues:

a. The identity of those involved, including name, rank/grade, unit, age, address (home and work), telephone number, occupation, and how they were involved, e.g., deceased as a result of the incident, in which case, identifying information for the next-of-kin or legal representative must be provided, as well, injured party, owner of property damaged, military member whose acts or omissions are alleged to have caused the harm, or witness. The findings of fact should provide information on how those involved may be located. Moreover, every attempt should be made to obtain a permanent address that will be accurate for at least 5 years after the accident. Indicate for each individual their status as military (indicate Regular or Reserve, on active duty, TAD, leave, liberty, and so forth at the time of the incident, after consulting sections 0205 and 0224 with regard to Reserves) or civilian (indicate whether they are a Federal employee or are a personal services contractor employed by an independent contractor). If maintenance or training is involved, identify the individual responsible for the maintenance or training at issue;

b. Date, time, and place of incident, including a full description of location, terrain, weather, light conditions, obstructions, and photographs of the site;

c. Nature of the claim, e.g., wrongful death, personal injuries, property damage;

d. A factual description of what happened, how the parties were injured, what equipment was being used, who was operating the equipment, who was supervising or should have been supervising, whether equipment failed or was operated incorrectly, if equipment failure, the maintenance history of the equipment, if the injury occurred on Government property, the condition of the property, who was responsible for the property's upkeep, the authority for the injured party to be present on Government property;

e. The nature and extent of personal injuries, if any:

f. Amount of property damage, including photographs before and after, if possible, and estimates or bills of repair and receipts, whether any pre-existing damage existed, original purchase price, date of purchase, salvage value of property, if any;

g. Extent of damage to Government property, estimates or bills of repair and receipts, original purchase price, date of purchase, and salvage value of property, if any. If no damage, so state;

h. Whether the claimant has insurance for this type of damage or injury, the insurance company, policy number, policy provisions relevant to this claim or incident, extent of coverage, limits on liability, whether a claim has been or will be made against the insurance carrier, the status of any such claim;

i. Names and addresses of other owners, if claimant is not the sole owner of the property;

j. Existence of any police or other investigative report, name and address of investigating officer and unit, custodian of original investigation, provide a copy of any police report as an enclosure;

k. Whether civilian or military criminal charges were filed, the jurisdiction in which they were filed, and the status or final disposition of those charges;

l. In the case of a litigation-report investigation, the supervisory judge advocate (NOT the investigating officer) should include the following opinions; if not a litigation-report investigation, consult with the cognizant judge advocate before inclusion.

(1) An opinion regarding the cause(s) of the incident. If the facts are insufficient to form an opinion regarding the cause(s), indicate those factors which significantly contributed to the incident;

(2) An opinion whether a claim is likely to be filed, the amount likely to be claimed, and the names and addresses of any potential claimants and their legal representatives, if any;

(3) An opinion regarding the scope of employment of any government employee that may be the alleged cause of a claim or litigation; and

(4) If appropriate, an opinion on whether an affirmative claim should be filed by the Government against a tortfeasor for personal injuries to its employees or damage to government property.

AVIATION MISHAPS

The following contains specific guidance when conducting an administrative investigation into aviation mishaps.

a. General. Aviation mishaps are investigated by one or more investigative bodies under various instructions and legal requirements.

(1) Safety investigation reports. For the sole purpose of safety and mishap prevention, the Chief of Naval Operations has issued special instructions for the conduct, analysis, and review of investigations of aviation mishaps in OPNAVINST 3750.6 (series). These investigations are known as "aviation mishap safety investigations" and are conducted by aviation mishap boards. The results of those investigations are documented in Safety Investigation Reports (SIRs).

(2) JAGMAN investigations. When an aviation mishap results in death or serious injury, extensive damage to Government property, or the possibility of a claim exists for or against the Government, an administrative investigation shall be ordered to determine the cause and responsibility for the mishap, nature and extent of any injuries, description of all damage to property, and any attendant circumstances. In most cases, a claim for or against the Government is likely. If the incident results in personal injury, death or property damage to a third party, and there are no active duty deaths involved, a litigation-report investigation should be conducted. In all investigations concerning potential claims for or against the Government, an advance copy of the investigation shall be forwarded to the Office of the Judge Advocate General (Code 15), Investigations Branch, 1322 Patterson Avenue SE, Suite 3000, Washington Navy Yard, DC 20374-5066 prior to completion of the CA's endorsement. Damage or injury to non-Federal property or personnel, caused by aircraft that originated from U.S. vessels is likely to involve Admiralty law aspects; consult JAGMAN Chapter XI and OJAG (Code 11). These JAGMAN investigations are in addition to, and separate from, the aviation mishap safety investigations conducted under the authority of OPNAVINST 3750.6 (series).

(3) Combat losses or damage. A JAGMAN investigation is not required for aircraft losses incident to direct enemy action (DEA). DEA occurs when one or more of the following three conditions exists: (1) damage or loss of an aircraft, or injury on the ground, or in the air, by enemy action, fire, or sabotage; (2) damage or loss of an aircraft, or injury due to evasive action taken to avoid enemy fire; (3) an aircraft fails to return from a combat mission and there is no evidence that an operational (non DEA) mishap occurred. DEA events may occur outside of an officially designated combat zone. Notwithstanding, a JAGMAN investigation is required when an aviation mishap occurs in the course of a combat operation but not under hostile circumstances, such as an aircraft crash while taking off, or returning to, an airfield or aircraft carrier. JAGMAN investigations are not precluded when deemed appropriate by operational or administrative commanders. CAs may convene investigations to gather, evaluate, or verify the facts of a combat engagement when enemy action has resulted in the loss or damage to Naval aircraft, or to determine whether combat losses were sustained by unintentional damage to friendly forces.

(4) Unintentional damage to friendly forces. "Unintentional damage to friendly forces," "friendly fire," "blue on blue," and "harm to friendly forces" are terms used to describe a circumstance in which members of a U.S. or friendly military force are mistakenly killed or wounded, or equipment is damaged by U.S. or allied forces actively engaged with an enemy or a presumed enemy. An aviation mishap safety investigation shall be conducted when a Navy or Marine Corps aircraft is involved in unintentional damage to friendly forces.

(5) This subsection relates to JAGMAN investigations only and does not affect any other reporting requirement, such as casualty and damage reports required under Article 0831, U.S. Navy Regulations (1990).

b. Relationship between JAGMAN investigations and aviation mishap safety investigations

(1) A JAGMAN investigation of an aviation mishap is a collateral investigation, as referred to in the joint directive issued under OPNAVINST 3750.16 (series), which implements section 702 of the Federal Aviation Act of 1958, 49 U.S.C. § 1442. OPNAVINST 3750.16 (series) provides specific direction concerning coordination of investigations of aviation mishaps between military authorities and the National Transportation Safety Board (NTSB) and the Federal Aviation Administration (FAA). Due to the separate purposes and procedures of JAGMAN investigations, military mishap investigations, and FAA or NTSB investigations, there are specific limitations and restrictions regarding the integration of these investigations, use of evidence obtained, including witness statements, and the use and disclosure of the respective reports. OPNAVINST 3750.16 (series), OPNAVINST 3750.6 (series) and MCO 5100.29 (series) provide detailed guidance regarding the restrictions on the use of these investigations and the permissible extent of integration between JAGMAN investigations and aviation mishap safety investigations. The relationship between the JAGMAN investigation and aviation mishap safety investigations should be thoroughly understood by all persons involved with investigating any aircraft accident or mishap.

(2) Statements gathered in the course of aviation mishap safety investigations may be privileged. This means that when the source of that information was given a promise of confidentiality, that statement, made before the aviation mishap board, cannot be used for any purpose other than mishap prevention. OPNAVINST 3750.6 (series) also extends the concept of privilege to those conducting the aircraft mishap safety investigation. This means that the opinions, analyses, and conclusions of the aviation mishap board, the privileged portions of the safety investigation report, and any subsequent endorsements cannot be used for purposes other than mishap prevention. In conducting the JAGMAN investigation, care shall be exercised to respect the privileged character of the aviation mishap safety investigation. No witness shall be questioned regarding information provided to the aviation mishap board under a promise of confidentiality.

(3) Although membership on an aviation mishap board does not bar an individual from being a witness for a JAGMAN investigation of the same incident, such dual participation is undesirable and should be avoided due to

the possibility of undermining the concept of privilege crucial to the conduct of safety investigations.

(4) Investigating officers of the aviation mishap safety investigation and JAGMAN investigation shall have access to all real evidence and have separate opportunities to question and obtain statements from all witnesses. JAGMAN investigating officers shall not sit in on interviews conducted by the aviation mishap board.

(5) If a possibility exists that witnesses will testify before both investigative bodies, the JAGMAN investigating officers shall explain to such witnesses the reasons for the apparent duplication of effort. This is particularly important with non-military witnesses. The explanation shall cover:

(a) the different objectives of the two investigations;

(b) the reasons why procedures vary;

(c) the need to preserve the privileged nature of the aviation mishap safety investigation; and

(d) the fact that since neither command nor administrative action may alter the privileged character of statements provided to the aviation mishap board, and such statements will not be available to the JAGMAN investigation from any official source.

(6) Requests for preservation of aircraft wreckage following a crash. Any request for the preservation of aircraft wreckage will be forwarded to the controlling command or individual (e.g., Naval Safety Center, squadron, mishap investigation board senior member). Copies of the forwarding letter and the original request with all attachments shall be forwarded separately to OJAG (Code 15).

c. Class A aviation mishap JAGMAN investigations

(1) Designation of Class A Aviation Mishaps. As soon as practical, but in no case more than 60 days after the occurrence of an aviation mishap involving an aircraft or unmanned aerial vehicle of the DON, the authority responsible for convening the investigation under this Manual shall determine whether the mishap is a Class A mishap. See Appendix A-2-a for the definition of "Class A aviation mishap." If the mishap meets the criteria for a Class A aviation mishap, the convening order for the investigation shall contain the following: "This [Command Investigation] [Litigation-Report Investigation] [Board of Inquiry] [Court of Inquiry] is convened to investigate the circumstances surrounding a Class A aviation mishap in compliance with 10 U.S.C. § 2255."

(2) Member Qualifications for Class A Aviation Mishap JAGMAN Investigations. Federal law establishes specific qualifications for members conducting Class A aviation mishap investigations. These qualifications apply to any Class A aviation mishap investigation under sections 0209, 0210, or 0211 of this Manual, convened on or after March 24, 1997; 10 U.S.C. § 2255.

(a) Multiple Member Investigations. A multiple member Class A aviation mishap JAGMAN investigation shall have:

1. a majority of its members selected from units other than the mishap unit or a unit subordinate to the mishap unit, as defined in Appendix A-2; and

2. at least one member who is a member of the armed forces or an officer or employee of the DoD who possesses knowledge and expertise relevant to aviation mishap investigations, for example, a graduate of a Naval Aviation Safety Officer or Command course, or previous service on an aviation mishap safety or aviation mishap JAGMAN investigation, or previous assignment as a squadron Aviation Safety Officer.

(b) Single Member Investigations. A single member Class A aviation mishap JAGMAN investigation shall be:

1. selected from a unit other than the mishap unit or a unit subordinate to the mishap unit, as defined in Appendix A-2-a; and

2. directed to consult with a member of the armed forces or an officer or employee of the DoD who possesses knowledge and expertise relevant to aviation mishap investigations, for example, a graduate of a Naval Aviation Safety Officer or Command course, or previous service on an aviation mishap safety or aviation mishap JAGMAN investigation, or previous assignment as a squadron Aviation Safety Officer.

(c) Exceptions to Statutory Qualifications

1. Waiver Criteria. The Secretary of the Navy may waive the statutory qualifications if the Secretary determines:

a. It is not practicable to meet the requirement because of

(1) the remote location of the aviation mishap;

(2) an urgent need to promptly begin investigating; or

(3) a lack of available personnel outside of the mishap unit who have adequate knowledge and expertise regarding the type of aircraft involved in the mishap; and

b. The objectivity and independence of the aviation mishap investigation will not be compromised.

2. Procedure for Obtaining a Waiver. Requests for a waiver shall be addressed to the Secretary of the Navy, via the chain of command, and contain a detailed explanation of the particular criteria listed in subsection (a) justifying the need for a waiver.

3. Congressional Notification. The Secretary of the Navy must notify Congress of a waiver granted under this section and the reasons.

d. Required facts and opinions. The scope of the investigation function varies with the nature and circumstances of the particular incident. The report of the investigation should include, but not be limited to, data relevant to the purpose of the investigation on the following matters:

(1) Identity of the pilot(s), co-pilot(s)/naval flight officer(s) (NFO), air crew and any passengers, including the background, history, training, and experience of the pilot, co-pilot/NFO and air crew and their familiarity with the type of aircraft involved.

(2) The military or civilian status of all personnel aboard, e.g., Regular, Reserve, or retired; active duty, inactive duty, inactive duty training; Temporary Additional Duty (TAD), Temporary Duty (TDY), leave, liberty; and so forth.

(3) Type, model, series and bureau number of the aircraft involved.

(4) Identification of the squadron, detachment, or unit authorizing the flight and the official who authorized the flight.

(5) If a privately-owned or rented aircraft was involved, identify the owner, authorization for the flight, existence of private insurance, and extent of coverage.

(6) The identity of all individuals who were killed, injured, or who suffered property damage as a result of the mishap, including name, age, address (home and work), telephone number, occupation, and a complete description of how their injuries occurred; see Part F for special considerations in death cases.

(7) Sociological, psychological, and human factors related to the accident, including potential stress factors, fatigue, use of medication, or intoxication.

(8) Type, duration, and purpose of the flight, briefing of the pilot, and other pertinent information regarding the particular flight, including the use of night vision goggles or other mission-specific factors relevant to aircraft or air crew equipment or performance.

(9) Weather conditions throughout the flight.

(10) Preflight history of the aircraft, compliance or noncompliance with pertinent technical directives, including flight hours since the last overhaul, discrepancies noted on recent "A sheets" (OPNAV Form 3760/2, OPNAVINST 3710.7 (series)), VIDS/MAF forms (OPNAV 4790/60, COMNAVAIRINST 4790.2A), and flight hours since the last intermediate check.

(11) Description of flight path and maneuvers of the aircraft during flight, including manner of descent and impact.

(12) Positions of external control surfaces, landing gear, canopy, and other relevant parts of the aircraft, during the flight.

(13) Presence, condition, and use of safety, communication, escape, and survival equipment.

(14) Post-mishap assessment of the aircraft and detailed description of all damage to the aircraft, including wreckage diagrams, disassembly and inspection reports, wreckage photographs, and data on engine, fuselage, and control surfaces.

(15) Assessment of the scene of the mishap including its precise location, a description of the terrain, and a complete listing and cost of damaged or destroyed Government and non-Government property.

(16) Description of rescue operations employed, their effectiveness, and any difficulties encountered.

(17) Instructions in effect at the time of the accident concerning procedures relating to the particular flight, including applicable local and regional flight rules governing the flight and copies of air charts in effect and in use.

(18) Performance data on the aircraft in question under prevailing wind, weather, and temperature.

(19) In the case of deaths caused by the mishap, the precise medical cause of death, substantiated by medical records, autopsy, and death certificate.

(20) Cause, nature, and extent of any injuries suffered as a result of the mishap as substantiated by medical records, including line of duty/misconduct determinations for injuries to Naval personnel, if required.

(21) Involvement of other aircraft, if any.

(22) Roles of supervisory, support, and controlling personnel.

(23) When the evidence concerning the mishap is sufficient to do so, an opinion or opinions as to the cause or causes of the mishap.

(24) When the evidence is not sufficient to form an opinion or opinions as to the cause or causes of the mishap, a description of those factors, if any, which, in the opinion of the investigator(s), substantially contributed to the mishap.

e. Release. In the case of aviation mishaps investigated under the provisions of this Manual, only the Secretary of the Navy may release unclassified tapes, scientific reports, and other factual information pertinent to an aircraft accident investigation before the release of the final accident report, per 10 U.S.C. § 2254. Requests for the release of evidence, including unclassified tapes, scientific reports, and other factual information, in aircraft investigations shall be forwarded expeditiously via the chain-of-command and OJAG (Code 15) to the Secretary of the Navy.

ACCIDENTS ABOARD SHIPS OR SUBMARINES (GENERAL)

The following contains general guidance when conducting an administrative investigation into accidents aboard ships or submarines. See subsequent sections for specific types of incidents.

a. General

(1) Command investigations are normally sufficient to document most shipboard accidents that require more than a preliminary inquiry. Major incidents involving greater losses of life, personal injuries, or property damage will normally be investigated by a court of inquiry. Accidents aboard ships, particularly those involving damage caused by other ships, watercraft, or cargo handling equipment, or injuries to dock workers, shipyard employees, longshoremen, or ship's visitors are likely to involve Admiralty Law aspects and should be the subject of a Admiralty Letter Report. Consult Chapter XI of this Manual and OJAG (Code 11), the cognizant judge advocate, or local RLSO.

(2) Mishap investigation reports. For the sole purpose of safety and mishap prevention, the Chief of Naval Operations has issued special instructions in OPNAVINST 5102.1 (series) for the conduct, analysis, and review of investigations of mishaps involving diving and those that occur aboard ships or submarines. These investigations are conducted by safety investigation boards (SIBs) appointed for that purpose and the results are documented in safety investigation reports (SIREPs).

(3) JAGMAN investigations. When an afloat mishap results in death or serious injury, extensive damage to Government property, or the possibility exists that a claim may be filed by or against the Government, a JAGMAN investigation shall be appointed to investigate and determine the cause and responsibility for the mishap, nature and extent of any injuries, description of all damage to property, and any and all attendant circumstances. These JAGMAN investigations are in addition to, and separate from, the SIBs appointed under the provisions of OPNAVINST 5102.1 (series).

(4) Combat losses or damage. A JAGMAN investigation is not required for damages to property or injuries to personnel that are incident to direct enemy action. Damage to property or injuries to personnel are incident to enemy action when the mishap results from hostile action or an unknown cause in a hostile area. Nonetheless, a JAGMAN investigation is required when the damage or injury occurs in the course of combat operations which are not subject to hostile circumstances, e.g., a collision at sea which occurs when the vessels involved are not engaged in action with enemy forces. Commanders may, in their discretion, convene JAGMAN investigations to gather, evaluate, or verify the facts of a combat engagement when enemy action has resulted in the loss or damage to naval ships or submarines, or to determine whether combat losses were sustained by "friendly fire." This subsection relates only to JAGMAN investigations and does not affect any other reporting requirements, such as reports required under article 0831, U.S. Navy Regulations (1990).

b. Relationship between JAGMAN investigations and safety investigations

(1) The JAGMAN investigation of an afloat mishap is a collateral

investigation and is conducted separately and independently from the afloat safety investigation. Due to the separate purposes and procedures of each of these investigations, there are specific limitations and restrictions regarding the integration of JAGMAN investigations with other safety investigations, use of the evidence gathered, including witness statements, by these other investigations, and use and disclosure of those reports. OPNAVINST 5102.1 (series) provides detailed guidance regarding restrictions on the use of these investigations and the permissible extent of integration between the JAGMAN investigation and safety investigations. The relationship between a JAGMAN investigation and a safety investigation should be thoroughly understood by all persons involved in investigating any afloat mishap.

(2) Statements gathered in the course of an afloat safety investigation may be protected from release by the safety privilege, meaning that when the source of that information has been given a promise of confidentiality, that statement, made before the SIB cannot be used for any purpose other than mishap prevention. OPNAVINST 5102.1 (series) also extends the concept of privilege to those individuals appointed to conduct the afloat safety investigation, meaning that their opinions, analyses, and conclusions cannot be used for purposes other than mishap prevention (e.g., identifying hazards and mishap causes). In conducting a JAGMAN investigation, care shall be exercised to respect the privileged character of the afloat safety investigation. No witness shall be questioned as to participation in an afloat safety investigation. Although safety investigations do not include witness statements from the JAGMAN investigation, the SIB can summarize the witness statements for inclusion with their report.

(3) Although membership on an afloat SIB does not bar an individual from being a witness for a JAGMAN investigation of the same incident, participation of mishap board members as witnesses for the JAGMAN investigation should be avoided due to the possibility of undermining the promise of confidentiality crucial to the conduct of safety investigations.

(4) Members of a SIB and JAGMAN investigating officers shall have access to all real evidence and have separate opportunities to question and obtain statements from all witnesses. JAGMAN investigating officers shall not sit in on interviews conducted by the SIB. Safety investigation reports and witness statements to safety investigators shall not be included in any JAGMAN investigations.

(5) If a possibility exists that a witness or witnesses will provide information to the SIB and to the JAGMAN investigating officers, the JAGMAN investigating officers shall explain to such witnesses why the apparent duplication of effort is necessary. The explanation shall cover:

(a) the different objectives of the two investigations;

(b) the reasons why the procedures for each investigation vary;

(c) the necessity for respecting and preserving the privileged character of the safety investigating board SIB; and

(d) the fact that statements obtained by the SIB will not be

available to the JAGMAN investigating officers from any official source because neither command nor administrative action may alter the privileged character of the statements provided to the SIB.

STRANDING OF A SHIP OF THE NAVY

The following contains specific guidance when conducting an administrative investigation into the stranding of a ship.

a. General. An investigation involving the stranding of a ship shall include all pertinent logs, charts, orders, regulations, condition of the sea and weather, rate and direction of the tidal stream, time of the tide, and other factors involving natural elements. Additionally, any mechanical or electronic deficiency or failure in the ship pertinent to the stranding shall be investigated and reported. The investigation shall ascertain the cause and responsibility for the stranding and resulting damage. The stranding of a Navy ship, unless only insignificant damage results, is usually a major incident. A court of inquiry will normally be convened unless the preliminary inquiry indicates that a command investigation will be sufficient to establish the facts. These incidents may also involve aspects of admiralty law; consult Chapter XI of this Manual and OJAG (Code 11), the cognizant judge advocate, or local RLSO.

b. Determination of ship's position. The investigation shall determine whether the proper chart provided by DON was used, whether the position of the ship at the last favorable opportunity to avoid the casualty was accurately determined and, if not, when it was last accurately ascertained. To enable the investigative body to fix the true position of the ship at the time of her grounding, an officer not attached to the ship involved may be directed to ascertain the position of the ship from the data available.

c. Navigation in pilot waters. If land was sighted and the distance estimated before the ship struck, steps taken during the time land was in sight to correct the ship's course and speed will be reported. The extent to which applicable instructions, e.g., those contained in Coast Pilot or Sailing Directions, were observed should be noted.

d. Other reports. Strandings are also reported under the separate procedures in Chapter 3 of OPNAVINST 5102.1 (series).

COLLISION AND ALLISION INCIDENTS

The following contains specific guidance when conducting an administrative investigation into a ship collision or allision.

a. General. All vessel collisions and allisions, a vessel and fixed object, are admiralty incidents. Consult Chapter XI of this Manual and OJAG (Code 11) for required investigations and guidance.

b. Other reports. Collisions and allisions are also reported under the separate provisions in Chapter 3 of OPNAVINST 5102.1 (series).

ACCIDENTAL OR INTENTIONAL FLOODING OF A SHIP

The following contains specific guidance when conducting an administrative investigation into the accidental or intentional flooding of a ship.

a. General. If the investigated mishap is a flooding, the first determination to be made is whether the flooding is significant enough to document. Generally, flooding is considered significant when one or more of the followings conditions exist: damage is caused to major/vital equipment; origin of the flooding is suspicious; flooding delays deployment, causes significant change in operating schedule, or degrades mission capability; Naval personnel were responsible for the flooding; defective naval design, specifications, or installation may have caused the flooding; or unsound operating doctrine or procedures caused or contributed to the flooding. Command investigations are normally used to document flooding.

b. Required facts and opinions. The following information shall be included in the report of investigation into flooding:

(1) Date, time, and location of the flooding by compartment name or number;

(2) Source and type of flooding, e.g., salt or fresh water, oil, JP-5;

(3) How the flooding was detected;

(4) Type of de-watering equipment that was used and its effectiveness;

(5) Draft forward and aft and list of ship, before and after damage. Drafts may have to be estimated from drafts recorded on departure from last port and on arrival in port after damage;

(6) General distribution and amount of variable weights, particularly fuel and water, before damage;

(7) Compartments flooded and the rate of flooding for each one, including time when:

(a) flooding started;

(b) flooding detected;

(c) time General Quarters sounded, or duty emergency repair party was called away;

(d) flooding was stopped or brought under control; and

(e) de-watering was completed;

(8) Description of the physical effects of the flooding and the extent of damage to hull, machinery, equipment, electronics, supplies, cargo, etc., including photographs, or diagrams to document the range and extent of damage;

(9) Date of last inspection of the involved spaces with any noted discrepancies;

(10) Ship's location at sea or in port;

(11) Ship's condition of readiness;

(12) Effect on the ship's ability to carry out its mission;

(13) Summary of the steps taken to control damage and to correct the list, trim, or depth;

(14) Performance of installations such as flood control, automatic door, and hatch closures;

(15) Estimated dollar amount of damage or repairs required, including damage to personal property which may result in a claim against the Government;

(16) Opinion on the probable cause of the flooding, including the cause of progressive flooding of other compartments, e.g., material condition of readiness violated, failure of structure, deficiency of structure; and

(17) Opinion on whether the occurrence of a similar type of flooding is possible on another ship.

c. Other reports. Accidental flooding of a ship is also reported under the separate provisions in Chapter 3 of OPNAVINST 5102.1 (series).

FIRES

The following contains specific guidance when conducting an administrative investigation into a fire.

a. General. If the investigated mishap is a fire of unknown origin affecting DON personnel or property under Navy/Marine Corps control, any investigation shall be coordinated with NCIS; see sections 0201(d) and 0225(c). The next, determination to be made is whether the fire is significant enough to document. Generally, a fire is considered significant when one or more of the following conditions exist: damage is caused to major/vital equipment; origin of the fire is suspicious; fire delays deployments, causes significant change in operating schedule, or degradation of mission capability; Naval personnel were responsible for the fire; defective naval design, specifications, or installation may have caused the fire; or unsound operating doctrine or procedures caused or contributed to the fire. Command investigations are normally used to document fires, unless the damage to property or loss of life involved rises to the level of a major incident. Fires in government quarters provided in kind by the government should normally be investigated by a litigation-report investigation since claims are usually involved.

b. Required facts and opinions. The following information shall be included in the report of investigation of fires:

(1) Date, time, and location of the fire, use compartment name or number if applicable;

(2) Class of fire;

(3) Method by which fire was detected;

(4) Time when:

(a) fire started (detected);

(b) fire was reported;

(c) General Quarters sounded, or fire party was called away;

(d) fire located;

(e) fire-fighting started;

(f) reflash watch was set;

(g) boundaries were set; and

(h) fire was extinguished.

(5) Type of fire-fighting organization that was used, e.g., duty section fire party, Condition One fire and repair party, base firefighters, civilian fire department;

(6) Number of personnel who responded to the fire, their level of fire-fighting and damage control training;

(7) Effectiveness of fire/repair locker organization, maintenance of organization charts, and leadership;

(8) Effectiveness of installed damage control systems and equipment;

(9) Type of extinguishing agent used and its effectiveness;

(10) Availability and operability of extinguishing equipment;

(11) System of communications that was used and any difficulties in communication;

(12) Description of the physical effects of the fire; radii of losses and damage with respect to fire, smoke, and water; extent of the spread of the fire, including maps, photographs, or diagrams to document the range and extent of the damage;

(13) Date of last inspection of the involved spaces with any noted discrepancies;

(14) Ship's location at sea or in port;

(15) Ship's condition of readiness;

(16) Effect of the fire on the ship's ability to carry out its mission;

(17) Estimated dollar amount of damage or repairs required, including damage to personal property which may result in a claim against the Government;

(18) Identity of personnel that were injured or killed, with full description of injuries, medical records, autopsy reports, as required; see Part F for special considerations in death cases;

(19) Opinion on the cause of fire and the factors that contributed to the spread of the fire; and

(20) Opinion on whether the occurrence of a similar type of fire is possible on another ship.

c. Other reports. All fires occurring afloat (except small trash fires in which no personnel are injured and the material property damage is limited to trash) are also reported under the separate provisions in Chapter 3 of OPNAVINST 5102.1 (series).

EXPLOSIONS

The following contains specific guidance when conducting an administrative investigation into explosions.

a. Required facts and opinions. Criminal law enforcement investigations are required for any fire or explosion of unknown origin affecting DON property or property under Navy/Marine Corps control. Any such investigation shall be coordinated with NCIS; see section 0201. An investigation involving an explosion should document the type of explosion, the cause of the explosion, the extent and nature of personnel injuries, the nature and extent of loss or damage to property, the estimated dollar amount of the loss or damage of the property, the estimated cost of medical treatment of non-military personnel injured by the explosion, the person(s) (if any) responsible for the explosion, and all other pertinent facts and circumstances. Command investigations are normally used to document nonlethal explosions, or where property damage is minor. If the explosion caused great loss of life or property damage associated with a major incident, a court of inquiry will normally be used.

(1) The following information shall be included in the report:

(a) Date, time, and location of the explosion, use compartment name or number if applicable;

(b) Type of explosion;

(c) Kind and quantity of the materials, gases, etc. that were involved;

(d) Measurable time intervals, if any, between explosions;

(e) Existence of barricades and protective gear and the effect of the explosion on them;

(f) Existence of any natural obstructions such as a hill, forest, or other object intervening between the site of the explosion and the areas affected;

(g) Description of any loss or damage to Government and private property and estimated dollar amount needed to replace or repair the loss or damage;

(h) Range and extent of damage as indicated by maps or photographs showing the following:

1. Radius of complete destruction;

2. Radius of structural damage beyond economical repair;

3. Radius of repairable structural damage;

4. Radius of general glass breakage;

5. Distances that significant missiles were projected, including kind and weight;

6. Distance between locations, if explosions occurred at more than one location; and

7. Distance between ships and other vessels or structures affected and distances to nearby ships or structures not affected.

(i) Approximate shape and dimensions of crater, if any, including depth and kind;

(j) Weather and atmospheric conditions and their effect on shock waves;

(k) Personnel involved and the extent of their involvement, their qualifications in terms of the Personnel Qualification Standards (PQS) System or other required safety qualifications, the level of training of the personnel involved, and whether the level of training met required standards;

(l) Identity of personnel injured or killed, with full description of injuries supported by medical records and autopsy reports, as required; see Part F for special considerations in death cases;

(m) Description of the safety precautions or operating procedures that were in effect at the time of the explosion and whether they were observed or violated; and

(n) Opinions on the probable cause(s) of the explosion.

(2) An environmental assessment of the damage caused by the explosion may be necessary, particularly if there is evidence of chemical contamination of the surrounding area; consult the cognizant judge advocate or local RLSO.

b. Other reports. All explosive mishaps as defined within OPNAVINST 5102.1 (series), whether occurring ashore or afloat, are reported under the separate procedures established in OPNAVINST 5102.1 (series).

MOTOR VEHICLE ACCIDENTS

The following contains specific guidance when conducting an administrative investigation into motor vehicle accidents.

a. General. All but the most minor of accidents involving Government vehicles and personally-owned vehicles must be investigated. Accidents involving $5,000 or less of property damage or minor personal injuries can, however, be adequately documented by completion of Standard Form 91 (Police Accident Form) alone. A litigation-report investigation should be conducted in more serious accidents that result in personal injury, death or property damage to a third party, and there are no active duty deaths involved (see section 0210). Chapter 6 of OPNAVINST 5102.1 (series) provides reporting procedures under the Navy's Mishap Investigation and Reporting System which may require an additional investigation.

b. Basic investigating requirements. When conducting an investigation into a motor vehicle accident, physically observe the damage to property and survey the accident scene whenever practical. Include photographs, if possible. Include the police report as an enclosure. Document injuries and damage by attaching the best available evidence. If the investigation concerns a potential claim for or against the government, an advance copy of the investigation should be forwarded to OJAG (Code 15), Investigations Branch, 1322 Patterson Avenue SE, Suite 3000, Washington Navy Yard, DC 20374-5066 prior to endorsement (see section 0210(e)(6)). Upon completion of the CA's endorsement, the original investigation and one copy shall be forwarded to OJAG (Code 15), Investigations Branch, at the above address.

c. Required facts. The following facts shall be included in all command investigations and litigation reports.

(1) Vehicle(s) completely identified, including vehicle identification number, license plate number, model, year, and color.

(2) Identity of driver(s) and owner(s), including name, age, addresses (home and work), and telephone numbers. For military members, indicate their military status at the time of the accident, e.g., active duty, TAD, leave, liberty, etc., their grade/rank, and the name, address, location and Unit Identification Code (UIC) of their unit. If an individual died or is incapacitated as a result of the accident, provide similar identifying information for the next-of-kin or legal representative. See sections 0205, 224 and Appendix A-2-k regarding special findings of fact required when an accident involves reservists coming to or from periods of active duty or training. If a Government vehicle was involved, identify the unit to which the vehicle was assigned, the individual at that unit who authorized use of the vehicle, and its authorized purpose.

(3) Time of the accident, light and weather conditions, and their effect on driving conditions.

(4) The location of the accident, e.g., highway number, direction of travel, milepost number, street name, intersection, road and terrain factors, including road characteristics, obstructions to the driver's vision, traffic

signals, and signs.

(5) Estimated speed of vehicle(s) involved as evidenced by witnesses, skid marks, condition of roads, and damages to the vehicles or other property.

(6) Actions of other vehicles involved in the accident, including any part played by them in creating the conditions that resulted in the accident.

(7) Traffic conditions at the scene and their effect on the accident.

(8) Traffic laws and regulations in force pertinent to the accident, including traffic safety devices, signs, and markings, e.g., school zone, no passing zone, railroad crossing, reduced speed limit, and any requirement to use safety devices installed in the vehicles, e.g., seat belts, child carriers. A copy of the statute, ordinance, or regulation should be made an enclosure. Consult the cognizant judge advocate or local Region Legal Service Office (RLSO).

(9) Mechanical condition of the vehicles. If a mechanical defect or condition, e.g., faulty or worn brakes/tires, is determined to have contributed to the accident, include the relevant maintenance history of the vehicle.

(10) Physical condition of the driver, or drivers, including intoxication, fatigue, use of medications or drugs, or other medical condition. The factual portion of the report should include such matters as the number of hours of sleep prior to the accident, the number of hours worked, the amount of alcohol consumed, results of any blood alcohol or other test for intoxication, any medications or drugs taken prior to the accident and the time elapsed between their last use and the accident, and any unusual stress or abnormal condition that might have affected the driver's alertness. The opinion section should address any reasonable inferences that may be drawn from these facts relevant to the cause of the accident.

(11) Driving experience of the driver or drivers, both generally and in the type of vehicles being driven, including the state which licensed the driver(s) and any previous loss of driving privileges and driving-related convictions, e.g., reckless driving, drunk driving, driving without insurance.

(12) Safety devices installed and whether they were being used at the time of the accident.

(13) Conduct of passenger(s). Opinions may include reasonable inferences on the effect of any passenger's conduct on the driver(s).

(14) Facts and opinions relevant to knowledge by any passenger of any impairment of the driver at the time the passenger entered or had a reasonable opportunity to leave the vehicle.

(15) Damage to vehicles fully described, including photos if available, and repair costs.

(16) Damage to other property, including photos if available, and

repair costs.

(17) Nature and extent of personal injuries and medical costs. If death resulted from the accident, indicate the cause of death and include a copy of the death certificate and any autopsy reports as enclosures, if possible.

(18) Name, age, address, and telephone number of any witnesses to the accident, a description of their location in relation to the accident scene, their ability to observe from that location, and what they saw.

(19) The name, address, and telephone number of any law enforcement official who investigated the accident. A copy of any law enforcement or police report made concerning the accident should be included as an enclosure and the custodian of the original report should be indicated.

(20) Any civilian or military criminal charges brought as a result of the accident and the ultimate resolution of those charges. Do not delay the report of investigation solely to document the outcome of criminal charges. The CA should forward that information to subsequent endorsers and to the copy-to addressees as it becomes available.

(21) If a private vehicle is involved in the accident, the name, address, policy number, and telephone number of any insurer of the vehicle, including the amount and type of insurance carried and those categories of drivers who are covered by the policy.

d. Opinions and Recommendations. The following opinions and recommendations, when appropriate, should only be included in a litigation-report investigation by the supervisory judge advocate.

(1) An opinion regarding the probable cause of the accident.

(2) An opinion regarding the contributory or comparative negligence of any party, if any. Consult with OJAG (Code 15), TCU for guidance pertaining to the relevant standard and its application.

(3) If not included in the facts relevant to military or criminal charges filed, an opinion concerning any laws, articles of the UCMJ, or regulations violated.

(4) Whether or not the vehicles are economically repairable, and if not, their salvage value.

(5) Whether or not the driver, in case of Government vehicle, was acting within the scope of employment.

(6) Whether or not disciplinary action should be taken against any of the parties involved. If disciplinary action has been taken, indicate the result, documented by enclosure. Nonpunitive letters of caution are private in nature and the issuance of such letters should not be addressed in the investigation, nor should copies of such letters be made enclosures to the investigation. A charge sheet with draft specifications may be included as an

enclosure if disciplinary action is recommended but has not been initiated. Draft specifications should not be preferred, however, since doing so starts the "speedy trial clock." Consult with the cognizant judge advocate or RLSO.

(7) If Government property has been damaged, a recommendation as to the disposition of the property as follows:

(a) Repaired and returned to service.

(b) Dropped from the records.

(8) Whether the Government should initiate a claim to recover losses suffered by the Government due to damage to property or injuries to personnel, if any.

(9) Pertinent recommendations on matters of safety procedures.

LOSS OR EXCESS OF GOVERNMENT FUNDS OR PROPERTY

The following contains specific guidance when conducting an administrative investigation into the loss or excess of government funds or property.

a. General. Article 0814, U.S. Navy Regulations (1990), requires commanding officers to recommend or convene an investigation under the provisions of the JAGMAN into the circumstances of all deficits (losses) or excesses of public funds or property in the custody of persons under their command, unless properly excused by higher authority. A command investigation is usually sufficient for this purpose. The following general provisions are pertinent:

(1) To verify the existence and amount of a deficit or excess, a prompt audit (preliminary inquiry) of funds or property records normally should precede the decision to convene a JAGMAN investigation. Consultation with an appropriate assist team is encouraged prior to convening a JAGMAN investigation.

(2) A JAGMAN investigation may be required even if the custodian of funds or property is not an accountable person, as defined in Department of Defense Financial Management Regulation, DoD 7000.14-R, Volume 5, Disbursing Policy and Procedures.

(3) A JAGMAN investigation may be a prerequisite, under section 0167, to setoff against pay for losses by nonaccountable personnel, and is the primary source of information in determining whether or not relief of liability may be granted to the custodian in cases of lost funds in amounts of $750.00 or more.

(4) Criminal law enforcement investigations are required if there is any indication that the loss or excess was caused by fraud, embezzlement, theft, or other criminal act. Any such investigation should be coordinated with NCIS; see section 0201. Whether or not a criminal investigation is conducted, inventory records must be corrected with a supporting survey, Financial Liability Investigation of Property Loss (DD Form 200). Losses or excesses of Government funds shall be investigated and reported either by JAGMAN investigation or by the procedures established in DoD 7000.14-R, Vol 5.

(5) Commanders or reviewing authorities should consider conducting a preliminary inquiry when recurring losses or excesses indicate carelessness in handling public funds or property, and regular management reviews and reports are not considered adequate to remedy the situation. A JAGMAN investigation may be appropriate even though each loss or excess, by itself, would not normally require one. Navy publications applicable to the type of funds or property involved, e.g., NAVSUP P-486 for provisions afloat, or P-487 for ships' stores, should be consulted for those amounts of losses or excesses that are considered normal for the volume of business conducted, and for those amounts that warrant further investigation.

(6) For losses or excesses of property, not funds, the procedures for Financial Liability Investigation of Property Loss (DD Form 200) meet the requirements for an investigation in most situations. The original report

will be forwarded in accordance with survey regulations, and a duplicate original will be forwarded as set out in subsection h.

(7) When the cause of loss or excess in the funds or property of a financially accountable custodian cannot be determined, negligence on the part of the custodian is normally presumed by the relief authority when considering requests for relief of liability.

(8) Except as provided in Chapter I of this Manual regarding the setoff of indebtedness of a person against pay, there is no authorization to collect the value of lost government property from nonaccountable personnel, even when caused by fault or negligence. Disciplinary action, however, may be taken, if appropriate, based on investigation findings of culpability.

b. Specific guidance

(1) Public funds. JAGMAN investigations are required for all losses or excesses of public funds, except as follows:

(a) When a loss of disbursing funds is voluntarily liquidated by the custodian under applicable provisions;

(b) When the loss or excess is less than $750.00 in a single incident or related series of incidents; or

(c) When routine accounting adjustments to accounts are appropriate to reflect a discrepancy in money on hand.

(2) Public property. A Financial Liability Officer (formerly called a Survey Officer) or Financial Liability Board (formerly a Survey Board) must inquire into, and report on, all losses or excesses of public property, unless an adjustment to accountable records is otherwise authorized by Naval Supply System Command regulations.

(a) JAGMAN investigations are not generally required for those losses or excesses for which a Financial Liability Investigation of Property Loss (survey) is not mandated by Naval Supply Systems Command regulations. This includes such actions as food service "losses without survey," ship's store "non-disproportionate losses or gains," supply stock or other property book material losses or excesses which are below survey thresholds, or when other routine accounting adjustments to property accounts or inventories are appropriate to reflect a discrepancy in the property on hand. Repetitive minor losses, however, which are indicative of negligence may warrant an investigation as discussed in subsection a(5) above. Furthermore, a JAGMAN investigation may be directed by higher authority in the chain of command or by Commander, Naval Supply Systems Command.

(b) To ensure independent investigation, the officer having custody of the property lost or in excess should not be designated the Financial Liability Officer to conduct the survey.

(3) Postal funds or property. Postal funds are not public funds. Investigations into loss or excess of postal funds or property, therefore, are

not required by Article 0814, U.S. Navy Regulations (1990). OPNAVINST 5112.6 (series), however, requires a commanding officer to convene an investigation into any "postal offense" listed in Volume I of the DoD Postal Manual, DoD 4525.6-M. Even where no offense is involved, a commanding officer should consider convening an investigation into any postal loss in which an accountable Naval postal clerk or officer has not made voluntary restitution. Such an investigation may be needed by the Postal Service for action on a request for relief of liability by the accountable individual.

(4) Nonappropriated funds or property. Nonappropriated funds are not public funds. Whether to convene an investigation under this Manual into losses or excesses of nonappropriated funds or nonappropriated fund property is in the discretion of the commanding officer or higher authority. In dealing with losses or excesses of "nonappropriated fund activities," however, it is important to note that some receive partial appropriated fund support. Losses or excesses of appropriated funds and appropriated fund property in the hands of nonappropriated fund activities must be investigated under subsections b(1) and b(2) above.

c. Primary references for processing losses or excesses of Government property. Primary references for processing losses or excesses of Government funds and property include:

(1) Department of Defense Financial Management Regulation, DoD 7000.14-R, Volume 5, Disbursing Policy and Procedures;

(2) Department of Defense Instruction, DoDI 5000.64, Accountability and Management of DoD-owned equipment and other Accountable Property;

(3) Secretary of the Navy Instruction, SECNAVINST 7320.10 (series), DON Personal Property Policies and Procedures;

(4) Naval Supply Systems Command Manual, Volume II, Supply Ashore;

(5) Naval Supply Systems Command Publication 485, Afloat Supply Procedures;

(6) Naval Supply Systems Command Publication 486, Volume I, Food Service Management - General Messes;

(7) Naval Supply Systems Command Publication 487, Ships Store Afloat; and

(8) Marine Corps Order (MCO) P4400.150 (series), Consumer Level Supply Policy Manual.

d. Type of investigation. At the conclusion of the preliminary inquiry, the commander must determine which of the investigatory options listed in section 0204 to exercise. Where disciplinary action may be a consideration, see section 0202. For losses of property, the commander may use a survey procedure under applicable Navy or Marine Corps regulations in lieu of an administrative investigation under this Manual. Original reports of survey generated by such bodies shall be forwarded as specified in the regulations

under which they are convened. A duplicate original shall be forwarded in the same manner as reports of investigation. This provision does not limit a commander's discretion to convene another type of investigation under this Manual in addition to a survey procedure. Regardless of the type of investigation convened, coordination with concurrent investigators from other DON organizations or other Federal agencies may be required.

e. Loss investigations: special notice to individuals affected. In any investigation into a loss of funds or property in the custody of an accountable individual, or for the purpose of making an administrative determination of accountability Chapter I of this Manual regarding the setoff of indebtedness of a person against pay, the accountable individual(s) shall, in addition to other warnings and advisements required by law or regulation, be advised of the following:

(1) The investigation extends to all facts relating to the loss, its causes, its dollar value, and the kinds and degrees of individual responsibility for the loss.

(2) The findings of the investigation may be a basis for any of the following actions that are applicable to the loss:

(a) Determination of financial liability of the accountable individual for loss of property or funds derived from sale of property by the Commander, Naval Supply Systems Command, Chief, Bureau of Medicine and Surgery, or Deputy Chief of Staff for Installations and Logistics, U.S. Marine Corps; see DoD Financial Management Regulation (DoD FMR), DOD 7000.14-R, Volume 12, Chapter 7, Financial Liability for Government Property Lost, Damaged or Destroyed;

(b) Determination whether relief of liability will be granted for physical loss or improper payment of disbursing funds or documents, upon request of the accountable individual, by the Secretary of the Navy or the Comptroller General, under 31 U.S.C. § 3527;

(c) Determination by the commander to hold a non-accountable individual liable for the loss under Chapter I of this Manual regarding the setoff of indebtedness of a person against pay.

(3) In loss of funds cases, negligence of the accountable individual may be presumed by the Secretary of the Navy or the Comptroller General if the loss remains unexplained.

(4) The affected individual may present evidence for the consideration of the investigating officer(s). The investigating officers may, however, refuse to accept evidence that is irrelevant, lacking in probative value, unduly voluminous, or whose inclusion would unduly delay the investigation.

(5) An accountable individual may request to liquidate voluntarily a loss of disbursing funds under the applicable provisions of Department of Defense Financial Management Regulation, DoD 7000.14-R, Volume 5, Disbursing Policy and Procedures.

f. Required facts and opinions. Chapter 6, section 0607, Department of Defense Financial Management Regulation, DoD 7000.14-R, Volume 5, Disbursing Policy and Procedures, provides specific procedures, findings and recommendations for investigation of major losses of funds due to physical loss, or illegal, incorrect, or improper payment. Command investigations appointed under the JAGMAN are used in the case of major losses of funds, defined as those losses of $750.00 or more or any physical loss where there is evidence of fraud within the accounting function, regardless of the dollar amount. JAGMAN investigations are not required in the case of minor losses, defined as losses of less than $750.00 without any evidence of fraud internal to the accounting function. Chapter 6 of DoD 7000.14-R, Volume 5, provides the procedures for investigating and reporting minor losses. In addition to any specific requirements of the appointing order or DoD 7000.14-R, investigations into losses or excesses of public funds or property must include, at a minimum:

(1) What items were lost or found in excess and the exact dollar value of the loss or excess, e.g., property, vouchers, cash, and so forth.

(2) The nature of the loss or excess, inventory gain or loss, cash shortage, or overage, etc. and, in case of loss of funds, whether the loss was a loss of proceeds of sale of Government property, a physical loss of funds, or the result of illegal or improper payment. Losses due to embezzlement or fraudulent acts of subordinate finance personnel, acting alone or in collusion with others, are physical losses, while all other payments on forged checks or vouchers are improper payments.

(3) How the loss or excess is being carried in the command's accounts.

(4) The facts and circumstances surrounding the loss or excess, and an opinion as to the cause of the irregularity or, if the cause cannot be determined, the most likely cause and the reasons it is so considered.

(5) The identity and position of the accountable officer, and the identity and position of any other person who had custody of the funds or property in question.

(6) The general reputation of the accountable individuals for honesty and care in the handling and safeguarding of funds or property entrusted to them.

(7) The experience and training of the accountable individual in the handling of funds or property, as appropriate, and the workload, including collateral duties, of the accountable individual at the time of the irregularity.

(8) A description, with diagrams where appropriate, of the physical working conditions of the accountable individual who incurred the loss or excess, including a description of physical security arrangements and devices, and security containers and persons with access to them, if applicable, and a statement of whether they were being used properly at the time of the irregularity.

(9) A description of the internal control procedures in effect in the division, department, or office where the irregularity occurred, and a statement whether they were being applied properly at the time of the irregularity. If relevant, include information on recent inspections, assist visits, management control reviews, or other evaluations of procedures.

(10) Identification of the regulations pertinent to the handling of the property or funds involved and a statement whether the regulations were followed.

(11) A description of remedial measures taken to prevent recurrence of the irregularity.

(12) An opinion whether the loss or excess was proximately caused by the fault or negligence of any accountable individual or by an act of a non-accountable individual that can be the basis for financial liability under Chapter I of this Manual regarding the setoff of indebtedness of a person against pay.

g. Guidelines for determining fault or negligence

(1) "Fault" means conduct showing bad faith, gross mismanagement, or neglect of care and may be inferred from irregularities resulting from inattention, dereliction, or perversity.

(2) "Negligence" means failure to exercise care that a reasonable, prudent, accountable person would have exercised under the same or similar circumstances. Failure to know and follow regulations for the care and safeguarding of public funds or property normally is considered negligence, as is failure to follow normal and customary disbursing, collection, or safeguarding procedures or standards without sufficient reason.

(3) "Proximate cause" means the irregularity was the direct and foreseeable consequence of an act or omission, or that the act or omission created the conditions for occurrence of the irregularity. A proximate cause is a cause without which the irregularity would not have occurred.

(4) Burden of proof. There is no burden of proof on the Government to show fault or negligence on the part of an accountable individual. The individual is automatically accountable for the loss and has the burden of establishing that he was not at fault or negligent in order to avoid financial liability. Normally, however, investigators and reviewing authorities should not presume fault or negligence from the mere fact that an irregularity occurred, except that negligence may be presumed when a loss of public funds is entirely unexplained.

h. Distribution. Reports of investigation under this section should be forwarded as described in section 209. In addition, reports should be provided as follows:

(1) For investigations of losses or excesses of disbursing funds or documents, a copy, as finally reviewed and acted upon pursuant to section 0209, shall be forwarded to Director, Defense Finance and Accounting Service,

Cleveland Center, Code FFA, 1240 E. 90th Street, Cleveland, OH 44199.

(2) For investigations of losses or excesses of Government property or proceeds from the sale of Government property, the report shall be forwarded to the Commander, Naval Supply Systems Command, the Chief, Bureau of Medicine and Surgery, or the Commandant of the Marine Corps (Code JA), as appropriate.

(3) For investigations involving fraud of public funds, waste, inefficiency, and related improprieties, the report shall be forwarded to the Office of the Navy Inspector General.

SONIC BOOMS, JET NOISE, AND ARTILLERY NOISE

The following contains specific guidance when conducting an investigation into sonic booms, jet noise and artillery noise. Because these incidents will almost always result in claims against the Navy, a litigation-report investigation should be conducted.

a. The nearest Navy or Marine Corps aviation activity receiving notice that a sonic boom occurred within the U.S., regardless of whether damage was reported, is responsible for an inquiry to determine whether a military aircraft caused the disturbance. The inquiry shall include queries to all Navy, Marine Corps, Air Force, Air National Guard, and other military facilities in the area where supersonic aircraft operate. All traffic, transient as well as local, shall be checked. Incidents of noise damage resulting from ship-based aircraft or shipboard weapons systems are admiralty incidents. Consult Chapter XI and OJAG (Code 11).

b. The principal types of damage caused by a sonic boom are glass and plaster damage. Less frequently, claims are received for damage allegedly caused to brick walls, driveways, concrete foundations, and other major structural elements. Studies have shown that it is almost impossible for a sonic boom to generate over-pressures of sufficient intensity to cause such structural damage regardless of the aircraft's altitude. Whenever questionable items of damage are claimed, the services of a construction engineer or other professionally qualified person should be employed as investigator or as consultant to the investigator. The following information shall be included in any investigative report regarding sonic booms, jet noise, or artillery noise:

(1) detailed description of alleged damage;

(2) photographs of the allegedly damaged building or structure and of the specific area of damage; see section 0214c(4);

(3) detailed description of the building or structure involved, including significant details of construction, size of rooms, age, and general state of repair;

(4) detailed examination and description of any alleged plaster damage;

(5) existence or absence of glass damage in the allegedly damaged building or structure and whether any other glass damage resulting from the incident was reported and verified;

(6) whether windows and doors were open or shut at the time of the boom;

(7) whether any loose objects, such as dishes, glassware, or trinkets inside the building or structure were moved as the result of the boom;

(8) existence or absence of similar damage to other buildings in the immediate neighborhood;

(9) type of surrounding community development, type of construction, and density of buildings or structures in the immediate area, etc.;

(10) occurrence or absence of seismic disturbances registered in the locality at the time involved;

(11) other potential sources of damage, such as heavy truck or rail traffic, explosions or earthquakes, and their distance and direction in relation to claimant's building or structure;

(12) any unusual weather or climatic conditions that may have affected the building or structure;

(13) complete physical description of the aircraft alleged to have caused the damage, including markings, whether jet or propeller driven, and any other distinctive characteristics;

(14) full description of the approximate altitude, maneuvers, speed, direction of flight, time of day, date, formation, and number of aircraft;

(15) any complaints of noise or sonic booms received by any duty office which coincides with the alleged damage; and

(16) authorization, description of flight, aircraft involved, applicable charts, and air controller transcripts or audiotapes of aircraft in the vicinity of the alleged damage.

FIREARM ACCIDENTS

The following contains specific guidance when conducting an investigation into firearm accidents.

a. General. A command investigation shall normally be used to document all relevant circumstances of incidents involving accidental or apparent self-inflicted gunshot wounds.

b. Required facts and opinions. An investigation involving firearm accidents shall include:

(1) Date, time of day, and names and addresses of witnesses present;

(2) Description of physical location of incident and light and weather conditions;

(3) Description of the firearm and its mechanical condition, especially safety mechanisms, and whether the safety mechanisms were used by the firearm handler;

(4) Authorization for possession of the firearm, including how, when, and where it was obtained;

(5) Description of firearm handler's formal training, experience, and familiarity with the firearm's condition, safety procedures, and proper use; and

(6) Discussion of any psychological problems, mental impairment due to drug or alcohol use, and mental responsibility of the firearm handler.

OTHER INCIDENTS

The following contains specific guidance when conducting an investigation into other specific types of incidents.

a. Pollution incidents. When pollution incidents are required to be investigated because of service regulations, other than the JAGMAN, or because of applicable Federal, State, or local laws or regulations, a copy of any report should be submitted directly to OJAG (Code 12) and the geographic environmental coordinator as set out in OPNAVINST 5090.1 (series). A litigation-report investigation should normally be convened, unless the event amounts to a major incident requiring a court of inquiry. When the pollution originates from a U.S. vessel, also see Chapter V of this Manual. The following information shall be included in the report of investigation of pollution incidents and spills:

(1) Location and circumstances of the spill, including the weather and conditions at the site (visibility, darkness, presence/phase of the moon), how, when, and by whom the spill was detected;

(2) Description of the activity occurring when the spill occurred, e.g., shifting fuel, taking on fuel, pumping bilges;

(3) Type of material, e.g., fuel, oil, other hazardous material;

(4) Estimated quantity of material spilled and the basis for the estimate;

(5) Source of the spill, e.g., tank, drum, or valve;

(6) Identity of personnel involved including name, rank/grade, unit, address (home and work), age, training and experience for task, and who was (or should have been) providing supervision;

(7) Whether required reports were made, e.g., reports required by OPNAVINST 5090.1 (series), reports to the National Response Center, reports required by State and local law, reports to the Navy operational chain-of-command, and reports under the Emergency Planning and Community Right-To-Know Act (EPCRA);

(8) Whether local SOPA and command instructions were complied with;

(9) Description of cleanup, including membership of the quick response team, training, response time, actions taken, equipment used, effectiveness of equipment and personnel, availability and readiness of equipment and personnel;

(10) Nature and extent of damages to Government and private property;

(11) Personal injuries, if any, including name of injured parties and extent of injuries (see section 0210 regarding claims);

(12) Attach copies of relevant training documents (e.g., Personnel

Qualification Standard (PQS) records), deck/watch logs, and engineering logs which support the facts; and

(13) An opinion regarding the cause of the spill, e.g., faulty equipment, container, fitting, or valve, operator error/safety, or operational procedure error.

b. Combined investigations of maritime incidents. For maritime incidents involving two or more NATO countries, commands may conduct a single investigation under NATO Standardization Agreement 1179 (STANAG). This sets forth three alternative investigation procedures: (1) combined board of inquiry; (2) national inquiry, attended by witnesses or observers from other nations; and (3) independent inquiries coordinated by the presidents of those inquiries.

c. Security violations. For specific investigation requirements respecting investigations ordered to inquire into the loss, compromise, or possible compromise of classified information; see SECNAV M-5510.36, Chapter 12. Such reports are sent to CNO (N09N) as ultimate addressee. A command investigation shall normally be used.

d. Postal violations. For specific investigation requirements respecting investigations ordered to inquire into postal losses or offenses, see paragraph 601, Department of the Navy Postal Instructions, OPNAVINST 5112.6 (series). In such cases, command investigations may be convened.

e. Allegations of discrimination or sexual harassment. Investigations of alleged discrimination or sexual harassment, including reporting and review procedures, are governed by OPNAVINST 5354.1 (series). Similar Marine Corps investigations are governed by MCO 5354.1 (series).

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CHAPTER III

COMPLAINTS OF WRONGS

0301 PURPOSE

To establish procedures for preparing, submitting, and processing complaints of wrongs against a complainant's commanding officer under Article 138, Uniform Code of Military Justice (UCMJ), and complaints of wrongs against a military superior, who is not the complainant's commanding officer, under Article 1150, U.S. Navy Regulations.

0302 AUTHORITY

a. Article 138, UCMJ 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."

b. Article 1150, U.S. Navy Regulations, states in part: "If any person in the naval service considers him or herself wronged by an act, omission, decision or order of a person who is superior in rank or command, that person shall not fail in maintaining a respectful bearing toward such superior, but may report the wrong to the proper authority for redress in the manner provided in this article." For purposes of this chapter:

(1) An Article 1150 complaint of wrongs, which can only be filed against a superior who is not the complainant's commanding officer, shall be processed as follows:

(a) Where the respondent and complainant do not have the same commanding officer, an Article 1150 complaint shall follow the same procedures enumerated in this chapter for an Article 138 complaint, except that there is no requirement that the complainant seek redress in writing prior to submitting an 1150 complaint.

(b) Where the respondent and complainant have the same commanding officer, that commanding officer shall take final action on the Article 1150 complaint. It is neither desired nor required that the report be forwarded to the Secretary of the Navy or the Office of the Judge Advocate General (OJAG) Administrative Law Division (Code 13) in such a case. If the complainant is not satisfied with the resolution made by the commanding officer, the complainant may file an Article 138 complaint against that commanding officer.

(2) An Article 1150 complaint of wrongs shall be in the format specified in Appendix A-3-a of this Manual.

0303 DEFINITIONS OF TERMS AND PHRASES USED IN THIS CHAPTER

a. Complaint of wrongs. A service member's formal request to superior authority for relief from a wrong committed against the member by a superior.

b. Complainant. The individual who files a complaint of wrongs against the commanding officer. See subsection 0305(a).

c. Commanding officer. For purposes of an Article 138 complaint, "commanding officer," as used in this chapter, means a commissioned or warrant officer who, by virtue of rank, assignment, or both, exercises primary command authority over a military organization, or prescribed territorial area, to which complainant is assigned, that under official directives is recognized as a "command." See Para. 2a, part V, MCM. This does not include an officer-in-charge, who is a "superior" for purposes of an Article 1150 complaint.

d. Superior. A person who is superior in rank or command to the complainant but not his or her commanding officer. For the processing of complaints against a superior filed under Article 1150, substitute the word "superior" for references to "commanding officer" as they are used in this chapter (unless otherwise indicated).

e. Respondent. The individual who committed the alleged wrong(s) against complainant, and against whom the complaint of wrongs is made. The respondent may be a uniformed member of any armed service. See subsection 0305(b).

f. General court-martial convening authority (GCMCA). The first officer superior in the chain-of-command exercising general court-martial jurisdiction over the respondent at the time of the alleged wrong. When the Chief of Naval Operations (CNO) or the Commandant of the Marine Corps (CMC) is the first superior officer in the chain-of-command exercising general court-martial jurisdiction over the respondent at the time of the alleged wrong, the Vice Chief of Naval Operations or the Assistant Commandant of the Marine Corps, respectively, may act on the complaint as the GCMCA for the processing of the complaint. In cases where the respondent is the CNO, the CMC, or a departmental level officer who does not report to CNO or CMC, the Assistant Secretary of the Navy (Manpower and Reserve Affairs) (M&RA) will act as the GCMCA for the purpose of processing the complaint. See subsection 0305(c).

g. Wrong. Any act, omission, decision or order, except those excluded by section 0304, taken, caused, or ratified by a commanding officer, under color of that officer's military authority that:

(1) results in personal detriment, harm, or injury to a military subordinate; and

(2) is without statutory or regulatory basis, unauthorized, an abuse of discretion, arbitrary and capricious, unjust, or discriminatory.

h. Redress. Any lawful action by the commanding officer, the GCMCA, or any officer in the chain-of-command (see subsection 0305(d)) that restores to the complainant any rights, privileges, property or status he would have been entitled to had the wrong not occurred.

i. Examination into a complaint. An inquiry into all facts material to the complaint. This inquiry may take any form the GCMCA deems appropriate. See subsection 0307(e).

j. True statement of the complaint, with the proceedings had thereon. The GCMCA's report to the Secretary of the Navy and response to the complainant, signed personally by the GCMCA. See subsections 0308(a) and (b).

0304 COMPLAINTS NOT WITHIN THIS CHAPTER

a. Improper subject of a complaint of wrongs. The following actions are not proper subjects of a complaint of wrongs:

(1) acts, omissions, decisions and orders not taken, caused or ratified by respondent;

(2) acts that are not final: most recommendations are not final acts; when the recommendation itself is controlling, such as a recommendation for advancement or for a Navy Enlisted Classification (NEC) removal, it is a final act, and a proper subject of a complaint of wrongs; if a recommendation has been acted upon by another authority, the complaint of wrongs will be processed under subsection 0307(d);

(3) general policies of the Department of Defense (DoD) and the Department of the Navy (DON), including the instructions and other documents promulgating such policies;

(4) the GCMCA's decisions and procedures on complaints of wrongs, except for failure to forward the complaint;

(5) complaints which may be redressed under other DON procedures that provide the complainant notice of the alleged wrongful act, a right to rebut or a hearing, as appropriate, and review by an authority superior to the officer taking the action; such procedures include, but are not limited to:

(a) proceedings, findings, or final actions of boards convened under 10 U.S.C. §§ 1181 (Board to Consider Separation of Regular Officers for Substandard Performance) and 1182 (Board of Inquiry);

(b) proceedings, findings, or final actions of nonjudicial punishment (NJP), court-martial, and administrative discharge procedures and results (however, the vacation of a suspended nonjudicial punishment is the proper subject of a complaint of wrongs as no other due process procedure exists to examine that action);

(c) detachment for cause proceedings;

(d) fitness report or evaluation review processes: such processes must provide the complainant notice, a right to rebut or a hearing, as appropriate, and review and action by higher authority; final Navy fitness reports and evaluations are, themselves, proper subjects of a complaint of wrong where the member believes the fitness report or evaluation to be

inaccurate, unjust, or wrongly submitted; the Marine Corps Performance Evaluation Review Board properly qualifies as "other DON procedures" under this subsection and are improper subjects of wrongs; and

(e) personnel detailing decisions in which the member has been afforded an opportunity for flag or general officer review.

The availability of review by the Board for Correction of Naval Records (BCNR) does not render a complaint improper under this subsection.

b. Improper redress of a complaint of wrongs. The following actions may not be requested to redress a wrong:

(1) action against or on behalf of another person, including but not limited to, court-martial charges, NJP, or apologies; or

(2) changes to military records, except as outlined below:

(a) A complaint of wrongs may NOT be used to modify a military record unless the service member initiates a complaint within 90 days after he or she knows of the record's submission for entry into the appropriate record or within 1 year after submission for entry into the appropriate record, whichever is earlier.

(b) In calculating these time periods, the time from the date the complainant requested redress from the commanding officer to the day the complainant receives notice from the commanding officer of the disposition of the request for redress, is not counted.

0305 PARTICIPANTS TO A COMPLAINT OF WRONGS

a. Who may complain.

(1) At the time the complaint is submitted, the complainant must be:

(a) a member of the armed forces on active duty, concerning a wrong which is alleged to have occurred while the complainant was on active duty; or

(b) any reservist, concerning a wrong alleged to have been committed by the respondent acting in his or her official capacity as a commanding officer.

(2) If, at the time the complaint is submitted, the complainant is a proper complainant as defined in this subsection, a subsequent change to the complainant's status does not affect the processing of the complaint under this chapter.

b. Who may be the subject of a complaint. A complaint must be against a specific person, not a command or position. Any commanding officer, as defined in subsection 0303, may be the respondent to a complaint of wrongs. Neither the Secretary of the Navy, Under Secretary of the Navy, the General Counsel of the Navy, nor any of the civilian Assistant Secretaries or Deputy

Assistant Secretaries, may be the respondent to a complaint of wrongs. A subsequent change to the respondent's status does not affect the processing of the complaint under this chapter.

c. Who shall consider the complaint.

(1) General rule. The GCMCA has the primary responsibility to conduct an inquiry into the complaint of wrongs, take action on it, and submit a report of the proceedings to the Secretary of the Navy.

(2) Reassignment of complainant or respondent. If the complainant, respondent, or both, detach prior to the submission of a complaint of wrongs, the complaint will be forwarded to the GCMCA over the respondent at the time of the alleged wrong, via the complainant's current commanding officer and the respondent.

(3) Review of complaints by Region Commanders. A Region Commander will act as the GCMCA when that officer is the GCMCA over the respondent as defined in subsection 0303e, or if specifically requested and authorized in writing to do so by the original GCMCA over the respondent.

(a) The Region Commander and the GCMCA over the respondent will determine, on a case-by-case basis, whether it is appropriate for the Region Commander to act on a particular complaint of wrongs, considering such factors as: the geographic location of the respective commands; the effect of operational commitments on the GCMCA's ability to investigate the complaint adequately; the relative burden of assuming investigative cognizance; the relative seniority of the respondent and the Region Commander; and familiarity with the subject matter of a specific complaint. The GCMCA's letter requesting a Region Commander to act upon a complaint should detail the reasons for the request. A Region Commander may decline for appropriate reasons to act on a complaint.

(b) Ultimate responsibility for processing the complaint remains with the original GCMCA over the respondent. If the original GCMCA forwards a complaint to the Region Commander, the original GCMCA shall maintain a file on the complaint for two years. The file should include a copy of the GCMCA's written request to the Region Commander to act as the GCMCA, and a copy of the Region Commander's action. Once the Region Commander assumes cognizance over the matter, that officer acts independently and in the place of the original GCMCA, with the authority to grant any redress the original GCMCA may have ordered.

(4) Review of complaints from joint commands. Where the complainant is assigned to a joint command, and the GCMCA over the respondent is a member of another service, the complaint shall be forwarded to the GCMCA via the senior Naval officer in the joint command, the designated Navy or Marine Corps commanding officer of the command, or the cognizant Naval Region Commander, as appropriate. He shall review the complaint to determine whether it raises issues unique to the Naval service and addressable only under DON regulations and instructions. The GCMCA may, in such a circumstance, specifically request and authorize either the Naval Region Commander or the appropriate component commander to act on the case.

d. Authority of intermediate superior officers. An intermediate superior officer, subordinate to the GCMCA, to whom a complaint is forwarded, may comment on the merits of the complaint, add pertinent evidence, and, if empowered to do so, grant redress, noting such action on the record. In all cases, intermediate superior officers shall promptly forward the complaint to the GCMCA, and provide a copy of the endorsement to the complainant. See subsection 0306(f).

0306 PROCEDURE

a. Request to commanding officer for redress. Before a complainant may submit a complaint of wrongs under Article 138, the complainant must request, in writing, that the commanding officer redress the wrong. The commanding officer must act upon this request for redress in a timely manner, ordinarily within 30 days, and notify the complainant in writing of the action taken. A complainant is not required to request a superior redress the wrong before submitting a complaint under Article 1150.

b. Time limitations. A complaint must be submitted within a reasonable time after discovery of the alleged wrong. Absent unusual circumstances, a complaint submitted more than 90 days after the complainant discovers the alleged wrong is untimely. The period during which the commanding officer is considering complainant's written request for redress under subsection 0306(a) is not included in this 90-day period. The GCMCA may deny relief solely because the complaint is untimely. If, however, the GCMCA determines that unusual circumstances justify the delay in submission, the GCMCA may find that the complaint is timely and act on it.

c. Form of complaint. The complaint shall be submitted in the format provided at Appendix A-3-a. This form must be completed in its entirety, unless a particular subparagraph, such as that providing for an explanation for untimely submission, does not apply.

(1) The complaint must specify the wrongs alleged and the specific redress requested, followed thereafter by explanatory information.

(2) The complainant should submit all relevant evidence, including affidavits, statements, and documents, with the complaint as numbered enclosures.

(3) Complaint shall be couched in temperate language and be confined to pertinent facts.

d. Joinder. A complaint may not be joined with the complaints of other individuals. Similarly, each complaint may seek redress for the wrong(s) of only one respondent. If the complainant believes more than one respondent has committed a wrong, the complainant shall submit a separate complaint against each respondent, not against a group such as “the chain of command.”

e. Forwarding the complaint. The complainant shall forward the complaint to the GCMCA, via his current commanding officer and the respondent.

f. Endorsements. Intermediate endorsers shall ordinarily forward the

complaint within 10 working days after receipt. Endorsements not completed within 10 working days of receipt must contain an explanation for the delay. Subject to applicable security of classified material instructions, endorsers must provide to complainant copies of their endorsements, including enclosures.

g. Respondent's response. The respondent shall respond, in writing, to the complaint of wrongs and forward that response, along with the complaint and any endorsements, to the GCMCA within 10 working days after receipt of the complaint. If the response is not completed within 10 working days of receipt, the response shall explain the delay. Subject to applicable security of classified material instructions, the respondent must provide complainant with copies of his or her response, including enclosures. If a complaint of wrongs is received by the GCMCA without a response from the respondent, it must be forwarded to the respondent to provide a written response back to the GCMCA with a copy to the complainant prior to being considered by the GCMCA.

h. Complainant's notifications and rebuttal.

(1) Subject to applicable security of classified material instructions, the GCMCA shall:

(a) ensure that the complainant has been provided a copy of all materials (to include, but not limited to, the Respondent's response and any substantive endorsements) received, as well as any evidence developed by the GCMCA's inquiry; and

(b) notify the complainant of the opportunity to rebut any matter contained therein within 10 working days of receipt of the notice. See Appendix A-3-b of this Manual.

(2) No opportunity to rebut is required where the GCMCA returns the complaint to complainant pursuant to subsection 0307(c).

(3) The complainant shall submit his rebuttal to the GCMCA, via his commanding officer and the respondent.

(4) No further opportunity to rebut is required where the respondent or intermediate endorsers provide plain endorsements on the rebuttal, for example, "forwarded," "forwarded for action as appropriate," or "forwarded recommending denial." However, complainant must be provided a copy of such endorsements.

(5) The GCMCA shall provide a copy of the rebuttal notification and the rebuttal as enclosures to its final report. See section 0308. If the complainant declines to provide rebuttal or fails to provide rebuttal within 10 working days, the final report shall adequately document the declination or failure.

i. GCMCA review and action. See sections 0307 and 0308.

j. Withdrawal of complaint. A complainant may withdraw a complaint at any time. The withdrawal must be in writing and signed by the complainant. After notifying the Secretary of the Navy via the OJAG (Code 13), the GCMCA

shall file the complaint and the withdrawal letter without further action, and maintain the file for two years from the date of withdrawal.

k. Waiver of requirements. The GCMCA may waive any requirement in this section, except those that afford a benefit to the complainant, such as the right to receive copies of all materials received and to rebut any matters submitted to or discovered by the GCMCA or any intermediate endorsers.

0307 REVIEW OF THE COMPLAINT BY THE GCMCA

a. Advance copy of the complaint. Immediately upon receipt, the GCMCA shall send a copy of the complaint, without enclosures, to the Office of the Judge Advocate General (Code 13), 1322 Patterson Ave, SE, Suite 3000, Washington Navy Yard, DC 20374-5066. Marine Corps activities shall include the Commandant of the Marine Corps (JAR), Headquarters, United States Marine Corps, 3000 Marine Corps Pentagon, Washington, DC 20350-3000, as a via addee.

b. Review of the complaint. The GCMCA shall review the complaint to ensure that:

(1) the complainant has requested redress from the respondent, if filed under Article 138 (see subsection 0306(a));

(2) the complaint is timely (see subsection 0306(b));

(3) the complaint is complete (see subsection 0306(c));

(4) the complaint does not join more than one complainant or more than one respondent (see subsection 0306(d));

(5) the complaint has been properly forwarded (see subsection 0306(e));

(6) the respondent has responded to the complaint in writing (see subsection 0306(g));

(7) the alleged wrong is a wrong and a proper subject of a complaint of wrongs (see subsection 0304(a)); and

(8) the requested redress is proper (see subsection 0304(b)).

A checklist to assist in this review is provided at Appendix A-3-c.

c. Defective or improper complaints.

(1) If the complaint is defective in that it fails to satisfy the requirements of subsections 0305(a) or (b), does not allege a wrong which is a proper subject of a complaint of wrongs, or makes no proper request for relief, the GCMCA shall return the defective complaint to the complainant with an explanation as to why it is outside the scope of this chapter. In returning a complaint to complainant under this subsection, the GCMCA shall not address the merits of the complaint. If appropriate, the GCMCA should inform the complainant about other channels available to resolve the alleged

wrong. The GCMCA shall prepare and forward to the Secretary of the Navy, via OJAG (Code 13), a report on the complaint, prepared in accordance with the requirements of subsection 0308a. Marine Corps activities shall include the Commandant of the Marine Corps (JAR), Headquarters, United States Marine Corps, 3000 Marine Corps Pentagon, Washington, DC 20350-3000, as a via addressee. A copy of the letter to complainant returning the complaint shall be included in the report.

(2) If the complaint is incomplete or otherwise fails to satisfy the procedural requirements of subsections 0306(a), (b), (c), or (d), the GCMCA shall, unless the deficiency is waived under subsection 0306(k), return the complaint to the complainant with an explanation. In returning a complaint to complainant under this subsection, the GCMCA shall not address the merits of the complaint. The GCMCA shall prepare and forward to the Secretary of the Navy, via OJAG (Code 13), a report on the complaint, prepared in accordance with the requirements of subsection 0308a. Marine Corps activities shall include the Commandant of the Marine Corps (JAR), Headquarters, United States Marine Corps, 3000 Marine Corps Pentagon, Washington, DC 20350-3000, as a via addee. A copy of the letter to complainant returning the complaint shall be included in the report.

(3) See Appendix A-3-d for sample letter back to complainant.

d. Complaints alleging recommendations as wrongs. If a complaint names a respondent who made a recommendation that was forwarded to another officer for final action, and that action has been completed, the officer who approved or acted on the recommendation in question shall be substituted as respondent in place of the original respondent. The complaint shall be forwarded, via the GCMCA over the original respondent and via the substituted respondent, to the GCMCA over that substituted respondent. That GCMCA will review all actions taken and grant or deny redress in accordance with this chapter.

e. Inquiry. If the complaint is not improper or defective, the GCMCA shall inquire into the merits of the allegation(s).

(1) The extent and nature of such inquiry is within the GCMCA's discretion, and depends upon the seriousness of the allegations, the extent of the investigation conducted by the chain-of-command subordinate to the GCMCA, the available time, and the exigencies of operations. The GCMCA may appoint an investigating officer to inquire into the complaint.

(2) The GCMCA should review SECNAVINST 5211.5 (series) to determine whether Privacy Act statements are required.

(3) The GCMCA may request complainant or respondent or both submit additional explanatory statements or other relevant documents.

(4) Certain complaints may involve matters that are complex or technical and require expert evaluation. In such cases, the GCMCA may seek expert evaluation from other Naval organizations or commands.

f. Complainant's rebuttal and notifications.

(1) Prior to taking final action on a complaint, and subject to

applicable security of classified material instructions, the GCMCA shall:

(a) ensure compliance with subsection 0306(h);

(b) ensure the complainant has been provided a copy of any new matters developed by the GCMCA inquiry; and

(c) inform the complainant of the opportunity to rebut any new matters within 10 working days.

(2) The complainant shall submit any new rebuttal materials to the GCMCA, via his commanding officer and the respondent.

(3) As with the original complaint, if the respondent or intermediate endorsers provide anything more than plain endorsements, for example, "forwarded," "forwarded for action as appropriate," or "forwarded recommending denial," in forwarding the rebuttal, the GCMCA shall ensure complainant is provided a copy of all materials received and inform the complainant of the opportunity to rebut any matters contained therein. If the respondent or intermediate endorsers only provide a plain endorsement, the GCMCA shall ensure the complainant receives a copy.

g. Time limitations. Except in unusual circumstances, the GCMCA shall act on the complaint within 90 days of receipt. If the GCMCA action is not completed within 90 days of receipt, the report to the complainant shall explain the delay.

h. Delay due to separate inquiry. The GCMCA may delay the examination into a complaint if there is an ongoing independent inquiry or proceeding (e.g., Inspector General investigation) that is reasonably likely to result in clarification of the issues or redress of the alleged wrong. Such delay should not ordinarily extend beyond 10 days after action is completed in the related procedure, or beyond 120 days from the date the GCMCA receives the complaint, whichever is earlier. If the GCMCA action is not completed within this period, the report to the complainant shall explain the delay.

i. Personal action by GCMCA. The GCMCA must take personal action on the complaint. The GCMCA may not delegate such authority to a subordinate command or individual.

j. Standard of Proof. Facts must be established in the GCMCA's determination by a "preponderance of the evidence."

k. Redress.

(1) If the GCMCA determines the complaint is without merit, the GCMCA shall deny redress.

(2) If the GCMCA determines the complaint has merit, the GCMCA shall grant such redress as is appropriate and within his authority. In certain situations, a complaint may have merit; however, redress may not be available, appropriate, or proper within the context of a complaint of wrongs. In such cases the GCMCA should acknowledge the merit of the complaint, even if relief is denied.

(3) If the GCMCA determines the complaint has merit, but cannot actually effect the appropriate redress (i.e., removal of a fitness report or performance evaluation from a service record), the GCMCA shall forward the file to the Secretary of the Navy in accordance with section 0308 via the officer who can effect it, requesting that the specific relief be granted. The officer so requested shall effect the relief, unless the officer determines that the relief requested is not permitted by current regulations or is otherwise prohibited by law or policy. In such cases, the officer may delay compliance with the request until the final review and direction by the Secretary of the Navy. In such cases, the officer's endorsement shall set out the precise reasons the requested relief has been delayed. If the officer effects relief, the officer's endorsement to the Secretary shall explain the details of this action. Complaints shall not be forwarded to the Secretary without appropriate endorsement.

0308 PREPARATION AND FORWARDING OF GCMCA REPORT

a. Written response to complainant. The GCMCA shall advise the complainant in writing of the action taken on the complaint. The letter shall specifically indicate which of the complainant's allegations have merit and which are without merit and shall either specify the relief granted or expressly deny the requested relief. See Appendix A-3-e.

b. Forwarding of GCMCA Report. In all cases, the GCMCA shall prepare and forward to the Secretary of the Navy, via OJAG (Code 13), a report on the complaint. Marine Corps activities shall include the Commandant of the Marine Corps (JAR), Headquarters, United States Marine Corps, 3000 Marine Corps Pentagon, Washington, DC 20350-3000, as a via addee. In joint commands where the GCMCA is of a different service, the GCMCA should forward complaint to the Service Secretary with the authority to fulfill the responsibilities identified.

(1) The report shall be in the format provided in Appendix A-3-f, and include the complaint with all endorsements and enclosures, a copy of any relevant correspondence with the complainant or respondent including any rebuttal notifications and rebuttals, and a copy of any pertinent investigations that were used in the decision and had been provided to the complainant. The basic letter should simply state "Per references (a) and (b), forwarded for final review." No further elaboration is required (as any elaboration may require forwarding back to the complainant for review).

(2) The report shall also include the signed GCMCA checklist found at Appendix A-3-c.

c. Signature of GCMCA. The report submitted to the Secretary of the Navy and the response to the complainant, if by separate correspondence, must be signed personally by the GCMCA, or, in that officer's absence, by the officer officially acting in such capacity, with the signature block so indicating.

0309 ENDORSEMENTS BY OFFICERS SENIOR IN THE CHAIN-OF-COMMAND TO THE GCMCA

Officers senior in the chain-of-command to the GCMCA, who themselves exercise

general court-martial jurisdiction, may require subordinate commanders to submit the GCMCA's report via them. Such officers may make comments or recommendations concerning the report to the Secretary of the Navy, but they may not modify in any manner the report of the GCMCA.

0310 ACTION BY THE JUDGE ADVOCATE GENERAL

a. When complaint has been acted upon by GCMCA. Upon receipt of the GCMCA's report to the Secretary of the Navy, the JAG shall ensure that there has been substantial compliance with Article 138, UCMJ, or Article 1150, U.S. Navy Regulations, and this chapter. The JAG has delegated this responsibility to OJAG (Code 13).

(1) If there has not been substantial compliance, OJAG (Code 13) shall return the file to the GCMCA for additional investigation or further action.

(2) If there has been substantial compliance, OJAG (Code 13) shall forward the complaint, with the actions thereon, to the Secretary of the Navy, with appropriate evaluations and recommendations.

(3) OJAG (Code 13) may delay forwarding of the complaint if there is an ongoing independent inquiry or proceeding (e.g., Inspector General investigation) that is reasonably likely to result in clarification of the issues or redress of the alleged wrong.

b. When the Assistant Secretary of the Navy (M&RA) is the GCMCA. When the Assistant Secretary of the Navy (M&RA) is the GCMCA, OJAG (Code 13) shall provide legal advice to the Assistant Secretary of the Navy (M&RA) for the purposes of acting upon a complaint pursuant to subsection 0303(f).

c. Referral to the General Counsel of the Navy. When the JAG or an officer within his chain-of-command is the GCMCA or respondent, or when OJAG (Code 13) has provided legal advice under subsection 0310(b), the Secretary of the Navy may refer the case to the General Counsel of the Navy for formal evaluation and recommendations under this section.

0311 REVIEW BY THE SECRETARY OF THE NAVY

a. Scope and Standard of Review. The Secretary of the Navy will review the action of the GCMCA. The standard for review is whether the GCMCA committed an abuse of discretion.

b. Action where redress was granted. The Secretary of the Navy may set aside actions favorable to the complainant only if such redress was beyond the statutory or regulatory authority of the officer granting the redress.

c. Action where redress was denied. The Secretary of the Navy may order further proceedings in the matter, or direct that all or a portion of the requested redress, or other appropriate redress, be granted.

d. Notification and finality. Upon review of a complaint, the Secretary of the Navy shall notify the complainant of the final action taken. Upon

final secretarial action the complainant will have exhausted his administrative remedies under Article 138, UCMJ, or Article 1150, U.S. Navy Regulations, as the case may be.

e. Other remedies. Exhaustion of remedies under Article 138, UCMJ, and Article 1150, U.S. Navy Regulations, does not affect remedies that may be available under other statutes or regulations, including petitions to the Board for Correction of Naval Records.

f. Delegation. The Secretary of the Navy may delegate any of the responsibilities under this chapter to the Assistant Secretary of the Navy (M&RA), except when the Assistant Secretary of the Navy (M&RA) has acted as the GCMCA. The Secretary or the Assistant Secretary of the Navy (M&RA) may delegate any of the responsibilities under this chapter to an appropriate Deputy Assistant Secretary of the Navy, or to the JAG. Actions taken pursuant to this chapter by the Assistant Secretary of the Navy (M&RA), a Deputy Assistant Secretary of the Navy, or the JAG shall be as effective as if done personally by the Secretary of the Navy.

0312 REVIEW BY THE SECRETARY OF THE NAVY OF FORMAL EQUAL OPPORTUNITY OR SEXUAL HARASSMENT COMPLAINTS

When final review by the Secretary of the Navy of a formal equal opportunity or sexual harassment complaint is requested pursuant to DON regulations, the procedures found in sections 0309 through 0311 of this chapter will apply. The request for final review by the Secretary of the Navy must be forwarded via the appellant's commanding officer and the GCMCA who conducted the initial review of the formal complaint.

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SAMPLE COMPLAINT

Date

From: (Rank/Rate, Name, Designator/MOS)
To: (GCMCA over respondent at the time of the alleged wrong)
Via: (1) (complainant's current commanding officer, if needed)
(2) (Respondent)
(3) (other intermediate superiors in chain-of-command prior to GCMCA)

Subj: COMPLAINT OF WRONGS UNDER (choose ARTICLE 138, UCMJ or ARTICLE 1150, U.S. NAVY REGULATIONS)

Ref: (a) (choose Article 138, UCMJ or Article 1150, U.S. Navy Regulations)
(b) JAGMAN, Chapter III

Encl: (1) (list individually all documents enclosed with the complaint to support the complaint, including - for Article 138 complaints - the written request for redress and the response)

1. This complaint of wrongs under reference (a) is submitted in compliance with reference (b).

2. Complainant Information:

a. Current command:
b. Command at time of alleged wrong:
c. EAOS/EAS/PCS/Separation/Retirement Date: (list date(s) as appropriate)
d. Permanent home address and e-mail address: (place where correspondence should be forwarded if separated from active duty)

3. Respondent Information:

a. Rank and name: (person against whom complaint is made)
b. Organization: (title/position and current command, and if different, provide same information for respondent at the time of the alleged wrong)

4. Complaint:

a. Type of Wrong: (e.g. improper evaluation report, harassment, etc)
(1) Date wrong discovered:
(2) Date written request for redress was submitted: (include request as enclosure if Article 138 complaint)
(3) Date answer to request for redress was received: (include answer as enclosure if Article 138 complaint)
(4) Number of days between wrong and submission of complaint (and if over 90 days, explanation for delay): (difference between date in block 4a above and date this form is submitted, excluding the period respondent considered the written request for redress, which can be determined from blocks 4b and 4c above; if complaint is submitted more than 90 days after discovery of the wrong, the delay must be explained)
(5) Specific, detailed explanation of wrong committed: (explain what the wrong was, and how respondent was responsible for it)

(6) Relief requested: (relief must be personal in nature and directly connected to the wrong alleged above; it may not include, for example, a demand for public apology or initiation of action against another).

b. Type of Wrong - (list additional types of wrongs if any)

(1) Date wrong discovered:

(2) Date written request for redress was submitted:

(3) Date answer to request for redress was received:

(4) Number of days between wrong and submission of complaint (and if over 90 days, explanation for delay):

(5) Specific, detailed explanation of wrong committed:

(6) Relief requested:

(If necessary, continue with lettered paragraphs to identify each wrong separately, following the format provided above.)

5. I CERTIFY THE ABOVE INFORMATION IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, AND THIS COMPLAINT IS SUBMITTED PER THE GUIDELINES AND PROCEDURAL REQUIREMENTS IN CHAPTER III, MANUAL OF THE JUDGE ADVOCATE GENERAL.

SIGNATURE OF COMPLAINANT: _____ Date: _____

SIGNATURE OF WITNESS: _____ Date: _____

PRIVACY ACT STATEMENT

1. Authority. 10 U.S.C. §§ 938, 5013.

2. Principal purpose(s). Used by command authorities and the Office of the Judge Advocate General (OJAG) to review, take action, and make recommendations to the Secretary of the Navy on Article 138, UCMJ, and Article 1150, U.S. Navy Regulations, complaints of wrongs.

3. Routine uses. The Blanket Routine Uses that appear at the beginning of the Department of the Navy's compilation in the Federal Register apply.

4. Mandatory or voluntary disclosure and effect on individual not providing information. Providing requested information is voluntary; however, failure to do so may result in delayed command action and JAG review, or the inability to notify complainant of the Secretary's decision.

GCMCA NOTICE OF RIGHT TO REBUT

From: (General Court-Martial Convening Authority)
To: (Complainant)
Via: (Current Commanding Officer, _____)

Subj: OPPORTUNITY TO REBUT MATTERS RELATING TO THE COMPLAINT OF WRONGS UNDER (ARTICLE 138, UCMJ or ARTICLE 1150, U.S. NAVY REGULATIONS) BY (COMPLAINANT)

Ref: (a) JAGMAN, Chapter III

Encl: (1) (identify documents)

1. As the officer exercising general court-martial jurisdiction over the respondent under reference (a), I am investigating and reviewing your complaint and the endorsements to it.

2. In accordance with subsections 0306(h) and 0307(f) of reference (a), enclosures (1) - (x) are forwarded for your review and possible rebuttal. If you desire to submit any matters in rebuttal, you must do so, in writing, via your commanding officer and the respondent, by (date certain, allowing at least 10 working days). After that date, I will complete my action on your complaint.

(Name of GCMCA)

Copy to: Respondent (if different from the complainant's current CO)

COMPLAINT OF WRONG PROCESSING CHECKLIST FOR GCMCA

Case name: _____

All references are to the JAGMAN, Chapter III unless otherwise noted.

COMPLAINT

Complainant

☐ Is complainant a proper complainant? (§ 0305(a)) If not, see § 0307(c)(1).**

☐ Complaint does not join more than one complainant? (§ 0306(d)) If it does, complaint may be returned to complainant in accordance with § 0307(c)(2).*

Respondent

☐ Complaint is against a specific person, not a command or position? (§ 0305(b)) If not, see § 0307(c)(1)**

☐ Is respondent the proper respondent? (§ 0305(b)/NAVREGS 1150)**
- ☐ If 138, respondent was complainant's CO at the time of the complained of actions. (§ 0303(c)) If not, process as 1150 or return under § 0307(c)(1), as appropriate.
- ☐ If 1150 and respondent and complainant have the same commanding officer, then it is a "true 1150" and no report to SECNAV is required. (§ 0302(b)(1)(b)) All other 1150s are processed using 138 rules.
- ☐ See § 0305(c)(2) if one of the parties has transferred since the alleged wrong.

☐ Complainant does not join more than one respondent? (§ 0306(d)) If he or she does, complaint may be returned to complainant in accordance with § 0307(c)(2).*

Alleged Wrong(s)and Relief Requested

☐ Each alleged wrong is a proper subject of a complaint of wrongs? (§ 0304(a))**
- ☐ Final actions; Not recommendations (unless controlling, e.g. advancement recommendations, NEC removal)?
- ☐ Not general policies of DON?
- ☐ Not wrongs that have another DON procedure that provides notice, right to rebut or hearing, and review by superior.

☐ The alleged wrong(s) resulted from acts, omissions, decisions or orders taken, caused or ratified by respondent (§ 0304(a)(1)).

☐ Complaint makes a proper request for relief? (§§ 0303(h) and 0304(b))**

Procedural Requirements

☐ Complainant submitted written request for redress to respondent prior to submitting Art 138 complaint? (§ 0306(a)) If not, complaint may be returned to complainant in accordance with 0307(c)(2).* This does not apply to 1150s.

☐ Complaint is timely, or late submission justified? (§ 0306(b)) If not,

complaint may be returned to complainant in accordance with § 0307(c)(2).*

☐ Complaint is properly forwarded? (§ 0306(e))*
  ☐ Addressed to proper GCMCA, via intermediate endorsers, including respondent. If not, readdress and forward properly.

☐ Complaint is in the proper format? (§ 0306(c), Appendix A-3-a) If not, obtain information and include in GCMCA's action or the complaint may be returned to complainant in accordance with § 0307(c)(2).*
  ☐ Includes complainant's and respondent's personal information?
  ☐ Includes date wrong discovered and number of days between discovery of wrong and complaint submission?
  ☐ Explains delay, if applicable?
  ☐ Complaint complete with all enclosures/endorsements?
  ☐ Certified complaint to be "true and correct" and is signed, witnessed, and dated?

* Defect may be waived by GCMCA.
** Defect **may not** be waived by GCMCA and requires finding that particular allegation/redress is not cognizable.

GCMCA REVIEW

☐ Advance copy provided to OJAG (Code 13)? (§ 0307(a))

☐ Complainant provided a copy of all materials received, including all endorsements and enclosures? (§§ 0306(h) and 0307(f))

☐ Complainant given opportunity to rebut all materials received or evidence developed by the GCMCA's inquiry using Appendix A-3-b? (§§ 0306(h) and 0307(f))

☐ Is this command the proper GCMCA? (§ 0305(c))
  ☐ If a Region Commander is acting as GCMCA, written request from original GCMCA must be included.

☐ Has complaint been withdrawn by complainant? (§ 0306(j))
  ☐ Signed withdrawal letter forwarded to OJAG (Code 13) with notice of withdrawal to SECNAV.

☐ If complaint returned to complainant because it is incomplete or otherwise procedurally deficient, has complainant been provided with an explanation for return? (§ 0307(c))

☐ GCMCA's action completed within 90 days of receiving complaint? (§ 0307(g))
  ☐ Delay must be explained in letter to Complainant.

GCMCA REPORT

☐ Report to SECNAV and complainant signed personally by GCMCA or official "Acting" (not "by direction")? (§ 0308(c))

☐ If GCMCA cannot effect redress granted, file forwarded to SECNAV via officer who may effectuate redress (e.g., CNP) (§ 0307(k)(3))

☐ Report to Complainant in proper format, including complaint and all

enclosures and endorsements? (§ 0308(a)) Report must discuss **each** allegation of wrong and conclude:

- ☐ whether the allegation is cognizable;
- ☐ if the allegation is cognizable, whether it has merit; and,
- ☐ if the allegation has merit, whether relief is appropriate.
- ☐ provide rationale for GCMCA's decision.

☐ For allegations that are not cognizable, the report does not discuss the merits.

☐ The report is in the format specified in Appendix A-3-e or A-3-f.

☐ For USMC commands, report to SECNAV sent via Commandant of the Marine Corps (JAR). (§ 0308(b))

_____
Signed by reviewing official

GCMCA REPORT TO COMPLAINANT – COMPLAINTS RETURNED AS IMPROPER OR DEFECTIVE

From: (General Court-Martial Convening Authority)
To: (Complainant)

Subj: COMPLAINT OF WRONGS UNDER (ARTICLE 138, UCMJ or Article 1150, U.S. NAVY REGULATIONS), BY (Rank/Rate) (Name)(Service)

Ref: (a) (Article 138, UCMJ or Article 1150, U.S. Navy Regulations)
(b) JAGMAN, Chapter III

Encl: (1) Original complaint with enclosures and endorsements

1. Per references (a) and (b), I reviewed enclosure (1) and determined that the complaint is (improper/defective) for the following reasons:

(a) – (x) (discuss each type of wrong under a separate letter heading).

2. My point of contact on this matter is (action officer). He/she may be reached at (commercial telephone number) or DSN (DSN number).

_____
(PERSONALLY SIGNED BY THE GCMCA OR
OFFICER ACTING IN SUCH CAPACITY-
SEE SUBSECTION 0308(b))

Copy to:
Respondent
Any previous endorsers

GCMCA REPORT TO COMPLAINANT

From: (General Court-Martial Convening Authority)
To: (Complainant)
Via: (Commanding Officer of Complainant)

Subj: COMPLAINT OF WRONGS UNDER (ARTICLE 138, UCMJ or Article 1150, U.S. NAVY REGULATIONS), BY (Rank/Rate) (Name)(Service)

Ref: (a) (Article 138, UCMJ or Article 1150, U.S. Navy Regulations)
(b) JAGMAN, Chapter III

Encl: (1) Original complaint with enclosures and endorsements
(2) Copy of GCMCA's letter(s) to complainant
(3)-(?) (related documents, reports, and investigations)
(all enclosures must have been previously provided to complainant)

1. Per references (a) and (b), enclosure (1) has been investigated.

2. In enclosure (1), you made the following allegations for which I have conducted an inquiry and concluded as follows based on enclosures (2)-(?):

(a) - (x). (Specifically list each separate alleged wrong, whether it is cognizable, whether it has merit, whether it warrants the relief requested or other relief, and rationale for GCMCA's decision.)

3. This action (was/was not) completed within 90 days of receipt as required by paragraph 0307(g) of reference (b). (If the GCMCA action is not completed within 90 days of receipt, the report shall explain the delay.)

4. As required by section 0308(b) of reference (b), I have forwarded a report of your complaint and the proceedings held thereon to the Secretary of the Navy, who will act as the final review authority in your case.

/s/
(PERSONALLY SIGNED BY THE GCMCA OR
OFFICER ACTING IN SUCH CAPACITY)
NAME

Copy to:
Respondent (w/out encl)
Any previous endorsers (w/o encl)

GCMCA LETTER TO SECNAV

From: (General Court-Martial Convening Authority)
To: Secretary of the Navy
Via: Office of the Judge Advocate General (Code 13)
(or for Marine Cases, Via:
(1) Commandant of the Marine Corps (JAR)
(2) Office of the Judge Advocate General (Code 13))

Subj: COMPLAINT OF WRONGS UNDER (ARTICLE 138, UCMJ or ARTICLE 1150, U.S. NAVY REGULATIONS (1990))) BY (COMPLAINANT)

Ref: (a) (Article 138, UCMJ or Article 1150, U.S. Navy Regulations (1990)))
(b) JAGMAN, Chapter III

Encl: (1) (GCMCA ltr to Complainant w/encls)
(2) (Signed GCMCA Checklist)

1. Per references (a) and (b), enclosures (1) and (2) are forwarded for final review.

2. My point of contact on this matter is (action officer). He/she may be reached at (commercial or DSN telephone number) or (email).

/s/
(PERSONALLY SIGNED BY THE GCMCA OR
OFFICER ACTING IN SUCH CAPACITY)
NAME

Copy to:
Complainant (w/o encl)

CHAPTER IV

ARTICLE 139 CLAIMS -- REDRESS OF DAMAGE TO PROPERTY

0401 SCOPE

0402 PROPER CLAIMANTS

0403 CLAIMS NOT COGNIZABLE

0404 LIMITATION ON CLAIMS

a. Time limitations
b. Acts of property owner
c. Only direct physical damage considered

0405 COMPLAINT BY THE INJURED PARTY AND INVESTIGATION

a. Contents of the claim
b. Claim submission
c. Actions by the command
d. Judge advocate review

0406 ACTION BY THE COMMANDING OFFICER AND GENERAL COURT MARTIAL CONVENING AUTHORITY

a. GCMCA action required
b. Multiple offenders
c. GCMCA review

0407 RECONSIDERATION

a. Original action by GCMCA
b. Original action by OJAG

0408 ASSESSMENT OF PECUNIARY LIABILITY

0409 EFFECT OF COURT-MARTIAL PROCEEDINGS

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Chapter IV

ARTICLE 139 CLAIMS -- REDRESS OF DAMAGE TO PROPERTY

0401 SCOPE

This chapter provides for assessments against the pay of members of the Naval service in satisfaction of claims for damage or wrongful taking of privately-owned property under Article 139, Uniform Code of Military Justice (UCMJ). Under Article 139, UCMJ, pay may be assessed if the damage, destruction, or loss is caused by willful, wrongful, reckless, riotous, or disorderly conduct by the servicemember. Charges against pay under these regulations shall be made only against the pay of persons shown to have been principal offenders or accessories.

0402 PROPER CLAIMANTS

Proper claimants include any individual (whether civilian or military), a business, charity, or a state or local government that lawfully owns or possesses property.

0403 CLAIMS NOT COGNIZABLE

The following claims are not cognizable under this Chapter:

a. Claims resulting from simple negligence.

b. Claims of subrogees.

c. Claims for personal injury or death.

d. Claims arising from acts or omissions within the scope of employment of the offender.

e. Claims for reimbursement for damage, loss, or destruction of Government property.

f. Claims resulting from a breach of contractual or fiduciary duty, such as nonpayment of rent.

0404 LIMITATION ON CLAIMS

a. Time limitations. A claim must be submitted within 90 days of the incident.

b. Acts of property owner. When the acts or omissions of the property owner, his lessee, or agent were a proximate contributing factor to the loss

or damage of the property, assessments will not be made against members of the Naval service in excess of the amount for which they are found to be directly responsible, i.e., comparative responsibility for the loss will be the standard for determining financial responsibility.

c. Only direct physical damage considered. Assessment will be made only for direct physical damage to the property. Consequential damages, such as loss of use, will not be considered.

0405 COMPLAINT BY THE INJURED PARTY AND INVESTIGATION

a. Contents of the claim. A claim shall contain a statement setting forth the amount of the claim, the facts and circumstances surrounding the claim, and any other information that will assist in the investigation and resolution of the matter. When there is more than one complaint resulting from a single incident, each claimant must file a claim separately and individually. The claim shall be personally signed by the claimant or his duly authorized representative or agent.

b. Claim submission. A claim shall be filed with the commanding officer of the alleged offender.

c. Actions by the command. A commanding officer is responsible for ensuring any complaint filed under this chapter is promptly investigated and adjudicated. Where a complaint is received by a commanding officer to whose command the alleged offender does not report, that officer shall forward the claim and other pertinent information about the matter to the alleged offender's commanding officer. Where the command of the alleged offender cannot be determined, the claim and supporting materials shall be forwarded to the Chief of Naval Personnel or the Commandant of the Marine Corps, as appropriate, for action.

(1) Upon receipt of the claim, the commanding officer shall provide notice to the alleged offender of the basic allegations in the claim. If at any time during the processing of the claim, the alleged offender voluntarily elects to make restitution, this matter may be closed.

(2) The commanding officer shall convene an investigation under Chapter II of this Manual to inquire into the circumstances surrounding the claim.

(a) The investigation shall gather all relevant information about the matter, answering the who, what, where, when, why, and how questions, and make findings and opinions, as appropriate, about the validity of the claim under Article 139, UCMJ, and these regulations.

(b) The investigation shall determine the amount of damage suffered by the property owner. The standard of proof for a finding of pecuniary liability and for the amount to be assessed under Article 139, UCMJ, is preponderance of the evidence. See section 0207 of this Manual for an explanation of the various standards of proof.

(c) The investigation shall make recommendations about the amount

to be assessed against the pay of the responsible parties. If more than one person is found responsible, recommendations shall be made about the assessments against each individual.

(d) Where a recommendation of pecuniary liability is made, the investigating officer will forward a copy of the investigation to the identified responsible member. The member will be advised that he has five working days to submit a statement or additional information about the incident.

(e) Upon receipt of comments from the member or the expiration of the comment period, the investigating officer shall forward the investigation to a judge advocate for review.

d. Judge advocate review. The judge advocate shall examine whether the evidence supports the findings and if the investigation's recommendations are consistent with the findings. If necessary, the report may be returned to the investigating officer for further investigation. Once satisfied the report is complete, the judge advocate will forward the investigation and his review to the commanding officer.

0406 ACTION BY THE COMMANDING OFFICER AND GENERAL COURT MARTIAL CONVENING AUTHORITY

a. GCMCA action required. If the commanding officer is not a general court martial convening authority (GCMCA), the claim, the investigative report, the offender's statement (if any), and the commanding officer's recommendations thereon shall be forwarded to the GCMCA over the command for review and action on the claim.

b. Multiple offenders. Where a claim involves multiple offenders that are members of different commands:

(1) Action by common superior. The investigative report shall be forwarded to the common superior GCMCA over the commands to which the alleged offenders are assigned.

(2) Forwarding to OJAG. Where it is not practical or possible to forward the investigation to a common superior GCMCA, the investigative report shall be forwarded to OJAG (Code 15), who will take action on the matter. In such a situation, commanding officers are not to make charges against the pay of their members until directed by OJAG (Code 15).

c. GCMCA review. The GCMCA shall review the entire claim file and determine whether the claim is properly within the provisions of Article 139, UCMJ, and these regulations, and whether the facts indicate responsibility for the damage by members of the command.

(1) If the GCMCA finds the claim payable under these regulations, he shall determine the amount to be assessed against the member.

(2) If the GCMCA determines that a member should be charged an amount

in excess of $5,000, the GCMCA will forward the entire claim file to the Office of the Judge Advocate General (OJAG) (Code 15), or Commandant of the Marine Corps (JAR), as appropriate, for review. After review, OJAG or JAR will return the claim file to the GCMCA for action.

(3) After the claim has been fully reviewed by the GCMCA, and OJAG/JAR if required, and a final determination has been made, the GCMCA shall promptly notify the claimant and member of the proposed action to be taken on the claim and inform both of the right to request reconsideration under section 0407.

0407 RECONSIDERATION

a. Original action by GCMCA. Either a claimant or a member who has been assessed pecuniary liability may request reconsideration of the decision. In the event of a request for reconsideration by the member, no action will be taken to assess pecuniary liability until OJAG (Code 15) has made a final decision on the reconsideration request.

(1) A request for reconsideration must be submitted to the GCMCA that took initial action within five working days of receipt of the GCMCA's decision. However, if it appears that good cause exists that would make it impractical for a request to be submitted within five days, the GCMCA may, in his discretion, grant an extension of time. The GCMCA's decision on extensions is final.

(2) Upon receipt of a request for reconsideration, the GCMCA may reopen the investigation or take any other action that the GCMCA believes is necessary in the interests of justice. If the GCMCA contemplates modifying the decision, the GCMCA will provide all parties to the claim with notice and a reasonable opportunity to respond.

(3) The GCMCA will forward the claim for review and final action to the Office of the Judge Advocate General, Claims and Tort Litigation (Code 15), 1322 Patterson Avenue, SE, Suite 3000, Washington Navy Yard, DC 20374-5066. The GCMCA's endorsement will state the claimant's name, the offender's name, the convening authority, the amount assessed, and the original determination, as well as the GCMCA's recommendation for action to be taken on the request for reconsideration. All documents, including the claim, the investigative report and the judge advocate review, will be included in the materials forwarded. The GCMCA shall notify the parties that the claim has been forwarded to OJAG (Code 15) for review and final action.

b. Original action by OJAG. A claimant or member who has been assessed pecuniary liability by OJAG, under section 0406b(2), may submit a request for reconsideration of the decision to OJAG (Code 15) within five working days of receipt of the original decision.

0408 ASSESSMENT OF PECUNIARY LIABILITY

a. No action shall be taken under this section until the member has been provided an opportunity to request reconsideration and final action has been taken on any such request.

b. If the GCMCA is not the member's commanding officer, the GCMCA shall direct the commanding officer to implement the charge against pay.

c. The commanding officer will order that the charged amount be collected from the member's pay as provided in the DoD Financial Management Regulation. The amount collected will then be paid to the claimant.

d. The amount charged in any single month against the pay of the member shall not exceed one-half of basic pay, as defined in Rule for Courts-Martial 1003(b)(2), Manual for Courts-Martial.

e. The action of the commanding officer in ordering the assessment shall be conclusive on any disbursing officer for payment to the claimant of the damages assessed, approved, charged, and collected.

0409 EFFECT OF COURT-MARTIAL PROCEEDINGS

Administrative action under these regulations is separate and distinct from, and is not affected by, any disciplinary action against the offender. The two proceedings are independent. The processing of the claim under Article 139, UCMJ, should not be delayed solely for the resolution of a pending court-martial. While acquittal or conviction of the alleged offender by court-martial is evidence for the administrative action, it is not determinative on the issue of responsibility for damages under these regulations. The GCMCA may, in the interest of justice, consider a request for reconsideration based upon the outcome of the court-martial submitted by a claimant or member who has been assessed pecuniary liability.

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CHAPTER V

ENVIRONMENTAL PROTECTION AND MANAGEMENT

0501 PURPOSE

The purpose of this chapter is to assist Navy and Marine Corps commanders in their efforts to protect and enhance the quality of the environment by strict adherence to all applicable law, regulatory standards, and planning requirements.

0502 SCOPE

This chapter provides an overview of the Navy's environmental compliance program. It does not reprint detailed guidance available elsewhere, but identifies sources. Primary resources include OPNAVINST 5090.1 (series), the Environmental Readiness Program Manual, and MCO P5090.2 (series), the Environmental Compliance and Protection Manual, which set forth Navy and Marine Corps policies and responsibilities regarding environmental compliance. Appendix A-5-a of this Manual contains a list of selected references.

0503 BACKGROUND

a. Legal Framework. Federal laws, regulations, and Executive Orders address how the Department of Defense (DoD) will analyze activities that result in effects on natural and cultural resources, as well as place limits on how DoD activities affect natural and cultural resources. In some cases, Congress has required that DoD comply with State and local procedural and substantive requirements respecting the control and abatement of pollution, including requirements to obtain permits and to pay reasonable service charges. Due to growing complexity of environmental compliance requirements, the Navy and Marine Corps have trained and assigned teams of environmental compliance experts, including legal counsel, to commands throughout the world. Commands should coordinate with these teams to ensure compliance with applicable laws, regulations and executive orders. Failure to comply may lead to environmental degradation, injunctions that disrupt operations, adverse publicity, and in some cases, payment of civil penalties. Additionally, some environmental laws carry criminal penalties for noncompliance, including possible criminal prosecution of military and civilian personnel. Therefore, familiarity with and adherence to applicable environmental laws and regulations is essential.

b. Legal Counsel. The Navy Judge Advocate General and Navy General Counsel have assigned uniformed and/or civilian environmental counsel to Navy Echelon I and II commands, each Navy Region and throughout the Research, Development and Acquisition system. Specifically, environmental counsel are assigned to U.S. Fleet Forces Command, U.S. Pacific Fleet, U.S. Naval Forces Europe/U.S. Naval Forces Africa/Commander, U.S. SIXTH Fleet, Naval Sea Systems Command, Naval Air Systems Command, Office of Naval

Research, Navy Research Laboratory, Space & Warfare Systems Command, Naval Installations Command, each Regional Command, and various components of Naval Facilities Engineering Command. The Commandant of the Marine Corps and Navy General Counsel have assigned uniformed and civilian environmental counsel to Marine Corps commands including the Eastern Area Counsel Office and the Western Area Counsel Office. The Office of the Navy Judge Advocate General also includes an Environmental Law Division (Code 12) which assists in coordinating environmental legal compliance issues throughout the Navy. Code 12 accomplishes this in part by assigning a uniformed environmental counsel to the Office of the Assistant Secretary of the Navy (Energy, Installations & Environment) and Chief of Naval Operations Environmental Readiness Division (N4).

c. DoD Regional Environmental Coordinators. DoD Instruction 4715.02, Regional Environmental Coordination, establishes a framework to build better coordination and communication between the component services, area regulators, and the public on environmental issues. It establishes a Military Service as an Executive Agent to represent the Department of Defense on environmental issues at the ten Federal Environmental Protection Agency (EPA) regions of the United States. The Secretary of the Navy is responsible for Regions I, III, and IX (Northeast, Mid-Atlantic, and Southwest). In some cases, Navy Regions may overlap with two or more EPA Regions. The responsible Executive Agent designates DoD regional environmental coordinators that are known as DoD RECs. Within each Region, each DoD component service also has their own respective regional environmental coordinators. Navy Regional Environmental Coordinator roles are fulfilled by Navy Region Commanders who have particular N-codes handling that responsibility. The role of the DoD REC is to coordinate environmental issues that affect more than one Service, to manage these issues through the Service Component RECs, and to take the lead on outreach for coordinated DoD positions on these issues.

0504 RESPONSIBILITY

a. Generally. Commands will comply with the reporting requirements established by superiors, ensure compliance with Chapter VI of this Manual, and should notify OJAG (Code 12) or Office of Counsel for the Commandant (CL), as appropriate, when there is any likelihood of civilian court involvement. Issues involving compliance with applicable requirements should be addressed to the Chief of Naval Operations (N45, Environmental Readiness Division) or Commandant of the Marine Corps (MC-LFL-7), as appropriate, via the chain-of-command.

0505 COMPLIANCE

a. Generally. Environmental compliance requires an understanding of laws, regulations, and executive orders applicable to the particular activity. Compliance includes ensuring that environmental programs reflect current requirements, are adequately funded and manned, and that personnel are appropriately trained. Sections 0507 through 0513 provide an overview of the most significant Federal laws, regulations, and executive orders that pertain to naval activities.

b. Permits and fees. Congress requires that Federal facilities comply with some State permit requirements including payment of some fees related to the administration of State and local environmental requirements. Given the complexity of these issues and changes in Administration policies, commanders should coordinate with environmental counsel before agreeing to permit requirements or any request by State and local governments for fees, service charges and other requests involving the transfer of federal funds to State and local governments.

c. Fees vs. taxes. In general, fees will be examined to determine whether: (1) the charge in question is imposed on all regulated entities without discrimination; (2) the charge is a fair approximation of the costs to the State or local authority implementing the program at the Federal activity; or (3) revenues from the service charge only fund the administrative costs of the associated program. Negative answers to any of these inquiries suggest that the charge is a tax rather than a fee or service charge, and the Navy may wish to contest it. Installations and activities questioning a charge should make it clear to the authority demanding payment that delay for review is not a reflection of Navy resistance to regulatory action, but is necessary because of legal issues that must be resolved before payment may lawfully be made. If any regulatory agency imposes a charge that is believed to be a tax on an environmental permit needed for lawful operation of a facility, the situation should be immediately reported via the chain of command to the Chief of Naval Operations (N45) or the Commandant of the Marine Corps (MC-LFL-7), as appropriate, and the Assistant Secretary of the Navy (Financial Management and Comptroller).

0506 NOTICES OF VIOLATION AND ENVIRONMENTAL LITIGATION

a. Notices of Violation. Notices of violation (NOV) or notices of noncompliance (NON) are issued by pollution abatement authorities. Because such notices may lead to penalties and environmental litigation, they shall be processed in accordance with OPNAVINST 5090.1 (series) and MCO P5090.2 (series). Legal papers received in connection with litigation filed or to be filed in State or Federal court shall be processed in accordance with SECNAVINST 5820.8 (series) and MCO P5090.2 (series), and Chapter VI of this Manual.

b. Litigation Holds and Discovery. Once litigation has commenced, the Navy's obligation to preserve documents and e-mails relevant to the subject of the litigation supersedes any other existing statutory or policy-based document retention period or destruction schedule. If a suit has not been filed, but litigation is reasonably anticipated, the command must act as if the matter is already in litigation. Not only must the command suspend scheduled destruction of relevant documents and e-mails, but take positive steps to preserve all relevant materials and prevent destruction.

Relevant materials may include tangible things that relate to the subject litigation such a physical specimens, but the largest categories of evidence are “documents” and “electronically stored information” (ESI). A “document”

is any written material, whether in final or draft form. This category includes but is not limited to memoranda, printed e-mails, spreadsheets, presentations, notes, recordings, microfiche, and entries on calendars or planners. ESI is similarly broad in scope. It includes but is not limited to e-mails, voicemails, electronically stored documents such as MS Word and Excel files, geographic information system (GIS) maps, computer-aided design (CAD) files, digital or scanned photos, scanned documents, and voicemails.

While the scope of a litigation hold can be extensive, individuals are not required to preserve everything. Parties are obligated to preserve only those materials that they know or reasonably should know are relevant to the subject of the litigation and are reasonably likely to be discoverable. Given the complexity of the issues surrounding litigation holds and ESI, commanders must coordinate with counsel to ensure compliance with recent court decisions.

0507 PROCEDURAL/PLANNING STATUTES AND REQUIREMENTS

a. National Environmental Policy Act. The principal Federal environmental planning statute is the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370h. NEPA is implemented by regulations issued by the Council on Environmental Quality (CEQ) (40 C.F.R. Chapter V) and further implemented by the Navy (32 C.F.R. part 775).

(1) NEPA Compliance. NEPA provides for the consideration of environmental impacts in Federal agency planning and decision-making. Regulations for Federal agency implementation of NEPA were established by CEQ. Analysis of the potential environmental impacts of a proposed action can be achieved in an Environmental Assessment (EA) or an Environmental Impact Statement (EIS). An EA is typically prepared to determine whether the proposed action will significantly affect the human environment. An EA could result in either a Finding of No Significant Impact, or a determination that a significant impact is anticipated. When it is determined that the agency's proposed action has the potential to significantly impact the quality of the human environment, the Federal agency is required to prepare an EIS. The EIS must disclose any potentially significant environmental impacts and inform decision-makers and the public of the reasonable alternatives to the proposed action. An EIS will result in the issuance of a Record of Decision (ROD) detailing the final action to be pursued based on the information provided in the EIS. If the activity in question does not significantly impact the human environment and does not result in significant changes from existing conditions, a categorical exclusion (CATEX) may be applied (32 C.F.R. § 775.6(f)) to meet the NEPA requirements so long as the activity clearly falls within the categorical exclusion and does not otherwise meet the provisions listed at 32 C.F.R. § 775.6(e).

(2) Consideration of environmental effects. Commanders must consider the environmental impacts of Navy actions from initial planning through implementation. Failure to adequately assess the potential environmental impacts of proposed actions may result in significant delays or cancellation of activities, projects, including training exercises. An

adverse environmental impact does not automatically preclude the project under NEPA so long as a thorough analysis has been conducted.

(3) Geographic Limits. NEPA applies to actions taken within the 50 States and U.S. territories. In addition, Presidential Proclamation 5928, issued December 27, 1988, extended the exercise of United States sovereignty and jurisdiction under international law to 12 nautical miles (nm); however, the Proclamation expressly provides that it does not extend or otherwise alter existing Federal law or any associated jurisdiction, rights, legal interests, or obligations; as a result, NEPA applies no further than three nautical miles (nm). As a matter of policy, the Department of the Navy analyzes environmental effects and actions within 12 nm under NEPA and those effects occurring beyond 12 nm under Executive Order 12114.

b. Executive Order 12114, Environmental Effects Abroad of Major Federal Actions. Administered by DoD through DoD Directive 6050.7, EO 12114 requires that DoD officials be informed and take account of environmental considerations when authorizing or approving certain major federal actions that do significant harm to the environment of places outside the United States. When the proposed action involves activities between the United States' territorial seas and foreign exclusive economic zone, the analysis may result in the preparation of an overseas environmental assessment (OEA) or overseas environmental impact statement (OEIS). For actions in foreign nations, the analysis may result in the preparation of an environmental review or environmental study depending on whether the analysis is conducted by the United States unilaterally or bilaterally/multilaterally. Activities which trigger both the requirements of NEPA and EO 12114 are often covered by a joint planning document (e.g., EIS/OEIS). Commanders should consult with environmental counsel when considering a proposed action outside the United States to determine the appropriate category and level of analysis.

c. Coastal Zone Management Act. The Coastal Zone Management Act (CZMA), 16 U.S.C. §§ 1451-1466, provides federal funding for state coastal management programs that develop land and water use programs for the state's coastal zone. It also requires that federal agency actions affecting, directly or indirectly, the coastal zone will be consistent to the maximum extent practicable with the state's approved coastal management program. In making a determination whether the CZMA applies to a proposed action, the command should thoroughly understand its proposed action, the environmental impacts of that action, whether any of the effects involve coastal resources, whether the coastal resources are protected by the approved coastal management plan, and whether the proposed action is consistent to the maximum extent practicable with the approved coastal management plan.

d. Executive Order 13547, Stewardship of the Ocean, Our Coasts, and the Great Lakes. Signed July 2010, EO 13547 establishes a National Ocean Policy (NOP) and requires the development of coastal and marine spatial plans (CMSPs) that build upon and improve existing Federal, State, tribal, and local and regional decision making and planning processes. Commands should consult with environmental counsel regarding any developments and potential requirements involving CMSPs.

e. Encroachment Management and Compatible Development. DoD Directive 3200.15, Sustainment of Ranges and Operating Areas, OPNAVINST 11010.40, Encroachment Management Program, and MCO 11011.22B, Policies and Procedures for Encroachment Control Management, establish a proactive strategy for addressing all types of encroachment at installations, ranges, and operating areas (OPAREAs) to preserve the ability to meet existing and future mission requirements and to provide effective testing and training capabilities. This strategy is a part of the Navy's Tactical Training Theater Assessment and Planning (TAP) program. Commands are encouraged to consult with environmental counsel concerning specific guidance for encroachment planning for different types of ranges and OPAREAS and for installations.

f. At-Sea Policy. In December 2000, the Under Secretary of the Navy through a memorandum established the "At-Sea Policy." This policy requires analysis of testing and training activities and provides an environmental compliance framework for ranges and operating areas, major training exercises, and for routine training and exercises. The Chief of Naval Operations established the TAP program as the primary mechanism for compliance with the At-Sea Policy. This program achieves compliance with environmental requirements in multiple phases. Compliance includes incidental take authorizations under applicable laws which result in mitigations with which commands must comply. Mitigations are captured for commands through Letters of Instruction for major exercises, Exercise Orders, Operations Orders, and Protective Measures Assessment Protocol (PMAP), a CD tool delivered to all commands engaged in routine training and exercises.

0508 POLLUTION CONTROL AND ABATEMENT STATUTES

a. Clean Air Act. The Clean Air Act (CAA), 42 U.S.C. §§ 7401-7671q, regulates the discharge of pollutants into the ambient air. Its basic framework regulates discharges sources based on whether they are stationary or mobile sources while achieving ambient air quality standards based on geographic boundaries. The United States Environmental Protection Agency (EPA), as the lead federal agency for implementing the CAA, develops ambient air quality standards and coordinates with states, who enforce many of the CAA requirements. The Navy has many stationary and mobile sources subject to regulation under the CAA. Given the complexity of these requirements and ongoing shifts in regulatory requirements, commanders should consult with environmental counsel if questions arise.

b. Federal Water Pollution Control Act. The Federal Water Pollution Control Act (FWPCA),33 U.S.C. §§ 1251-1387, promotes improvement of the nation's waters. It does so by regulating the discharge of pollutants into waters of the United States. Many of these discharge restrictions involve municipal and industrial wastewater treatment standards. Some commands operate facilities that are required to apply these standards. Naval vessels are also regulated sources. These regulations are captured in the OPNAVINST 5090.1 (series) and MCO P5090.2 (series). Commanders should consult with environmental counsel if questions arise.

c. Resource Conservation and Recovery Act. The Resource Conservation and Recovery Act (RCRA), also known as the Solid Waste Disposal Act (SWDA),

42 U.S.C. § 6901-6992k, is our nation's primary law for governing the disposal of solid and hazardous waste. RCRA's solid waste program involves the development of comprehensive plans to manage nonhazardous industrial solid waste and municipal solid waste, sets criteria for municipal solid waste landfills and other solid waste disposal facilities, and prohibits the open dumping of solid waste. RCRA's hazardous waste program establishes a system for controlling hazardous waste from the time it is generated until its ultimate disposal -- from "cradle to grave." Commanders should consult with environmental counsel if questions arise.

d. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). CERCLA, 42 U.S.C. §§ 9601-9675, is directed at restoring and rehabilitating sites containing hazardous waste. These sites, including those commonly referred to as Superfund sites, are identified for clean up on a National Priority List (NPL). Sites located on former and active Navy and Marine Corps shore activities are covered by the Installation Restoration Program (IRP). CERCLA also establishes a requirement for immediate notification of the unpermitted release (land), discharge (water), or emission (air) of designated hazardous substances. Commanders should consult with environmental counsel if questions arise.

e. Safe Drinking Water Act. The Safe Drinking Water Act, 42 U.S.C. §§ 300f - 300j-26, establishes standards for water distribution systems and protects surface and underground sources of drinking water. The standards implemented by EPA and state regulations apply to all naval activities.

f. Ocean Dumping Act. The Ocean Dumping Act, also known as Titles I and II of the Marine Protection, Research, and Sanctuaries Act (MPRSA), 33 U.S.C. §§ 1401-1445, prohibits transportation for the purpose of dumping material in the territorial sea and seaward without a permit, but excludes sewage from vessels and effluent from motor-driven equipment on vessels. The MPRSA is administered by EPA. EPA regulations, implementing both the statute and certain international agreements, specifically restrict the type of materials that may be transported for disposal at sea. Department of the Navy regulations also set forth requirements and/or limitations on the disposal of various materials at sea.

0509 STATUTES CONTROLLING SPECIFIC SUBSTANCES

a. Toxic Substances Control Act. The Toxic Substances Control Act (TOSCA), 15 U.S.C. §§ 2601-2695d, regulates substances that pose "an unreasonable risk of injury to health or the environment." Under TOSCA, EPA regulates the manufacture, distribution, storage, and disposal of only asbestos and Polychlorinated Biphenyls (PCB).

b. Federal Insecticide, Fungicide, and Rodenticide Act. The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y, regulates most industrial uses of covered agents, including the unlawful disposal of insecticides.

c. Marine Plastic Pollution Research and Control Act. The Marine Plastic Pollution Research and Control Act, 33 U.S.C. §§ 1901-1915, implements the International Convention on the Prevention of Marine

Pollution (MARPOL Convention), and precludes marine disposal of all plastics by seagoing naval units.

d. United States Public Vessel Medical Waste Anti-Dumping Act. This law, 33 U.S.C. § 2501-2504, prohibits the dumping of potentially infectious medical wastes into ocean waters, unless the health or safety of individuals on board is threatened, or during time of war or declared national emergency. When disposal is authorized under one of these two exceptions, it must be disposed of beyond 50 nautical miles from the nearest land. Additionally, for surface public vessels, the medical waste must be sterilized, properly packaged, and sufficiently weighted to prevent waste from coming ashore after disposal; for submersible public vessels, the waste must be properly packaged and sufficiently weighted to prevent the waste from coming ashore. OPNAVINST 5090.1 (series), fleet directives, and medical guidance should be consulted before any medical wastes are disposed of at sea.

e. Oil Pollution Act. The Oil Pollution Act, 33 U.S.C. §§ 2701-2762, provides for the prevention of, liability for, removal of and compensation for the discharge or substantial threat of discharge, of oil into or upon the navigable waters, adjoining shorelines or the EEZ of the United States. It requires establishment of comprehensive spill response plans for facilities with regulated quantities of oil. The Act also provides for recovery of damages for injury to, destruction of, or loss of use of natural resources by designated Federal, State, Indian Tribe, and Foreign Natural Resource Trustees. The Secretary of Defense is one of the designated Federal Natural Resource Trustees responsible for natural resources on lands owned/managed by the Department of Defense. In February 2011, the Secretary delegated Natural Resource Trustee responsibilities to the Secretaries of the Military Departments and directed that the delegation be incorporated in the next revision of DoDD 4715.1.

Navy ships, because their status as public vessels, are not facilities as defined in the Oil Pollution Act. They are, however, required to develop a Shipboard Oil Spill Contingency Plan (SOSCP) consistent with a sample plan from Commander, Naval Sea Systems Command (COMNAVSEASYSCOM). Ships may consolidate the SOSCP with the Hazardous Material (HM) Spill Contingency Plan (SCP), but this combined plan shall address the unique procedures for spills over the side and use of the ship's Oil Spill Response Kit. The plan(s) shall contain procedures for reporting, containment, control, recovery, and disposal of spilled material, protective clothing, and spill clean-up materials; information sources for oil and Hazardous Materials; and names and telephone numbers of fleet as well as shore-side Navy on-scene commanders. Although neither the U.S. Coast Guard nor state officials has authority to require preparation of public vessel Oil and Hazardous Substance (OHS) SCPs, the Navy will provide Navy ship SCPs to USCG and state officials upon request, but fees associated with public vessel plan submissions will not be paid.

0510 STATUTES PROTECTING CATEGORIES OF SPECIES AND PLACES/GEOGRAPHIC AREAS

a. Endangered Species Act. The Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544, protects "endangered" or "threatened" species and identifies

critical habitat considered necessary for their survival and conservation. It requires that Navy evaluate whether any proposed action is likely to jeopardize the continued existence of an endangered or threatened species or adversely modify or destroy critical habitat identified by the regulatory agency as essential to the conservation of the species and which may require special management. When a Naval activity anticipates taking an action that may affect a listed species or critical habitat, it must consult with the regulatory agency responsible for that species (U.S. Fish and Wildlife Service or National Marine Fisheries Service). Consultations may result in mitigations that the action proponent must carry out during the conduct of the action.

b. The Sikes Act. The Sikes Act, 16 U.S.C. §§ 670-670o, requires preparation and implementation of Integrated Natural Resource Management Plans (INRMPs) at all Navy installations in the United States that contain significant natural resources. Effective INRMPs may be used to reduce preclude the establishment of critical habitat and limit additional mitigation requirements on installation management, training, testing, and use.

c. Marine Mammal Protection Act. The Marine Mammal Protection Act (MMPA), 16 U.S.C. §§ 1361-1423h, regulates human activities which result in the harassment, injury, or death of marine mammals. It is primarily administered by the National Marine Fisheries Service. Proposals for actions should be reviewed early in the process to determine if it is reasonably foreseeable for the proposal to "take" or "harass" a marine mammal even with mitigation measures in place. If a take or harassment is reasonably foreseeable, appropriate authorization must be granted before the action can proceed. Incidental take authorizations usually result in detailed mitigations and monitoring plans. Mitigation reduces the effects of the action on the marine mammals. Monitoring plans evaluate the effectiveness of the mitigations and gather information on the accuracy of the analysis and knowledge of marine mammals.

d. National Historic Preservation Act. The National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470 - 470x-6, preserves places listed or eligible for listing on the National Register of Historic Places. NHPA covers the entire United States, its territories, and its possessions. It is implemented by a review process involving the State Historic Preservation Officer (SHPO) for the state concerned and the Advisory Council on Historic Preservation and may require coordination with Tribal Representatives or Tribal Historic Preservation officers. Commanders should consider the historic value of any place significantly affected by naval activities and ensure that the NHPA is observed. The NHPA also requires that the Navy account for and mitigate adverse effects on property outside the United States which is on the World Heritage List or the applicable equivalent of the National Register.

e. National Marine Sanctuaries Act. The National Marine Sanctuaries Act (NMSA) (also known as Title III of the Marine Protection, Research, and Sanctuaries Act (MPRSA)), 16 U.S.C. §§ 1431 - 1445c-1, identifies, designates, and manages, as national marine sanctuaries, areas of the marine environment that are of special national significance. NMSA prohibits the destruction of, loss of, or injury to any sanctuary resource. Each

sanctuary has different regulations available in the Code of Federal Regulations identifying prohibited activities and allowing particular exemption from that prohibition for some activities. These activities may include Navy testing and training and other DoD activities. Depending on a sanctuary's specific regulations, testing and training activities can occur within or in close proximity to a sanctuary. Action proponents must review the sanctuary's regulations and applicable Navy environmental analyses of activities before undertaking activities within a designated sanctuary. Generally, if an action proponent desires to conduct a new activity not identified within the sanctuary's existing regulations that is likely to destroy, cause the loss of, or injure a sanctuary resource, then consultation with the sanctuary may be required.

f. American Antiquities Act. The American Antiquities Act, 16 U.S.C. §§ 431-33, provides the President the authority to identify historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments and regulate activities impacting them through the issuance of permits. Originally used to identify land areas, Presidents have recently applied the Act to large areas of the marine environment within the United States' exclusive economic zone.

g. Archaeological Resources Protection Act. The Archaeological Resources Protection Act, 16 U.S.C. §§ 470aa-470mm, authorizes Federal land managers to protect archaeological resources through permits authorizing excavation and/or removal of archaeological resources; through civil and criminal penalties for unauthorized excavation and/or removal, damage, alteration, or defacement of archaeological resources or attempts to perform such unauthorized acts; through provisions for the preservation of archaeological resource collections and data; and through provisions for ensuring confidentiality of information about archaeological resources when disclosure would threaten the resource.

0511 ENVIRONMENTAL COMPLIANCE IN THE FEDERAL WORK PLACE

The Occupational Safety and Health Act (OSHA), 29 U.S.C. §§ 651-678, as implemented by specific directives, requires the Navy establish and maintain a comprehensive safety and health program for civilian and military personnel. Commanders should ensure an aggressive and comprehensive occupational health and safety program for their units.

0512 ENERGY MANAGEMENT

Several statutes and executive orders require federal agencies and departments, including the Navy, to achieve specified performance targets for energy efficiency, reducing the use of fossil fuels, and increasing the use of renewable fuels. As a matter of policy, the Navy has established a more ambitious goal of obtaining half of its energy requirements from renewable sources by 2020 for both ashore and afloat activities. The Navy Task Force Energy is responsible for developing, coordinating, and executing the Navy's energy policy and strategy. Commands are encouraged to consult

with environmental counsel on meeting the specific requirements related to energy management.

0513 OVERSEAS ENVIRONMENTAL COMPLIANCE AND INTERNATIONAL OPERATIONS

a. Generally. Naval activities in foreign countries and naval vessels, aircraft, and vehicles operated in foreign countries will comply with any applicable Status of Forces Agreement (SOFA) and, pursuant to Executive Order 12088, with environmental pollution control standards of general applicability in the host country. Requests by foreign officials for access to naval installations, vessels, aircraft, and vehicles to monitor compliance with host country environmental standards, if not governed by the SOFA, should be referred to higher authority via the chain-of-command.

b. Ships and aircraft. U.S. military aircraft, warships, and auxiliaries (including USNS vessels and Afloat Prepositioning Force ships) enjoy sovereign immunity from interference by foreign governmental authorities. Foreign officials shall not be allowed access to ships or aircraft entitled to sovereign immunity for purposes of environmental inspection or examination. Commanding officers, masters, and aircraft commanders may certify compliance with host country environmental requirements. If foreign authorities are permitted onboard for the purpose of accepting certification of compliance, they shall not be permitted to exercise governmental authority while aboard. This prohibition includes conducting inspections or acting as observers while U.S. personnel conduct inspections.

c. Naval installations in foreign countries. DODI 4715.5, Management of Environmental Compliance at Overseas Installations, provides guidance. Analysis of environmental compliance issues for these installations will depend on whether Final Governing Standards (FGSs) are in effect for the country or region in which the installation is located. FGSs are a comprehensive set of country-specific substantive provisions, typically technical limitations on effluent, discharges or specific management practices developed by the responsible Environmental Executive Agent (EEA) for the country or region. OPNAVINST 5090.1 (series) and MCO P5090.2 (series) contains a list of EEAs.

(1) Where FGSs are in effect. When FGSs have been issued by the EEA, U.S. Navy and Marine Corps facilities must comply with them. FGSs will take into account the requirements of applicable international agreements, applicable host-nation environmental standards as required under Executive Order 12088, and the Overseas Environmental Baseline Guidance Document (OEBGD).

(2) Where FGSs are not in effect. If the responsible EEA has not promulgated FGSs for the country or region, U.S. Navy and Marine Corps facilities will comply with the DoD OEBGD, applicable international agreements, and applicable host-nation environmental standards as required under Executive Order 12088. In case of conflicting requirements, the facility will comply with the standard that is more protective of the human environment; but, the facility must consult with the EEA on actions that involve a substantial commitment of funds or that could set a precedent.

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SELECTED REFERENCES

Department of Defense

- DoDD 3200.15, Sustainment of Ranges and Operating Areas (OPAREAS)
- DoDI 4710.02, DOD Interactions with Federally-Recognized Tribes
- DoDI 4715.02, Regional Environmental Coordination
- DoDI 4715.03, Natural Resources Conservation Program
- DoD 4715.05-G, Overseas Environmental Baseline Guidance Document
- DoDI 4715.4, Pollution Prevention
- DoDI 4715.5, Management of Environmental Compliance at Overseas Installations
- DoDI 4715.6, Environmental Compliance
- DoDI 4715.8, Environmental Remediation for DoD Activities Overseas
- DoDD 4715.11, Environmental and Explosives Safety Management on Operational Ranges Within the United States
- DoDD 4715.12, Environmental and Explosives Safety Management on Operational Ranges Outside the United States
- DoDD 6050.7 Environmental Effects Abroad of Major Department of Defense Actions
- DoDI 6055.1, Department of Defense Safety and Occupational Health (SOH) Program
- DoD Policy, American Indian and Native Alaskan Policy

Secretary of the Navy Instructions

- SECNAVINST 5090.6 (series), Environmental Planning for Department of the Navy Actions
- SECNAVINST 5090.7 (series), Access to Ships and Shore Facilities, and Release of Information Regarding Navy Oil Spills
- SECNAVINST 5090.8 (series), Policy for Environmental Protection, Natural Resources, and Cultural Resources Programs
- SECNAVINST 5100.10 (series), Department of the Navy Policy for Safety, Mishap Prevention, Occupational Health and Fire Protection Programs

Chief of Naval Operations Instructions

- OPNAVINST 3550.1 (series), Range Air Installations Compatible Use Zones (RAICUZ)
- OPNAVINST 3770.2 (series), Airspace Procedures and Planning
- OPNAVINST 5090.1 (series), Environmental and Natural Resources Protection Manual
- OPNAVINST 5100.23 (series), Navy Occupational Safety and Health (NAVOSH) Manual
- OPNAVINST 11010.36 (series), Air Installations Compatible Use Zones (AICUZ)
- OPNAVINST 11010.40 (series), Encroachment Management

Marine Corps Instructions

- MCO P11000.8 (series), Vol. V, Real Property Facilities Manual
- MCO P5090.2 (series), Environmental Compliance and Protection Manual
- MCO 11011.22 (series), Policies and Procedures for Encroachment Control Management

Commander Navy Installations Command

- CNICINST 11010.1 (series), Encroachment Management

- Installation Commanding Officer's Guide for Environmental Compliance

United States Code and Public Laws
- American Antiquities Act, 16 U.S.C. §§ 431-433
- Archeological Resources Protection Act, 16 U.S.C. §§ 470aa-470mm
- Bald Eagle Protection Act, 16 U.S.C. §§ 668-668d
- Clean Air Act, 42 U.S.C. §§ 7401-7642
- Clean Water Act, 33 U.S.C. §§ 1251-1387
- Coastal Zone Management Act, 16 U.S.C. §§ 1451-1464
- Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675
- Emergency Planning and Community Right to Know Act, 7 U.S.C. §§ 11001-11050
- Energy Policy Act of 2005, Pub. L. No. 109-58
- Energy Independence and Security Act of 2007, Pub. L. No. 110-40
- Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y
- The Sikes Act, 16 U.S.C. §§ 670-670o
- Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1883
- Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1421h
- Marine Plastic Pollution Research and Control Act, 33 U.S.C. §§ 1901-1915
- Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712
- National Environmental Policy Act, 42 U.S.C. §§ 4321-4370a
- National Marine Sanctuaries Act, 16 U.S.C. §§ 1431-1445c
- Ocean Dumping Act, 33 U.S.C. §§ 1301-1445
- Oil Pollution Act, 33 U.S.C. §§ 2701-2762
- Rivers and Harbors Act, 33 U.S.C. §§ 401-426p
- Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6991i
- Safe Drinking Water Act, 42 U.S.C. §§ 300f - 300j-26
- Submerged Lands Act, 43 U.S.C. §§ 1301-1315
- Toxic Substances Control Act, 15 U.S.C. §§ 2601-2654
- U.S. Public Vessel Medical Waste Anti-Dumping Act,_33 U.S.C. §§ 2501-04

Executive Orders
- Executive Order 12088, Federal Compliance with Pollution Control Standards
- Executive Order 12114, Environmental Effects Abroad of Major Federal Actions
- Executive Order 13175 - Consultation and Coordination With Indian Tribal Governments
- Executive Order 13423, Strengthening Federal Environmental, Energy, and Transportation Management
- Executive Order 13514, Federal Leadership in Environmental, Energy, and Economic Performance
- Executive Order 13547, Stewardship of the Ocean, Our Coasts, and the Great Lakes

Code of Federal Regulations
- 15 CFR Part 923, Coastal Zone Management Program Regulations
- 15 CFR Part 930, Federal Consistency with Approved Coastal Management Programs
- 32 CFR Part 775, Procedures for Implementing the National Environmental Policy Act
- 40 CFR Part 112, Oil Pollution Prevention

CHAPTER VI

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CHAPTER VI

DELIVERY OF SERVICE MEMBERS, CIVILIANS, AND DEPENDENTS -- SERVICE OF PROCESS AND SUBPOENAS -- STATE TAX AND REGULATORY AUTHORITY

0601 SCOPE

This chapter provides direction and guidance for various situations where a military commander is asked to provide or, at a minimum, permit the taking of personnel, property, or records from a military installation by civilian authorities. Part A generally deals with requests by authorities for the surrender of members or civilians pursuant to arrest warrants or similar process, generally in connection with a criminal prosecution. Parts B and C provide procedures for responding to the initiation and processing of civil litigation, whether or not the Department of the Navy (DON) is a party. Part D provides guidance for dealing with the Department of Justice (DOJ) in criminal and civil prosecutions. Part E discusses appearance of judge advocates in civilian proceedings. Finally, Part F provides guidance on state attempts to tax or regulate activities or personnel aboard military installations.

0602 AUTHORITY OF THE JUDGE ADVOCATE GENERAL AND THE GENERAL COUNSEL

a. Authority of the JAG. The JAG, the Deputy Judge Advocate General (DJAG), and the Assistant Judge Advocates General (AJAG) are authorized to act for the Secretary of the Navy in the performance of functions under this chapter. This delegation extends to the Deputy Assistant Judge Advocate General (DAJAG)(General Litigation)/Division Director (DivDir), General Litigation Division (Code 14), with the exception of actions set forth in section 0623. Authority is delegated to the DAJAG/DivDir of the specified division within the Office of the Judge Advocate General (OJAG) to act on the specific sections noted:

(1) International Law (Code 10) - sections 0609;

(2) Admiralty (Code 11) - sections 0616-0618;

(3) Claims and Tort Litigation (Code 15) - sections 0616-0618.

b. Authority of the General Counsel. The authority of the GC of the Navy is prescribed by Navy Regulation, 32 C.F.R. § 700.327, and by appropriate departmental directives and instructions, e.g., SECNAVINST 5430.25 (series). The principal areas of responsibility of the Office of the General Counsel (OGC) are commercial law, including maritime contract matters (e.g., contracts for the repair and alteration of Naval vessels); civilian personnel law; real property law; and Freedom of Information Act and Privacy Act matters as delineated in SECNAVINST 5720.42 (series). The OGC shares responsibility with the JAG on these issues and both are authorized to provide advice on them as necessary. Coordination will often be required as contemplated by the regulations cited in this section.

c. Points of contact. Commanding officers are advised to contact their local area judge advocates for assistance in referring matters to the appropriate office of the JAG or GC. Appendix A-6-d sets out the litigation points of contact for the JAG and OGC.

d. Coordination within the Marine Corps. The Staff Judge Advocate to the CMC (JAR) shall be advised of all matters referred to the JAG. Counsel to the CMC (CL) shall be advised of matters referred to the OGC. This includes providing copies of all correspondence and documents. Appendix A-6-d sets out litigation points of contact for the Marine Corps.

PART A -- DELIVERY OF PERSONNEL

0603 DELIVERY OF PERSONS REQUESTED BY STATE AUTHORITIES IN CRIMINAL CASES

a. Delivery under Article 14, UCMJ (10 U.S.C. § 814). It is the policy of the DON to cooperate with state authorities unless the best interests of the Navy or Marine Corps will be prejudiced. See subsection (b) below and section 0610. Navy and Marine Corps commanders will assist in the expeditious delivery of a member, civilian employee, civilian contractor and his employee(s), or a dependent to civilian authorities when proper credentials and legally sufficient documentation are provided. Examples of legally sufficient documentation include indictment, warrant for arrest, contempt order, show cause order, or court order with sufficient information to identify the member, civilian employee, civilian contractor and his employee(s), or the dependent.

b. Considerations when delivery is to state authorities. Responding to such requests by a state for delivery of members or civilian employees involves balancing the federal interest in preserving sovereign immunity and the productivity, peace, good order, security and discipline of the installation, against the right of the state to exercise its jurisdiction. Additionally, by regulation, Navy and Marine Corps authorities are limited in the extent to which they can directly assist such an act. Commands should respond to such requests in the manner set forth in this chapter, generally using the minimum authority necessary to preserve the federal interests without unduly restricting state jurisdiction. For purposes of this chapter, "state" includes the District of Columbia, territories, commonwealths, and all possessions or protectorates of the United States.

0604 DELIVERY WHEN PERSONS ARE WITHIN TERRITORIAL LIMITS OF THE REQUESTING STATE

a. When local civil authorities of a state request the delivery of any member or civilian for an offense punishable under the laws of that jurisdiction, and such person is located at a Navy or Marine Corps installation within the requesting jurisdiction, or aboard a ship within the territorial waters of such jurisdiction, commanding officers are authorized to, and normally will, deliver such person when a proper warrant is issued. Additionally, the Regional Commander, or the equivalent Echelon II Marine Corps Commander may, after coordination with the Deputy Assistant Judge

Advocate General (DAJAG) (General Litigation) (Code 14), issue guidance authorizing local commanders to deliver any such persons to civil authorities who are acting without a warrant under conditions in which state law permits warrantless arrest.

b. In the case of a member, delivery will only be effected upon compliance with section 0607, subject to the exceptions in section 0610 and, in the case of civil authorities acting without a warrant, any additional exceptions prescribed by the above-designated Commander. A Navy or Marine Corps judge advocate should be consulted before delivery is effected.

c. The rule discussed above applies equally to civilian employees and civilian contractors and their employees when located on a Navy or Marine Corps installation, except that compliance with section 0607 and consideration of section 0610 are not required.

d. Commands should normally not become actively involved in civilian law enforcement. See SECNAVINST 5820.7 (series). When a command has determined that a person is to be delivered in response to a valid warrant, the following guidance should be considered.

(1) If the person to be delivered is a military member, the member may be ordered to report to a location designated by the commanding officer, for example, to the base legal office, and surrendered to civil authorities under Article 14, UCMJ.

(2) If the person to be delivered is a civilian, the person may be invited to report to the designated space for delivery. If the civilian refuses, the civilian authorities may be escorted to a place where the civilian is located in order that delivery may be effected. A civilian may be directed to leave a classified area.

(3) All should be done with minimum interference to good order and discipline.

0605 DELIVERY WHEN PERSONS ARE BEYOND TERRITORIAL LIMITS OF THE REQUESTING STATE

a. General. When state civil authorities request delivery of any member of the Navy or Marine Corps for an alleged crime or offense punishable under the law of the jurisdiction making the request, and such member is not attached to a Navy or Marine Corps activity within the requesting state or a ship within the territorial waters thereof, the following action will be taken. Any officer exercising general court-martial jurisdiction, or officer designated by him, or any commanding officer, after consultation with a judge advocate of the Navy or Marine Corps, is authorized, upon compliance with the provisions of this section and section 0607, and subject to the exceptions in section 0610, to deliver such member to make the member amenable to prosecution. The member may be delivered upon formal waiver of extradition or in accordance with subsection b, or upon presentation of a fugitive warrant, in which case the procedures of subsection c apply. The rule discussed above applies equally to civilian employees and civilian contractors and their

employees when located on a DON installation not within the requesting state, except that compliance with section 0607 and consideration of section 0610 are not required.

b. Waiver of extradition.

(1) Any member may waive formal extradition. A waiver must be in writing and be witnessed. It must include a statement that the member signing it has received the counsel of either a military or civilian attorney prior to executing the waiver, and it must further set forth the name and address of the attorney consulted. The form for waiver should be substantially the same as that in Appendix A-6-a.

(2) In every case where there is any doubt as to the voluntary nature of a waiver, such doubt shall be resolved against its use and all persons concerned will be advised to comply with the procedures set forth in subsection c, below.

(3) Executed copies of any waiver will be mailed to the Deputy Assistant Judge Advocate General (DAJAG) (General Litigation) (Code 14) after its execution.

(4) When a member declines to waive extradition, the nearest Region Legal Service Office or Marine Corps staff judge advocate shall be informed and shall confer with the civil authorities as appropriate. The member concerned shall not be transferred or ordered out of the state in which he is then located without the permission of the Secretary of the Navy (Judge Advocate General), unless a fugitive warrant is obtained as set forth in subsection c, below.

c. Fugitive warrants.

(1) A fugitive warrant, as used in this chapter, is a warrant issued by a state court of competent jurisdiction for the arrest of a member. Normally, a state requesting delivery of a member from another state will issue a fugitive warrant to the state where the member is then located.

(2) Upon issuance of a fugitive warrant by the requesting state to the state in which the member is located, the latter state will normally request delivery of the member to local state authorities. Delivery to local state authorities should be arranged by Navy or Marine Corps officers designated in subsection a of this section, upon compliance with the provisions of section 0607, and subject to the conditions of section 0610 and paragraphs (3) and (4) of this subsection.

(3) Upon receipt of a request for delivery of a member under fugitive warrant to state authorities, if the member voluntarily waives extradition, the provisions of subsection b, above, apply. If the member is delivered to local authorities but refuses to waive extradition, he will have the opportunity to contest extradition in the courts of the state in which he is located.

(4) No delivery of a member by Navy or Marine Corps officers pursuant

to a fugitive warrant or waiver of extradition shall be effected without completion of the agreement required by section 0607 and execution of such agreement either: (a) by authorities of the requesting state, or (b) by authorities of the state in which the member is located, if such authorities, on behalf of the requesting state, accept full responsibility for returning the member to a command agreed upon by the parties.

0606 DELIVERY WHEN PERSONS ARE STATIONED OUTSIDE THE UNITED STATES

a. Persons desired by U.S. non-federal authorities. When delivery of any member in the Navy or Marine Corps, or any civilian employee or dependent, is desired for trial by state or other non-federal U.S. authorities and the individual whose presence is sought is stationed outside the United States, the provisions of DODI 5525.09, Compliance of DoD Members, Employees and Family Members Outside the U.S. with Court Orders, as implemented in SECNAVINST 5820.9 (series), Compliance with Court Orders by Department of the Navy Members, Employees, and Family Members outside the United States, will be followed. In all such cases, the nearest Navy or Marine Corps judge advocate shall be consulted before any action is taken.

0607 AGREEMENT REQUIRED PRIOR TO DELIVERY TO STATE AUTHORITIES

a. Delivery under Article 14, UCMJ. When delivery of any member of the Navy or Marine Corps to the civilian authorities of a state is authorized, the member's commanding officer shall, before making such delivery, obtain from the Governor or other duly authorized officer of such state a written agreement that substantially conforms to Appendix A-6-b. The state official completing the agreement must show that he is authorized to bind the state to the terms of the agreement.

b. Terms. Every delivery agreement shall provide for: 1) location to which the member will be returned when proceedings have concluded; 2) how the member will be returned; 3) conditions determining which Entity will pay which costs associated with return; 4) conditions under which state authorities will communicate with the originating command regarding the progress and/or outcome of the proceedings; and 5) any other terms deemed appropriate by the parties. Agreements under this section are fact-specific and should give consideration to the facts of the case, respective burdens on the parties, and expediency. Agreements should seek to respect and foster continued positive relationships between the DON and local authorities. The example at Appendix A-6-b is intended to provide guidance only, and can be modified as necessary to reflect the agreements of the parties.

When indicating in the agreement the Naval or Marine Corps activity to which the member delivered is to be returned by the state, care should be taken to designate an activity that is the most fair and convenient for all parties.

c. Compliance. In an agreement in which civilian authorities agree to return the member to a specific location, the DON considers such agreement under this section substantially complied with when: (1) the member is furnished transportation under escort in cases of delivery in accordance with

section 0613 to a Naval or Marine Corps activity as set forth in the agreement; or (2) the member is provided cash to cover incidental expenses en route thereto and the DON is so informed. A copy of agreements executed under this section should be forwarded to OJAG (Code 14) as soon as practicable.

d. Delivery under Interstate Agreement on Detainers Act. Special forms, not contained in this Manual, are used when delivering prisoners under the Interstate Agreement on Detainers Act. The Act is infrequently used and most requests are pursuant to Article 14, UCMJ. See sections 0613-14 for a detailed discussion of the Detainers Act. Those with further questions regarding delivery under this paragraph should consult the Deputy Assistant Judge Advocate General (DAJAG) (General Litigation) (Code 14).

0608 DELIVERY OF PERSONS TO FEDERAL AUTHORITIES

a. Authority to deliver. When federal law enforcement authorities display proper credentials and federal warrants for the arrest of members, civilian employees, civilian contractors and their employees, or dependents residing at or located on a DON installation, commanding officers are authorized to, and should, allow the arrest of the individual sought. The exceptions in section 0610 apply. A Navy or Marine Corps judge advocate should be consulted before delivery is effected.

b. Members located overseas. When the DOJ requires a member of the Navy or Marine Corps to appear at a trial in a federal court, DOJ must make an appropriate representation to the Judge Advocate General or his representative. Upon receipt of this notification the DON will, at its own expense, return the member to the United States and hold the member at a military facility convenient to both the Navy and DOJ. Delivery may be accomplished subject to the exceptions in section 0610.

c. Agreement not required of federal authorities. The agreement described in section 0607 is not a condition to the delivery of members to federal law enforcement authorities. Regardless of whether the member is convicted or acquitted, after final disposition of the case, the member will be returned to the Naval Service, provided that Naval authorities desire his return, and the necessary expenses will be paid from an appropriation under the control of the DOJ.

0609 DELIVERY OF PERSONS TO FOREIGN AUTHORITIES

Except when provided by agreement between the United States and the foreign government concerned, commanding officers are not authorized to deliver members or civilian employees of the DON, or their dependents residing at or located on a Naval or Marine Corps installation, to foreign authorities. Detailed information concerning the delivery of members, civilian employees, and dependents to foreign authorities when a status of forces agreement is in effect is contained in DoD Directive 5525.1 and SECNAVINST 5820.4 (series). When a request for delivery of these persons is received in a country with which the United States has no agreement or when the commanding officer is in

doubt, advice should be sought from OJAG (Codes 10 and 14).

0610 CIRCUMSTANCES IN WHICH DELIVERY IS REFUSED

a. When Delivery may be Refused. Delivery may be refused only in the following limited circumstances:

(1) Where the accused has been retained for prosecution as set forth in section 0125;

(2) When disciplinary proceedings involving military offenses are pending and after consultation from a judge advocate of the Navy or Marine Corps;

(3) For delivery to foreign authorities, when not required under any applicable international agreement; or

(4) When the commanding officer determines that extraordinary circumstances exist which indicate that delivery should be refused.

b. Reports Required. When delivery will be refused, the commanding officer shall report the circumstances to OJAG (Code 14) by telephone, or naval message if telephone is impractical. The initial report shall be confirmed by letter setting forth a full statement of the facts. See Appendix A-6-c. A copy of the report shall be forwarded to the Region Commander.

0611 MEMBERS RELEASED BY CIVIL AUTHORITIES ON BAIL OR ON THEIR OWN RECOGNIZANCE

A member of the Navy or Marine Corps arrested by foreign, federal or state authorities and released on bail or on his own recognizance has a personal duty to return to his parent organization. Accordingly, when a member of the Navy or Marine Corps is arrested by foreign, federal or state authorities and returns to his ship or station on bail, or on his own recognizance, the commanding officer, upon verification of the attesting facts, date of trial, and approximate length of time that should be covered by the absence, shall grant liberty or leave to permit appearance for trial, unless this would have a serious negative impact on the command. In the event that liberty or leave is not granted, a judge advocate of the Navy or Marine Corps should immediately be requested to act as liaison with the court. Nothing in this section is to be construed as permitting the member arrested and released to avoid the obligations of bond or recognizance by reason of the member's being in the military service. Members shall be advised that, in the event the member is ordered not to leave the jurisdiction of the court, the member shall immediately contact his command and request further instructions. The command may make arrangements for the member to remain in the court's jurisdiction through no-cost TAD to the nearest Naval or Marine Corps activity. If TAD arrangements are impractical, or if it appears that the matter cannot be resolved in 30 days, the member's command shall seek guidance and assistance from the Navy Personnel Command or from Headquarters Marine Corps.

0612 INTERVIEWING MEMBERS OR CIVILIAN EMPLOYEES BY FEDERAL CIVILIAN INVESTIGATIVE AGENCIES

Requests by the Federal Bureau of Investigation, Naval Criminal Investigative Service, or other federal civilian investigative agencies to interview members or civilian employees of the DON suspected or accused of crimes should be promptly honored. Any refusal of such a request shall be immediately reported to OJAG (Code 14) or OGC, as appropriate, by telephone, or by message if telephone is impractical. When the employee in question is a member of an exclusive bargaining unit, a staff judge advocate or GC attorney will be consulted to determine whether the employee has a right to have a bargaining unit representative present during the interview.

0613 REQUEST FOR DELIVERY OF MEMBERS SERVING SENTENCE OF COURT-MARTIAL

a. General. Article 14, UCMJ, 10 U.S.C. § 814, provides authority to honor requests for delivery of members serving a sentence of a court-martial. Although seldom utilized, additional authority and mandatory obligation to deliver such members are provided by the Interstate Agreement on Detainers Act, 18 U.S.C. Appendix §§ 1-9, hereinafter "the Act", which applies to the federal agency holding the prisoner. The DON, as an agency of the Federal Government, shall comply with the Act. The Act is designed to avoid speedy-trial issues and to aid in rehabilitation efforts by securing a greater degree of certainty about a prisoner's future. The Act provides a way for a prisoner to be tried on charges pending before state courts, either at the request of the state where the charges are pending or the prisoner's request. When refusal of delivery is intended, comply with section 0610b.

b. Interstate Agreement on Detainers Act. Upon request under the Act by either state authorities or the prisoner, the cognizant Navy or Marine Corps staff judge advocate, as appropriate, shall communicate with the appropriate state officials, and monitor and ensure that the cognizant commander acts on all such requests. The Act provides that court-martial sentences continue to run during temporary custody. This section does not cover requests between federal authorities. The procedure set forth in subsection c, below, shall be applied in such cases.

(1) State request. State officials may request delivery of prisoners in military custody under section 2, Article IV of the Act. Where (1) a detainer has been lodged against the prisoner, and (2) the prisoner is serving a sentence, regardless of whether an appeal is in process, delivery is mandatory unless the request is disapproved by the cognizant commanding officer of the prisoner.

(2) Prisoner request. The obligation to grant temporary custody under the Act also applies to prisoners' requests to be delivered to state authority. Section 2, Article III(c) of the Act requires the custodial official to inform the prisoner of the existence of any detainer and of the prisoner's right to request disposition. The prisoner's request is directed to the custodial official who must forward it to the appropriate prosecuting official and court with a certificate of prisoner status as provided by Article III of the Act.

c. Article 14, UCMJ. When a request for custody does not invoke the Act, delivery of custody shall be governed by Article 14, UCMJ, and sections 0603 through 0610 of this Manual. The request shall be honored unless, in the exercise of discretion, there is an overriding reason for retaining the accused in military custody, e.g., additional courts-martial are to be convened or the delivery would severely prejudice the prisoner's appellate rights. Execution of the agreement discussed in section 0607 is a condition precedent to delivery to state authorities. It is not required before delivery to federal authorities. See section 0608. Unlike delivery under the Act, delivery of custody pursuant to Article 14, UCMJ, interrupts execution of the court-martial sentence.

d. Forms. The form in Appendix A-6-c with appropriate modifications should be utilized in reporting refusal of delivery of prisoners.

0614 REQUEST FOR DELIVERY OF MEMBERS SERVING SENTENCE OF A STATE COURT

a. General. Ordinarily, members serving protracted sentences resulting from a state criminal conviction will be processed for administrative discharge by reason of misconduct. See MILPERSMAN 1910-144 and MARCORSEPMAN paragraph 6210.7. It may, however, be in the best interest of the Naval Service to retain a member charged with a serious offense, subject to military jurisdiction, to try the member by court-martial. The Navy may obtain temporary custody of incarcerated members for prosecution with a request to the state under the Act, 18 U.S.C. App. The DON may use the Act in the same manner in which state authorities may request members pursuant to section 0613.

b. Interstate Agreement on Detainers Act. Military authorities may use the Act to obtain temporary custody of a member incarcerated in a state institution, pursuant to conviction by a state court, to resolve criminal charges against the member before a court-martial.

(1) Detainer. If a command requests temporary custody under the Act, the commanding officer of the cognizant Region Legal Service Office (RLSO) or the Marine Corps staff judge advocate, shall file a detainer with the warden, commissioner of corrections, or other state official having custody of the member. The detainer shall identify the member with particularity, enumerate the military charges pending, and request the command be notified in advance of any intention to release the member from confinement.

(2) Request for delivery. As soon as practical after filing the detainer, the commanding officer of the cognizant RLSO or the Marine Corps staff judge advocate, shall prepare a written request for temporary custody of the member addressed to the state official charged with administration of the state penal system. The request shall designate the person(s) to whom the member is to be delivered and shall be transmitted via the military judge to whom the member's case has been assigned. If the request is properly prepared, the military judge shall approve, record, and transmit the request to the addressee official. The Act provides the state with a 30-day period after receipt of the request before the request is to be honored. Within that period of time, the governor of the state may disapprove the request, either

unilaterally or upon the prisoner's request. If the governor disapproves the request, the command should coordinate any further action with OJAG (Code 14).

(3) Responsibilities. The cognizant command shall ensure that the responsibilities of a receiving jurisdiction, delineated in section 2, Article IV of the Act, are discharged. In particular, the Act requires that the receiving jurisdiction:

(a) Commence the prisoner's trial within 120 days of the prisoner's arrival, unless the court, for good cause shown during an Article 39(a), UCMJ, session, grants a continuance necessary or reasonable to promote the ends of justice;

(b) Hold the prisoner in a suitable jail or other facility regularly used for persons awaiting prosecution, except for periods during which the prisoner attends court or travels to or from any place at which his presence may be required;

(c) Return the prisoner to the sending jurisdiction at the earliest practical time, but not before the charges that underlie the request have been resolved because prematurely returning the prisoner may result in dismissal of the charges; and

(d) Pay all costs of transporting, caring for, keeping, and returning the prisoner to the sending jurisdiction, unless the command and the state agree on some other allocation of the costs or responsibilities.

0615 [RESERVED]

PART B -- SERVICE OF PROCESS AND SUBPOENAS UPON PERSONNEL

0616 SERVICE OF PROCESS UPON PERSONNEL

a. Service of process of federal or state courts arising from personal acts

(1) General. Commanding officers afloat and ashore may permit service of civil process of federal or state courts upon members, civilian employees, dependents, or contractors residing at or located on a Naval installation, if such persons are located within their commands. Service will not be made within the command without the commanding officer's consent. The intent of this provision is to protect against interference with mission accomplishment, to maintain security, and to preserve good order and discipline, while not unnecessarily impeding the court's work. Where practical, the commanding officer shall require that the process be served in his presence, or in the presence of a designated officer. In all cases, individuals will be advised to seek legal counsel, either from a legal assistance attorney or from personal counsel for service in personal matters, and from Government counsel for service in official matters. The commanding officer is not authorized to act as a process server. The action required depends in part on the status of

the individual requested and which state issued the process.

(2) In-state process. When a process server or law enforcement officer, such as a deputy sheriff, with civil process originating from a state or federal court from the jurisdiction where the Naval station is located requests permission to serve process aboard an installation, the command ordinarily should not prevent service of process so long as delivery is made in accordance with reasonable command regulations and is consistent with maintaining security, good order and discipline. Withholding service may be justified only in the rare case when the individual sought is located in an area under exclusive federal jurisdiction not subject to any reservation by the state of the right to serve process. Questions on the extent of jurisdiction should be referred to the staff judge advocate, command counsel, or local RLSO. If service is permitted, an appropriate location should be designated, for example, the command legal office, where the process server and the member or employee can meet privately in order that process may be served away from the workplace. A member may be directed to report to the designated location. A civilian may be invited to the designated location. If the civilian does not cooperate, the process server may be escorted to the location of the civilian in order that process may be served. A civilian may be required to leave a classified area in order that the process server may have access to the civilian. If unusual circumstances require that the command not permit service, see section 0616e.

(3) Out-of-state process. In those cases where the process is to be served by authority of a jurisdiction other than that where the command is located, the person named is not required to accept process. The same is true regardless of whether the process server or law enforcement official is from within the state or out-of-state, since the jurisdiction of the issuing court determines whether the person is required to accept process or not. Accordingly, the process server acting pursuant to out-of-state jurisdiction need not be brought face-to-face with the person named in the process. Rather, the process server should report to the designated command location while the person named is contacted, apprised of the situation, and advised that he may accept service, but also may refuse. In the event that the person named refuses service, the process server should be so notified. If service of process is attempted from out-of-state by mail and refused, the refusal should be noted and the documents returned to the sender. Questions should be referred to the staff judge advocate, command counsel, or the local RLSO.

b. Service of process of federal or state courts arising from official duties.

(1) Any member or civilian employee served with federal or state court civil or criminal process or pleadings, including traffic tickets, arising from actions performed in the course of official duties shall immediately deliver all such process and pleadings to the commanding officer. The commanding officer shall ascertain the pertinent facts and notify OJAG (Code 14) or AGC (Litigation), as appropriate per Appendix A-6-d, by telephone or by message if telephone is impractical, of the service and immediately forward the pleadings and process to the relevant office. The member or civilian employee will be advised of the right to remove civil or criminal proceedings from state to federal court under 28 U.S.C. §§ 1442-1442a, rights under the

Federal Employees Liability Reform and Tort Compensation Act (28 U.S.C. § 2679), if applicable, and the right of a federal employee to request representation by DOJ attorneys in federal (civil) or state (civil or criminal) proceedings and in congressional proceedings in which that person is sued in an individual capacity, as delineated in 28 C.F.R. § 50.15 (1989). Requests for representation shall be addressed to OJAG (Code 14) or AGC (Litigation), as appropriate per Appendix A-6-d, and shall be endorsed by the commanding officer, who shall provide all necessary data relating to the questions of whether the person was acting within the course of official duty or scope of employment at the time of the incident out of which the suit arose.

(2) If the service of process is for injunctive relief (such as for habeas corpus or a temporary restraining order), or the member or civilian employee receives service of process by mail in any case involving the named member's or employee's duties or official position and such service contains an attached form for return of acknowledgement of service, the nearest judge advocate of the Navy or Marine Corps or attorney with OGC shall be immediately contacted, who will immediately contact OJAG (Code 14) or the AGC (Litigation), as appropriate per Appendix A-6-d. Notification shall include: the name of the petitioner(s) and defendant(s), a summary of the bases of the petition, and the date and time of any scheduled hearing. Action must be taken expeditiously in injunctive cases as the courts generally allow a very short period of time for response. If habeas relief is requested, a copy of all pleadings, orders, and process in the case, will be forwarded to OJAG (Code 14) or the AGC (Litigation), as appropriate per Appendix A-6-d, along with a detailed explanation of the circumstances under which the petitioner has been detained. When the hearing has been completed and the court has issued its order in the case, a copy of the order shall be forwarded promptly to OJAG (Code 14) or to the AGC (Litigation), as appropriate per Appendix A-6-d. This is particularly important if the order was adverse in order to facilitate compliance or to make a timely determination whether to undertake further proceedings.

(3) If the service of process involves a potential claim against the Government, see section 0804 and JAGINST 5890.1 (series). The right to remove to federal court under 28 U.S.C. §§ 1442-1442a must be considered where the outcome of the state court action may influence a claim or potential claim against the United States. Questions should be directed to OJAG (Code 14) or AGC (Litigation), in accordance with Appendix A-6-d of this Manual.

(4) Suits against DON personnel arising from actions taken in their official capacity are considered by federal courts to be suits against the United States. The DON Office of the General Counsel is the only office within DON authorized to receive service of process on behalf of the United States (SECNAVINST 5820.8 series).

c. Service of process of foreign courts.

(1) Usually, the amenability of members, civilian employees, and their dependents stationed in a foreign country, to the service of process from courts of the host country will have been settled by an agreement between the United States and the foreign country concerned. For example, in the

countries of the signatory parties, amenability to service of civil process is governed by paragraphs 5(g) and 9 of Article VIII of the NATO Status of Forces Agreement. When service of process on a person described above is attempted within the command in a country in which the United States has no agreement on this subject, advice should be sought from OJAG (Code 14) or AGC (Litigation), as appropriate. See Appendix A-6-d. When service of process is upon the U.S. Government or one of its agencies or instrumentalities as the named defendant, the doctrine of sovereign immunity may allow the service of process to be returned to the court through diplomatic channels. Service of process directed to an official of the United States, on the other hand, must always be processed in accordance with the applicable international agreement or treaty, regardless of whether the suit involves acts performed in the course of official duties. OJAG (Code 14) or AGC (Litigation), as appropriate per Appendix A-6-d, will arrange through the DOJ for defense of the suit against the U.S. or an official acting within the scope of official duties, or make other arrangements, and will provide appropriate instructions.

(2) Usually, service members, civilian employees, and their dependents stationed in a foreign country are not required to accept service of process outside the geographic limits of the jurisdiction of the court from which the process issued. In such cases, acceptance of the service is not compulsory, but service may be voluntarily accepted in accordance with subsection a(3), above. In exceptional cases when the United States has agreed that service of process will be accepted by such persons when located outside the geographic limits of the jurisdiction of the court from which the process issued, the provisions of the agreement and of subsection a(2), above, will govern.

(3) Under the laws of some countries, service of process is effected by the document, in original or certified copy, being handed to the person for whom the service is intended. Service is considered to have taken place even if the person refuses to accept the legal documents. Therefore, if a commanding officer or other officer in the military service personally hands, or attempts to hand, that person the document, service is considered to have been effected, permitting the court to proceed to judgment. Upon receipt of foreign process with a request that it be served upon service members, civilian employees, and their dependents stationed in a foreign country, a commanding officer shall notify the person of the fact that a particular foreign court is attempting to serve process and also inform that person that the process may be ignored or received. If the person to be served chooses to ignore the service, the commanding officer will return the document to the embassy or consulate of the foreign country with the notation that the commanding officer had the document, that the person chose to ignore it, and that no physical offer of service was made. The commanding officer will advise OJAG (Code 14) or AGC (Litigation), as appropriate per Appendix A-6-d of this Manual, of all requests for service of process from a foreign court and the details thereof.

d. Leave or liberty to be granted persons served with process. When members or civilian employees are either served with process, or voluntarily accept service of process, in cases where the United States is not a party to the litigation, the commanding officer normally will grant leave or liberty to the person served to permit compliance with the process, unless to do so would have an adverse impact on Naval operations. If the United States is a party,

liaison with the DOJ and local U.S. Attorney's offices is through the appropriate litigation division within OJAG, based on the subject matter of the litigation. See section 0620. When a member or civilian employee is a witness for a nongovernmental party because of performance of official duties, the commanding officer may issue the person concerned permissive orders authorizing attendance at the trial at no expense to the Government. The provisions of SECNAVINST 5820.8 (series) must also be considered in such cases. Members or civilian employees may accept allowances and mileage tendered; however, any fees tendered for testimony must be paid to the DON unless the member or employee is on authorized leave while attending the judicial proceeding. When it would be in the best interests of the U.S. Government, for example, in state criminal trials, travel funds may be used to provide members and civilian employees as witnesses as provided in the Joint Federal Travel Regulations. Responsibility for the payment of the member's mileage and allowances will be determined pursuant to the Joint Federal Travel Regulations. Questions on this section should be referred to the OJAG (Code 14) or the AGC (Litigation), as appropriate per Appendix A-6-d of this Manual.

e. Report where service not allowed. Where service of process is not permitted, or where the member or civilian employee is not given leave, liberty, or orders to attend a judicial proceeding, a report of such refusal and the reasons therefore shall be made by telephone, or message if telephone is impractical, to OJAG (Code 14) or AGC (Litigation), as appropriate per Appendix A-6-d of this Manual.

0617 REQUESTS FOR GOVERNMENT INFORMATION AND GOVERNMENT WITNESSES BY STATE AND FEDERAL COURTS

The release of official information, both written and verbal, for litigation purposes, including a release in response to a subpoena duces tecum is controlled by Department of Defense Instruction 5405.02 and Secretary of the Navy Instruction 5820.8 (series). Those regulations are published at 32 C.F.R. parts 97 and 725 (2005). These guidelines are issued consistent with 5 U.S.C. § 301 and the Supreme Court's holding in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), which affirms the authority of the head of a federal agency to control the release of official information. These guidelines further the policy that factual official information should be made reasonably available for use in litigation, unless that information is classified, privileged, or otherwise protected from public disclosure. Questions regarding the release of official government information or availability of government witnesses should be directed to OJAG (Code 14) or AGC (Litigation), as appropriate per Appendix A-6-d of this Manual.

0618 REPOSSESSION OF PERSONAL PROPERTY

Repossession of personal property, located on a Navy or Marine Corps installation, belonging to a member or to any dependent residing at or located on a DON installation, may be permitted in the discretion of the commanding officer of the installation where the property is located, subject to the following. The documents purporting to authorize repossession and the procedures for repossessing the property must comply with state law. Prior to

permitting physical repossession of any property, the commanding officer shall cause an informal inquiry into the circumstances and then determine whether to allow the repossession. If repossession is to be allowed, the person whose property is to be repossessed should be asked if he wishes to relinquish the property voluntarily. Repossession must be carried out in a manner prescribed by the commanding officer. In the case of property owned by civilian employees of the DON or civilian contractors or their employees or dependents, the commanding officer should direct that the disputed property be removed from the installation until the commanding officer is satisfied that the dispute is resolved.

PART C -- LIAISON WITH THE DEPARTMENT OF JUSTICE

0619 LITIGATION REPORTS AND PLEADINGS

In all lawsuits involving the DON, other than those under the cognizance of the GC, the pleadings or litigation report to the DOJ will be prepared in OJAG (Codes 11, 14 and 15 as appropriate) unless authority to prepare the report is specifically delegated by the JAG.

0620 LIAISON WITH THE U.S. ATTORNEY AND OTHER OFFICIALS OF THE DOJ, INCLUDING OFFICIALS OF THE U.S. MARSHAL SERVICE

In matters other than those under the cognizance of the GC, (see section 0602(b) and Appendix A-6-d), liaison with local U.S. Attorneys and other officials of the DOJ, including officials of the U.S. Marshal Service, will be maintained through OJAG (Code 14). This does not apply where specific authority to establish such liaison has been delegated to a field activity. For cases within the authority of the GC, liaison shall be maintained by the AGC (Litigation), unless delegated by him.

PART D -- MISDEMEANORS COMMITTED ON NAVY AND MARINE CORPS INSTALLATIONS

0621 GENERAL

The Federal Magistrates Act, 18 U.S.C. §§ 3401-3402 (1982), provides for trial by federal magistrates of individuals who commit misdemeanors within federal reservations. Policies and procedures for implementation of the Federal Magistrates Act and the handling of misdemeanors committed on Navy and Marine Corps installations are in SECNAVINST 5822.1 (series).

0622 PROSECUTION BEFORE FEDERAL MAGISTRATES

a. Responsibility of the DOJ. The DOJ is primarily responsible for the prosecution of offenses before federal magistrates. With the approval of the appropriate U.S. Attorney, qualified Navy and Marine Corps judge advocates may prosecute misdemeanors committed on Navy and Marine Corps installations

situated within the judicial district of a U.S. District Court.

b. Designation of Navy and Marine Corps officers to conduct prosecutions. If the U.S. Attorney advises that no DOJ representative is available to prosecute misdemeanors and so authorizes, the commanding officer of an installation may designate one or more Navy or Marine Corps judge advocates of the command, or make necessary arrangements for the designation of one or more Navy or Marine Corps judge advocates stationed in the area, to conduct such prosecutions.

PART E -- APPEARANCES BY JUDGE ADVOCATES IN CIVIL COURT AND/OR CIVIL ADMINISTRATIVE PROCEEDINGS

0623 PRACTICE OF LAW ON BEHALF OF MEMBERS IN CIVILIAN PROCEEDINGS

a. Active duty (or reservists recalled to active duty) Navy or Marine Corps judge advocates may not appear as counsel on behalf of any member of the armed services before any civil court, civil administrative tribunal, civil regulatory body, or any civil governmental agency, in any proceeding, including a collateral attack on a court-martial, administrative discharge, or investigatory proceeding, unless specifically authorized by the JAG or Commander, Naval Legal Service Command, as appropriate. The Expanded Legal Assistance Program, which involves limited in-court appearances by Navy and Marine Corps judge advocates, is a separate matter and specifically provided for in section 0711 of this Manual. Requests for outside practice of law in a personal capacity are also a separate matter and are addressed in JAGINST 5803.1 (series), Professional Conduct of Attorneys Practicing under the Cognizance and Supervision of the Judge Advocate General.

b. Requests by Navy or Marine Corps judge advocates to appear in their official capacity as counsel before any court, tribunal, body, or agency outlined above will be delivered to the commanding officer of the judge advocate, or staff judge advocate, as appropriate. The request must contain: the identity of the member to be represented; reasons for requesting permission to appear; identity of the court, tribunal, etc., where appearance is desired; nature of action intended to be filed; relief to be requested; reasons why civilian counsel may not be retained; estimated time required for representation (including preparation, travel, and appearance); and any other action previously filed or pending on the same subject matter. The commanding officer or staff judge advocate will forward the request to the Office of the Judge Advocate General, 1322 Patterson Ave. SE, Suite 3000, Code 13, Washington Navy Yard, DC 20374, with comments and recommendations concerning the request. If the request is for a Marine Corps judge advocate, the request, with comments and recommendations, shall be submitted to OJAG (Code 13) via the Judge Advocate Division, Headquarters, U.S. Marine Corps, Pentagon, Washington, DC 20370-3000. Comments and recommendations concerning the request will include, but are not limited to: the nature and status of any pending military justice, court-martial, administrative discharge, or investigatory proceedings relevant to the request; a listing of all counsel participating in the case; the nature and status of any previous civil or military court action in this or related cases; and comment on the

availability of the requesting counsel in relation to the overall workload in his office.

c. If the request for appearance is approved by the JAG or Commander, Naval Legal Service Command, as appropriate, any expenses incurred due to representation (travel costs, filing fees, etc.) will be at no cost to the Government.

d. Military prisoners sentenced to death by a court-martial, who seek to file in federal civilian court(s) post-conviction habeas corpus petition(s) respecting such court-martial following the approval of their court-martial sentence to death by the President pursuant to Article 71, UCMJ, shall, upon request of the accused to the JAG, be detailed military counsel by the JAG to represent them in such proceedings and any resulting appeals. See Article 70(e), UCMJ. For the purposes of these proceedings, the provisions of subsection c, above, do not apply.

PART F -- STATE TAX AND REGULATORY AUTHORITY

0624 BACKGROUND

Under the Constitution, federal law generally controls over state law, and the Federal Government generally is immune from taxation or regulation by state authorities. Many exceptions exist, however, and commanders of installations or units in the United States often must deal with state authorities. This part discusses relations with state revenue authorities, both as to claims for state taxes and demands for compliance with state revenue-related regulations. It also describes in general terms the liability of members and their dependents to taxation and regulation by states and localities.

0625 STATE REGULATION OF FEDERAL FUNCTIONS, INCLUDING SALES

a. Application of state law. Except where Congress has specifically authorized application of state law, the Federal Government is immune from any regulation by state or local authorities.

b. Federal immunity. In most other areas, however, the Federal Government does not need to comply with state regulations or obtain state licenses for its activities. This immunity extends to activities of the DON, and to federal instrumentalities, including authorized non-appropriated fund instrumentalities (NAFIs). The American Red Cross also has been ruled to be a federal instrumentality. Thus, commissaries, exchanges, bowling alleys, and other NAFI-operated facilities need not, as a matter of law, comply with state law or obtain state business licenses to operate. In some areas, such as the age for sale of alcoholic beverages and operation of bingo games, the Secretary of the Navy has directed compliance with state restrictions. This reflects a DON policy of voluntary compliance, and does not subject federal instrumentalities to direct state regulation. The immunity accorded federal instrumentalities applies wherever they may be located, and is not limited to

exclusive jurisdiction property. For example, NAFI resale outlets selling alcoholic beverages, whether on exclusive, concurrent, or proprietary jurisdiction property, may not be required to obtain state liquor licenses; and vehicles owned by the Government or NAFIs need not have state license plates in order to operate off-base.

c. Private individuals. The immunity applies only to the Government and its instrumentalities. Private individuals and organizations operating businesses on military property generally are subject to state laws and regulation. Thus, dependents operating businesses out of their quarters on concurrent jurisdiction land, even if authorized by the base commander, are subject to state taxes, regulations, and licensing requirements. Likewise, thrift shops operated by spouse clubs or charitable organizations are subject to state taxation, and may be subject to business license requirements. Private activities of organizations of members, civilian employees, or dependents, even if command sponsored, will be subject to state taxes and may be subject to regulation unless the activity is a properly organized and authorized NAFI. In the same manner, activities of federal contractors may be subject to state law, taxes, and regulation, unless the application of state law would interfere with a federal function.

d. Demands for compliance. Commanders confronted with demands for compliance with state regulation or payment of state taxes, other than environmental regulations, taxes, or fees, should immediately contact a local staff judge advocate or General Counsel attorney and notify OJAG (Code 14). For procedures to deal with state demands for compliance with environmental regulations or payment of environmental fees or taxes, contact the local environmental counsel.

0626 STATE AND LOCAL TAXATION OF ON-BASE SALES

The Buck Act authorizes application of state sales taxes on military installations, even those under exclusive federal jurisdiction. See 4 U.S.C. § 105. Sales by the United States and its instrumentalities are exempt. See 4 U.S.C. § 107. Thus, commissaries, exchanges, and other NAFI resale outlets need not collect state or local sales tax on sales to authorized patrons. Any activity which is not an authorized NAFI resale outlet, however, must collect sales taxes as required by state and local law. This may include thrift shops operated by private organizations, flea markets, or large "coffee messes" or "sandwich messes" that do not qualify as NAFI resale outlets. The requirements of state and local laws vary and should be consulted in each case.

0627 STATE AND LOCAL TAXES, INCLUDING HOTEL TAXES AND THE FEDERAL TRAVELER

The Federal Government's exemption from state and local taxation applies only to taxes whose "legal incidence" is on the Government or its instrumentalities. This usually means that the Government is exempt only where the Government itself actually pays the tax. Where an individual incurs a tax liability for a transaction and is then reimbursed by the Federal Government, there normally is no immunity because the legal

incidence of the tax was on the individual. Hotel taxes can be structured in various ways, but the legal incidence of the tax is virtually always on either the innkeeper or the person occupying the room. As a result, the fact that the Government will ultimately pay the bill through reimbursement confers no immunity from hotel taxes on the federal traveler. In those rare cases where the Government will directly pay for accommodations, local law should be checked for a possible exemption. A few jurisdictions provide an exemption from hotel taxes to federal travelers. This is, however, a matter of state legislative grace rather than federal law. For the member or civilian employee traveling on a reimbursable basis, "certificates of exemption" should not be issued or used unless there is a known specific tax exemption for federal travelers in the local law of the place visited. In the same manner, a federal traveler normally is not exempt from state sales, meal, or car rental taxes merely because his expenses are reimbursed by the Federal Government.

0628 LIABILITY OF MILITARY PERSONNEL AND DEPENDENTS FOR STATE AND LOCAL TAXES

a. In general. There is no general exemption for military personnel or dependents from state and local taxation. Military personnel are provided some relief by the Servicemember's Civil Relief Act (SCRA), which limits the right of states to tax military income and motor vehicles owned by military personnel. Spouses of service members are provided some relief by the Military Spouses Residency Relief Act (MSRRA), which extends parts of the SCRA to military spouses so that a spouse of a service member may maintain his/her residence for tax purposes in certain situations. The MSRRA establishes that a military spouse neither loses nor establishes residency for tax purposes solely by executing a PCS move with his/her military spouse to a new jurisdiction, so long as the servicemember and spouse maintain the same official domiciliary.

b. Income taxes.

(1) states and localities may tax income of three classes of people: (a) domiciliaries, who are legal residents of the state and taxable on their worldwide income; (b) statutory residents, who, regardless of their domicile, have actually lived in the state for a prescribed period and are taxable on their worldwide income; and (c) nonresidents, who are taxable only on income from sources in the state unless exempt under MSRRA provisions.

(2) SCRA states that a military member does not acquire residence or domicile in a state merely because he is present there due to military orders, nor lose domicile in a state merely because of absence due to military orders. See 50 U.S.C. App. § 571. Thus, a member cannot be a "statutory resident" of a state when present due to military orders. Members are either domiciliaries of a state and fully taxable there, or nonresidents taxable only on income from sources in the state. For this purpose, military pay is sourced in the member's state of domicile. A member domiciled in one state and stationed in a second state is taxable by the second state only on income other than military pay which is earned in that state. Examples include income from outside jobs and interest earned on local bank accounts. The member's home

state, however, could tax both military pay and the income earned in the second state. Some states allow credits for tax paid in another state to prevent double taxation.

(3) Some states do not tax their domiciliaries when they are living outside the state. Members domiciled in such states may avoid all state income taxes on their military pay. These states often have technical requirements for nonresidence which members must be careful to observe in order to maintain exemption. Restrictions may include a minimum period of absence from the state to begin nonresidence, a maximum visiting period allowed in the state, or a requirement that the member maintain a permanent home outside the state or not maintain a permanent home inside the state. Barracks, Bachelor Quarters, and shipboard quarters are sometimes not considered a permanent home for these purposes.

(4) A member's domicile normally starts out as the state where he lived before entering the service. Members may, however, change their domiciles voluntarily. The SCRA merely prevents involuntary changes. The legal concept of domicile has two elements: (1) presence in a state; and (2) intent to permanently treat that state as "home" by remaining there or consistently returning there after absences. For a member validly to change domicile, he must meet both tests. Thus, it is not possible to validly declare domicile in a state where the member has never lived. Also, to ensure respect for a choice of domicile, members should retain all possible contacts, such as real property ownership, voter registration, driver's licenses and vehicle registrations, and professional licenses, with the chosen state to show intent to return there. Each state may test domicile separately. If contacts are inconsistent, it is possible for a member to be held a domiciliary of more than one state and subjected to multiple taxation. Members with domicile problems should be referred to a legal assistance attorney.

(5) Dependents, unlike members, are subject to state tax residency laws unless protected by the MSRRA. Spouses who accompany their service member spouse on a change of duty station orders may be exempt from paying state taxes on services performed in the new state where they relocated. In order to take advantage of the MSRRA, the military spouse’s state of domicile must be the same as the service members’ state of domicile. A spouse of a service member may not select their state of domicile but instead, he or she must demonstrate a physical presence along with intent to return and permanently reside in the domiciliary state. The law does not allow a spouse of a service member to recapture or regain a previous domicile. The exemption only applies to wage income and income from services performed in the non-domiciled state. Interest income, as well as income from a business or rental property in the non-domiciled state will be subject to taxation. Each state has its own requirements on how they implement the MSRRA in their jurisdiction and each state’s Department of Revenue should be contacted to assure compliance. Dependents who cannot claim MSRRA protection often will be statutory residents of whatever state they happen to live in, and will be fully subject to that state's income tax laws. If they retain legal domicile in some other state, they may be fully taxable by that state as well. Further, some states use the income of the military member to set the rate at which the dependent's income will be taxed. There is a remaining conflict

among the states regarding these practices.

c. Personal property taxes and vehicle registration.

(1) Non-business personal property of members generally is taxable only in the state of domicile. See 50 U.S.C. App. § 571.

(2) If a non-business vehicle owned by a member is properly registered in the state of domicile, no other state may require its registration there. If not properly registered in the state of domicile, the vehicle must be registered where the member actually resides. That state may assess only such fees as are necessary for issuance and administration of the registration. Fees or excises in lieu of property taxes are not allowed. This does not, however, apply to sales taxes, which have been held to be outside the scope of the SCRA.

(3) Registration in any state other than the state of domicile or the state of current residence generally is invalid. Thus, if a member does not maintain registration in his state of domicile, he must re-register the vehicle after each interstate PCS move.

(4) Vehicles owned by dependents are subject to tax and registration wherever the vehicle is located unless protected under the SCRA 10 U.S.C. app. § 571 and the service member or spouse paid the license, fee, or excise required by the service member's home state (domicile). In some states, if the vehicle is registered solely in the name of either the service member or the spouse or both and they are not residing in their state of domicile but instead are in a host state due to military orders, no tax may be levied by the host state as long as the vehicle is properly titles and registered in the domiciliary state. In all other instances vehicles jointly owned with a spouse or other dependents or other individuals may be taxed by both the member's state of domicile and the state where the vehicle is located. In most cases, however, the member's state of domicile will not tax the vehicle because most ad valorem property taxes depend on the presence of the property in the jurisdiction. Some states exempt members' jointly owned vehicles from taxation.

d. Assistance. Assistance for individual members with state and local tax problems is available from legal assistance attorneys. If commanders become aware of problems of general application, those problems may be forwarded to OJAG (Code 16) for examination by the Armed Forces Tax Council per SECNAVINST 5840.8 (series).

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WAIVER OF EXTRADITION

I, _____, U.S. Navy (U.S. Marine Corps), having been advised of my rights to formal extradition as provided for in JAGMAN, section 0604, by _____ [name of military or civilian attorney] of _____ [address of attorney], waive such rights and agree to, accompany _____, a representative of the State of _____, into the territorial limits of said State. I have been advised that the crime which I am charged to have committed in the State of _____ is as follows:

_____
[Signature]

WITNESSED:

_____
[Signature of witness]

DELIVERY AGREEMENT

In consideration of the delivery of _____ [name of person delivered], U.S. Navy/Marine Corps, to _____ [state representative], at _____ [physical location], for trial upon the charge of _____, I hereby agree pursuant to the authority vested in me as _____ that _____ [name of person delivered], U.S. Navy/Marine Corps will be transported to the State of _____ without expense to him or the United States and that the Commanding Officer of _____ will be notified immediately of the outcome of the trial and that the said _____ [name of person delivered], will be returned to the command, or to such place as appropriate military authorities shall designate, or transportation issued thereto, without expense to the United States or to the person, delivered immediately upon dismissal of the charges or completion of the trial in the event he is acquitted, or immediately upon satisfying the sentence of the court in the event he is convicted and a sentence imposed, or upon disposition of the case, provided that the Department of the Navy shall then desire his return.

DELIVERY REFUSAL NOTIFICATION LETTER

5821
Ser
(Date)

From: Commanding Officer
To: Office of the Judge Advocate General (Code 14)

Subj: DELIVERY REFUSED TO _____ [STATE, LOCAL, etc.] AUTHORITIES ICO _____
[RANK, FULL NAME, SSN, U.S. NAVY/MARINE CORPS]

Ref: (a) (Previous telephone call or message notification to OJAG Code 14)
(b) JAGMAN, § 0610

Encl: (1) Copy of warrant of arrest

1. As reported by reference (a), and in accordance with reference (b), report is made that upon presentation of a valid warrant of arrest charging violation of _____ [crime charged], _____ [name of accused] was refused delivery to _____ [sheriff, etc., of county, state, etc.] on _____ [date] because _____ [explanation of extraordinary circumstances].

2. Enclosure (1) is forwarded for information.

_____
[Signature]

Copy to:
ISIC
[For USN - NPC]
[For USMC - CMC(JAM)]

DEPARTMENT OF THE NAVY
LITIGATION POINTS OF CONTACT

I. Office of the Judge Advocate General

A. COGNIZANCE: Matters involving military personnel law, military justice, torts, admiralty, international law, affirmative claims such as the Medical Care Recovery Act, and Freedom of Information Act and Privacy Act suits in which the Judge Advocate General was the appellate authority. Responsibility for environmental suits is shared with the Office of the General Counsel.

The subject matter of the correspondence forwarded will determine the appropriate code designation:

(1) Suits against the United States or U.S. citizens in foreign courts -- Code 10 (International and Operational Law)

(2) Admiralty cases -- Code 11 (Admiralty and Maritime Law)

(3) Affirmative claims, including the Medical Care Recovery Act and actions under the Federal Tort Claims Act and Driver's Act -- Code 15 (Claims and Tort Litigation)

(4) All other cases under cognizance of the Judge Advocate General, other than those described in subparagraphs (1), (2), and (3) above, including Freedom of Information Act and Privacy Act suits -- Code 14 (General Litigation)

B. ADDRESS: Office of the Judge Advocate General
1322 Patterson Ave, SE, Suite 3000
Washington Navy Yard, DC 20374-5066

C. CONTACT INFORMATION:

(1) International and Operational Law (Code 10)
703-697-9161/2
DSN: 227-9161/2 FAX: 703-695-8073

(2) Admiralty and Maritime Law (Code 11)
202-685-5040
DSN: 325-5040 FAX: 202-685-5471

(3) General Litigation (Code 14)
202-685-5450
DSN: 325-5450 FAX: 202-685-5472

(4) Claims and Tort Litigation (Code 15)
202-685-4600
DSN: 325-4600 FAX: 202-685-5484

II. Office of the General Counsel

A. COGNIZANCE: Matters involving commercial law, including contract disputes arising out of maritime contracts (e.g., contracts for the repair and overhaul of Naval vessels), civilian personnel law, real property, and Freedom of Information Act and Privacy Act suits in which the General Counsel denied the appeal. Responsibility for environmental law is shared with OJAG.

B. ADDRESS: Associate General Counsel (Litigation)
Office of the General Counsel
720 Kennon Street, SE, Bldg 36, RM 233
Washington Navy Yard, DC 20374-5013

C. The principal point of contact for the Office of General Counsel is the Associate General Counsel (Litigation), telephone 202-685-7039, FAX 202-685-7036.

III. Marine Corps Points of Contact

A. Staff Judge Advocate to the Commandant (CMC (JAR)) for matters referred to the Judge Advocate General.
703-614-2510
DSN: 225-2510 FAX: 703-695-1934

B. Counsel to the Commandant (CMC (CL)) for matters referred to the Office of General Counsel.
703-614-2150
DSN: 224-2150 FAX: 703-693-4453

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CHAPTER VII

LEGAL ASSISTANCE

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CHAPTER VII

LEGAL ASSISTANCE

0701 SCOPE

a. This chapter provides information concerning the Department of the Navy (DON) legal assistance program. Additional regulations are contained in the Legal Assistance Manual, JAGINST 5801.2 (series), and other related directives.

b. Definition. "Dependents," as used in this chapter, are those persons defined by 37 U.S.C. § 401. In the case of civilians who are eligible for legal assistance as described in section 0706, the term "dependents" refers to the civilian's spouse and minor children.

c. The legal assistance program promotes increased readiness of active duty and reserve members of the Naval service, and enhances the morale and quality of life for military personnel, dependents, and other eligible clients, through provision of free, effective attorney advice, outreach programs, referral services, and vigorous preventive law activities.

d. Legal assistance is not separately funded; the program is authorized, not mandated, by Congress. See 10 U.S.C. § 1044. Accordingly, all legal assistance services are provided subject to availability of staff legal resources.

0702 SUPERVISION OF LEGAL ASSISTANCE

a. The DON legal assistance program is implemented and supervised by the Judge Advocate General (JAG). It is administered in the Navy by the Chief of Naval Operations (CNO) (NO9J) and in the Marine Corps by the Commandant of the Marine Corps (CMC) (Code JA).

b. Commanding officers of legal service offices, senior staff judge advocates to officers exercising general court-martial convening authority, and Marine Corps judge advocates at Marine Corps installations, designated by the CMC (Code JA), shall oversee the legal assistance practice within their respective chains of command, and have broad authority to ensure that services are provided commensurate with resources available.

0703 LEGAL ASSISTANCE ATTORNEYS

A legal assistance attorney is a judge advocate or civilian attorney authorized by the JAG, or by the JAG's designated representatives, including, for Marine Corps personnel, the CMC (Code JA), to perform legal assistance functions. A legal assistance attorney represents the interests of the individual client concerning personal legal matters. Provision of legal assistance necessitates appropriate conflicts of interest analysis especially when the assistance is provided to a victim of a crime. Provision of the assistance must not undermine the delivery of zealous and effective

representation of any client, including that victim. Practitioners shall seek guidance from their Chain of Command regarding appropriate conflict management in providing these services.

0704 NON-LAWYER PERSONNEL

Non-lawyer legal officers, legalmen, independent duty legalmen, civilian paralegals, and legal clerks may assist attorneys, but they may not provide legal advice or provide services that call for the professional judgment of an attorney. Non-lawyer personnel may provide assistance not requiring the professional judgement of an attorney, such as notarizations and the preparation of routine powers of attorney using attorney approved forms.

0705 PERSONS ELIGIBLE FOR LEGAL ASSISTANCE

a. Members of the armed forces on active duty for 30 days or more. Legal assistance is intended primarily for active duty personnel, including Reservists and members of the National Guard on active federal duty for 30 days or more. Legal assistance may be provided to dependents, or the legally appointed fiduciary, of active duty personnel on behalf of personnel incapacitated or otherwise incapable of seeking such assistance personally:

(1) For Reservists on active duty for less than 30 days, see sections 0705(b)(4) and 0705(b)(5) except as provided for in the following paragraph.

(2) Members of Reserve components following release from active duty under a call or order to active duty for more than 30 days issued under a mobilization authority, as determined by the Secretary of Defense, for a period of time that begins on the date of the release and is not less than twice the length of the period served on active duty under that call or order to active duty, for legal issues that relate to serious wounds, illnesses, or injuries incurred during the period of mobilization.

b. Other persons eligible. As resources permit, legal assistance may also be provided to the following categories of people in the order listed:

(1) Dependents of active duty personnel and of personnel who died while on active duty.

(2) Retired Members:

(a) Retired members entitled to military disability compensation or Department of Veterans Affairs compensation; and

(b) Retired members entitled to retired or retainer pay.

(3) Dependents of retired members and dependents of deceased retired members.

(4) Reservists on active duty for single periods of 29 days or less and their dependents may be provided legal assistance in emergency cases as determined by the head of the legal assistance office.

(5) For the purpose of enhancing the readiness of Reserve personnel for mobilization, pre-mobilization legal counseling and assistance may be provided to active duty or inactive Reserve personnel consistent with mobilization readiness needs. Pre-mobilization assistance normally will consist of drafting or updating wills, advance medical directives, and powers of attorney. Other assistance may be provided if it relates to recall or mobilization. Examples of such assistance include advice concerning rights under the Servicemembers Civil Relief Act (SCRA) or the Uniformed Services Employment and Reemployment Rights Act (USERRA). Pre-mobilization legal assistance services are not authorized for dependents with the exception of dependents of Reserve personnel with mobilization orders for more than 30 days.

(6) Members of Reserve components, other than those described in section 0705(a)(2) above, following release from active duty under a call or order to active duty for more than 30 days issued under a mobilization authority, as determined by the Secretary of Defense, for a period of time that begins on the date of the release and is not less than twice the length of the period served on active duty under that call or order to active duty.

(7) Dependents of members of the Reserve components listed in subsection (6) above.

(8) Civilian personnel:

(a) DoD civilian personnel deploying for at least 30 days to a combat zone, in support of a contingency operation, or aboard a naval vessel may be provided pre-deployment legal assistance services. Legal assistance may also be provided to dependents of these civilian personnel, both before and during deployment, on deployment-related matters. All services are to be provided within current means and capabilities. Additionally, legal assistance services are authorized to be provided to civilian personnel and their dependents for a reasonable period, but not to exceed 30 days, after he or she returns from deployment to close out ongoing legal assistance matters related to deployment that arose before or during deployment. Eligibility for DoD civilian personnel and their dependents for legal assistance while overseas is governed by section 0705(b)(8)(b).

(b) DoD civilian personnel who are U. S. citizens, other than local hire employees, employed by, serving with, or accompanying the Armed Forces of the United States, when they are assigned to a foreign country or to a vessel or unit of the Armed Forces of the United States deployed in excess of 30 days. Dependents who accompany DoD civilian personnel authorized under this subsection are also eligible.

(c) Non-DoD U.S. Government employees who are U.S. citizens and not contractors, serving in locations in a foreign country or on a vessel of the Armed Forces of the United States, where legal assistance from non-military legal assistance providers is not reasonably available. Such legal assistance is generally limited to ministerial services (for example, notarial services), legal counseling (to include the review and discussion of legal correspondence and documents), legal document preparation (limited to powers of attorney and advanced medical directives (AMDs)), and help with

retaining civilian lawyers.

(d) Civilian contractor personnel who are U.S. citizens and are serving with or accompanying U.S. forces in a theater of operations, and produce documentation of an employment contract that requires the U.S. government to provide legal assistance, may be provided with services as addressed in the contract. If the employee's contract does not specify services, services shall be limited to notarizations and provision of deployment-related powers-of-attorney.

(9) Members of allied forces and their dependents in the United States, serving with the Armed Forces of the United States.

(10) A 20/20/20 un-remarried former spouse as defined in 10 U.S.C. § 1072.

(11) Spouses, former spouses, and children who are victims of abuse by members losing the right to retired pay under 10 U.S.C. § 1408(h).

(12) Dependents of members separated for dependent abuse consistent with the transitional compensation provisions of 10 U.S.C. § 1059.

(13) Other persons authorized by the JAG.

0706 PERSONAL AND PRIVILEGED CHARACTER OF SERVICE

a. In general. Information and files pertaining to legal assistance clients are private and privileged under law and applicable professional rules and guidelines. Such information and files shall not be disclosed to anyone by the attorney providing legal assistance, except upon the specific permission of the client or when the attorney determines that disclosure is authorized or required by law or applicable rules of professional conduct. Disclosure of such information cannot be authorized or made lawful by order of superior military authority.

b. Information requests by commanding officer. After the formation of an attorney-client relationship, information concerning a service member's appointments or meetings with a legal assistance attorney or legal staff assistant may not be disclosed, unless an exception to the attorney-client privilege applies or the client gives informed consent.

0707 LEGAL ASSISTANCE SERVICE TIERS

a. The following provides the priority for legal readiness services.

(1) Tier I services. Tier I services are standard legal readiness services/first priority services. Advice or services regarding the following matters are normally available to eligible persons but may be limited due to availability of a qualified attorney or other resources:

(a) Basic foreclosure advice and counseling.

(b) Consumer finance issues, including:

(1) Consumer fraud/identity theft issues advice, counseling, and action to resolve.

(2) Consumer protection statutes (federal and state) advice, counseling, and action to resolve.

(3) Consumer services/motor vehicle contract and financing review, advice and counseling (excluding real estate purchase and sale contracts), and action to resolve.

(4) Credit/Debt collection advice, counseling, and action to resolve.

(5) Credit report counseling, advice, and action to resolve.

(6) General indebtedness, government indebtedness, involuntary allotment, and garnishment issues advice, counseling, and action to resolve.

(7) Payday loan/Predatory Lending advice, counseling, and action to resolve.

(c) Crime victim information and advice (regardless of whether victim elected unrestricted or restricted (confidential) reporting of a sexual assault), to include:

(1) Victim/Witness Program, including the rights and benefits afforded the victim (including those under 10 U.S.C. § 1565b), the role of the Victim Advocate and what privileges do or do not exist between the victim and the Victim Advocate, and the nature of the communication made to the Victim Advocate as opposed to those made to the legal assistance attorney;

(2) The differences between restricted and non-restricted types of reporting in sexual assault cases;

(3) General information concerning the military justice system including the roles and responsibilities of trial counsel, defense counsel, and the investigators; this may include the ability of the government to compel testimony;

(4) Services available from appropriate agencies or offices for emotional and mental health counseling and other medical services;

(5) The availability of and protections offered by civilian and military restraining orders;

(6) Eligibility for and benefits potentially available as part of the transitional compensation benefits established in 10 U.S.C. § 1059 and in other state and federal victims' compensation programs;

(7) Traditional forms of legal assistance involving matters such as leases, taxes, consumer affairs, estate planning and powers of attorney; and

(8) Other additional rights or benefits provided under DoD

Directive 1030.01 Victim and Witness Assistance, DoD Instruction 1030.2 Victim and Witness Assistance Procedures, SECNAVINST 5800.11 (series) Victim and Witness Assistance Program, OPNAVINST 5800.7 (series) Victim and Witness Assistance Program, SECNAVINST 1752.4 (series) Sexual Assault Prevention and Response, SECNAVINST 1752.3 (series) Family Advocacy Program, JAGINST 5801.2 (series) Navy-Marine Corps Legal Assistance Program, COMNAVLEGSVCCOMINST 5800.1 (series) Naval Legal Service Command Manual, and service-specific or subsequent regulations.

(d) Demobilization briefings, to include information on the Uniformed Services Employment and Reemployment Rights Act (USERRA).

(e) Dependent nonsupport/support counseling, advice, and document drafting (regarding service support obligations).

(f) Deployment briefings and assistance.

(g) Disaster relief support/advice.

(h) Family Care Plan and court custody orders advice and counseling.

(i) Family Law Advice, including:

(1) Basic child custody, child support and child visitation counseling and advice.

(2) Basic divorce, dissolution, annulment counseling, and advice.

(3) Basic separation agreement and spousal support agreement counseling and advice.

(j) Military rights under the Servicemembers Civil Relief Act (SCRA).

(k) Naturalization and immigration advice and counseling.

(l) Notary services.

(m) Paternity advice and counseling.

(n) Power of Attorney (General Power of Attorney and Special Power of Attorney) advice and drafting.

(o) Preventative law briefings.

(p) Simple estate planning to include advice, counseling, drafting and document execution of:

(1) Basic Wills.

(2) Advance Health Care Directives.

(3) Death Gratuity, unpaid pay and allowances, and DD93 advice and drafting.

(4) Durable Financial/Property Management Powers of Attorney.

(5) Health Care Powers of Attorney.

(6) Pre-residuary and residuary trusts for minors, including Uniform Gifts to Minors Act (UGMA)/Uniform Transfer to Minors Act (UTMA) accounts and nomination of guardians/conservators.

(7) Servicemembers' Group Life Insurance (SGLI) advice and SGLI beneficiary designation drafting.

(8) "Page 2" dependent designations.

(q) Tenant advice and counseling, to include security deposits, early termination and SCRA protections.

(2) Tier II services. Tier II services are second priority services. Advice or services regarding the following matters are normally available to eligible persons but may be limited due to availability of a qualified attorney or other resources:

(a) Adoption advice and counseling limited to:

(1) Step-parent adoption advice and counseling.

(2) Navy/DoD adoption reimbursement and adoption tax credit and deduction advice and counseling.

(b) Guardianship (Conservatorship) of the person advice and counseling.

(c) Guardianship of the estate advice and counseling, limited to the estates of dependent minor children of servicemembers who died while on Active Duty.

(d) Immigration paper-work filing, review, and advice for dependents.

(e) Small claims court pro se pleadings advice, counseling, and drafting.

(f) Service as a temporary guardian to a mentally incompetent servicemember for purposes of Department of Defense proceedings conducted under 37 U.S.C. §§ 601-604, and under Bureau of Medicine and Defense Finance and Accounting Service regulations. This service shall only extend until the appointment of a permanent guardian by a qualified court.

(3) Tier III services. Tier III services are third priority services not normally provided by active duty military legal assistance providers. In rare circumstances where Tier I and Tier II support is fully established, addressed and sustainable, support in the following matters shall only be extended to eligible clients by fully qualified providers with the express permission of the unit Commanding Officer, or for the Marine Corps, the SJA to CMC (Code JA) or his designee.

(a) Bankruptcy advice and counseling.

(b) Drafting of Family Law/Domestic Relations Documents, including:

(1) Drafting of child custody, child support, and child visitation documents.

(2) Drafting of divorce, dissolution, and annulment documents.

(3) Drafting of separation and spousal support agreements.

(c) Federal and state tax advice and counseling.

(4) Tier IV services. Tier IV services are the lowest-priority services not normally provided by active duty military legal assistance providers. In rare circumstances where Tier I and Tier II support is fully established, addressed and sustainable, support in the following matters may be balanced against Tier III services and extended to eligible clients by fully qualified providers with the express permission of the unit Commanding Officer, or for the Marine Corps, the SJA to CMC (Code JA) or his designee. These qualified providers might include Reserve Judge Advocates and civilian subject matter experts, or in rarest of circumstances, fully qualified military legal assistance providers.

(a) Expanded Legal Assistance Program (ELAP) cases:

(1) Adoption.

(2) Bankruptcy.

(3) Consumer law issues.

(4) Probate filing and hearings.

(5) Uncontested divorce or dissolution.

(6) Uncontested separation.

(b) Complex estate planning to include advice, counseling, drafting and document execution of the following:

(1) Credit shelter trusts and disclaimer credit shelter trusts.

(2) Marital deduction trusts.

(3) Qualified Domestic Trusts (QDT) when a foreign national spouse is the client's beneficiary.

(4) Qualified Terminable Interest Property (QTIP) trusts.

(5) Special Needs Trusts or Supplemental Needs trusts, under the supervision of a civilian subject matter expert.

(6) Tax and Cost Analysis of Survivor Benefit Plan Election.

(c) Real estate purchase agreement contract review and explanation of terms. No drafting of real estate purchase or sale contracts

is authorized.

b. Other services. Legal assistance offices may provide additional services not specifically prohibited by regulation if the legal assistance providers are competent to provide such services and they are approved by the Commanding Officer and Commander, Naval Legal Service Command, or CMC (JA) as appropriate.

0708 LIMITATIONS ON SCOPE OF LEGAL ASSISTANCE SERVICES

a. Personal legal matters only. Legal assistance is authorized for personal civil legal affairs only. Legal advice and assistance will not be provided regarding business ventures or regarding matters that are not of a personal nature. A member who leases his or her single personal residence due to a PCS move may obtain assistance regarding the leasing of that single personal residence.

b. Advice or assistance in official military matters. Legal assistance duties are separate and apart from responsibilities of trial counsel, defense counsel, or others involved in processing courts-martial, nonjudicial punishments, administrative boards or proceedings, and investigations. Members accused or suspected of offenses or conduct that may result in disciplinary or judicial proceedings under the Uniform Code of Military Justice (UCMJ), or processing for administrative discharges, will be referred to a defense counsel.

c. Representation of opposing parties or interests. If two or more eligible persons with conflicting interests seek advice from the same legal assistance office on the same matter, the party first establishing an attorney-client relationship will be provided representation. The legal assistance office will then follow the guidance contained within JAGINST 5801.2 (series) on referral of the conflicted party(ies) to an alternate source of assistance. When providing legal assistance to a crime victim, refer to JAG/COMNAVLEGSVCCOM 5800.4A and COMNAVLEGSVCCOM 5800.1F, and for the Marine Corps, MCO P5800.16 before forming an attorney client relationship with that victim.

d. Proceedings involving the United States. Legal assistance attorneys shall not represent or assist an individual in a matter in which the United States has a direct and substantial interest, whether or not the Government's position is adverse to that of the individual, except as permitted by JAGINST 5801.2 (series) or other prior and specific authorization of the JAG or his designee, Deputy Assistant Judge Advocate General (DAJAG) (Legal Assistance) (Code 16) or the CMC (Code JA).

e. Telephone inquiries. The initial delivery of legal assistance will not be provided over the telephone without visual verification of eligibility for legal services with the exception of authorized alternate verification procedures in the administration of remote legal assistance services, or as otherwise specified in JAGINST 5801.2 (series).

f. Advice to third parties. The privileged attorney-client relationship requires personal and private communication. Except when the client is unable

to communicate adequately, advice or assistance will not be provided through third parties. For example, each client must be interviewed personally by a legal assistance attorney prior to execution of the client's will. When command representatives seek information or assistance on behalf of service members, they shall normally be instructed to have the service member obtain a legal assistance appointment. Bona fide requests for command services shall be referred to the judge advocate normally charged with providing advice and assistance to the command concerned.

0709 REFERRALS AND FEES

a. Referral to a civilian attorney or law firm. The legal assistance attorney may determine that the best interests of the client will be served by referring the case to a civilian attorney or law firm. Should referral be necessary, payment of legal fees is the client's responsibility. The Government will not reimburse the individual or pay any expenses associated with the referral.

b. Prohibition of fees. Services provided in the DON legal assistance program are at no cost to eligible personnel. All legal assistance personnel are prohibited from accepting or receiving from eligible clients any fee or compensation other than Government compensation. Reserve personnel not on active duty are prohibited from receiving fees or compensation for the same matters about which they consulted with or advised their legal assistance clients, regardless of the reservist's duty status when the legal assistance was provided.

0710 EXPANDED LEGAL ASSISTANCE PROGRAM

a. General. Under the Expanded Legal Assistance Program (ELAP), as approved by the JAG or his designee, DAJAG (Legal Assistance) or the CMC (Code JA), designated legal assistance attorneys may provide in-court representation to certain categories of clients who cannot afford private attorney fees. Additional information on ELAP is contained in JAGINST 5801.2 (series).

b. Eligibility. Persons eligible:

(1) Active duty military personnel in pay grades E-3 and below.

(2) Active duty military personnel in pay grade E-4 with dependents.

(3) Dependents of personnel in pay grades E-4 and below.

(4) Other active duty military personnel and their dependents who are unable to afford an attorney without substantial financial hardship may be eligible if approved by the JAG or his designee, DAJAG (Legal Assistance) or the CMC (Code JA).

(5) Service members with cases that involve a significant issue that affects other service members, if approved by the JAG or his designee, DAJAG (Legal Assistance) Code 16, or the CMC (Code JA).

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CHAPTER VIII

GENERAL CLAIMS PROVISIONS

PART A -- GENERAL

0801 SCOPE

This chapter provides information about responsibilities for the supervision and management of the Department of the Navy's claims program and the investigation of claims under the various Federal claims statutes. Detailed information about the adjudication of Foreign Claims is in Part B. Explanations of the other claims statutes and information about adjudication are further detailed in JAGINST 5890.1 (series).

0802 RESPONSIBILITIES

a. The Judge Advocate General (JAG) is responsible for the resolution of claims arising under the Federal Tort Claims Act (FTCA), Military Claims Act (MCA), Nonscope Claims Act, Military Personnel and Civilian Employees' Claims Act (PCA), Foreign Claims Act (FCA), International Agreements Claims Act (IACA), Medical Care Recovery Act (MCRA), the Third Party Payers Act, and the Federal Claims Collection Act (FCCA) (affirmative claims). The Office of the Judge Advocate General (OJAG), Claims and Tort Litigation Division (Code 15) executes this responsibility on behalf of the JAG.

b. The Division Director, Claims and Tort Litigation (OJAG Code 15) is the manager of the Department of the Navy (DON) claims system that evaluates, adjudicates, and provides litigation support for claims arising under the acts listed above. The claims system consists of attorneys and support personnel assigned to OJAG (Code 15). Code 15 personnel responsible for processing tort claims are located at the Tort Claims Unit (TCU), Norfolk, Virginia. Personnel responsible for processing PCA claims are located at the Personnel Claims Unit (PCU), Norfolk, Virginia, and at the PCU Branch Office, Pearl Harbor, Hawaii. Personnel responsible for processing affirmative claims under the MCRA are located at Medical Care Recovery Units (MCRUs) in Norfolk, Virginia; Pensacola, Florida; and San Diego, California.

c. Commanding officers of commands receiving claims are responsible for complying with the guidance on investigations in Chapter II and sections 0803 and 0804 of this Chapter, and the guidance on handling and forwarding claims found in section 0805.

d. Admiralty claims are discussed in Chapter XI. The DAJAG (Admiralty and Maritime Law) is responsible for adjudication of all claims, for and against the Navy, within admiralty jurisdiction. See JAGMAN Chapter XI of this Manual.

0803 INVESTIGATIONS - GENERALLY

Chapter II of this Manual addresses administrative investigations. Whenever an investigation is conducted primarily for claims purposes, it shall be conducted as a litigation-report investigation in accordance with section 0210 of this Manual. As noted in section 0210, such an investigation is conducted under the direction and supervision of a DON attorney in anticipation of litigation and the investigation is privileged.

0804 CLAIMS - GENERALLY

a. Claims against the U.S. Claims against the United States shall receive prompt and professional disposition. Every effort will be made to ensure an investigation is thoroughly and accurately completed, the claimant's allegations evaluated promptly, and where liability is established, payment is made as quickly as possible. Similarly, claims not payable will be processed promptly and claimants advised of the reasons for the denial. Forms and instructions for filing claims are located on the JAG website at: http://www.jag.navy.mil/organization/code 15.htm. For questions regarding tort claims, contact the TCU at (757) 341-4583. For questions regarding PCA claims, contact the PCU at (888) 897-8217.

b. Claims in favor of the U.S. Potential claims in favor of the United States will be critically evaluated and promptly investigated. OJAG (Code 15) has the sole authority to assert affirmative claims for damage to DON property. For questions regarding affirmative claims for damage to DON property, contact the TCU at (757) 341-4583.

0805 CLAIMS - ACTION BY RECEIVING COMMAND

a. Record date of receipt. The first command receiving a claim shall stamp or mark the date of receipt on the letter or claim form. The envelope in which the claim was received shall be preserved.

b. Forward the claim to OJAG (Code 15), Tort Claims Unit (TCU). The receiving command shall immediately send the original claim to the Tort Claims Unit, 9620 Maryland Avenue, Suite 205, Norfolk, VA 23511-2989. The original claim should be sent to the TCU as soon as possible; the command should not retain the original claim while conducting an investigation.

c. Initiate an investigation. The command most directly involved with the claim, usually the command where the incident is alleged to have occurred or whose personnel caused the loss, shall immediately convene a litigation-report investigation in accordance with Chapter II of this Manual, if one has not already been convened. Upon completion, an advance copy of the investigation shall be forwarded to OJAG (Code 15), Investigations Branch, 1322 Patterson Ave SE, Suite 3000, Washington Navy Yard, DC 20374-5066. Waiting until endorsements have been obtained before providing a copy of the investigation to Code 15 is neither required nor desirable as the facts of the incident must be made known to cognizant claims personnel as soon as possible. After the litigation report is finalized and endorsed, the original report and one copy shall be sent to OJAG (Code 15) at the above address.

d. Assistance to claimants. Claimants or potential claimants who inquire concerning their rights or the procedures to follow in the filing of claims shall be referred immediately to the TCU. The TCU is responsible for: (1) providing the proper claims forms; (2) advising where the claims forms should be submitted; (3) advising what substantive evidence will be required to be filed with the claims forms; and (4) providing general information concerning the filing of claims. All federal officials must be careful not to violate 18 U.S.C. § 205, which makes it a crime for any officer or employee of the United States to act as an agent or attorney in the prosecution of any claim against the United States.

0806 CLAIMS - ACTION WHEN SUIT FILED

Commencement of any civil action against the United States involving the DON seeking money damages for personal injury, property damage, or death that comes to the attention of any officer or employee of the Navy in connection with his official duties shall be reported immediately to the TCU at (757) 341-4583. Civil actions involving Admiralty incidents shall be reported immediately to OJAG (Code 11) at (202) 685-5040. OJAG (Code 14) shall be immediately notified of the initiation of any litigation involving the DON with respect to Freedom of Information Act (FOIA) and Privacy Act (PA); actions challenging military personnel programs, policies and decisions; and suits against service members for official actions allegedly violating another's constitutional rights. OJAG (Code 14) may be reached at (202) 685-5450. The Office of General Counsel (OGC) shall be immediately informed of all other lawsuits involving the DON. Refer to Chapter VI, Part B regarding the service of process and subpoenas upon Navy personnel.

Part B - FOREIGN CLAIMS

0807 DEFINITION

Foreign claims are demands for payment against the United States presented by inhabitants of foreign countries for property damage, personal injury, or death occurring outside the United States and caused either by the negligent or wrongful act or omission of members or civilian employees of the U.S. Armed Forces or by the non-combat activities of these forces in foreign countries. Foreign claims are adjudicated under two federal statutes: the International Agreement Claims Act (IACA) and the Foreign Claims Act (FCA).

0808 SINGLE SERVICE CLAIMS RESPONSIBILITY

a. DoDI 5515.08 (series) assigns "single-service claims responsibility" to individual military departments for processing claims in specified foreign countries. A memorandum from DoD OGC dated 30 April 2009 further assigned single-service responsibility for specified countries in Africa. In accordance with these references, the DON has single-service responsibility for claims arising in: Bahrain, Djibouti, Greece, Iceland, Israel, Italy, Portugal, Spain, United Arab Emirates, Benin, Cape Verde, Cote D'Ivoire, Guinea, Guinea-Bissau, Kenya, Liberia, Mali, Mauritania, Mozambique, Niger, Nigeria, São Tomé

and Príncipe, Senegal, Sierra Leone, The Gambia, and Togo. DoDI 5515.08 also provides DON with authority to settle non-scope of duty claims for less than $2,500 arising in foreign ports visited by U.S. forces afloat, including those arising in countries assigned to the Departments of the Army and the Air Force.

b. If a claim arises in a country not specified by either of these references, then the service component of the tortfeasor is responsible for adjudication.

c. Claims arising in countries assigned to the Army and the Air Force must be forwarded promptly to the assigned military department. Claims shall not be processed by DON activities under this chapter until it has been determined that such action is consistent with these references.

0809 INTERNATIONAL AGREEMENTS

a. International Agreement Claims Act (IACA). Claims may be adjudicated under the IACA, 10 U.S.C. § 2734a and § 2734b, when there is a Status of Forces Agreement (SOFA) between the United States and the country where the claim arose and the SOFA contains specific tort claims cost-sharing provisions. The IACA permits payment for damages for acts or omissions of military members and civilian employees acting in the performance of official duties when the act or omission at issue is one for which the armed force is legally responsible under host nation law.

(1) 10 U.S.C. § 2734a authorizes payment for damages for the pro rata share agreed to in the SOFA for acts or omissions of U.S. Armed Forces military members and civilian employees acting in the performance of official duties abroad. Generally, the host nation will investigate, then deny or approve the claim. If approved, the host nation will pay the claim and then present a bill to the United States for its pro rata share.

(2) 10 U.S.C. § 2734b authorizes payment for damages for the pro rata share agreed to in the SOFA for acts or omissions of armed forces of another party to the SOFA occurring in the United States.

b. Foreign Claims Act. If there is no SOFA, or a SOFA exists with no tort claims cost-sharing provisions, the claim should be processed under the FCA.

c. RLSO EURAFSWA. The Commanding Officer, Region Legal Service Office (RLSO) Europe, Africa, and Southwest Asia (EURAFSWA) has authority to represent the DoD to the appropriate foreign authorities and to facilitate reimbursement for claims paid by the foreign authorities for all claims arising within his area of responsibility in accordance with the NATO or other applicable SOFA.

d. Claims arising in other countries. Questions regarding whether the United States has an applicable SOFA with the country where the claim arose should be directed to Code 15 at (202) 685-4600. Code 15 may consult OJAG, International and Operational Law Division (Code 10) for guidance.

0810 FOREIGN CLAIMS ACT

a. General. The Foreign Claims Act (FCA), 10 U.S.C. § 2734, authorizes the filing, investigating, processing, and settling of foreign claims under such regulations as the Service Secretary shall prescribe. The remainder of this chapter contains regulations implementing the FCA within the DON.

b. Purpose. The purpose of the FCA is to "promote and maintain friendly relations through the prompt settlement of meritorious claims" in foreign countries.

c. Construction. These regulations should be broadly construed to carry out the FCA's statutory purpose. The United States generally accepts responsibility for almost all damage, injury, or death to local inhabitants caused by either the negligent or wrongful act or omission of members or civilian employees of the U.S. Armed Forces or by the non-combat activities of our armed forces in foreign countries. Meritorious claims should be settled fairly and promptly, without regard to whether the acts giving rise to them are mistaken, negligent, intentional, or even criminal.

0811 FILING THE CLAIM

a. General. A claim must be presented in writing to the appropriate U.S. military authorities within 2 years after the claim accrues. It must: (1) state the time, date, place, and nature of the incident; (2) state the nature and extent of any injury, loss, or damage; and (3) request compensation in a definite amount, in the local currency.

b. Presentation of the claim. A claim may be presented to any U.S. authority or to foreign government authorities if authorized under a Status of Forces Agreement or other applicable treaty or agreement. Claims shall be promptly transferred to the appropriate authorities for processing.

c. Appropriate authorities

(1) General. The commanding officer of the organization or individual(s) whose activities gave rise to the claim has authority to process claims under these regulations, subject to the restrictions of any SOFA provisions or DoD guidance on single-service responsibility (see 0808(c)). A commander who receives a claim over which he does not have authority shall forward the claim promptly to the appropriate authority and shall provide assistance necessary to investigate and adjudicate the claim.

(2) RLSO EURAFSWA. The Commanding Officer, RLSO EURAFSWA has authority to process all claims under the Foreign Claims Act arising in Italy, Greece, Spain, and those countries in Africa for which DON has single-service responsibility (see section 0808). He has authority to pay claims filed in any amount when payment is less than $50,000.00 and unlimited denial authority.

d. Form of the claim. A properly completed Standard Form 95 signed by the claimant or an authorized agent, or other written demand containing the same essential information, is sufficient. A claim may be signed by either the injured party or an authorized agent, such as a lawyer. Agents must show their

title or legal capacity and present evidence of their authority to sign the claim. A claim must also describe the incident in sufficient detail to give reasonable notice of the time, place, circumstances, and resulting harm.

e. Amending the claim. A claim may be amended at any time prior to final settlement or denial. Amendments must be written and signed by the claimant or an authorized agent.

f. Statute of limitations. A claim must be filed within 2 years after it accrues. A claim accrues when the claimant discovers or reasonably should have discovered the personal injury or property damage giving rise to the claim. Generally, to compute the statutory time period, the day the claim accrued should be excluded and the day the claim was filed should be included.

0812 CLAIMS PAYABLE

a. General. For a claim to be payable under the FCA, both the claimant and the incident giving rise to the claim must be covered by the statute (10 U.S.C. § 2734).

b. Covered claimants. The FCA applies only to "inhabitants" of foreign countries, who are defined as persons, corporations, or other Government or business entities, whose usual place of abode or activity is in a foreign country. "Inhabitant" has a broader meaning than "citizen" or "national." Foreign citizenship or legal domicile in the country in which the claim arose is not required. Therefore, the FCA applies to foreign nationals visiting or traveling in a foreign country in which they do not reside. Examples of covered claimants are:

(1) Foreign nationals residing in a foreign country.

(2) Foreign nationals visiting or traveling in a foreign country where they do not reside.

(3) U.S. citizens residing in a foreign country, if they are inhabitants of a foreign country and are not there as U.S. service members or civilian employees, or their sponsored dependents.

(4) A corporation or other organization doing business in a foreign country on a permanent basis, even if organized under United States law.

(5) Foreign governments and their political subdivisions, including the equivalents of State, county, and city governments, unless excluded by waiver provisions of an international agreement.

c. Covered incidents. Unless otherwise prescribed, a claim for personal injury, death, or damage or loss of real or personal property may be settled under these regulations if the incident occurred outside the United States and was caused by either the negligent or wrongful act or omission of members or civilian employees of the U.S. Armed Forces or the non-combat activities of these forces.

d. Scope of employment. As a general rule, scope of employment of the

service member or civilian employee that allegedly caused the loss is immaterial. If, however, a claim arises from the act of a U.S. employee who is an indigenous person, prisoner of war, or interned enemy alien, scope of employment is a prerequisite to U.S. responsibility. Claims arising from the operation of a U.S. Armed Forces vehicle by a U.S. employee who is an indigenous person, prisoner of war, or interned enemy alien should be settled if local law imposes liability on the owner of the vehicle under the circumstances.

0813 CLAIMS NOT PAYABLE

(1) Claims of insurers and other subrogees.

(2) Claims of sponsored dependents accompanying members and civilian employees of the U.S. Armed Forces, or U.S. national civilians employed by either the U.S. Government or a civilian contractor performing an agreement with the U.S. Government.

(3) Claims of foreign military personnel suffering injury or death incident to a joint military mission or exercise with U.S. Armed Forces, or as a result of the actions of a member or civilian employee of the U.S. Armed Forces, acting within the scope of employment, unless a treaty specifically provides for recovery.

(4) Claims of civilian employees of the United States, including local inhabitants, injured incident to their employment. Compensation for such injuries is separately provided in federal statutes and agreements with foreign governments.

(5) Claims of national governments or their political subdivisions engaging in combat with the United States or its allies.

(6) Claims of a national or a nationally controlled corporation of a country engaging in combat with the United States or its allies, unless it is determined that the claimant is friendly.

(7) Claims resulting from combat activities, except that claims arising from an accident or malfunction incident to aircraft operations, including airborne ordnance, occurring while preparing for, going to, or returning from a combat mission may be paid.

(8) Claims previously paid or denied.

(9) Claims purely contractual in nature.

(10) Claims involving private contractual and domestic obligations between individuals.

(11) Claims based solely on compassionate grounds.

(12) Claims for paternity or illegitimacy.

(13) Claims payable under other federal statutes.

(14) Claims for damage caused by naval vessels, unless payment is specifically authorized by OJAG (Code 11) under section 1116 of this Manual.

0814 COMPUTATION OF THE AMOUNT OF PAYMENT

a. General. The local laws, standards, and customs of the country where the incident occurred control when computing damages for personal injury, death, or damage to property. Naval attaches, embassy personnel, and host nation attorneys under United States employment are all good resources for finding and interpreting local laws and customs.

b. Compensation. An appropriate award is generally limited to reasonable compensation for the injury, death, or property damage or loss only and does not extend to payment of punitive damages, interest, costs, attorneys' fees, bail, or any other such charges, regardless of whether they are allowed by local laws, standards, or customs. In the cases of personal injury or death, compensation may include medical expenses, pain and suffering, burial expenses, loss of society and companionship, and lost income. In cases of permanent disability, compensation may also include diminished earning capacity and costs of medical care in the future. In cases of property damage, compensation may include cost of repair, cost of replacement or diminished value, and loss of use of the property.

c. Apportionment. When there are multiple claimants or beneficiaries for a single award, the amount approved should be apportioned among them in the proportions prescribed by local laws, standards, and customs.

d. Joint liability. When two or more parties are liable for causing the same harm, they may be jointly liable for payment of compensation. Any amount paid by or on behalf of such a party should be deducted from the amount allowed under these regulations.

e. Insurance. Only insurance coverage that has been paid or is reasonably likely to be paid to the claimant by or on behalf of the United States by reason of the same injury, death, or damage or loss, should be deducted from the amount allowed under these regulations. Otherwise, insurance coverage should not be considered.

f. Negligence of the claimant. A claimant's negligent or wrongful act contributing to the injury, death, or damage that is the basis of the claim, may bar the claim entirely (contributory negligence) or diminish the claim proportionately (comparative negligence). The local laws, standards, and customs of the place where the incident occurred should be applied to determine whether and in what amount to allow a claim.

g. Currency. The amount of the award should be computed in the local currency of the place where the incident occurred or in the local currency of the place where the claimant presently resides.

0815 FOREIGN CLAIMS COMMISSIONS

a. Purpose. The purpose of a Foreign Claims Commission (Commission) is to settle meritorious claims fairly and promptly. A Commission shall deny or pay, in full or in part in accordance with its adjudicating authority, all claims referred to it or forward adjudication recommendations to appropriate higher authorities for those claims outside its adjudicating authority.

b. Authority to appoint

(1) All commanding officers of the Navy and Marine Corps have authority to appoint a Commission, unless restricted by a competent superior commander.

(2) For the purpose of the FCA and these regulations, the following officers are also considered commanding officers: the JAG; the Commanding Officer of the RLSO EURAFSWA; Chiefs of Naval Missions, including Chiefs of the Naval Section of Military Missions; Chiefs of Military Assistance Advisory Groups, including chiefs of the naval section of such groups and naval attachés.

c. Claims presented. A Commission may be appointed to consider each claim as presented or a standing Commission may be appointed to consider all claims presented. The commanding officer to whom a claim is presented shall refer the claim to a Commission appointed under these regulations.

d. Composition of the Commission. A Commission shall be composed of either one or three members. Alternate members may be appointed where circumstances require and may be substituted for the principal members for specific cases by order of the appointing authority. The appointing orders should clearly indicate which member is president of a three-member Commission.

e. Qualifications of members

(1) Members appointed to serve on a Commission shall be commissioned officers of the Navy or Marine Corps of sufficient grade and experience to carry out the purpose of the Commission, consistent with the FCA.

(2) Whenever possible, at least one member of the Commission should be a judge advocate. If a commanding officer believes that it would be more efficient or practical to appoint a judge advocate or a civilian attorney of another military service to serve on a Commission, he shall request that the Division Director, Claims and Tort Litigation (OJAG Code 15) request such appointment from the Claims Chief of the other service. This request is made pursuant to a 1998 Memorandum of Understanding between the Army, Navy, and Air Force. If approval is granted, the Division Director will forward written confirmation of such approval to the commanding officer. Likewise, when it would be more efficient or practical for an officer of the Navy or Marine Corps to serve on a Commission of another armed force, the Claims Chief of that armed force shall request approval from the Director, OJAG (Code 15) for such appointment.

f. Adjudicating authority. A Commission's authority to pay a claim, within the amounts provided below, is determined by the value of the settlement amount in U.S. dollars according to the conversion rate on the date of payment.

Likewise, its authority to deny a claim is determined by the claimed amount in U.S. dollars on the date of denial. Consequently, if the value of the U.S. dollar decreases after a claim is filed, the Commission may be required to forward a recommendation to a higher authority for a claim that was previously within its adjudicating authority.

(1) Claims up to $20,000.00. The Commission may deny or pay, in whole or in part, claims within the following limitations:

(a) One officer Commission: May deny claims of $5,000.000 or less; may pay claims filed in any amount when payment is $5,000.00 or less.

(b) One officer Commission (judge advocate): May deny claims of $10,000.00 or less; may pay claims filed in any amount when payment is $10,000.00 or less.

(c) Three officer Commission: May deny claims of $10,000.00 or less; may pay claims filed in any amount when payment is $10,000.00 or less.

(d) Three officer Commission with at least one judge advocate: May deny claims of $20,000.00 or less; may pay claims filed in any amount when payment is $20,000.00 or less.

(2) Claims in excess of Commission's limits or $20,000.00. Commissions shall forward recommendations to OJAG (Code 15), or to RLSO EURAFSWA for claims arising in their area of responsibility, to deny claims in excess of their denial authority or to pay, in full or in part, an amount that exceeds the limits of the Commission's authority. Recommendations shall be forwarded through the appointing authority as directed under section 0818.

0816 PROCESSING OF CASES

a. Action by the staff judge advocate. The staff judge advocate of the commanding officer receiving a claim for action is responsible to provide advice, guidance, and review to the commanding officer, Commission, and claims investigating officer on the policies and procedures in these regulations. This assistance may also be provided by the RLSO servicing the area in which the claim arose. Commands without a staff judge advocate assigned should request assistance from the cognizant RLSO, the next superior command with a staff judge advocate, or the nearest command with a staff judge advocate or any judge advocate assigned.

b. Action by the appointing authority. The commanding officer to whom a claim is presented, and who is authorized to take action under this chapter, is the appointing authority for the Commission to adjudicate the claim. The appointing authority shall: detail appropriately qualified members and appoint them in writing; convene an appropriate investigation or obtain the report of investigation, if one has already been conducted; refer the claim with the investigative report of the incident to the Commission for adjudication; and if applicable, receive a recommendation from the Commission for denial or payment beyond its authority, review it with appropriate legal advice, and take action or forward it as appropriate under these regulations.

c. Action by the claims investigating officer. There is no formal procedure for conducting an investigation of a foreign claim. The requirements of Chapter II of this Manual may be followed as a guide. Verbatim witness statements are not required; only the substance of the statements must be recorded. Written statements provided by witnesses should be signed, if possible. The formal rules of evidence need not be followed and any relevant evidence, regardless of form, may be received to establish the essential facts of the incident. The investigation shall be submitted to the appointing authority as soon as practicable.

d. Action by the Commission

(1) Review the claim and the investigation and, if necessary, initiate or request further investigation.

(2) If appropriate, negotiate with the claimant for settlement of the claim within the limit of adjudicating authority. All settlements will be in local currency.

(3) Adjudicate and deny or pay the claim, in full or in part, within the limits of the Commission's denial or adjudication authority in Section 0815f or make a recommendation to OJAG. The decisions of the Commission shall be determined by a majority vote.

(4) Report its decision or recommendation and the reasons therefore to, or through, the appointing authority, as required under these regulations.

(5) Prepare the written notification to the claimant, explaining its decision to deny or pay the claim, in full or in part, or advising that the claim has been referred to a higher authority.

(6) Prepare the settlement agreement and release using the form at Appendix A-8-a of this Manual. The settlement agreement and release should state the agreed settlement amount in the local currency where the claim arose or where the claimant resides. Ensure that the claimant signs the settlement agreement and release upon payment of any claim and forward this document through the appointing authority to the disbursing officer.

(7) Pay the claim in the currency of the country where the claimant resides or where the claim arose. See section 0822 for guidance on payment procedures.

0817 REPORTS REQUIRED

a. The Commission shall make a written report of each claim, to include:

(1) Appointing order and any modifications;

(2) Claim document;

(3) Investigative report;

(4) Summaries of witness testimony or witness statements signed by the witnesses, if possible;

(5) The settlement agreement and release when payment is approved;

(6) Proposed notification to the claimant; and

(7) Memorandum containing the following information:

(a) Dates of the proceedings.

(b) Amount claimed, stated in the local currency and the conversion into U.S. currency at the official rate of exchange on the date of initial consideration of the claim.

(c) Brief summary of essential facts, including: date of incident, date claim was filed, circumstances of incident, nature and extent of injury or damage, and basis for determining whether the claim is payable.

(d) Brief evaluation of the applicable local laws, standards, and customs.

(e) Date of adjudication by the Commission.

(f) Amount of any award or recommended award, stated in the local currency and the conversion into U.S. currency at the official rate of exchange on the date of payment.

(g) Statement of the decision or recommendation of the Commission and an explanation of its basis.

b. With regard to non-scope of duty claims under $2,500 arising in foreign ports, the Commission can make a single summarized report detailing all the claims paid for that port visit. However, individual settlement agreements and releases still need to be completed by the claimant and included as enclosures to the report.

0818 FORWARDING REPORTS

a. Claims within adjudicating authority. When a Commission pays or denies a claim within its adjudicating authority, the original report and all related papers shall be forwarded to the appointing authority.

b. Claims in excess of adjudicating authority. When a Commission recommends payment or denial of a claim in excess of its denial or adjudicating authority, the original report and all related papers shall be forwarded to the appointing authority to retain, and a copy shall be forwarded through the appointing authority to OJAG (Code 15) for further action.

0819 ACTION ON FORWARDED CLAIMS

a. Claims in excess of adjudicating authority. When payment or denial of

a claim in excess of the adjudicating authority of the Commission is recommended, the following officers may approve or disapprove the recommendation and the claim, in whole or in part, pay or deny the claim, or return the claim with instructions to the appointing authority or the Commission. The adjudicating authority of these officers should be determined by the conversion method described in section 0815f.

(1) Claims up to $50,000.00. The Deputy Judge Advocate General, (DJAG), the Assistant Judge Advocate General (AJAG) (Civil Law), or the Division Director (Claims and Tort Litigation), or, for claims arising in his or her area of authority, the Commanding Officer, RLSO EURAFSWA; these officers have unlimited denial authority;

(2) Claims from $50,000.00 through $100,000.00. The JAG (who has unlimited denial authority); and

(3) Claims in excess of $100,000.00. The Secretary of the Navy. See 10 U.S.C. § 2734(d).

0820 NOTIFICATION TO THE CLAIMANT

The claimant shall be notified promptly by the Commission in writing of approval or denial of claims within the adjudicating authority of the Commission, or of referral of claims in excess of the adjudicating authority of the Commission to higher authority. Notification should inform the claimant of the action of the Commission and briefly explain the reasons therefore. The claimant shall not be informed of the amount of the recommendation to higher authority for payment and shall not be shown the report of the Commission. The notification shall also inform the claimant of the right to request reconsideration of the adjudication of the claim. When resources permit, the letter of notification should be translated into claimant's language, preferably using the interlinear method. When final action on a claim is taken by an officer with greater adjudicating authority than the Commission, a notification letter should be forwarded to the claimant through the appointing authority, with a copy to the Commission.

0821 RECONSIDERATION, APPEAL, AND SUIT

a. Reconsideration

(1) A claim may be reconsidered by the original Commission, a successor Commission, or a newly appointed Commission, upon written request from the claimant, upon the original Commission's own initiative, or upon instructions from a superior officer authorized to take action on the claim, when it appears that the original action was incorrect in law or fact based on the evidence of record at the time of the action or based on evidence subsequently received. Requests for reconsideration must be received within 60 days of the date of the denial letter unless good cause is shown.

(2) If the Commission concludes that the original recommendation was incorrect, it will modify the decision or forward a supplemental recommendation through the appointing authority for action. If the Commission concludes that

the original recommendation was correct, it will affirm the decision and forward a memorandum for information through the appointing authority. Notification to claimant will be as prescribed in section 0820.

(3) Claimant's request for reconsideration of the decision of the Commission or the action of a higher authority should indicate the legal or factual basis asserted as grounds for relief. When action on reconsideration has been completed and approved, the appointing authority shall notify the claimant that such action is final and conclusive by law. See 10 U.S.C. § 2735.

b. Appeal. There is no right of appeal under this statute.

c. Suit. The United States has not consented to be sued under this statute.

0822 PAYMENT

a. Documentation. When a Commission determines that a payment should be made within its adjudicating authority, it shall submit the original and one copy of the approved report of the Commission to the nearest Navy or Marine Corps disbursing officer for payment of the claim. If no Navy or Marine Corps disbursing officer is reasonably available, then the nearest U.S. disbursing officer of any agency may be requested to pay the claim.

b. Voucher. The command adjudicating the foreign claim is responsible for immediately mailing a legible copy of every voucher to: The Office of the Judge Advocate General (Code 64), 1322 Patterson Ave, SE, Suite 3000, Washington Navy Yard, D.C. 20374-5066.

c. Accounting data. Foreign claims are paid from a centrally managed budget with a fund citation from the DoD Financial Management Regulations. The Standard Document Number (SDN) that must appear on every Foreign Claim Voucher is: "N00013$$MDA1001" where "$$" equals the last two digits of the fiscal year when the payment is actually made. The Line of Accounting Data (LOA) that must appear on every Foreign Claim Voucher is: "AA 17+1804.12TL 420 00013 H 068892 2D +##### 00013+A1001X" where "+" is the last digit of the fiscal year when the payment is actually made, and where "#####" is the five digit UIC of the command making the payment.

d. Settlement agreement and release. A settlement agreement and release shall be obtained from the claimant when payment of an award is accepted. The settlement amount shall be set forth in local currency. If payment will be made by electronic fund transfer, the necessary banking and routing information should be included on the settlement agreement. The suggested form for the settlement agreement and release is in Appendix A-8-a of this Manual.

e. Advance payments. Advance payments may be paid under this section.

f. Currency. Due to federal currency restrictions, all payments under this chapter shall be made in the local currency of the country in which the claim arose or in the currency of the country where the claimant resides at the time of such payment.

SETTLEMENT AGREEMENT AND RELEASE

File Reference: _____

I, _____ [claimant], hereby agree to accept the sum of _____[amount in local currency] in full satisfaction and final settlement of any and all claims which I have individually, on behalf of the next of kin of _____ [injured party], and on behalf of the estate of _____ [injured party] or may have against the United States, its officers, agents and employees, for property damage, personal injury, wrongful death, [whichever applicable] and associated losses arising from _____ [brief details of incident], and for any and all damages, injuries and losses proximate and consequent thereto.

In consideration hereof, I hereby release and forever discharge the United States, its officers, agents and employees, from all liability, claims and demands of whatsoever nature arising from the said incident.

It is understood that the amount tendered is accepted in full satisfaction and final settlement and that the award is made pursuant to the Foreign Claims Act, 10 U.S.C. § 2734, which provides for the administrative settlement of disputed claims against the United States arising from its activities, and is not to be construed as an admission of liability on the part of, but as a release of, the United States, its officers, agents and employees.

IF THE PAYMENT WILL BE MADE BY ELECTRONIC FUND TRANSFER, INCLUDE THE FOLLOWING:

Payment of the settlement amount will be made by government wire transfer as per the following:

Name of Bank: _____
Street Address of Bank: _____
City, State and Zip Code of Bank: _____
Federal Reserve Number: _____
Routing Number: _____
Name of Account: _____
Account Number: _____

_____
[claimant] DATE

WITNESSES:

_____ _____
NAME ADDRESS

_____ _____
NAME ADDRESS

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CHAPTER IX

AUTHORITY OF ARMED FORCES PERSONNEL TO PERFORM NOTARIAL ACTS

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CHAPTER IX

AUTHORITY OF ARMED FORCES PERSONNEL TO PERFORM NOTARIAL ACTS

PART A -- AUTHORITY TO PERFORM NOTARIAL ACTS

0901 SCOPE

This chapter designates individuals authorized to perform notarial acts and compiles existing laws, regulations, and guidelines on the authority of U.S. Armed Forces members and certain civilian employees to administer oaths; take affidavits, sworn statements, or depositions; take acknowledgments; and perform other notarial acts.

0902 FEDERAL AUTHORITY TO ADMINISTER OATHS AND PERFORM NOTARIAL ACTS

a. Relationship to state authority. The authority to perform notarial acts under 10 U.S.C. § 1044a is separate and apart from any authority provided by state law. Federal notarial authority may be exercised without regard to geographic limitation. Several states grant select military members the authority to render state notarial acts. When exercising state authority, the statutory or other requirements of the jurisdiction must be strictly followed to ensure the legal effectiveness of the notarial act performed. The validity of notarial acts performed pursuant to 10 U.S.C. § 1044a is a matter of federal law.

b. Authority to administer oaths with regard to military administration and military justice and necessary in the performance of duties.

(1) Under the authority of 10 U.S.C. § 936(a), the following persons on active duty or performing inactive-duty training may administer oaths for the purposes of military administration, including military justice:

(a) All judge advocates;

(b) All summary courts-martial;

(c) All adjutants, assistant adjutants, acting adjutants, and personnel adjutants;

(d) All commanding officers of the Navy, Marine Corps, and Coast Guard;

(e) All staff judge advocates and legal officers, acting or assistant staff judge advocates and legal officers;

(f) All officers in the grade of O-4 and above;

(g) Executive and administrative officers;

(h) Marine Corps officers with a Military Occupational Specialty (MOS) of 4430, while assigned as legal administrative officers;

(i) All limited duty officers (law), and all legalmen who are certified and registered under subsection (d)(1)(j); and

(j) Persons empowered to authorize searches, for any purpose relating to a search authorization.

(2) Under the authority of 10 U.S.C. § 936(b), the following persons on active duty or performing inactive-duty training may administer oaths necessary in performing their duties:

(a) The president, military judge, trial counsel, and assistant trial counsel for all general and special courts-martial;

(b) The president and counsel for the court of any court of inquiry;

(c) All officers designated to take a deposition;

(d) All persons detailed to conduct an investigation;

(e) All recruiting officers; and

(f) The president and recorder of personnel selection boards.

c. Oaths for appointment, enlistment, or commissioning. Under the authority of 10 U.S.C. §§ 502 and 1031, any U.S. Armed Forces commissioned officer of any Regular or Reserve component, whether or not on active duty, may administer oaths required for appointment, enlistment, or commission in the Armed Forces.

d. Authority to act as a notary.

(1) Under the authority of 10 U.S.C. § 1044a, the following persons may perform the notarial acts listed in subparagraph (2) below for persons listed in section 0705 of this Manual as eligible for legal assistance, and for others as authorized in 10 U.S.C. § 1044a:

(a) All civilian attorneys serving as legal assistance officers;

(b) For the performance of notarial acts at locations outside the United States, all civilians employed by the Department of the Navy (DON) supporting legal assistance offices;

(c) All adjutants, assistant adjutants and personnel adjutants, including reserve members when not in a duty status;

(d) All officers in the grade of O-4 and above;

(e) All commanding, executive, and administrative officers;

(f) All legal and assistant legal officers;

(g) All Marine Corps officers with MOS of 4430 while assigned as legal administrative officers;

(h) All judge advocates, including Reserve judge advocates when not in a duty status;

(i) All limited duty officers (law);

(j) All legalmen upon (1) completing notary training, (2) signing a Duties and Responsibilities Form, (3) receiving certification from the legalman's Commanding Officer or ranking Staff Judge Advocate (paygade 04 or above) on the legalman's qualifications, and (4) and registering as a 10 U.S.C. §1044a notary with OJAG Code 16; the registration to execute notarial acts shall be linked to the relevant duty assignment and shall not transfer to subsequent assignments (which will require re-registration, that is, completion of the above steps); and

(k) All Marine Corps legal services specialists E-4 and above, while serving in legal assistance billets, when authorized by the cognizant Staff Judge Advocate.

(2) Subject to the guidance set forth in section 0906, the following acts may be performed by the persons listed above while acting as a notary:

(a) Administration of oaths, acknowledgments, affidavits, and affirmations; and

(b) Certification of copies as true.

e. No fees. Fees may not be paid or received for the administration of any oath or the performance of any notarial act.

f. Duties and responsibilities of notaries. Persons acting as notaries under the authority of 10 U.S.C. § 1044a are governed in the performance of their duties by, and must comply with, this chapter.

g. 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 office is prima facie evidence that the signature is genuine, that the person holds the office designated, and that he has the authority to so act. No seal is required on the document being notarized.

h. Legal effectiveness. 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 limitation and is not dependent on any state or local law.

i. Formats. Formats for taking acknowledgements and executing sworn instruments are set forth in the appendix and in JAGINST 5801.2 (series).

0903 NON-FEDERAL AUTHORITY TO PERFORM NOTARIAL ACTS

a. Non-federal authority. Separate from, but related to, the federal authority to perform notarial acts (see 0902(a)), the laws of most states, U.S. possessions, territories, and commonwealths authorize certain U.S. Armed Forces members to perform for U.S. Armed Forces members, their dependents, and accompanying civilians the following notarial acts:

(1) Administer oaths;

(2) Take affidavits;

(3) Take sworn statements;

(4) Take depositions; and

(5) Take acknowledgements.

b. Exercise of non-federal authority. A situation may arise in which the exercise of state, vice federal, notarial authority may be warranted. Before exercising such authority, the notary official should determine:

(1) The state or states where the instrument is to be used;

(2) Who has authority to perform the particular notarial act under the laws of the jurisdiction(s) involved (several states have enacted the Uniform Acknowledgment Act or its successors, the Uniform Recognition of Acknowledgments Act and the Uniform Law on Notarial Acts; in many instances, these Acts have not been accompanied by revision of existing laws on the power to perform notarial acts, resulting in overlapping or conflicting authorization); and

(3) For whom the particular notarial function may be performed under the laws of the jurisdiction(s) involved.

c. Legal effectiveness. When exercising state authority, the statutory requirements of the jurisdiction(s) in which the instrument is to be used determine the legal effectiveness of the notarial acts performed. When a single instrument requiring acknowledgment is to be used in more than one jurisdiction, the acknowledgment must comply with the laws of every jurisdiction in which it is to be used. Note, the majority of state statutes authorize any commissioned officer with the grade of ensign (or second lieutenant) or higher to take acknowledgments and sworn instruments, but the rules do vary as to who, when, where, and for whom acknowledgments and sworn instruments may be taken. Notaries should verify the state law provisions and/or use the formats in JAGINST 5801.2 (series) for effective execution. When necessary, consult with a judge advocate. Any instruction

from a civilian attorney who prepares and forwards an instrument for execution should be followed carefully.

d. Civil notaries. Although both federal and state law authorize a variety of federal officials to perform notarial acts, it is permissible in the United States to use locally appointed notaries public, or when abroad, a U.S. consul.

PART B - GENERAL INSTRUCTIONS FOR THE PERFORMANCE OF NOTARIAL ACTS

0904 INTRODUCTION

This part provides general guidance on performing notarial acts. When in doubt, specific guidance should be obtained from a judge advocate.

0905 GENERAL RESPONSIBILITIES OF A NOTARY

a. Notaries shall not engage in the practice of law and, accordingly, may not draw up legal documents, such as wills, contracts, mortgages, and deeds.

b. Notaries shall not sign their names to blank instruments. Nor shall they certify the authenticity of public, registered, or court records or documents, or issue certified copies of such documents or records. They shall not take an affidavit or an acknowledgment unless the person who signed the instrument is actually in their presence. Notaries shall administer oaths, if an oath is authorized or required, in person. Notaries shall not falsely execute certificates, such as predating or postdating the document. The notarial authority shall not be delegated to another person.

c. Notaries may be subject to civil and criminal liability, including fines and imprisonment for misconduct, negligence, malpractice, or other breach of official duties.

0906 GENERAL INSTRUCTIONS FOR NOTARIAL ACTS

a. Acknowledgments. An acknowledgment is a formal declaration or admission before a properly authorized official, by a person who has executed an instrument, that such instrument is his act or deed. It includes the certificate or written evidence of the act of acknowledgment made by the officer, as well as the act itself. Acknowledgments relate primarily to written instruments affecting land and granting or creating legal rights. Statutes may require that deeds, mortgages, leases (particularly those over a certain length of years), or powers of attorney be acknowledged.

(1) The acknowledgment must be made in the presence of the notary, who must identify the person (in accordance with 0906(i)) and verify the

person's eligibility. Notaries shall decline to take the acknowledgment if proper identification is impossible or if the person is not eligible under the proper authorizing statute. Notaries shall not: 1) take their own acknowledgments; 2) acknowledge a document under which they are an appointee or beneficiary; or 3) acknowledge a document if they are related by blood or marriage to the principal. Notaries shall ensure the correct dates are properly inserted for any certificate verified or acknowledged before them. Changes, cross outs, and erasures in the body of the acknowledgment should be avoided unless specifically authorized by state notary statute. If not specifically authorized by state notary statute and unavoidable, they should be initialed by the notary wherever they appear.

(2) If a signature has been affixed outside the notary's presence, the signer shall verify, affirm, and acknowledge the signature on the acknowledgment or affidavit. The notary shall compare the signature affixed with a signature made in the notary's presence and with the signature on the signer's state or federally issued identification card or passport.

(3) The notary officer shall sign his name and print or stamp his name and authorizing title, rank and/or Corps. See section 0902(d) and JAGINST 5801.2 (series). The notary must have notarial authority in the venue or the place the affidavit is administered. The venue is the name of the state and the county, or other territorial subdivision to which jurisdiction is limited.

b. Sworn instruments. A sworn instrument is a written declaration signed by a person who declares under oath before a properly authorized official that the facts set forth are true to the best of his knowledge and belief. Sworn instruments include affidavits, sworn statements, and depositions. See JAGINST 5801.2 (series). An affidavit is a sworn statement made by a person known as the affiant or deponent. The facts in the affidavit are sworn or affirmed to be true by the affiant before the notary. See Section 0906(e) on taking oaths.

(1) See Section 0906(a)(3) for guidance on the signature block for the notary. Additional signature block requirements are provided in JAGINST 5801.2 (series).

(2) The notary need not be concerned with the affiant's veracity. The notary is not required to independently verify the truth of the facts stated in the affidavit. The affiant may be subject to prosecution for perjury if the facts are willfully misstated. In taking verification upon oath or affirmation, the notarial officer shall identify from satisfactory evidence (a valid state or federally issued identification card or passport bearing both the affiant’s signature and photo) that the person appearing before the officer and making the verification is the person whose signature appears on the statement being verified. In exigent circumstances an authorized officer or legalman, acting under 10 U.S.C. § 1044, may, with the Commanding Officer’s permission, identify the affiant via personal knowledge. Personal knowledge for these purposes means direct interaction and contact that leaves no doubt that the person is who he (she) says he

(she) is. If there is reason to have even the slightest doubt satisfactory proof must be produced by the affiant.

c. Certified true copy of documents originating within the certifying command.

(1) The entity that created the document or maintains the original document or electronic record as part of its official responsibilities is the sole body capable of verifying the authenticity of a document. Therefore, military notaries and other members of the legal assistance staff shall not certify documents as true and accurate copies of original documents that are neither created by the command nor maintained by the command as part of its official responsibilities. In certifying or attesting a copy of a document or other item that was originated in the command, the notarial officer must determine that the proffered copy is a full, true, and accurate transcription or reproduction of the original, by carefully and personally comparing the copy and original or observing the copying process. Documents shall not be certified as true copies based upon the assertion of the requester. See also 0905(b).

(2) Military notaries may acknowledge the signature of the document custodian on the certification of authenticity. The document custodian must be from the office responsible for maintaining the original document or electronic record. Additionally, military notaries may create an affidavit by a client, attesting to a copy of an original official document he or she has received and maintained, if such a notarized statement suffices to meet the client's needs.

(3) Military notaries shall not certify any documents that on their face, or otherwise, indicate they may not be copied (i.e. Naturalization Certificates). Military notaries shall not certify any documents that are public records, for example, birth certificates, marriage certificates, court documents.

d. Consul of the U.S. Overseas, the U.S. State department runs Consulate Offices and Embassies that perform tasks such as passport renewals, visa applications, and notarization or certification of documents. 10 U.S.C. § 1044a gives overseas military notaries the general powers of "a consul of the U.S." for the limited purposes of performing the aforementioned tasks.

e. Oaths and affirmations. Oaths and affirmations are pledges whereby affiants, having satisfactorily proven their identity in accordance with 0906(i), swear or affirm in the presence of the notary the truth of statements made by them. Oaths and affirmations are used when taking affidavits or sworn instruments. See Section 0902(b) and 0902(c) and JAGINST 5801.2 (series).

(1) Persons administering the oath should tell the affiant to raise his right hand and say the following: "Do you swear that the information contained in this document is the truth to the best of your knowledge so help you God?"

(2) Affirmation under oath for persons objecting to the phrase "so help you God" may be administered in the following form: "Do you solemnly, sincerely, and truly declare or affirm the information contained in this document is the truth to the best of your knowledge?"

(3) The reply should be "I do" or similar words of assent to both the oath and affirmation.

f. Seal of the person executing document. Although most jurisdictions no longer distinguish between sealed and unsealed instruments, some require certain instruments be executed under seal. When a seal is required, insert the statement "witness the following signature and seal," immediately preceding the signature of the person executing the document. In most jurisdictions, typing, printing, or writing "(SEAL)" or the symbol "(LS)" after the signature completes the sealing of the instrument. Others also require that the intention to create a sealed instrument be reflected in the body of the instrument. Only use a seal if specifically required by statute or other law. Seals should be used cautiously, since in some states instruments under seal create special legal consequences or have a unique status. Consult a judge advocate as necessary.

g. Seal of the person performing notarial act. The federal statute and state statutes authorize the performance of 10 U.S.C. § 1044 notarial acts without an impressed or raised seal. The formats in JAGINST 5801.2 (series) provide evidence of an officer's authority to take acknowledgments or sworn instruments.

h. Witnesses. Acknowledgment of instruments that may affect title to real property must be witnessed by three persons, none of whom may be the notary. See JAGINST 5801.2 (series). The name, grade or rate, branch of service, and duty station or permanent home address of each witness should be typed or printed below the signature of the witness. Each of the three witnesses and the grantor under the instrument shall sign the notary log book recording the execution and witnessing of the instrument. Acknowledgments affecting title to real property may, in some states (e.g., California), require the notary to record the thumbprint of the grantor in the notary logbook. State law must be consulted to ascertain whether a thumbprint of the grantor is required in the notary log along with the signature of the grantor.

i. Identifying the person requesting the notarial act. In witnessing or attesting a signature, the notarial officer must determine that the person appearing before the officer is the person named in the document to be signed. A notarial officer has satisfactory evidence of the identity of the person whose signature is on a document and that the person is within the class of persons for whom the notarial act may be performed, if that person is: identified by a valid state or federally issued identification card, driver's license or passport.. The notary must compare the signature on the document with the signature appearing on the state or federally issued identification card, driver's license or passport.

(1) Exception (A): Allowing reliance on Common Access Card for Active Duty in Limited Circumstances where it is impossible or impractical for the active duty member to retrieve his or her state or federally issued identification card for Notaries Acting Under 10 U.S.C. § 1044. In exigent circumstances, the Commanding Officer (or his or her authorized designee) may authorize a 10 U.S.C. § 1044 notary to perform the notarial act without a federal or state issued identification card, driver's license or passport by relying on a valid Common Access Card (CAC) for active duty personnel.

(2) Exception (B): Allowing Use of Credible Witness. In exigent circumstances, where it is impossible or impractical for the active duty member to retrieve his or her state or federally issued identification card, both 10 U.S.C. § 1044 notaries and state notaries may use personal knowledge of an active-duty servicemember or the personal knowledge of a credible witness to verify the active-duty servicemember's identity without comparing the servicemember's signature to a state or federally issued identification card or passport. A state notary shall only rely on this exception when his or her state notary statutes allow use of this exception. For more information on this exception, see JAGINST 5801.2 (series).

0907 NOTARY LOGS

Notaries must be able to confirm specific notary acts they performed many years after the act. A notary log, therefore, shall be maintained and kept indefinitely by each notary, even after release from active duty. The log shall minimally include signer's name, signature, type of document notarized or attested to, and date. Each notary log should also include the location of notary act, physical address of residence of the signer and the type of identification card relied upon to verify the signer's identity, as well, if applicable, the signature and name of the witnesses and their work address if they are active duty or their physical residence if they are not active duty. In addition, where required for a state law authorized notary, the log shall include the signer's thumbprint. These personal logs may not be made part of any Navy system of records and are not to be passed to other Navy personnel.

In addition to complying with the requirements of this section, state notaries are required to maintain their notary logs in compliance with the rules and regulations of the state under which they have notarial authority. Any notarial official having questions about any of these statutes should research the statute and discuss with a supervising attorney. If questions remain, contact Office of the Judge Advocate General (Code 16).

0908 CERTIFICATES OF FULL FAITH AND CREDIT

The Judge Advocate General, the Deputy Judge Advocate General, and the Assistant Judge Advocates General may execute certificates of full faith and credit certifying the signatures and authority of officers of the DON. 32 CFR § 720.32.

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FORMAT FOR SIGNATURE BLOCK, WITNESSES, AND ACKNOWLEDGMENT CERTIFICATE

[Signature]
WITNESS the following signature [and seal (if required for a non-federal instrument by state law)] this_____day of_____, 20___.

(Signature of person [and "SEAL" or "LS" (if required for a non-federal instrument by state law)]

[Witness*]
Signed and delivered in the presence of:

(signature of witness)
(name of witness)
(rank/rate and branch of service)
(Military Address or permanent home address)

(signature of witness)
(name of witness)
(rank/rate and branch of service)
(Military Address or permanent home address)

(signature of witness)
(name of witness)
(rank/rate and branch of service)
(Military Address or permanent home address)

[Venue]
With the U.S. Armed Forces
At (location**)

[Acknowledgement]
I, _____, the undersigned officer, do hereby certify that on this __day of_____, 20___, before me, personally appeared (name of person whose signature is being acknowledged), (Social Security Number if required), (status***), and presented a government issued identification card, and then did execute the foregoing instrument as a true, free, and voluntary act and deed. I do further certify that I am at the date of this certificate qualified pursuant to the authorizing statute to act in this capacity, that this certificate is executed by me in that capacity, (and by statute no seal is required).

(signature of officer)
(name of officer)
(grade, branch of service)
Notary and Consul of the U.S. (optional)
(command or organization - optional)
Commission expires: (EAOS for enlisted, "Indefinite" for officers and civilians - optional)
Authority: (authority****) (optional)
No Seal Required (optional)

_____

* If signature before witnesses is required for the document, insert the identifying information for each witness here.

** Insert country, state, and county in which instrument is acknowledged. If military considerations preclude disclosure of exact place of execution, insert "In a Foreign Country" or "In a possession of the U.S. outside the continental U.S."

*** "A U.S. Armed Forces member on active duty," "the spouse/dependent of a U.S. Armed Forces member," "a person serving with the U.S. Armed Forces," or other appropriate description of status.

**** Indicates one or more of the following as appropriate: "10 U.S.C. § 1044a and JAGMAN § 0902" (for general federal authority to notarize documents); "10 U.S.C. § 936 (Article 136, UCMJ), and JAGMAN § 0902" (for federal authority to administer oaths for purposes of military administration, including military justice); or "_____" (indicate state statutory authority).

FORMAT FOR A SWORN OR AFFIRMED INSTRUMENT

[Venue]
With the U.S. Armed Forces
At (location*)

I, (name of person executing the sworn instrument), do solemnly swear (affirm) that . . . (This part of the instrument contains the substance of the affidavit, deposition, or other sworn statement.)

(Signature of person executing the sworn instrument)

[Jurat]
I, _____, the undersigned officer, do hereby certify that the foregoing instrument was subscribed and sworn to (affirmed) before me this___day of_____, 20___, by (name of person making statement), (Social Security Number if required), whose permanent home address is_____, and who is known to me to be (status**). And I do further certify that I am at the date of this certificate qualified pursuant to the authorizing statute to act in this capacity, that this certificate is executed by me in that capacity, and by statute no seal is required.

(signature of officer
(name of officer)
(rank/rate and branch of service)
Notary and Consul of the U.S. (optional)
(command or organization - optional)

Commission expires: (EAOS for enlisted, "Indefinite" for officers and civilians - optional)
Authority: (authority***) (optional)
No Seal Required (optional)

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*Insert country, state, and county in which instrument is acknowledged. If military considerations preclude disclosure of exact place of execution, insert "In a Foreign Country" or "In a possession of the U.S. outside of the continental U.S."

** "A U.S. Armed Forces member on active duty," "the spouse/dependent of a U.S. Armed Forces member," "a person serving with the U.S. Armed Forces," or other appropriate description of status.

*** Indicate one or more of the following as appropriate: "10 U.S.C. § 1044a and JAGMAN § 0902" (for general federal authority to notarize documents); "10 U.S.C. § 936 (Article 136, UCMJ), and JAGMAN § 0902" (for federal authority to administer oaths for purposes of military administration, including Military justice); or "_____" (indicate state statutory authority).

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CHAPTER X

INTERNATIONAL LAW

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CHAPTER X

INTERNATIONAL LAW

1001 SCOPE

The purpose of this chapter is to highlight major international law issues likely to arise in the context of military operations overseas. This chapter does not reprint detailed material readily available elsewhere. It guides the reader to those sources where necessary.

1002 NAVAL OPERATIONS OVERSEAS

a. General. The Commander's Handbook on the Law of Naval Operations, NWP 1-14M/MCWP 5-12.1/COMDTPUB P5800.7A (NWP 1-14M), sets out the fundamental principles of law governing operations by the U.S. Naval Service. It is geared to the operator in a clear, concise format. It provides an overview of the law of the sea, including jurisdiction of nations over various parts of the world's oceans, legal status and navigational rights of warships, other government vessels, and military aircraft, protection of persons and property at sea, and the law of naval warfare. The Naval War College has issued an annotated version for past versions of NWP 1-14M; the annotated version does provide useful explanations and references.

b. Areas of frequent inquiry.

(1) Presence of nuclear weapons. It is general U.S. policy not to deploy nuclear weapons aboard surface ships, attack submarines, and Naval aircraft. However, under the U.S. Government neither confirm nor deny (NCND) policy, members of the Department of the Navy (DON) and its civilian employees shall not discuss the presence or absence of nuclear weapons at any general or specific location, including aboard any U.S. military station, ship, submarine, vehicle, or aircraft. Detailed instructions on the proper response to inquiries for information or assurances with respect to the presence or absence of nuclear weapons or components can be found in OPNAVINST 5721.1 (series). The DON's nuclear weapons classification system is established in OPNAVINST 5513.9 (series). Information concerning the capability of a unit to deliver, handle, or maintain nuclear weapons is unclassified. Information concerning the actual presence or absence of nuclear weapons in relation to a specific location is classified.

(2) Search of vessel by foreign authorities. Commanders and masters will not permit foreign authorities to search any portion of a U.S. Navy ship. See U.S. Navy Regulations, 1990, Article 0828.

(3) Protection of persons and property at sea. See NWP 1-14M, chapter 3.

(4) Quarantine rules in foreign ports and airports. Commanders and masters will comply with foreign quarantine regulations and may certify such compliance to foreign authorities. Commanders will not allow foreign authorities to conduct onboard inspections. See OPNAVINST 6210.2 (series).

(5) Sovereign immunity. See NWP 1-14M, chapter 2.

(6) Pollution and environmental concerns. See U.S. Navy Regulations, 1990, Article 1163, and OPNAVINST 5090.1 (series). See also section 1006, below.

(7) U.S.-USSR (now adopted by the Russian Federation) incidents at sea. See OPNAVINST 5711.96 (series); NWP 1-14M, section 2.10.

(8) Humanitarian and civic assistance. See 10 U.S.C. §§ 401, 2576, and 2805, and the annual Department of Defense (DoD) Authorization and Appropriation Acts. See also DODD 3025.18, Defense Support of Civil Authorities (DSCA); DODD 3025.12, Military Assistance for Civil Disturbances (MACDIS); and DODD 5525.5, DoD Cooperation with Civilian Law Enforcement Officials.

1003 INTERNATIONAL AGREEMENTS

a. General. DODD 5530.3 lays out procedures for the negotiation and conclusion of international agreements. In it, the Secretary of Defense delegates his authority to negotiate and conclude certain international agreements. No DoD member or civilian employee may conclude an international agreement except in accordance with DODD 5530.3 and the applicable CJCSI 2300.01 (series) (for agreements under the authority of the Chairman of the Joint Chiefs of Staff) or SECNAVINST 5710.25 (series) (for agreements under the authority of the Secretary of the Navy).

b. International agreement defined.

(1) An international agreement is any oral or written agreement with one or more foreign governments (including their agencies, instrumentalities, or political subdivisions) or with an international organization that:

(a) Is signed or agreed to by personnel of any DoD component;

(b) Signifies the intention of its parties to be bound in international law; and

(c) Is denominated as an international agreement or as a memorandum of understanding, memorandum of agreement, memorandum of arrangements, exchange of notes, exchange of letters, technical arrangement, protocol, note verbal, aide memoire, agreed minute, contract, arrangement, statement of intent, letter of intent, statement of understanding, or any other name connoting a similar legal consequence.

Any oral agreement that meets the above criteria is an international agreement. The DoD representative who enters into the agreement shall cause such agreement to be reduced to writing. In written form, the agreement is subject to the requirements of sections 5 and 7, of DoD Directive 5530.3.

(2) The following are not considered to be international agreements:

(a) Contracts made under Federal Acquisition Regulations (FAR);

(b) Foreign Military Sales Credit Agreements;

(c) Foreign Military Sales Letters of Offer and Acceptance and Letters of Intent;

(d) Standardization Agreements (STANAGs, QSTAGs, ASCC Air Standards, and NAVSTAGs) that record adoption of like or similar military equipment, ammunition, supplies, and stores or operational, logistic, and administrative procedures; while most STANAGs are not international agreements, a STANAG that provides for mutual support or cross-servicing of military equipment, ammunition, supplies, and stores or for mutual rendering of defense services, including training, is considered to constitute an international agreement;

(e) Leases under 10 U.S.C. §§ 2667 and 2675 and 22 U.S.C. § 2796;

(f) Agreements solely to establish administrative procedures; and

(g) Acquisitions or orders with NATO and other Allies pursuant to cross-servicing agreements made under the NATO Mutual Support Act (10 U.S.C. §§ 2341-2350m) and DoD Directive 2010.9, Acquisition and Cross-Servicing Agreements; umbrella agreements, implementing arrangements, and cross-servicing agreements under the NATO Mutual Support Act, however, are international agreements.

c. Negotiation of agreements. The United States concludes international agreements in many forms. Members of the U.S. Navy and U.S. Marine Corps may conclude these agreements only when procedurally and substantively authorized. For matters under the cognizance of the DON, authorization to negotiate and conclude an international agreement should be sought from the Secretary of the Navy, the Assistant Secretary of the Navy (Research, Development and Acquisition), the Chief of Naval Operations, the Chief of Naval Research, or the Commandant of the Marine Corps, as appropriate. For matters that concern operational command of joint forces, such authorization should be sought via the Combatant Commander chain of command. Negotiations toward the formation of any international agreement are not permitted pending receipt of such authorization. Once authorized to negotiate, the cognizant representative of the United States must not deviate significantly from the letter of the authorization.

(1) Request for authority to negotiate. A request for authority to negotiate an international agreement must contain:

(a) A draft text or outline of the proposed agreement, or an explanation why such a draft cannot be provided;

(b) A legal memorandum reciting the authority to carry out each obligation to be assumed by the United States and an explanation of other legal considerations;

(c) A fiscal memorandum specifying the estimated cost and appropriations authority or source of each obligation assumed by the DON or

other DoD component; and

(d) A Technology Assessment Control Plan (see DODD 5530.3, encl (7)), which, inter alia, requires the proponent of the agreement to:

(i) itemize all sensitive U.S. classified and unclassified property and data to be transferred under the proposed agreement;

(ii) assess the risk to U.S. national security through such transfer; and

(iii) identify the foreign technologies or other benefits that the United States is likely to acquire through the proposed agreement.

(2) Conclusion of the agreement. Should negotiations lead to an acceptable draft, the U.S. representative must ensure that:

(a) The proposed U.S. signatory holds proper authority to conclude the agreement. This authority is obtained in the same manner as the authority to negotiate.

(b) The requirements of prior consultation with the Department of State in accordance with the Case-Zablocki Act, 1 U.S.C. § 112b, have been met for the particular agreement. The Office of the Judge Advocate General (OJAG) (Code 10) has historically performed this function.

(c) If a foreign language text is added, the agreement must specify either that the English text governs or that both texts are equally authentic. In the latter case, the agreement must include certification that the texts conform and have the same meaning in all substantive respects. Translators must be designated as qualified, consistent with local practice, by the official authorized to negotiate and conclude the agreement, or by an appropriate official of the State Department.

(3) Forwarding of agreement. Within 10 days of conclusion, the U.S. Navy or U.S. Marine Corps signatory must forward four (4) certified copies of the agreement, background statement, and translator's certificate (if required) to the Office of the Judge Advocate General (OJAG), Attn: Code 10, 1322 Patterson Avenue SE, Suite 3000, Washington Navy Yard, DC 20374-5066. Additional copies should be forwarded to others with an interest in the subject of the agreement.

d. Additional guidance. See OPNAVINST 5710.25 (series), Case-Zablocki Act implementation (22 CFR Ch. 1, sub. S, Part 181), and DIAI 2000.001 concerning intelligence agreements. Questions on international agreements may be directed to OJAG (Code 10), or, for Marine components, SJA to CMC (JAO).

1004 SECURITY ASSISTANCE

a. General. Security assistance enhances U.S. national security by providing defense articles, services, training, and other assistance by grant, credit, or cash sales to friendly foreign nations. Authority for these programs is found in the Foreign Assistance Act and the Arms Export Control

Act. Basic guidance is found in the Security Assistance Management Manual, DOD 5105.38-M, the DoD Financial Management Regulation, DOD 7000.14-R, and the Joint Security Cooperation Education and Training/Joint Security Assistance Training (JSAT) Regulation, AR 12-15/SECNAVINST 4950.4 (series)/AFI 16-105.

b. Statutory requirements. The more important statutory requirements regarding security assistance include:

(1) Transfers of defense articles or services must be to an eligible country or designated international organization.

(2) Defense articles or services must be properly utilized by the purchaser. This means, for example, that such articles or services must be used by the purchaser's defensive forces for defensive purposes only.

(3) Withdrawal from U.S. stocks requires proper authorization.

(4) A purchasing country must pay full value, including applicable costs and surcharges.

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

c. What constitutes security assistance. The DoD Dictionary of Military and Associated Terms (JCS Joint Pub 1-02) defines "security assistance" as a group of programs authorized by the Foreign Assistance Act of 1961, as amended, and the Arms Export Control Act of 1976, as amended, or other related statutes by which the United States provides defense articles, military training, and other defense-related services by grant, loan, credit, or cash sales in furtherance of national policies and objectives. Security assistance is an element of security cooperation funded and authorized by Department of State to be administered by Department of Defense/Defense Security Cooperation Agency.

(1) There is a fine line between reimbursable security assistance and the authorized extension of limited assistance as a goodwill gesture or international courtesy in connection with combined operations. Cases are factually dependent and should, if practicable, be discussed with a Security Assistance Organization (SAO) at the local diplomatic mission or with an international lawyer with security assistance training. As a very general proposition, it is improper to extend any defense article or service (broadly defined) on a non-reimbursable basis unless there is:

(a) a specific statutory authorization for the provision of assistance; for example, 10 U.S.C. § 7227 authorizes the non-reimbursable provision of routine port and airport line services on conditions of reciprocity documented by written agreement; or

(b) the assistance is being provided to advance a clear and immediate U.S. mission interest; for example, the non-reimbursable transport of members of a foreign armed force aboard a U.S. vessel or aircraft to a remote site in connection with a combined exercise.

(2) Even if a statutory or "mutual benefit" basis can be found for

extending assistance, there are country-specific limitations on the provision of assistance derived from the Foreign Assistance Act and annual authorization and appropriation acts that negate an otherwise valid legal justification for providing assistance to a foreign government.

(3) The foregoing discussion applies to the authority of U.S. forces to provide assistance to a foreign government. Similar restrictions prevent U.S. forces from accepting logistical or other support from a foreign government because of the fiscal prohibition against unauthorized augmentation of appropriations. Various statutes authorize the acceptance of certain types of assistance, such as reciprocal routine port and airport services (10 U.S.C. § 7227) and financial or in-kind host nation support (10 U.S.C. §§ 2608, 2350g); however, implementing guidance issued by DoD and the Navy should be consulted before any foreign assistance is accepted.

1005 POLITICAL ASYLUM AND TEMPORARY REFUGE

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

(1) Under no circumstances will a person seeking asylum in U.S. territory or in international waters be surrendered by the Navy or Marine Corps to foreign jurisdiction or control, except at the personal direction of the Secretary of the Navy or higher authority.

(2) Commanders of U.S. warships, military aircraft, and military installations in territories under foreign jurisdiction (including foreign territorial seas, archipelagic waters, internal waters, ports, territories, and possessions) are not authorized to receive onboard foreign nationals seeking asylum. Such persons should be referred to the American Embassy or nearest U.S. consulate in the country, foreign territory, or foreign possession involved, if any, for assistance in coordinating a request for asylum with the host government insofar as practicable. Because warships are extensions of the sovereignty of the flag nation and because of their immunity from territorial sovereignty of the foreign nation in whose waters they may be located, they have often been looked to as places of asylum. The United States, however, considers that asylum is generally the prerogative of the government of the territory in which the warship is located. However, if exceptional circumstances exist involving imminent danger to the life or safety of the person, the cognizant Commander may grant temporary refuge IAW section 1005(b).

b. Temporary refuge. International law and practice have long recognized the humanitarian practice of providing temporary refuge to anyone, regardless of nationality, who may be in imminent physical danger for the duration of that danger. See Article 0939, U.S. Navy Regulations, 1990; SECNAVINST 5710.22 (series); and NWP 1-14M, section 3.3. Temporary refuge is protection afforded for humanitarian reasons to a foreign national in a DoD shore installation, facility, military aircraft or vessel within the territorial jurisdiction of a foreign nation or on international waters, under conditions

of urgency in order to secure the life or safety of that person against imminent danger, such as pursuit by a mob. It does not normally include persons fleeing from lawful pursuit by the law enforcement authorities of a foreign country. Temporary refuge may be granted by the senior officer present at a U.S. installation or onboard a U.S. vessel. Once granted, temporary refuge will be terminated only at the direction of the Secretary of the Navy or higher authority. Persons whose temporary refuge is terminated will be surrendered only to authorities designated in the message authorizing release.

c. Public announcement. No public statement concerning political asylum or temporary refuge cases should be released without authorization by the Assistant Secretary of Defense for Public Affairs. See DoDI 2000.11 and SECNAVINST 5710.22. In foreign territory, any such announcements should also be coordinated with the U.S. Embassy.

d. Reporting requirements. Upon receipt of a request for political asylum or temporary refuge onboard a U.S. installation or vessel, the information described below should be reported via OPREP-3 PINNACLE procedures. See OPNAVINST 3100.6 (series) and MCO 3504.2 (series). Initial reports should not be delayed pending further developments.

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

(2) Date, place of birth, and occupation;

(3) Description of any documentation in his possession;

(4) List of foreign authorities who are aware of or will be notified of the request;

(5) Circumstances surrounding the request;

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

(7) Reason for requesting asylum or temporary refuge;

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

(9) Any Communist Party or other political party affiliation; also list any government office currently held or previously occupied;

(10) If applicable, whether a field office of the United States Immigration and Customs Enforcement (ICE) has been notified and if arrangements have been made to transfer the case to CIS; and

(11) Any other pertinent information.

e. Custody. Any request by foreign authorities for custody of a person seeking refuge should be reported immediately to higher authority. Pending

guidance from higher authority, no action should be taken other than informing the foreign authorities that the case has been referred to higher authorities for instructions.

1006 FOREIGN LITIGATION

a. Department of Justice (DOJ). DOJ has the primary responsibility for representing the United States in all foreign litigation. This requires timely notice to the Attorney General of legal actions arising out of overseas naval operations. The Assistant Judge Advocate General for Civil Law (Code 01) through the International Law Division (Code 10), the Litigation Division (Code 14), and the Claims Division (Code 15) of OJAG, maintains close liaison with the DOJ, Office of Foreign Litigation.

b. Reports to the OJAG. Any foreign legal proceedings, including those involving non-appropriated fund activities that arise out of U.S. Naval operations overseas or are otherwise of substantial interest to the DON should be reported to OJAG (Code 10) by the most expeditious means, using naval message, telephone, or letter. This includes, but is not limited to, any proceeding involving the United States as a party and arising out of naval operations; proceedings against any person subject to military law or any DON official or employee in connection with official duties; and proceedings where attachment of U.S. funds or other property is sought. The report should include as much of the following information as possible:

(1) Names of parties to the proceeding;

(2) Nature of the action;

(3) Name of the tribunal where the proceedings have been brought;

(4) Docket number;

(5) Names and positions of persons served, method of service, and dates;

(6) Explanation of U.S. Government's interest in the proceeding;

(7) Deadline for pleadings or other response;

(8) Nature of the principal defense, if known;

(9) Status of any named party as a U.S. Government officer, employee, agent, contractor, non-appropriated fund activity employee, etc.;

(10) Nature of relief sought;

(11) A recommendation as to qualified local attorneys, English-speaking if possible, available for retention to defend the interests of the United States. Normally, the names of such attorneys should be from a list maintained by the U.S. Embassy or Consulate; and

(12) Any other information that would provide a full understanding of

the case and enable the U.S. Government to prepare a defense.

1007 STATUS OF FORCES AGREEMENTS

a. General. Status of Forces Agreements (SOFAs) govern the rights, obligations, and privileges of military personnel stationed in foreign countries. The NATO SOFA is generally used as a model. Although the wording of individual SOFAs varies, they are generally uniform in subject matter. Some of the more important provisions cover entry and exit from the host country, customs, respect for local law, taxation, criminal jurisdiction, and claims. Note: Not all U.S. military personnel in country are necessarily covered by the SOFA. For example, military personnel attached to a U.S. embassy are normally afforded some form of diplomatic status.

b. Foreign personnel in the United States. Most SOFAs govern only U.S. personnel stationed overseas. The NATO SOFA is reciprocal in that it also covers personnel from other NATO countries stationed in the United States. Foreign service personnel in the United States not protected by a SOFA are subject to applicable federal, state, and local law and regulations, and any working arrangements with the various States. Foreign service personnel serving in the United States are exempt from U.S. income tax of non-U.S. source income. They are also exempt from certain customs duties.

1008 FOREIGN CRIMINAL JURISDICTION

a. General. A sovereign nation has jurisdiction to punish persons who commit acts that violate its laws committed within its borders, but may waive its jurisdiction. Every SOFA includes provisions for the exercise of criminal jurisdiction. Other agreements (e.g., Defense Cooperation Agreements, Visiting Forces Agreements) may also contain criminal jurisdictional provisions. DoD and DON policies regarding status of forces and foreign criminal jurisdiction are set in DODD 5525.1 and SECNAVINST 5820.4 (series).

b. Policy. It is DoD policy to protect, to the maximum extent possible, the rights of U.S. personnel who may be subject to criminal trial by foreign courts and imprisonment in foreign prisons.

c. Exercise of jurisdiction. While international law generally recognizes the authority of the host state over all persons in its territory, the sending state also has a legitimate need to maintain good order and discipline among the members of its forces. Host states have no direct interest in many offenses, such as those committed on base or where both the victim and offender are members of the U.S. force. In order to balance the relative interests of the host and sending states, some SOFAs provide for each state to have exclusive jurisdiction over certain classes of offenses and for them to have concurrent jurisdiction over others. In case of concurrent jurisdiction, the SOFA provides for primary and secondary rights to exercise that jurisdiction, depending upon such factors as the type of offense, whether the offense arose in the performance of official duty, and whether the victim was a fellow member or dependent of the sending state's forces. There are other SOFAs that provide U.S. service members with a status equivalent to that of the Administrative and Technical Staff of embassies under the Vienna

Convention on Diplomatic Relations.

d. Waiver of jurisdiction. SOFAs that provide for concurrent jurisdiction generally include a procedure where one state may waive its right to exercise primary jurisdiction if so requested by the other state. In some agreements, this waiver has been institutionalized so that the host state essentially agrees in advance to a blanket waiver, with the right to "recall" its waiver if a specific offense is of "particular importance."

e. Custody. Whenever U.S. military personnel, members of the civilian component, or their dependents are apprehended by foreign authorities on criminal charges, every effort should be made to secure their release to U.S. custody pending final resolution of judicial proceedings.

(1) Requests by foreign authorities for delivery of custody of such personnel should be handled in strict compliance with the applicable SOFA. If there is no SOFA, U.S. personnel should not be delivered to foreign authorities pending guidance from OJAG (Code 10).

(2) Personnel in foreign custody, whether prior to or after trial, must be visited on a regular basis in accordance with SECNAVINST 1640.9 (series), DON Corrections Manual, and chapter 3 of SECNAVINST 5820.4 (series), Status of Forces Policies, Procedures, and Information. Particular attention should be given to legal assistance, medical care, adequacy of food and clothing, health and comfort, and accountability for personal property. See MILPERSMAN 1160-050 or MCO P1900.16 (series), regarding extension beyond the expiration of enlistment for enlisted personnel confined in foreign jails. Such personnel will not be separated until completion of sentence and return to the United States. See SECNAVINST 5820.4, para 3-8.

f. Fees. Under U.S. law, counsel fees, court costs, bail, and other expenses associated with the exercise of foreign criminal jurisdiction over military members, members of the civilian component, and their dependents, may be paid by the U.S. Government. Use of U.S. Government funds to pay fines is not authorized. See SECNAVINST 5820.4, chapter 2.

g. Solatia. In certain countries, it is customary to offer a victim or his family a token gift of fruit, flowers, or money for injury, death, or property damage. Depending on the local culture, such token expressions of remorse can affect the resolution of criminal charges. NAVSO P-1000 075146 permits the payment of solatia from operation and maintenance funds under certain circumstances, as determined by the appropriate country commander. Consult the Region Commander, the servicing Staff Judge Advocate or the nearest Region Legal Service Office (RLSO) to determine the propriety of paying solatia from official funds in a particular country.

h. Official duty. Under every SOFA, offenses committed in the performance of official duty are subject to the primary jurisdiction of the United States rather than the host nation. Such cases should be handled in strict compliance with the applicable SOFA.

i. Reporting requirements. The exercise of foreign criminal jurisdiction creates a number of reporting requirements. The most important for the operational unit is the serious incident report described in OPNAVINST 3100.6

(series) and MCO 3504.2 (series), SECNAVINST 5820.4, chapter 4, and regulations issued by the cognizant Combatant or Region Commander.

j. Military Extraterritorial Jurisdiction Act of 2000 (MEJA). MEJA has expanded the criminal jurisdiction of the United States to civilians accompanying U.S. forces overseas. The availability of criminal sanctions for conduct overseas may assist in obtaining waiver of host nation jurisdiction over offenses committed by civilians. See 18 U.S.C. §§ 3261-3267; implementing instruction found at 32 C.F.R. Part 153 or DODI 5525.11.

1009 ENFORCEMENT OF U.S. LAW OVERSEAS

Routine exercise of U.S. jurisdiction over DoD personnel in countries where U.S. personnel are stationed is provided for in the status of forces provisions of agreements with the host government and the Uniform Code of Military Justice (UCMJ). Generally, assistance by DoD personnel to U.S. civilian law enforcement agencies is provided pursuant to DODD 5525.5 and SECNAVINST 5820.7 (series). Outside U.S. jurisdiction, military actions conducted in direct assistance to U.S. civilian law enforcement agencies require the approval of the Secretary of Defense or the Deputy Secretary of Defense who will consider, on a case-by-case basis, requests for exceptions to the policy restrictions against direct assistance by military personnel.

1010 PROPERTY CAPTURED FROM THE ENEMY DURING ARMED CONFLICT

Under U.S. law, title to captured enemy public property passes from the government of the enemy to the U.S. Government. Individuals, whether enemy or friendly, acquire only such private rights in captured enemy public property as the laws of the United States provide. See Combatant Commander guidance; OPNAVINST 3460.7/MCO 5800.6 (series); Article 103, UCMJ, 10 U.S.C § 903.

1011 NONCOMBATANT EVACUATION OPERATIONS (NEO)

The Secretary of State is responsible for the safe and efficient evacuation of U.S. Government personnel, their dependents, and private U.S. citizens from foreign territory when their lives are endangered by war, civil unrest, or natural disaster. The Secretaries of State and Defense are assigned lead and support responsibilities, respectively. Combatant Commanders are prepared to support Department of State to conduct NEOs. See NWP 1-14M, section 3.10.3; DODD 3025.14; MCDP 1-0, chapter 5; and 22 U.S.C. §§ 4801-02.

1012 ACCEPTANCE OF GIFTS FROM FOREIGN GOVERNMENTS

Under the Constitution and U.S. laws, military personnel and civilian employees of the DON may not accept gifts from foreign governments without the consent of the Congress. Congress has consented to the acceptance and personal retention by military personnel and civilian employees of gifts of minimal value only. Procedures for the acceptance of gifts of more than minimal value are contained in DODD 1005.13 and SECNAVINST 1650.1 (series).

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CHAPTER XI

ADMIRALTY AND MARITIME LAW

PART A -- INTRODUCTION

1101 SCOPE

a. General application. This chapter applies to admiralty tort claims, including claims against the United States for death, personal injury, or property damage caused by a Naval vessel or other property under the jurisdiction of the Department of the Navy (DON), or resulting from a maritime tort committed by any agent or employee of the DON, and affirmative claims by the United States for damage to Naval property caused by another's vessel or maritime tort. Also, this chapter briefly discusses salvage claims by or against the United States and claims by the Government for towage services rendered to privately owned vessels. This chapter does not apply to admiralty incidents involving only U.S. Government vessels or property. See section 1119.

b. Guidance and procedures. Part B of this chapter provides guidance to commanders on reporting and investigating admiralty incidents. Part C of this chapter discusses procedures for processing admiralty claims by judge advocates involved in admiralty claims adjudication.

c. Notice. Effective handling of admiralty claims depends on Commanders making immediate notice of any admiralty incident, however trivial, to the Judge Advocate General (JAG). The Deputy Assistant Judge Advocate General (DAJAG) (Admiralty and Maritime Law) (Code 11) is designated as Admiralty Counsel of the Navy and is responsible for all admiralty and maritime law claims and legal/policy issues addressed in this chapter. Notifications per this chapter to Office of the Judge Advocate (OJAG) (Admiralty and Maritime Law Division) (Code 11) suffices for notification to the JAG. See sections 1103 and 1104. Prompt reporting facilitates proper investigation and resolution of admiralty matters, whether the case is settled administratively under the Secretary of the Navy's statutory claims settlement authority or results in litigation.

1102 ORGANIZATION

a. Secretary of the Navy. The Secretary of the Navy has authority for administrative settlement and direct payment of claims for personal injury or property damage caused by Naval vessels or other property under the DON's jurisdiction, or by a maritime tort committed by an agent or employee of the DON, and for towage or salvage services rendered to Naval vessels, when the amount paid does not exceed $15,000,000.00 and the matter is not in litigation. See 10 U.S.C. §§ 7622 and 7623. The Secretary also has authority to settle affirmative admiralty claims for damage to property under the DON's jurisdiction caused by a vessel or floating object. See 10 U.S.C. § 7623.

b. Judge Advocate General. The JAG is responsible for processing admiralty claims for adjudication by the Secretary of the Navy, or the Secretary's designee, and acts as principal liaison with Department of Justice (DOJ) for admiralty tort cases in litigation. This responsibility has been delegated to the DAJAG (Admiralty and Maritime Law), OJAG (Code 11). The contact information for OJAG (Code 11) is:

Office of the Judge Advocate General
Suite 3000, Code 11
1322 Patterson Avenue SE
Washington Navy Yard D.C. 20374-5066

Phone: 202-685-5040 (DSN 325)
FAX: 202-685-5471 (DSN 325)
Secure phone: 202-685-7040
E-Mail: admiralty@navy.mil
SIPR E-Mail: admiralty@navy.smil.mil
PLAD: NAVY JAG WASHINGTON DC

c. Other organizations. Other organizations may process specific admiralty claims. Contract claims arising from operation of Navy auxiliary and Military Sealift Command chartered vessels, including claims for charter hire, cargo damage, general average, and redelivery repairs, are handled by Office of Counsel, Military Sealift Command (MSC). Similarly, claims for damage resulting from vessel cargo loading and unloading operations by DON-contract longshoremen are under the cognizance of Office of Counsel, Naval Supply Systems Command. However, all tort claims arising from the operation of any Naval vessel, including MSC vessels, are handled by OJAG (Code 11).

PART B -- REPORTING AND INVESTIGATING ADMIRALTY INCIDENTS

1103 ADMIRALTY INCIDENTS

a. Generally. Any personal injury, loss of life, property damage, salvage, oil spill recovery/clean-up or rescue, whether occurring at sea or on land, arising in whole or in part from the operation of any DON-owned or operated ship, submarine, boat, gig, tug, barge or other vessel (including Morale, Welfare, and Recreation (MWR) vessels) upon navigable waters, or caused by ship-launched aircraft or weapons, is considered an admiralty incident. Furthermore, damage occurring ashore caused by a vessel or afloat object usually falls within admiralty jurisdiction, as does damage to certain structures located on navigable waters which traditionally are not thought of as vessels. Paragraphs (b) through (m) list common admiralty incidents which often generate admiralty claims or litigation. Whenever one of these incidents occurs -- regardless of how the incident occurred, whether there is any apparent Navy responsibility for the incident, whether the injury or damage appears minor, or whether the injured person states an intention not to file a claim against the Government -- the affected command is to notify OJAG (Code 11) immediately by Naval message, phone, E-Mail, or FAX. See section 1104. Similarly, if a command receives a complaint, claim, invitation to a survey, or other correspondence alleging such an incident (even if the

receiving command believes the complaint or allegation has no basis in fact), notify OJAG (Code 11) immediately. If a command is uncertain of whether an incident is a reportable admiralty incident, contact OJAG (Code 11) for guidance.

b. Collision. A collision occurs when a moving vessel strikes another moving vessel. See sections 1108 and 1109 for special considerations when investigating a collision.

c. Allision. An allision occurs when a moving vessel or object strikes a stationary vessel, object, or structure (such as a pier, bridge, buoy, anchored or moored vessel, or a submerged object such as a wreck, coral reef, moored fishnet or trap). See sections 1108 and 1109 for special considerations when investigating an allision.

d. Personal injury or death. Death or personal injury to any person, except active duty U.S. military personnel or federal civilian employees in the performance of their duties, occurring onboard a Naval vessel, (including small boats such as tugs, gigs, and barges) or on the brow, gangway or ladders of a Naval vessel, is an admiralty incident. Additionally, injuries occurring ashore, caused by alleged negligent actions of a Naval vessel or its crew on navigable waters, are also admiralty incidents by virtue of the Admiralty Jurisdiction Extension Act (46 U.S.C. 30101).

(1) Injured parties may include visitors and guests, dependents, contractor technical representatives (tech-reps), ship repairmen, stevedores and longshoremen, non-federal civilian mariners, and harbor pilots.

(2) Additionally, death or personal injury occurring ashore or onboard another vessel not owned by the United States, but arising in whole or partially from the operation of any Naval vessel, is also an admiralty incident and must be reported.

(3) Examples include injuries caused by objects thrown or dropped from a Naval vessel, brow injuries, individuals sickened by food served onboard a vessel or by fumes or gas emanating from a vessel, and injuries resulting from improper medical treatment or malpractice onboard a vessel. See section 1110 for special considerations in death and personal injury investigations.

e. Property damage. Any loss, damage, or destruction of property, afloat or ashore, which arises, in whole or in part, incident to the operation of a Naval vessel, or damage to Naval property caused by a privately owned vessel or floating object, is an admiralty incident. Examples include:

(1) Fishing nets, lines, lobster pots, or other gear in the water, cut or damaged by Naval vessels, including amphibious vehicles. Also, fishing gear damaged or lost by becoming fouled on DON submarine cables, underwater Naval ship or aircraft wreckage, or Naval ordnance.

(2) Automobiles or other property located on a pier damaged by an object thrown or dropped from a Naval vessel, or by paint overspray from the vessel, or by smoke, fumes, or chemicals from the vessel.

(3) Air or water pollution damage caused by a vessel or occurring on navigable waters. This includes any release of oil, fuel or other pollutants into the water from a vessel, regardless of subsequent clean-up efforts. Further information about pollution claims can be found in section 1113.

(4) Damage or loss of a civilian contractor's property on board a Naval vessel.

(5) Significant damage to afloat Naval property, including a vessel in dry-dock, from substandard performance by a civilian contractor.

f. Swell wash/wake damage. Civilian personal injury or property damage allegedly resulting from the wake or swell created by a Naval vessel is an admiralty incident. Property damage includes damage to other vessels, shore structures, oyster beds, or clam flats. Similarly, damage to Naval property from the wake or swell from a privately owned vessel is an admiralty incident.

g. Naval maritime target ranges. Civilian personal injury or property damage allegedly resulting from maintenance or use of a Naval maritime target range is an admiralty incident.

h. Morale, Welfare, and Recreation (MWR) and special services boats and marinas. Death, personal injury, or property damage resulting from use of MWR marinas and rental boats (including personal watercraft) is an admiralty incident and must be reported. Likewise, any damage to non-Navy owned vessels moored, anchored, or stored at MWR or special services marinas resulting from Government negligence should also be reported. This requirement is not affected by the existence of a waiver of liability or release form signed by the MWR customer as a condition for use of the property.

i. Naval aircraft and weapons. Death, personal injury, or property damage caused by Naval aircraft on or over navigable waters is an admiralty incident. Likewise, damage caused by sea launched Naval aircraft or weapons launched from Naval aircraft or a vessel, causing damage over land or sea is also an admiralty incident. Examples include minesweeping equipment cutting fishing gear, debris or ordnance falling from an aircraft and damaging a civilian boat or injuring passengers, or damage caused by ship and aircraft launched weapons (e.g., gunfire, missiles, bombs).

j. Salvage. Salvage of any Naval property by a non-federal entity from navigable waters and salvage of non-federal property by a Naval unit are admiralty incidents. Likewise, if any Navy vessel, equipment, or personnel are used in the towing, salvage, or rescue of non-federal vessels or property, it is also considered an admiralty incident and must be reported to OJAG (Code 11) who will forward the information to Counsel, Supervisor of Salvage, as appropriate.

k. Vessel seizures. A Naval unit's seizure of any civilian vessel is an admiralty incident. An example is seizing a civilian boat during a drug interdiction operation.

l. Groundings. The grounding of a Naval vessel is an admiralty incident. Damage to a Naval vessel resulting solely from the actions of Navy personnel,

without damage to non-federal property, does not normally trigger concerns of third party claims or litigation; however, damage to underwater resources, coral reefs, or non-federal property does trigger such concerns, thereby justifying the report to OJAG (Code 11). Additionally, OJAG (Code 11) can advise on liability considerations for use of commercial salvage/tow services. See chapter II in this Manual for special considerations when investigating a grounding.

m. Significant maritime incidents. Proximity of a Naval vessel to any significant maritime incident should be reported to OJAG (Code 11) because the United States, even if not directly involved, is often joined in litigation arising from these events. Examples include witnessing the loss or damage of a civilian merchant vessel, or the rescue at sea of survivors from a sunken or disabled vessel.

1104 INITIAL REPORT OF ADMIRALTY INCIDENT

a. Means of initial report. Every admiralty incident must be reported by the affected command immediately by telephone, FAX, E-Mail, or Naval message. See section 1103. This initial report is in addition to other reports required by this chapter (e.g., Admiralty Letter Report/Litigation Report), or by other authority. The initial report of an admiralty incident may be accomplished by making "NAVY JAG WASHINGTON DC" an information addressee on a message required by other directives (e.g., OPREP 3, oil spill reports, etc.).

b. Initial report. The initial report of an admiralty incident should include all information available at the time of the report. Normally, an initial report includes date, time, and place of incident, a brief description of the incident and any resulting injury or damage, and identification of the parties involved in the incident (Naval vessel, aircraft or unit, individuals, or organization).

c. Notice. Immediate notice enables an admiralty attorney to examine the admiralty claims and litigation considerations of a particular case at an early stage. Liability may not be apparent to the Naval command considering the operational, administrative, or disciplinary aspects of a case. The admiralty attorney provides advice on admiralty issues and assists in preparing the investigation considering a potential claim or civil lawsuit. Also, admiralty claims and litigation practice requires action soon after the event. Common examples include: engaging the services of an independent marine surveyor for attendance at a formal joint survey of damages, see section 1106; developing detention data on a Naval vessel to be repaired; and ensuring segregation of repair work orders and cost data for an admiralty incident from other work, not arising from the admiralty incident, accomplished during a repair period for the convenience of the DON.

1105 SUBSEQUENT INVESTIGATIVE REPORT

a. Generally. The initial report of an admiralty incident, discussed in section 1104, shall be supplemented as soon as practicable by a written investigative report. The selection of the format for the report is

ultimately within the convening authority's discretion. The convening authority shall consult with OJAG (Code 11) as soon as possible after the incident. OJAG (Code 11) will evaluate the likelihood of litigation, may consult with the Department of Justice, and advise the convening authority as to the most appropriate investigation format.

b. Admiralty Letter Report investigation. The Admiralty Letter Report (ALR) is a convenient reporting method that is less time-consuming than a command investigation. The precise form of a letter report is less important than fulfilling the requirement that the circumstances of an incident be completely and promptly documented under the protection of the attorney work-product privilege. This is accomplished by having the report done under the supervision of a Code 11 attorney (or their designee). The ALR format shall be used when litigation is possible and protection of internal information/decisions from discovery is required. The ALR shall consist, at a minimum, of a letter from the command principally involved in an admiralty incident, addressed to the "Office of the Judge Advocate General (Code 11)", with the facts of the case stated in narrative form. The ALR shall include as enclosures, unsworn summaries of witness statements (written witness statements shall not be taken, but if a statement is already in existence, it shall be preserved and forwarded with the report), copies of documents, photographs (including negatives), contracts, medical records, and other supporting information. Also, include the full name, rates/ranks, email address and billets for all: witnesses; principles in the chain-of-command (CO, XO, CMC, Department Head, Division Officer, LCPO, LPO); watch-standers; and medical response personnel as appropriate. All non-federal entities must be completely identified and copies of contracts bearing on damage should be enclosed. The report should not include opinions or recommendations and should not be endorsed by the convening authority or chain-of-command. Instead, the original report and original enclosures shall be forwarded directly (advance copy by E-Mail or FAX) to OJAG (Code 11). The investigating officer shall be appointed, in writing, by the convening authority using the sample format in Appendix A-11-a. A sample ALR is contained in Appendix A-11-b. The information contained in an ALR shall not be disseminated to any individual or organization not directly involved with the conduct of the investigation without prior authorization of OJAG (Code 11). Any unauthorized dissemination may significantly impact the litigation position of the United States.

c. Command or Safety Investigation. For some admiralty incidents, a convening authority may determine that concerns outside of litigation such as safety, operational requirements, or accountability outweigh the desire to protect the Government's interests in internal information/decisions in litigation, or that the probability of litigation is unlikely. Under these circumstances, the command investigation format discussed in Chapter II or the Mishap investigation formats are appropriate. An advance copy of any command or safety investigation involving an admiralty incident shall be forwarded to OJAG (Code 11) as soon as possible, with endorsements to follow when completed.

d. Dual-Purpose Investigation. When a convening authority is faced with an incident involving concerns of safety, operational requirements, or accountability and OJAG (Code 11) also anticipates litigation, a Dual-Purpose

investigation may be used to protect privileged information while allowing the investigation to be used for other official purposes (e.g., disciplinary action, safety). The Dual-Purpose investigation report shall adhere to the procedures set forth for an ALR whenever possible. However, the Dual-Purpose investigation report may include opinions or recommendations and may be endorsed by the convening authority or chain-of-command if appropriate, but those portions may be subject to discovery in litigation or release under the Freedom of Information Act. The initial report shall be forwarded to OJAG (Code 11) with endorsements to follow when completed. Appendix A-11-c contains a sample Dual-Purpose investigation appointing letter. Note, a mishap investigation under the safety programs cannot be combined with a dual-purpose investigation.

e. Court of Inquiry. The following additional considerations are relevant in admiralty cases involving courts of inquiry.

(1) When investigating collisions or allisions with non-federal vessels, personnel of those vessels will not be designated parties to the investigation or accorded such rights. They may, however, be invited to appear as witnesses with counsel while testifying. Such invitations are usually declined on advice of counsel. If invitees elect to appear, neither those individuals nor their counsel may be present when other witnesses are testifying.

(2) Witnesses from a non-federal vessel testifying before a Naval investigation should be furnished a copy of their testimony as a matter of written record, and the witnesses should be requested to inform the investigating officer or convening authority of any errors in the transcript. This increases the value of the record for its possible effectiveness for impeachment in later litigation. Opposing interests are not furnished a copy of the investigation report or any information on the testimony of Naval witnesses.

(3) In a court of inquiry, it usually is not advisable to subpoena witnesses from the non-federal vessel involved in a collision with a Naval vessel because the record of the Naval inquiry would then be discoverable.

(4) If submission of the investigation report will be significantly delayed, an advance copy of the transcribed testimony at the investigation should be forwarded to OJAG (Code 11).

f. Relation to damage survey. A formal joint survey of damages, described in section 1106, is not a substitute for a command's investigative report of an admiralty incident.

g. Release of investigative report. No individual or command, other than OJAG (Code 11), may release an ALR investigation or Dual-Purpose investigation report of an admiralty incident, or any portion, to any individual or organization not directly involved in the conduct of the investigation itself, involved in critical self-analysis of the incident, or involved in preparation for litigation on behalf of the Government. See SECNAVINST 5720.42 (series) and SECNAVINST 5820.8 (series). A command contemplating release of a command investigation of an admiralty incident to a potential claimant, an attorney

purporting to represent a claimant or any other private person or organization shall first consult with OJAG (Code 11), see section 1111.

1106 SURVEYS

a. Claim asserted. When a claim for damage to property arising from an admiralty incident is asserted, the party contemplating such a claim usually invites the allegedly responsible party or parties to a joint marine survey of the damage. If invited to attend a joint marine survey to be conducted by the opposing party, OJAG (Code 11) shall be consulted to determine if Navy attendance and participation is necessary or desired. Otherwise, OJAG (Code 11) will determine whether a joint marine survey is warranted and will make the necessary contractual arrangements. A survey minimizes subsequent disputes on the nature and extent of damage attributable to a particular incident, and provides a reliable estimate of the cost of repairs. If a claim is not settled administratively, the survey report can eliminate questions of proof during litigation. Failure to give opposing interests an opportunity to survey damage allegedly resulting from an admiralty incident places a heavy burden of proof on the party later seeking to establish such damage at trial. In most admiralty cases with substantial damage, whether involving potential claims by or against the United States, a joint marine survey of the damage will be desired.

b. Determination of damage. The survey is the formal, technical, joint survey held by representatives of the two (or more) parties involved. It is not an *ex parte* appraisal, as is used in the DON's internal investigation of an incident or with the disposal of worn or damaged Naval material. Nor should a joint marine survey of damage be confused with the survey conducted on vessels by representatives of marine underwriters following damage incidents. Rather, for a joint marine survey of damage, each party normally appoints its own surveyor who, with the other surveyor(s), examines the damage and attempts to reach agreement on the extent of damage from the casualty. The survey report lists items of damage and recommended repairs. When all parties agree, the surveyors sign the report to record their concurrence. Surveyors normally sign without prejudice as to liability. If there is disagreement, disputed points are specifically noted.

c. Timeliness. Surveys must be held as soon after the casualty as possible. Surveys are arranged and funded by OJAG (Code 11). The survey of a Navy vessel should occur only with the participation of a surveyor representing the Navy. Additional or substitute participation by DON personnel should be coordinated with Code 11.

d. Acceptance of survey invitation. Only OJAG (Code 11) may accept survey invitations from potential claimants, extend survey invitations to persons allegedly responsible for damaging Naval property, and request representation by a marine surveyor at the survey. If any Naval activity receives an invitation to attend a survey of damage, OJAG (Code 11) must be notified immediately.

1107 EVIDENCE PRESERVATION

a. Original documents. The Government's position may be materially prejudiced if an original document is not available at trial. No apparently relevant original document should be destroyed or discarded without the prior approval of OJAG (Code 11). Photocopies of pertinent official documents are acceptable for investigative reports under section 1105; however, original logs, rough statements, chronologies, and other documents must be segregated and safeguarded for possible future use at a trial. Because a trial may occur years after the incident, the custodian must ensure the materials are not inadvertently discarded by persons unfamiliar with the admiralty incident and the reasons for preserving the documents. If possible, all original documents and photographs (including negatives) should be labeled as originals and forwarded to OJAG (Code 11) for retention.

b. Use of documents at trial. Although originals are required at trial, the original is produced for inspection only and does not become part of the court record. The court attaches a copy to the record of trial and returns the original to OJAG (Code 11) for forwarding to the appropriate command.

c. Photographs and video. Photographs and video can be valuable enclosures to admiralty investigations, especially when taken near in time to the incident. They illustrate property damage, angle of collision, size and condition of equipment, and physical layout of a space where an injury occurs. Commands may use official photographers or other persons to take photographs. Record on the reverse side of each photograph: the hour and date it was taken; a brief description of the location or area photographed; the full name, rank or rate of the photographer; and full names and addresses of persons present when the photograph was taken. Similar information should be affixed to videotape, DVD, CD-ROM, or other media. This information is important so photographs or video can be authenticated and identified by witnesses during litigation. Photographic negatives should be segregated and safeguarded for possible future use.

d. Logs. No erasures should be made in a logbook or original navigation record. Make corrections by lining through the original so that it is still legible and inserting the correction. The person making the change should initial the original entry and correction.

e. Electronic files. All E-Mail and electronic files associated with an admiralty incident must be segregated and preserved pending guidance from the assigned admiralty attorney.

f. Physical evidence. All physical evidence (e.g., lines, equipment) must, if practical, be segregated and preserved, pending guidance from the assigned admiralty attorney.

1108 COLLISION AND ALLISION CASES - PRESERVING SHIP'S OPERATION EVIDENCE

a. Documentary evidence. Commanding officers shall ensure that all documentary evidence, including electronic data, is collected and safeguarded immediately after any collision or allision. Witnesses shall

not be asked to produce written or recorded statements, logs, or drawings. Once an investigating officer has been appointed in writing, the investigating officer may interview witnesses and produce summaries of witness statements. If existing written statements, personal logs or drawings concerning the incident are discovered, the originals shall be included as enclosures to the investigation. Relevant documents, including electronic data, must be preserved as soon as possible in their original form. Where electronic data cannot be preserved in their original form, the data should be preserved by other means, such as printing or taking photographs of a system display. The following, if maintained by the ship, shall be preserved (note that not all are relevant in every case):

(1) Charts in use (do not erase or continue to use);

(2) Electronic navigation data (such as from ECS, ECDIS, VDR, AIS, LRIT, GPS, GMDSS, NAV SSI, or VMS);

(3) Deck log;

(4) Engineering log;

(5) Bell books (bridge and engineering);

(6) Electronic engineering data;

(7) Combat Information Center (CIC)/Combat Direction Center (CDC) watch log;

(8) Electronic CIC/CDC data;

(9) Surface/Subsurface tracker log;

(10) Position log;

(11) Bearing book;

(12) Magnetic compass record;

(13) Deviation data, azimuth records and course recorder records (such as Shipboard Inertial Navigation System (SINS) or Electrostatic Gyro Navigator (ESGN));

(14) Contact Evaluation Plot (CEP) (onboard submarines);

(15) Fathometer log;

(16) Dead Reckoning Tracer (DRT) plot (annotated with the DRT operator's name, scale, and time period covered);

(17) Global Command and Control System - Maritime (GCCS-M) track data;

(18) Maneuvering board worksheets (bridge and CIC/CDC);

(19) Photographs of status boards (bridge and CIC/CDC) (do not erase or continue to use until photographed);

(20) Radiotelephone logs (such as bridge-to-bridge radiotelephone logs) and recordings (such as from an RD390);

(21) Communication and signal logs;

(22) All message traffic relating to the incident (classified and unclassified, from every net, whether transmitted or received);

(23) Barometer log and Marine Surface Weather Observations reports;

(24) Standing orders (CO's and Engineering) (with signature log);

(25) Night orders (with signature log);

(26) Ship's Standard Organization and Regulations Manual (SORM) or any other document prescribing watchstander duties and procedures;

(27) Audio or video recordings of the incident (including U.S. Coast Guard bridge-to-bridge recordings);

(28) Damage control boards (do not erase or continue to use);

(29) Damage control reports; and

(30) Training and qualification records for all Bridge, CIC/CDC, Deck, and Engineering watchstanders.

b. Safeguard records. To preserve all records of first entry, collect and safeguard rough logs, notebooks, and individual sheets of paper containing navigational or other data later recorded in a smooth log, noting who recorded the particular information.

c. Conflicts of time. Conflicts between times of entries in various logs often cause difficulty in litigation. Comparisons of the clocks in the bridge, CIC, engine room, radio room, etc., should be recorded as soon as possible after a collision or allision.

d. List of officer and enlisted watch-standers. Completely list all officer and enlisted watch-standers on the bridge (including lookouts), signal bridge, CIC, and engine room at the time of the incident, as soon as possible after the incident. The identity of any other person who was in CIC, on the bridge, or otherwise topside when a collision or allision occurred, also should be noted. This list shall contain the full name, rank/rate, email address, and watch-station of each individual.

1109 COLLISION AND ALLISION CASES -- DOCUMENTING DAMAGE AND REPAIR COSTS

a. Elements of naval damages. In almost all collisions where the other vessel is at least partially at fault, the United States will assert a claim against that vessel for the costs incurred in repairing the Naval ship. Establishing the value of the DON's damage claim is often difficult. The claim arising from a collision or allision may include the cost of:

(1) Temporary and permanent hull repairs;

(2) Dry-docking;

(3) Lost or damaged equipment, stores, provisions, fuel, and ammunition;

(4) Off-loading and reloading fuel and ammunition;

(5) Towage and pilotage;

(6) Personnel claims paid to crewmembers who suffered personal property losses due to the collision;

(7) Survey fees;

(8) Detention; and

(9) Emergency assistance by other Naval commands to the Naval vessel involved.

b. Collision repairs. Collision repair specifications should reflect the findings and recommendations in the joint survey report. If significant additional damage not covered by the original survey is discovered during repairs, OJAG (Code 11) should be notified immediately so opposing interests may be contacted for a chance to survey newly discovered damage.

c. Repair costs. The Naval Sea Systems Command directs its field activities to maintain separate and exact records of collision repair costs and to expedite the furnishing of data to judge advocates preparing damage statements. Usually, original repair specifications, job orders, time and material cards, dry-docking report, and departure report are needed for damage statements. Coordination with the repair activity is necessary. The vessel's logs must contain entries establishing the specific time the collision repairs were commenced and completed. A departure report must be checked to confirm that its data is consistent with other repair documents and that there is a proper allocation of costs between collision and non-collision items, as reflected by the job orders.

d. Non-collision work. All non-collision work must be covered by separate job orders to eliminate including non-collision work in the collision repair costs.

e. Commercial shipyard repairs. When Naval vessels will be repaired in commercial yards rather than Naval shipyards, invitations to bid are issued to commercial shipyards and the contract is awarded to the low bidder. The collision repair specifications should be based on the surveyor's findings and recommendations. The shipyard's bill or invoice and proof of DON payment shows repair costs for those items performed by the commercial shipyard. As with repairs done by a Naval shipyard, non-collision work should be covered by separate specifications, job orders, bids, and invoices.

f. Detention costs. When a commercial vessel must be withdrawn from service because of collision damage, her owner may recover the vessel's loss of earnings and reasonable expenses incurred during the repair period. This loss of earnings rule does not apply to Naval vessels since they do not carry passengers or cargo for profit.

(1) When a collision causes the unexpected loss of use of a Naval vessel, however, the Government may recover the operating and maintenance costs of the ship for the period the DON was deprived of the vessel's normal service. Detention is not legally recoverable when a vessel would have otherwise been out of service, such as for periodic overhaul or prospective inactivation. Detention includes out-of-pocket expenses for the repair period, particularly --

(a) Pay and allowances of officers and crew;

(b) Subsistence of crew;

(c) Fuel and lube oil consumed; and

(d) Supplies and stores consumed.

(2) To support a detention claim, the DON's damage statement includes documentary evidence showing the exact subsistence, wages, and other expenses of the vessel. Affidavits from the cognizant supply, disbursing, and engineering officers stating that the original ship's records (that must be preserved) disclose such expenditures will support the claim. OJAG (Code 11) will provide advice and assistance on preparing affidavits and other documentation in support of a detention claim.

g. Prompt repairs. Collision repairs to a Naval vessel should be made as expeditiously as practical, especially when a detention claim is being presented by the Government. A short repair period avoids the "skeleton crew doctrine," where the DON would recover as detention costs only the pay, allowances, and subsistence for a skeleton crew, rather than the full complement of members, when an extended repair period was involved.

1110 PERSONAL INJURY CASES

a. Generally. Any shipboard death or injury to an individual not a member of the armed forces of the United States is a reportable admiralty incident. See section 1103(a) and (d). This section applies to injuries to persons ascending or descending a brow, gangway, or accommodation ladder, or to injuries to persons on a pier or on another vessel as a result of events taking place onboard the Naval ship. Notify OJAG (Code 11) immediately of such accidents so the incident is investigated as required by sections 1103 through 1105.

b. Types of victims. Victims include individuals injured while onboard any Naval vessel, or the brow, gangway, ladder or other maritime property attached to a vessel, or a person injured on a pier or otherwise near the vessel as a result of an incident that occurs onboard a vessel. The following

classes of people may be considered victims in injury cases: ship workers, guests, dependents, ship repairmen, contractor technical representatives (tech reps), longshoremen, stevedores, maintenance and sanitation workers, harbor and river pilots, civilian mariners, and persons rescued from maritime distress.

c. Considerations in any investigation. When investigating any personal injury or death case, consider:

(1) Logs. All shipboard injuries to persons not members of ship's company should be recorded in the ship's deck log. The occurrence may be mentioned in other logs, such as the engineering log when the incident occurs in an engineering space, or in the medical log if care is rendered by the medical department. All logs which might possibly contain an entry about the incident should be inspected by the investigating officer, and photocopies of each log containing a relevant entry should be included in the investigative report. When copying a log, copy the entire day's log, not just the page containing the relevant entry. If no entries on an injury are found in any log, it may indicate the victim was not hurt seriously enough to report the injury to the officer of the day or to request immediate medical assistance. Clearly identify logs reviewed and indicate that no entry was found on the alleged occurrence.

(2) Witnesses. Clearly identify all Naval and civilian witnesses to the accident. Identify all persons in the space at the time of an accident, even if they claim not to have seen or heard anything. For Naval personnel, include the member's full name, rank/rate, and email address. For civilians, include the person's full name email address, and telephone number. If the person is a civilian shore worker, also include the individual’s badge number, employer, and shop where the person is employed. It is also useful to identify the ship's personnel normally in charge of the particular space (division officer, LPO, LCPO) so they may be contacted to comment on the space's cleanliness, upkeep, and general repair.

(3) Witness statements. The investigating officer should prepare a summary of the interview with the witness, rather than having the witness write, sign, or adopt a statement. Typically, only military personnel and U.S. employees are interviewed by the investigating officer. The investigating officer must coordinate with the supervisory attorney (normally assigned from Code 11) prior to contacting the victim in a personal injury incident or contacting any non-federal Government civilian witness.

(4) Inspection of the accident site. A claim or suit by an injured shore worker or visitor is based on a contention that the ship was negligently maintained or operated. A post-accident inspection can be corroborated by evidence of other inspections (zone, safety, or health and comfort) closely preceding the incident. Evidence that qualified personnel (DCPO, LPO, division officer, safety officer, or investigating officer) carefully inspected a site immediately following an accident and found the area free from defects is especially important when there is no eyewitness to the injury. The post-accident inspection should focus on conditions likely to have contributed to the particular incident. For example, if the victim was injured in a fall, the inspection should include the quality of the footing

(Was the deck or ladder wet or greasy? Were the ladder treads worn?), lighting in the space, and existence of structural conditions and protuberances that might cause an individual to fall. Similarly, if the injury resulted from the failure or giving-way of any of the vessel's gear or equipment, a careful examination to discover the cause of the failure should be made, and, if feasible, the gear should be carefully preserved. Whenever possible, a post-accident inspection should include photographs of the accident location (or gear involved) before any changes are made after the incident. See section 1107c. Furthermore, if a defective condition is uncovered, the inspector should attempt to determine how long the condition has been in existence, who (individual and employer) created the condition, and, if created by someone other than a U.S. employee, whether any crewmembers learned of the defective condition prior to the accident. Finally, Planned Maintenance System (PMS) records for a space or piece of equipment should be consulted and retained when a defective condition is found.

(5) Medical records. Include copies of all Navy medical records of treatment by Naval personnel in an investigative report of a death or injury. The investigating officer need not obtain medical records from a civilian hospital, physician, or the injured party. The investigating officer should determine the general nature of the victim's injuries from reports and records, if available, to the DON.

d. Shore worker injuries. For a shore worker injury investigation, an accident report and/or an employer's report of injury may be obtained from the injured worker's employer, the shipyard safety office, or the cognizant office of the Supervisor of Shipbuilding, Conversion and Repair, USN (SUPSHIP).

e. General visiting and ship tours. In addition to paragraph c of this section, investigative reports of an injury occurring during general visiting or tours of the ship should comment on warnings given to visitors (conspicuous signs, printed warnings on brochures provided, and verbal warnings by a tour guide), and presence of crewmembers on the tour route to assist visitors and correct any hazardous conditions noted.

1111 CORRESPONDENCE WITH PRIVATE PARTIES

a. Forward to OJAG (Code 11). All correspondence received by a command on an admiralty incident, especially that from a claimant or an attorney purporting to represent a claimant, shall be forwarded expeditiously to OJAG (Code 11) for reply. Under SECNAVINST 5820.8 (series) and SECNAVINST 5720.42 (series), OJAG (Code 11) is responsible for processing requests for DON records, for access to DON property and information, or for interviews of Naval personnel in admiralty matters. These requests often precede claims or lawsuits against the United States.

b. Naval personnel. All Naval personnel contacted by a claimant or by a claimant's attorney on an admiralty incident are encouraged not to give a statement without first reporting the contact to the commanding officer, who will inform OJAG (Code 11).

c. Admission of liability. Naval personnel shall not advise a claimant to forward a repair bill so the DON can "take care of it." This advice may mislead the claimant and serve as a later charge that the DON admitted liability. Similarly, avoid any informal, off the record assurances of probable recognition of a claim.

1112 COAST GUARD AND NATIONAL TRANSPORTATION SAFETY BOARD INVESTIGATIONS

a. Coast Guard investigations of marine casualties.

(1) The Coast Guard routinely receives reports of and investigates marine casualties or accidents involving privately owned vessels. "Marine casualty or accident" includes collisions, strandings, groundings, founderings, heavy-weather damage, fires, explosions, failure of vessel gear and equipment, and any other damage that might affect the seaworthiness of the vessel. Public vessels of the United States and all Naval vessels are exempt from investigation even if involved in the incident under investigation. Naval personnel are not required to report a marine casualty involving a public vessel to the Coast Guard, complete any Coast Guard form or other document describing the maritime incident, or participate in a Coast Guard investigation. See 46 C.F.R. Part 4. The incident must be reported to OJAG (Code 11) under sections 1103 and 1104.

(2) The DON may assist the Coast Guard with its investigation by sharing information from the DON's own investigation and making Naval personnel available as witnesses, but the DON will not prejudice its claims or litigation. Information disclosed to the Coast Guard normally becomes part of a public record of the incident and is available to interests opposed to the United States. OJAG (Code 11) decides whether to disclose a Naval investigation to the Coast Guard and whether Naval personnel will be made available to testify at a Coast Guard investigative hearing. Requests for such information, reports, or witnesses should be forwarded to OJAG (Code 11).

(3) OJAG (Code 11) may provide a copy of the DON's investigative report of an admiralty incident to the Coast Guard investigator when issues of civil liability are not involved or have been settled. In other situations, OJAG (Code 11) may give the Coast Guard a copy of DON'S report only if it is used exclusively for Coast Guard purposes and not made part of the public record. This practice assists the Coast Guard's understanding of the incident, supports DON's policy of interagency cooperation, and preserves the Government's position on claims or litigation.

b. National Transportation Safety Board (NTSB) investigations of marine casualties.

(1) The NTSB, an independent Government agency, promotes transportation safety by conducting independent investigations of accidents involving Government regulated transportation: air, highway, rail, pipeline, and major maritime casualties. The NTSB may conduct an investigation of any casualty involving public and nonpublic vessels. 49 C.F.R. § 850.15(b) directs NTSB to conduct an investigation when: the casualty involves a Coast Guard and a nonpublic vessel, and at least one fatality or $75,000 in

property damage; the Commandant of the Coast Guard and NTSB agree that NTSB should investigate a casualty involving a public (e.g., a U.S. Navy) vessel and a nonpublic vessel, and involving at least one fatality or $75,000 in property damage; or the casualty involves "significant safety issues relating to Coast Guard safety functions." See 49 U.S.C. §§ 1101 - 1155 and 49 C.F.R. parts 845 and 850.

(2) The NTSB investigation does not have priority over other official inquiries into major marine casualties, such as the DON's JAGMAN investigation. The NTSB conducts a simultaneous but separate investigation from the JAGMAN investigation. Usually NTSB announces whether it will investigate within one day after the incident occurs. An NTSB official in Washington D.C. notifies the type commander of the Naval vessel involved by telephone; although, the group or squadron commander may receive initial notification. Upon notice of NTSB involvement, notify OJAG (Code 11) by telephone of the initial notice from NTSB and any requests from NTSB. If available, OJAG (Code 11) may assign an admiralty attorney to represent the interests of the Navy in potential litigation as counsel at all NTSB hearings involving admiralty incidents. A judge advocate shall be assigned by the nearest Region Legal Service Office (RLSO), or cognizant Region Commander or Type Commander to assist the admiralty attorney, or, in the absence of an admiralty attorney, shall consult with OJAG (Code 11) and represent the Navy's interests in potential litigation before the NTSB Board. Also, a DON liaison officer must be appointed as POC for NTSB and as a Navy representative at any NTSB hearings. The POC should be of the rank of O-4 or above, technically competent in shipboard navigation and engineering skills, and not a crewmember of the vessel involved. The command should appoint an investigating officer for an Admiralty Letter Report or dual-purpose investigation (ALR/dual-purpose).

(3) Ensure original documents are preserved and witnesses (after any exercise of their right to counsel) are made available to the DON's investigating officer. Do not have any Government witnesses make written statements, create logs, or draw pictures or diagrams relating to the incident unless directed by the investigating officer after consultation with OJAG (Code 11). However, the investigating officer shall preserve all written statements, logs, diagrams, or other documents related to the incident then in existence. OJAG (Code 11) shall approve all requests for production of witnesses, documents, visits, expert analysis, or testimony. Release of information without approval is not authorized and may jeopardize Government interests in litigation arising from the incident. Availability of Government witnesses and evidence shall be coordinated by the DON liaison officer point of contact (POC) and the investigating officer with approval of OJAG (Code 11). NTSB has subpoena power, enforceable through the federal courts, for the production of persons and documents. The DON's policy is to cooperate with the NTSB's investigation as much as possible, while safeguarding the rights of individuals involved in the incident, protecting the Navy's attorney work-product and critical self-analysis privileges, and preventing unnecessary disruption of the JAGMAN investigation. The POC shall consult with the appointed attorneys prior to making any statements or other representations on behalf of the Navy, questioning any witnesses, or otherwise providing information, documents, explanations, or advice of any kind. Prior to any NTSB hearings or visits, the OJAG (Code 11) admiralty attorney or assigned

judge advocate shall brief the POC on the contents of SECNAVINST 5820.8 (series) and the limits of the POC's authority to provide information or assistance to the NTSB or any other entity outside the DON. If questions arise that cannot be resolved by the appointed attorneys, the POC shall immediately consult with OJAG (Code 11) for a determination on the issue.

(4) NTSB may request to inspect documents and interview DON crewmembers as soon as the vessel involved arrives at the pier. The POC should insist that the ALR/dual-purpose and NTSB investigations proceed in an orderly fashion. The following is suggested as a reasonable sequence of events:

(a) When the ship returns to port, the investigating officer for the ALR/dual-purpose investigation should have been assigned. If not transported to the ship while at sea, the investigating officer should immediately collect and review charts, logs, and other documents aboard the ship, and may commence interviews of crewmembers.

(b) Within a few days of the ship's return, and under arrangements made by the POC, the NTSB (generally three to four officials) arrives on board and is provided with copies of unclassified relevant documents. Only after the investigating officer has interviewed witnesses and OJAG (Code 11) has consulted with the DOJ may NTSB officials conduct preliminary crewmember interviews or formal questioning of Government witnesses at a hearing, but sworn statements should not be permitted. All Navy witnesses to be interviewed by the board should be advised by the POC or the assigned judge advocate that during any interview with NTSB officials (regardless of the form), that they have the right to be accompanied, represented, or advised by an attorney or non-attorney representative. All Navy witnesses may seek advice from a judge advocate assigned to a defense command, but may not be represented by that counsel during an NTSB hearing or questioning unless counsel has been specifically detailed to do so. Document review, preliminary interviews, and hearings may take from two days to two weeks depending on the magnitude of the incident.

(c) The ALR or dual-purpose investigation is completed as soon as possible. The convening authority forwards an advance copy to OJAG (Code 11) under section 1105.

(d) The judge advocate that attended the NTSB hearing should obtain a copy of the verbatim transcript and summary report of the hearing from the POC and forward them to OJAG (Code 11).

1113 MARITIME OIL/HAZARDOUS SUBSTANCE SPILLS

a. OJAG (Code 11) strongly encourages dissemination of information necessary for effective cleanup to authorities outside DOD while spill response and cleanup is underway. Requirements for timely and accurate reporting of oil and hazardous waste spills to federal, state, and local agencies are set forth in OPNAVINST 5090.1 (series) and MCO P5090.2 (series). The Federal On-Scene Coordinator should be given all available information to assist with a rapid and complete cleanup. Similarly, state representatives

have a strong interest in ensuring a proper response to the spill. Priority is given to halting the spill and cleaning it up. All unclassified information necessary for that purpose should be shared.

b. Shortly after cleanup is complete, a Naval activity may, consistent with response reports, confirm information which was or might have been released incident to cleanup concerning whether a spill has occurred, the specific source of the spill, the type of substance spilled, when the spill occurred, where the spill occurred, the preliminary estimate of how much oil was spilled, a description of the Navy's response efforts, and estimates of amounts of oil recovered. Information should be coordinated with cognizant Navy regional environmental counsel and OJAG (Code 11).

c. After the response is complete, however, the command should have due concern for the effective defense of the United States in claims and litigation resulting from the incident. OJAG (Code 11) adjudicates claims under admiralty tort law for property damage and natural resource damage stemming from Navy oil spills. In this regard, it is of utmost importance that only verified and accurate information is released to state or private authorities. Otherwise, multiple inconsistent statements may jeopardize the Government's interests in litigation. All statements made after the response is complete should be made in a manner that will not jeopardize the interests of the United States.

d. Upon report of a spill, Code 11 may request that local commands prepare an ALR or dual-purpose investigation See section 1105.

e. After an official report is forwarded to OJAG (Code 11), a command may be requested to release additional information to state authorities concerning the cause of the spill. To ensure the accuracy of information, causal and other information relating to an oil spill may be released only after approval by OJAG (Code 11) in light of the Government's interests in potential litigation. Such disclosures, if approved, should be identified or marked as "Post-Accident Remedial Measure Information." Requests for witness interviews shall be in accordance with the provisions and limitations of SECNAVINST 5820.8 (series).

1114 DISTURBANCE OF NAVY SHIPWRECKS, AIRCRAFT WRECKS, AND OTHER SUBMERGED PROPERTY

a. The attempted salvage, removal, looting, destruction, or desecration of Navy shipwrecks, aircraft wrecks, or other submerged property is an admiralty incident and should be reported to OJAG (Code 11).

b. DON ship and aircraft wrecks remain the property of the United States, without regard to geographic location or age, and are not considered to be abandoned unless a formal determination to abandon the wreck is made pursuant to law.

PART C -- ADMIRALTY CLAIMS

1115 ADMINISTRATION OF DEFENSIVE ADMIRALTY CLAIMS

a. Generally. It is DON policy to settle admiralty claims fairly and promptly when legal liability exists. Administrative settlement of admiralty claims eliminates the expense and delay of litigation while obtaining a result advantageous to the financial interests of the United States. Litigation is likely when settlement cannot be arranged.

b. Assistance to claimants. Refer claimants or potential claimants inquiring about rights or procedures to OJAG (Code 11). The cognizant admiralty attorney will advise the individual how to present a claim, the address the notice of claim should be mailed to, and what, if any, evidence is required. An officer or employee of the Government cannot act as agent or attorney for another in the prosecution of any claim against the United States. See 18 U.S.C. § 205. See chapter VII of this Manual for requests for legal assistance with claims against the United States.

1116 ADJUDICATING ADMIRALTY CASES AS FOREIGN CLAIMS

a. Foreign Claims Act. Admiralty claims arising in foreign countries may be adjudicated under the Foreign Claims Act (10 U.S.C. § 2734). Such claims are not handled as foreign claims without the prior authorization of OJAG (Code 11).

b. Copy to OJAG (Code 11). If permission is granted for an admiralty claim to be adjudicated under foreign claims regulations, OJAG (Code 11) shall be provided a copy of the Foreign Claims Commission proceedings and, if an award is made to claimant, a copy of the executed release.

1117 AUTHORITY FOR AFFIRMATIVE CLAIMS SETTLEMENT

a. Generally. The United States may pursue affirmative admiralty claims for most admiralty incidents and affirmative salvage claims. See 10 U.S.C. §§ 7363 and 7623, and 32 C.F.R. part 752.

b. SECNAV authority. The Secretary of the Navy has authority to settle, compromise, and receive payment for claims by the United States for damage to any property under the jurisdiction of the DON, if the damage was caused by a vessel or floating object, or is otherwise within admiralty jurisdiction. See 10 U.S.C. § 7623. The Secretary also has settlement authority for damage to property that the DON is responsible for, allowing subrogation claims accruing in favor of the United States. For example, when the DON leases a privately owned pier which is damaged by a commercial vessel, and the lease obligates the DON to pay the pier owner for the damage, or when Naval property is damaged while leased to private interests and the DON assumes the risk of loss or damage, the DON may recover from the tortfeasor.

1118 SALVAGE

Salvage claims may be filed against the DON for compensation for towage and salvage services, including contract salvage, rendered to a Naval vessel or other property under the DON's jurisdiction. The United States may file claims for salvage services rendered by Naval vessels or units. Regulations on these claims are published at 32 C.F.R. part 752. Commanding officers of vessels or installations, or U.S. Government or contract harbor pilots, have no authority to waive salvage fees or claims on behalf of the Navy.

1119 FEDERAL INTER-GOVERNMENTAL ADMIRALTY INCIDENTS

a. Waiver doctrine. Potential claims for collisions between vessels and for other admiralty incidents involving property damage, when the owners involved are the DON and another Government agency, are subject to waiver. The waiver doctrine is based upon Comptroller General decisions that appropriations of one Government department are not available to pay the claims of another.

b. Report of incident. When it appears only Federal Government interests are involved, a report of the admiralty incident must be made under sections 1103 and 1104; however, an investigation of liability and survey of damage are not required. Upon receiving the initial report of the incident, OJAG (Code 11) confirms the status of the vessels or property involved by correspondence with the other Government agency, and the waiver is made a matter of record. It is important to avoid unnecessary labor and expenditures when the claim is subject to waiver. If in doubt on the status of the other vessel or property, request advice by rapid means from OJAG (Code 11).

1120 FOREIGN GOVERNMENT CLAIMS

a. Report to OJAG (Code 11). Admiralty incidents involving Naval vessels or property, and a vessel or property owned by a foreign government, must be reported to OJAG (Code 11) under sections 1103 and 1104. Action on such claims may be affected by treaties, international law, and federal statutes. For example, the Foreign Sovereign Immunities Act recognizes a foreign nation's immunity for sovereign or public acts of that nation in U.S. territory and limits immunity for commercial or personal acts. See 28 U.S.C. §§ 1602-1611.

b. Jurisdictional process. Under customary international law, a nation's public war vessels are not subject to jurisdictional process in any other nation; all Naval vessels (including MSC vessels) are immune from arrest. If an attempt is made to arrest a Naval vessel in a foreign country, include NAVY JAG WASHINGTON DC as an information addressee in the message report of the arrest attempt. If requested, OJAG (Code 11) will then assist DOJ and Department of State to address the issue.

c. Immunity. Government-owned merchant ships have limited immunity from jurisdictional process of a foreign state. For example, a foreign government-owned vessel is exempt from U.S. jurisdiction if devoted to public use or

government operations; however, the immunity of foreign government-owned merchant vessels in competitive commercial transactions may be restricted.

d. Waiver agreements. The United States has waiver agreements with the British and Canadian governments, so certain maritime claims between the United States and Great Britain or Canada, arising out of the operation of public vessels of these respective governments, are waived. See Maritime Transportation and Litigation Agreement with Great Britain, 4 December 1942, 56 Stat. 1780, E.A.S. 282; and Waiver of Claims Involving Government Ships Agreement with Canada, November 15, 1946, 61 Stat. 2520, T.I.A.S. 1582. These admiralty incidents do not require the usual investigative report or survey for claims purposes.

e. Status of Forces Agreements. Admiralty claims are also affected by Status of Forces Agreements. Under Article VIII of the NATO Status of Forces Agreement, an inter-governmental admiralty claim for damage to property owned and used by the armed forces of one contracting party, caused by a vessel of another contracting party, is waived if either the damaging vessel or the damaged property was used in the operation of the North Atlantic Treaty. Similarly, under Article XVIII of the Status of Forces Agreement with Japan, the United States and Japan mutually waive claims for property damage caused by members of their defense forces if the damaging instrumentality or the damaged property was being used for official purposes. Similar provisions may be included in Status of Forces Agreements and Visiting Forces Agreements with other countries.

SAMPLE ADMIRALTY LETTER REPORT APPOINTING LETTER

5800
Ser
[Date]

From: Commanding Officer, USS _____
To: LT _____

Subj: ADMIRALTY LETTER REPORT INVESTIGATION OF _____
INVOLVING _____ ON _____

Ref: (a) JAGMAN, Chapter XI

1. Per reference (a), you are hereby appointed to investigate the circumstances surrounding _____. During the investigation you will be under the direction and supervision of _____, JAGC, USN, Admiralty Attorney, 202-685-5040 (DSN: 325-5040). Consult with _____ before beginning your inquiry or collecting any evidence. If you have not already done so, you should read reference (a) for additional guidance.

2. This investigation is being convened and your report is being prepared in contemplation of litigation and for the express purpose of assisting attorneys representing interests of the United States in this matter. As such, it is privileged and should be discussed only with personnel who have an official need to know of its progress or results. If you have any doubt about the propriety of discussing the investigation with any particular individual, then you should seek guidance from _____ before doing so.

3. Investigate all facts and circumstances surrounding the incident, including the cause, resulting injury, and any fault, neglect, or responsibility therefore. Report your findings by letter format to _____ by _____ unless an extension of time is granted. Do not express any opinions or recommendations unless _____ directs you to do so. Label your report "FOR OFFICIAL USE ONLY: ATTORNEY WORK PRODUCT" and take appropriate measures to safeguard it.

X. X. XXXX

SAMPLE ADMIRALTY LETTER REPORT

FOR OFFICIAL USE ONLY: LITIGATION/ATTORNEY WORK PRODUCT

5880
[Date]

From: LT _____, USN, ALR Investigating Officer
To: Office of the Judge Advocate General (Code 11)

Subj: ADMIRALTY LETTER REPORT OF _____ INVOLVING _____ ON _____

Ref: (a) Appointing Letter of ____
(b) JAGMAN, Chapter XI

Encl: (1) [See sections 1107-10]_____

1. Pursuant to references (a)-(b), the following information is provided. This is a detailed factual internal report of inquiry conducted after the occurrence of the subject event and under the direction and supervision of a Navy Admiralty Attorney and _____, JAGC, USN, Command Judge Advocate, ___(command)___. This report is prepared in anticipation of litigation and for the express purpose of adequately preparing and assisting attorneys representing the interests of the Navy and the United States in this matter. This investigation was requested based upon an independent determination by the Navy Admiralty Counsel that a report is necessary to properly represent the Navy and the United States in litigation arising from this incident. As this report may only be released to those Department of Navy or Department of Justice personnel with a demonstrated official need to know its contents, it was not and shall not be disclosed to anyone without the requisite official need to know. Incident to the subject investigation and preparation of the report thereof, the Department of the Navy has relied on the protection afforded by the attorney-work product privilege.

2. The basic facts are as follows: [The form of the Admiralty Letter Report is not significant; that it includes all of the information necessary to prepare and resolve the case is important. JAGMAN Chapter XI is generally applicable and paragraphs 1107 through 1110 provide helpful evidentiary requirements in various types of cases. Do not include opinions or recommendations.]

3. [Written summaries of witness interviews conducted at the request of the Admiralty Counsel are strongly preferred to statements written, adopted or signed by witnesses because interview summaries may be withheld during litigation discovery. If witnesses prepared statements prior to appointment of this inquiry, do not destroy them; append them as report enclosures.]

[Statement summary format:
LAST, FIRST M.
DUTY STATION:
PHONE:
EMAIL:

Subj: ADMIRALTY LETTER REPORT OF _____ INVOLVING _____
ON _____

Summarized content of statement.]

4. The investigating officer in this matter is [name and rank]; and may be contacted at [telephone number] and/or by email at [email address].

X. X. XXXXX
LT, USN

[Do not send the report to any other addee unless specifically authorized by Admiralty Counsel]

SAMPLE DUAL PURPOSE LITIGATION REPORT APPOINTING LETTER

5880
Ser
[Date]

From: Commanding Officer, USS _____
To: LT _____, USN

Subj: DUAL PURPOSE LITIGATION REPORT INVESTIGATION OF _____ INVOLVING _____ AND _____ ON _____

Ref: (a) JAGMAN, Ch. II and XI

1. Per reference (a), you are hereby appointed to investigate the circumstances surrounding _____. During the investigation you will be under the direction and supervision of _____, JAGC, USN, (phone), and _____, JAGC, USN, Admiralty Attorney, 202-685-5040 (DSN: 325-5040). Please consult these attorneys before beginning your inquiry or collecting any evidence. If you have not already done so, you should read reference (a) for additional guidance.

2. This Dual-Purpose investigation is being conducted, and report of investigation prepared, in contemplation of litigation. The purpose of this internal report is to prepare attorneys to represent the legal interests of the Department of the Navy (DON) and the United States in litigation, and to candidly and forthrightly evaluate and improve, if necessary, Navy procedures involved in this incident. This report is predicated on the forthright honesty of DON personnel to candidly self-evaluate incidents to prevent recurrence of similar incidents and to further the public interest and safety. Accordingly, this report may only be released to those DON or Department of Justice (DOJ) personnel with a demonstrated official need to know its contents. Releasing this report to those without an official need to know could hamper the honesty and candor of those who contributed to this investigation or who may contribute to future investigations. This is a report of an internal investigation completed under the supervision of counsel. Incident to the subject investigation and preparation of the report thereof, the DON has relied on the protections afforded by the attorney-work product and critical self-analysis privileges. This investigation is privileged and should be discussed only with personnel who have an official need to know of its progress or results. If you have any doubt about the propriety of discussing the investigation with any particular individual, then you should seek guidance from counsel before doing so.

3. During the course of your investigation you are directed to refrain from taking written or recorded statements from any witness. Instead, type summaries of witness interviews. However, you shall collect and include any statements already in existence. Also include all original charts, logs, photographs, video, e-mail and other documentary or electronic evidence. Label items as discussed in reference (a).

4. Investigate all facts and circumstances surrounding the incident, including the cause, resulting injury, and any fault, neglect, or

responsibility therefore. You are also directed to develop opinions and recommendations that should focus on the accountability, safety and training issues involved to prevent recurrence and further the public interest in safety. Label your report "FOR OFFICIAL USE ONLY: LITIGATION/ATTORNEY WORK PRODUCT" on each page, and take appropriate measures to safeguard it.

5. Include the following language in the preliminary statement of your report: "This Dual-Purpose investigation was conducted, and a report of investigation prepared, in contemplation of litigation. The purpose of this internal report is to prepare attorneys to represent the legal interests of the Department of the Navy (DON) and the United States in litigation and to candidly and forthrightly evaluate and improve, if necessary, Navy procedures involved in this incident. This report is predicated on the forthright honesty of DON personnel to candidly self-evaluate incidents to prevent recurrence of similar incidents and to further the public interest and safety. Accordingly, this report may only be released to those DON or Department of Justice (DOJ) personnel with a demonstrated official need to know its contents. Releasing this report to those without an official need to know could hamper the honesty and candor of those who contributed to this investigation or who may contribute to future investigations. This is a report of an internal investigation completed under the supervision of the Admiralty Counsel of the Navy and _____, JAGC, USN, a judge advocate. Incident to the subject investigation and preparation of the report thereof, the DON has relied on the protections afforded by the attorney-work product and critical self-analysis privileges. This investigation is privileged and should be discussed only with personnel who have an official need to know of its progress or results."

6. Report your findings of fact, opinions, and recommendations to _____ by _____ unless an extension of time is granted.

X. X. XXXXX

SAMPLE DUAL-PURPOSE LITIGATION REPORT

FOR OFFICIAL USE ONLY: LITIGATION/ATTORNEY WORK PRODUCT

5880
[Date]

From: LT _____, USN, Investigating Officer
To: Commanding Officer, USS

Subj: DUAL PURPOSE LITIGATION REPORT INVESTIGATION OF _____
INVOLVING _____ AND _____ ON _____

Ref: (a) Appointing Letter of ____
(b) JAGMAN

Encl: (1) _____
(2) _____

1. This Dual-Purpose investigation was conducted, and a report of investigation prepared, in contemplation of litigation. The purpose of this internal report is to prepare attorneys to represent the legal interests of the Department of the Navy (DON) and the United States in litigation and to candidly and forthrightly evaluate and improve, if necessary, Navy procedures involved in this incident. This report is predicated on the forthright honesty of DON personnel to candidly self-evaluate incidents to prevent recurrence of similar incidents and to further the public interest and safety. Accordingly, this report may only be released to those DON or Department of Justice (DOJ) personnel with a demonstrated official need to know its contents. Releasing this report to those without an official need to know could hamper the honesty and candor of those who contributed to this investigation or who may contribute to future investigations. This is a report of an internal investigation completed under the supervision of the Admiralty Counsel of the Navy and _____, JAGC, USN, a judge advocate. Incident to the subject investigation and preparation of the report thereof, the DON has relied on the protections afforded by the attorney work product and critical self-analysis privileges. This investigation is privileged and should be discussed only with personnel who have an official need to know of its progress or results.

2. [The form of the DP Investigation Report can be the same as a JAGMAN Chapter 2 investigation, but need not be. No particular format is required from the perspective of admiralty claims adjudication. If the appointing command would prefer to use the JAGMAN Chapter 2 format, then that format is certainly acceptable. It is not, however, required for the admiralty claims process.]

3. [Written summaries of witness interviews conducted at the request of the Admiralty Counsel are strongly preferred to statements written, adopted or signed by witnesses because interview summaries may be withheld during litigation discovery. If witnesses prepared statements prior to appointment of this inquiry, do not destroy them; append them as report enclosures. If the DP Investigation report is in the form of a JAGMAN, Chapter 2

Subj: DUAL-PURPOSE LITIGATION REPORT INVESTIGATION OF
THE _____INVOLVING USS ___AND _____ ON [Date]

investigation, please include your interview summaries as enclosures. If it is not in the Chapter 2 format, the summaries may be in the body of the report or attached as enclosures, whichever the investigator prefers. Regardless of format, please include full names and current command contact information for the witness.]

X. X. XXXXX
LT, USN

Copy to:
OJAG (Code 11) (w/orig encls)
[original documents enclosed with the report should be sent to Code 11]

[Note: if the CO formally endorses the investigation or takes any action, he shall send a copy of his action to Code 11 as well; any other commands that endorse this report shall send a copy of their endorsement to Code 11.]

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JAGINST 5800.7F MAJOR CHANGES

- **Section 0105(b)(4).** Revised to explicitly indicate that the public interest warrants disclosure of accountability actions taken in cases of misconduct involving flag and general officers and SES personnel in order to retain the public's confidence and trust. Further, misconduct involving commanding officers, executive officers, officers-in-charge, senior enlisted advisors and other personnel of lower rank or grade may also warrant release.
- **Section 0111(g).** Adds a paragraph on the significance of receiving no punishment at NJP, which is the same as if the charge were dismissed at the hearing. In addition, the section explicitly permits NJP for the same offense if no punishment was imposed at a prior proceeding or the charges were dismissed.
- **Section 0114a.** Section breaks out Secretarial letters of censure from its current section in punitive censure because the case law (Miller v. Lehman, 801 F.2d 492 (D.C. Cir. 1986) indicates such letters are not the same as punitive letters.
- **Section 115(f).** Revised to explicitly indicate that the public interest warrants disclosure of NJP results in cases of misconduct involving flag and general officers and SES personnel in order to retain the public's confidence and trust. Further, misconduct involving commanding officers, executive officers, officers-in-charge, senior enlisted advisors and other personnel of lower rank or grade may also warrant release.
- **Section 0119(c).** Section adds requirement for report of enlisted misconduct for E-6 through E-9 consistent with MILPERSMAN 1616-040.
- **Section 0126(j).** Authorizes National Security Case Disposition Authority to enter into pretrial agreements in national security cases.
- **Section 0137(b).** Adds an explicit requirement for convening authorities to consider input from victims before acting on a pretrial agreement in accordance with VWAP.
- **Section 0141a.** New section added with guidance to minimize the use of Personally Identifiable Information (PII) in records of trial.
- **Section 0142(g).** Adds language to permit release of information that a suspect is under investigation or the accused is pending charges to other governmental authorities if required to alert them to an issue that is important for

their duties and for which they would be otherwise unaware of.

- **Section 0150(e).** Adds detailed requirements to safeguard images or material of child pornography that are contained in records of trial.
- **Section 0159(b).** Explicitly recognizes SECNAV's existing authority to suspend or remit a sentence of confinement for life without eligibility for parole only after service of 20 years of confinement.
- **Section 0163a.** New section adds procedures for SECNAV to exercise his authority, pursuant to Article 74(b), UCMJ, to substitute an administrative form of discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial.
- **Section 0204(c)(1), Appendix A-2-l.** Deletes references to dual-purpose investigation.
- **Section 0209(f), 0211(j).** Allows the Convening Authority to explicitly state in his endorsement that non-punitive letters of caution were issued (but it still prohibits inclusion of the actual letter).
- **A-3-a.** Structures the complainant's letter so that it is clear what are the alleged wrongs are and what is the requested relief for each wrong.
- **A-3-e.** Modifies the GCMCA's response to the complainant so that it addresses each alleged wrong individually (instead of as a group).
- **A-3-f.** Modifies the GCMCA's response to SecNav such that it simply forwards the response that has been sent to the complainant (instead of requiring the GCMCA to provide a separate rationale for his decision).
- **Section 0402.** New section providing a definition of "Proper Claimants." Includes any individual (whether civilian or military), a business, charity, or a state or local government that lawfully owns or possesses property.
- **Section 0408.** New section on "Assessment of Pecuniary Liability." Specifically, provides that a commanding officer will order that the charged amount be collected from the member's pay as provided in the DoD Financial Management Regulation and then paid to the claimant. Further, the amount charged in any single month shall not exceed one-half of basic pay, and the action of the commanding officer in ordering the assessment shall be conclusive on any disbursing officer for payment to the claimant of the damages assessed, approved, charged, and collected.

SUMMARY OF JAGINST 5800.7F CHANGES

- **Chapter V, Release of Government Information, has been deleted.** The chapter was deleted because it did not provide directive guidance, but instead was redundant with source instructions: SECNAVINST 5720.42 (series), SECNAVINST 5211.5 (series), and SECNAVINST 5820.8 (series), as appropriate.
- **Chapter V is now the Environmental Protection and Management (old Chapter XIII).**
- **Section 0506.** Adds detailed paragraphs on naval commands' actions to preserve evidence during litigation holds and discovery.
- **Sections 0507-0510.** Amplifies basic information about environmental laws that pertain to the Department of the Navy.
- **Section 0616(b).** Relevant portions of former sections 0618-0621 now combined into Section 0616(b); otherwise they have been deleted.
- **Section 0623.** Clarifies that the section provides the process to obtain approval for active duty judge advocates in their official capacity to represent a client in civilian proceedings; requests to represent outside official duty are a separate matter and are addressed in JAGINST 5803.1 (series), Professional Conduct of Attorneys Practicing under the Cognizance and Supervision of the Judge Advocate General.
- **Section 0628.** Revises the language regarding a military spouse's establishment of residency for tax purposes. Subsection (b)(5) adds language to provide more detailed information regarding dependents and military spouse's residency for State tax residency purposes.
- **A-6-b.** Revises the Delivery Agreement to provide an "appropriate military authority" as the person authorized to designate the place where the person will be returned (if not to their command).
- **Section 0707.** Updates and prioritizes provision of legal assistance services via Tiers and specifically addresses provision of services for crime victims in accordance with National Defense Authorization Act for Fiscal Year 2012, P.L. Law 112-81 (NDAA FY12), section 581. Adds a requirement of NLSC or CMC (JA) approval for provision of any additional services not cited in the Tiers.
- **Section 0712.** Deletes the section on immigration as this was the only substantive matter detailed in JAGMAN Chapter VII.

SUMMARY OF JAGINST 5800.7F CHANGES

- **Sections 0804-0805.** Updates contact information to obtain claims forms and to ask questions; also amplifies information about Tort Claims Unit.
- **Section 0808.** Updates list of countries for which Navy has single-service claims responsibility.
- **Section 0809.** Adds details on International Agreement Claims Act.
- **Section 0815(e).** Provides details on how to request, via OJAG Code 15, the assistance of another service's judge advocate for Foreign Claims Commission.
- **Section 0902(d)(1)(2)(i).** Adds authority for all legalmen to act as notaries (currently limited to E-7 and above, all independent duty legalmen, and all legalmen assigned to legal assistance offices or SJAs providing legal assistance), provided they complete notary training and are registered with Code 16 (new requirements).
- **Section 0906(b)(2).** Allows Notary to establish the identity of affiants completing sworn documents (affidavits, sworn statements, depositions) via personal knowledge in "exigent circumstances," in addition to verification by ID card in normal circumstances.
- **Section 0906(c).** Notaries may certify documents as true and accurate copies of original documents that are created or maintained by the command (vice the "office").
- **Section 0906(i).** Adds new requirement that Notaries be provided a valid ID Card containing a signature (State Drivers License, State ID, Passport) in normal circumstances when witnessing or attesting to the "signature" of the affiant.
- **Section 0907.** Adds requirements for additional information to be contained in the notary log.
- **Sections 0908-0910.** Moves text from 0908 and 0909 into earlier in the chapter; deletes 0910 (section on state notarial procedures and laws) and instead adds clear language requiring attorney to independently verify.
- **Section 1003, 1005.** Amplifies basic information about international agreements and asylum/temporary refuge.
- **Chapter XI, Customs Requirements, has been deleted.** The chapter was deleted because it did not provide directive guidance, but instead simplified source instructions. Instead, customs information may be obtained from DODD 4500.09 and DTR 4500.9-R-Part V, (located at http://www.transcom.mil/dtr/part-v/).

SUMMARY OF JAGINST 5800.7F CHANGES

- **Chapter XI is now the Admiralty and Maritime Law (old Chapter XII).**
- **A-11-d.** Adds example of dual-purpose investigation format (only applicable for admiralty and maritime investigations; use of this format may not be used for Chapter II investigations).
- **Chapter XIV, Payments Due Mentally Incompetent Members, Physical Examinations of Such Members, and Trustee Designations, has been deleted.** The chapter was deleted because it was informational. Instead, information about the process may be obtained from 37 USC §§ 601-04, MEDMANUAL Chapter 18, and DoD FMR Volume 7B, Chapter 16.
- **Index has been deleted.** The new JAGMAN may be searched electronically instead.
- **There are numerous other administrative and non-major changes in the document, which move paragraphs, update references or clarify existing language throughout the JAGMAN.**

MANUAL
OF THE
JUDGE ADVOCATE GENERAL
(JAGMAN)

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