DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
1322 PATTERSON AVENUE SE SUITE 3000
WASHINGTON NAVY YARD DC 20374-5066

JAGINST 5800.7G CH-1
14 Feb 22

JAG INSTRUCTION 5800.7G CHANGE TRASMITTAL 1

From: Judge Advocate General of the Navy

Subj: MANUAL OF THE JUDGE ADVOCATE GENERAL

Ref: (a) ALNAV 09/22 of 11 Feb 22

Encl: (1) Revised pages 1-1 through 1-164
(2) Revised pages A-1-a through A-1-q

1. Purpose. This change is issued to incorporate the change to Chapter 1 published by reference (a). This change provides significant updates to regulations implementing and supplementing the Manual for Courts-Martial in accordance with the latest requirements.

2. Action. Remove pages 1-1 through 1-167 and pages A-1-a through A-1-q and insert enclosures (1) and (2).

D. E. CRANDALL

Distribution:
Electronic only on the Department of Navy Issuance website, https://www.secnav.navy.mil/doni/default.aspx, and on the website of the Judge Advocate General at: http://www.jag.navy.mil.

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
1322 PATTERSON AVENUE SE SUITE 3000
WASHINGTON NAVY YARD DC 20374-5066

JAGINST 5800.7G
Code 13

JAN 15 2021

JAG INSTRUCTION 5800.7G

From: Judge Advocate General

Subj: MANUAL OF THE JUDGE ADVOCATE GENERAL

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

Encl: (1) Manual of the Judge Advocate General

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) through (d), the Judge Advocate General.

2. Cancellation. JAGINST 5800.7F.

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 format or media, must be maintained and dispositioned per the records disposition schedules located on the Department of the Navy Directorate for Administration, Logistics, and Operations, Directives and Records Management Division portal page at https://portal.secnav.navy.mil/orgs/DUSNM/DONAA/DRM/Records-and-Information-Management/Approved%20Record%20Schedules/Forms/AllItems.aspx

John G Hannink
JOHN G. HANNINK

Distribution:
Electronic only via the DON directives website at http://secnav.navy.mil/doni/JagInstructions.aspx, and the U.S. Navy JAG Corps website at http://www.jag.navy.mil.

MANUAL
OF THE
JUDGE ADVOCATE GENERAL
(JAGMAN)

Office of the Judge Advocate General
Department of the Navy
1322 Patterson Avenue, Southeast
Suite 3000
Washington Navy Yard
Washington, DC 20374-5066

JAGMAN[1] TABLE OF CONTENTS

CHAPTER		PAGE
I	REGULATIONS IMPLEMENTING AND SUPPLEMENTING THE MANUAL FOR COURTS-MARTIAL	1-1
II	ADMINISTRATIVE INVESTIGATIONS	2-1
III	COMPLAINTS OF WRONG	3-1
IV	ARTICLE 139 CLAIMS - REDRESS OF DAMAGE TO PROPERTY	4-1
V[2]	RESERVED	
VI	DELIVERY OF SERVICE MEMBERS, CIVILIANS, AND DEPENDENTS; SERVICE OF PROCESS AND SUBPOENAS; STATE TAX AND REGULATORY AUTHORITY	6-1
VII	LEGAL ASSISTANCE	7-1
VIII	GENERAL CLAIMS PROVISIONS	8-1
IX	AUTHORITY OF ARMED FORCES PERSONNEL TO PERFORM NOTARIAL ACTS	9-1
X	INTERNATIONAL LAW & APPLICATION OF U.S. LAW OVERSEAS	10-1
XI	ADMIRALTY AND MARITIME LAW	11-1

---

[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, 2019 ed., 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.

[2] Chapter V, Environmental Protection and Management, has been deleted.

CHAPTER ONE

REGULATIONS IMPLEMENTING AND SUPPLEMENTING THE MANUAL FOR COURTS-MARTIAL

TABLE OF CONTENTS

0101 Scope

Part A – Nonpunitive Measures

0102 Nonpunitive Administrative Measures, Generally

a. Definition of commander
b. Types of administrative measures

0103 Extra Military Instruction

a. Definition
b. Limitations

0104 Administrative Withholding of Privileges

a. Privilege
b. Deprivation of liberty

0105 Nonpunitive Censure and Nonpunitive Letter of Caution

a. General
b. Nonpunitive censure

Part B – Nonjudicial Punishment

0106 Authority to Impose

a. Commander
b. Officer in charge
c. Principal assistant
d. Joint commander
e. Withholding of nonjudicial punishment authority
f. Terminology

0107 Jurisdiction

a. Individual
b. Over Reserve Component personnel on active duty or inactive-duty training

0108 Limitations on Initiation of Article 15, UCMJ, Proceedings

a. Right to refuse nonjudicial punishment
b. Units attached to ships
c. Use of self-reporting of arrest, conviction, or criminal charges by civilian authorities
d. Cases previously tried in civilian courts
e. Waiver of statute of limitations

0109 Advice to Accused before Initiation of Article 15, UCMJ, Proceedings

a. Advice before nonjudicial punishment
b. Accused attached to or embarked in a vessel
c. Accused not attached to or embarked in a vessel; record cannot be used in aggravation
d. Accused not attached to or embarked in a vessel; record may be used in aggravation at a later court-martial
e. Service record entries

0110 Procedures for Initiation of Article 15, UCMJ, Proceedings

a. Article 15, UCMJ, guide
b. Standard of proof
c. Observers at nonjudicial punishment proceedings
d. Alternatives to personal appearance
e. Nonjudicial punishment based on report of a fact-finding body
f. Advice after imposition of nonjudicial punishment

0111 Limitations on and Nature of Punishments

a. Restriction imposed upon officers and warrant officers
b. Correctional custody
c. Confinement
d. Extra duties
e. Reduction in grade
f. Arrest in quarters
g. No punishment
h. Suspended punishment
i. Punishment involving forfeiture of pay

0112 Limitations on Nonjudicial Punishments to be Imposed on Reserve Component Personnel Not on Active Duty

a. Punishment involving restraint on liberty
b. Punishment involving forfeiture of pay

0113 Effective Date and Execution of Nonjudicial Punishments

a. Forfeiture of pay and reduction in grade
b. Punishments involving restraint and extra duties
c. Punitive letters

0114 Punitive Censure

a. General
b. Official records of admonition or reprimand
c. Internal departmental responsibility

d. Content of letter of admonition or reprimand
e. Appeals
f. Forwarding letter
g. Removal and set aside

0114a Secretarial Letter of Censure

a. General
b. Rebuttal

0115 Announcement of Nonjudicial Punishment

a. Publication
b. Plan of the day publication
c. Bulletin boards
d. Daily formation or morning quarters
e. Public censures
f. Release to the public
g. Release of results to victims

0116 Command Action on Nonjudicial Punishment Appeals

a. Time limit
b. Procedures
c. Contents of forwarding endorsement

0117 Authority to Act on Nonjudicial Punishment Appeals

a. When the officer who imposed punishment is in a Navy chain of command
b. When the officer who imposed punishment is in a Marine Corps chain of command
c. When punishment is imposed within a joint force
d. Delegation of authority to act on appeals
e. Proceedings after appeal

0118 Suspension, Mitigation, Remission, Setting Aside, and Vacation of Suspension

a. Definition of "successor in command"
b. Authority to suspend, mitigate, remit, set aside
c. Interruption of probationary period
d. Vacation of suspension

0119 Records of Nonjudicial Punishment

a. Records
b. Report of officer misconduct
c. Report of enlisted misconduct

Part C — Courts-Martial

Subpart C1 — Pretrial Matters

0120 Designation of Additional Convening Authorities

a. General courts-martial
b. Special courts-martial
c. Summary courts-martial

0121 Requests for Authority to Convene Courts-Martial

a. General courts-martial
b. Special and summary courts-martial
c. Separate and detached units
d. Commanding officer of staff enlisted personnel
e. Requests for courts-martial convening authority
f. Record maintenance

0122 General Restrictions on Exercise of Court-Martial Jurisdiction

a. General, special, and summary courts-martial
b. Units attached to ships

0123 Exercise of Court-Martial Jurisdiction over Retired, Reserve, Fleet Reserve, Fleet Marine Corps Reserve, and Discharged Personnel

a. Policy
b. Request for authorization
c. Apprehension and restraint
d. Jurisdiction over Reserve Component personnel under Article 3(d), UCMJ
e. Order to active duty in the case of Reserve Component personnel not on active duty
f. Release from active duty of Reserve Component personnel ordered to active duty pursuant to subsection 0123(e)
g. Tolling statute of limitations

0124 Exercise of Courts-Martial Jurisdiction in Cases Tried in Domestic or Foreign Criminal Courts

a. Policy
b. Criteria
c. Procedure
d. Limitations

0125 Exercise of Courts-Martial Jurisdiction Over Major Federal Offenses

a. Background
b. Limitations on court-martial jurisdiction
c. Exceptions
d. Related matters

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
b. Case not designated as a national security case
c. Referral to the Naval Criminal Investigative Service
d. Preliminary inquiry
e. Notice to the JAG, SJA to the CMC, and National Security Case Disposition Authority
f. Limitations on convening courts-martial
g. Courts-martial involving classified information
h. Reporting requirements by responsible command
i. Reporting requirements by National Security Case Disposition Authority
j. Plea agreements

0127 Pretrial Restraint of Accused

a. Custody and restraint of accused before or during trial
b. Counsel
c. Preliminary probable cause review
d. Initial review officer
e. Reserve Component personnel

0128 Disposition of Charges

a. Victim preference for jurisdiction for sex-related offenses
b. How to obtain and document a victim’s preference for jurisdiction for sex-related offenses
c. Consideration of victim’s preference for jurisdiction
d. Procedures if civilian prosecution is preferred
e. Consideration of victim’s views regarding disposition
f. Victim input on nature of offense
g. Sexual Assault Initial Disposition Authority
h. Decisions not to refer charges for sex-related offenses
i. Timeline following determination not to refer based on insufficient evidence
j. Forwarding of charges by an officer in a Navy chain of command
k. Forwarding of charges by an officer in a Marine Corps

chain of command

0129 Superior Competent Authority Defined

a. Accuser in a Navy chain of command
b. Accuser in a Marine Corps chain of command

0130 Personnel of Courts-Martial and Victims' Counsel

a. Military judges
b. Counsel
c. Members
d. Reporters, interpreters, escorts, bailiffs, clerks, and guards
e. Article 32 preliminary hearing officers in sexual assault cases
f. Oaths of court-martial personnel
g. Rules of practice before courts-martial

0131 Standards for Determining Availability of Requested Individual Military Counsel

a. General
b. Definitions
c. Submission and forwarding of requests
d. Action by the determining authority
e. Administrative review
f. Approval of associate defense counsel

0132 Article 32 Preliminary Hearings

a. The preliminary hearing officer
b. Counsel for accused request to interview victim of alleged sex-related offense prior to Article 32 hearing
c. Audiovisual technology

0132a Certain Proceedings Conducted Before Referral

a. Scope of Article 30a proceedings
b. Procedures for Article 30a hearings

0132b Investigative Subpoenas

a. Contents of investigative subpoenas
b. Notice required
c. Requests for relief and orders of enforceability

0132c Warrants and Orders

a. Contents of applications for warrants and orders
b. Non-disclosure orders

c. Submission of applications for warrants and orders
d. Requests for relief and orders of enforceability

0133 Additional Matters in Convening Orders

a. General
b. Alternates
c. Military judge alone special court-martial pursuant to Article 16(c)(2)(A), UCMJ
d. Summary courts-martial

0134 Additional Matters in the Case of Certain Reserve Component Personnel

a. Holdover of Reserve Component personnel on active duty
b. Holdover of Reserve Component personnel on inactive-duty training
c. Extension of reserve term of service
d. Sentences to forfeiture or fine
e. Sentences involving restraint on liberty

Subpart C2 — Trial Matters

0135 Article 39(a), UCMJ, Sessions

a. General
b. Audiovisual technology

0136 Delegation of Authority to Excuse Members

0137 Plea Agreements

a. Major federal offenses
b. Consultation
c. Limitations
d. Cases with charged offenses that occurred both before and after the effective date of the Military Justice Act of 2016 (1 January 2019)

0138 Authority to Grant Immunity from Prosecution

a. General
b. Procedure
c. Civilian witnesses
d. Cases involving national security
e. Review
f. Form of grant

0139 Post-Testimony Procedure When Authority to Grant Immunity Was Obtained from the Attorney General

0140 Rules for Government Appeals under Article 62, UCMJ, Petitions for Extraordinary Relief, and Victim Petitions for Writs of Mandamus

a. Government appeals under Article 62, UCMJ
b. Government petitions for extraordinary relief
c. Defense petitions for extraordinary relief
d. Victim petitions for writs of mandamus
e. No rights given

0141 Personal Data and Character of Prior Service of the Accused

0141a Personally Identifiable Information in Records of Trial

a. General
b. Matters under seal
c. Race, ethnicity, and gender data

0142 Release of Information Pertaining to the Administration of Military Justice and Accused Persons

a. General
b. Applicability of regulations
c. Release and dissemination of information
d. Additional information subject to release
e. Prohibited information
f. Scope
g. Public access to court-martial information
h. Consultation

0142a Victim Notification Requirements – Military Justice Process

a. General
b. Definitions
c. Significant events
d. Documentation
e. Additional requirements
f. Exceptions
g. Termination of notification requirement

0142b Additional Victim Notification Requirements by Commander

a. General
b. Definitions
c. Notification requirement
d. Documentation

0143 Spectators at Proceedings

a. Courts-martial
b. Article 32, UCMJ, preliminary hearings

0144 Security of Classified Matter in Judicial Proceedings

a. General
b. Security clearance of personnel
c. Procedures concerning spectators

0145 Financial Responsibility for Costs Incurred in Support of Courts-Martial

a. Pay, travel, per diem, fees, and mileage
b. Involuntary recall and extension on active duty of members in the Reserve Component
c. Services and supplies

0146 Fees of Civilian Witnesses

a. Method of payment
b. Public voucher
c. Obtaining money for advance tender or payment
d. Reimbursement
e. Certificate of person before whom deposition is taken
f. Payment of accrued fees
g. Computation
h. Non-transferability of accounts
i. Signatures
j. Rates for civilian witnesses prescribed by law
k. Supplemental construction of section
l. Expert witnesses
m. Payment of witness fees to foreign nationals

0147 Warrants of Attachment

Subpart C3 – Post-Trial Matters

0148 Effective Dates Relating to Post-Trial Processing and Post-Trial Sentencing Procedures

0149 Post-Trial Representation of a Convicted Accused

a. Representation for submission of matters under R.C.M. 1106
b. Relief of trial defense counsel
c. Representation during Article 66(b), UCMJ, appellate review

0150 Statement of Trial Results

a. General
b. Distribution

0151 Accused and Crime Victim Access to Court-Martial Records Following Adjournment

a. Access for submission of matters
b. Audio recording
c. Access to exhibits
d. Timing

0152 Matters Submitted by Accused and Crime Victims

a. Notification to crime victim of right to submit matters
b. Accused's right to submit matters

0153 Convening Authority Action

a. General
b. Suspension of sentences
c. When impracticable for convening authority to act
d. Electronic signatures

0154 Actions on Specific Types of Sentence

a. Summary courts-martial
b. Sentences including reprimand
c. Sentences extending to dismissal
d. Sentences including adjudged or automatic forfeitures
e. Automatic reduction in pay grade

0155 Service and Execution of Sentences

a. General
b. Confinement
c. Punitive discharge and dismissal
d. Death penalty
e. Hard labor without confinement

0156 Entry of judgment

a. General
b. Contents of entry of judgment
c. Timing
d. Service of entry of judgment
e. Distribution of entry of judgment

0157 Certification of Record of Trial - General and Special Courts-Martial

a. Record of trial
b. Preparation of the certified record of trial
c. Preparation of transcript
d. Verification of record of trial
e. Certification of record of trial
f. Retention of court reporter notes and court-martial audio recordings
g. Security classification
h. Records of trial involving images or material of child pornography
i. Records containing classified information

0158 Certification of Record of Trial - Summary Courts-Martial

0158a Summary Courts-Martial - Service of Record and Action

a. Service of record of trial
b. Service of convening authority's action.

0158b Review of Summary Court-Martial

a. General
b. Action
c. Review by the Judge Advocate General
d. Application for review by the Judge Advocate General

0159 Service of Record of Trial to the Accused and Victims - General and Special Courts-Martial

a. General
b. Accused copy
c. Victim copy

0160 Transmittal and Review of Records of Trial

a. JAG supervision
b. Records of trial requiring digital transmittal to Navy-Marine Corps Appellate Review Activity – OJAG (Code 40)
c. Records of trial requiring physical transmittal to Navy-Marine Corps Appellate Review Activity – OJAG (Code 40)
d. Records of trial not requiring physical transmittal to OJAG (Code 40)
e. Compliance with crime reporting requirements
f. Review of cases

0161 Appeal of Sentence by the Government

a. Submission of request to appeal

b. Contents of request
c. Timing

0162 JAG Orders Implementing Appellate Court Rulings

a. Background
b. Returned cases
c. When confinement is affected

0163 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
b. Authority to remit or suspend sentences
c. Probationary period
d. Liaison with Naval Clemency and Parole Board

0163a Limitations on Authority to Remit and Suspend Sentences

a. Cases involving national security
b. Life without the possibility of parole
c. Flag and general officers
d. Officers and warrant officers
e. Authority of the Commanding Officer, Navy-Marine Corps Appellate Leave Activity, and the Commanding Officer, Marine Detachment, U.S. Disciplinary Barracks, Fort Leavenworth, KS

0164 Restoration of the Accused

0165 Vacation of Suspension of Sentence

a. Review of confinement of probationer pending vacation proceedings
b. Notice of proceedings
c. Filing of report of proceedings
d. Execution of vacated punishments

0166 Request for Waiver or Withdrawal of Appellate Review

a. General
b. Waiver or withdrawal

0167 Article 69, UCMJ, Reviews

a. General
b. Time limits
c. Scope of review
d. Submission procedures
e. Contents of application

f. Signatures on application
g. Notification of JAG review
h. Court of Criminal Appeals review of Article 69, UCMJ, appeals

0168 Petition for New Trial – Article 73, UCMJ

0169 Substitution of Discharge – Article 74(b), UCMJ

a. Statutory provision
b. Submission procedures
c. Contents of the application
d. Signature on application

0170 Notification to Accused of Court of Criminal Appeals Decision

a. Service of NMCCA decision upon accused
b. Contents
c. Copies of decision
d. Change in address
e. Completion of appellate review

0171 Request for Immediate Execution of Discharge

a. General
b. Conditions of approval
c. Execution of unexecuted portion of sentence
d. Form of request for immediate execution of discharge

0172 Inspection of Record of trial Containing classified Information

0173 Setoff of Indebtedness of a Person Against Pay

a. Courts-martial decisions
b. Administrative determinations
c. Army and Air Force property
d. Voluntary restitution

Part D – Miscellaneous

0174 Apprehension by Civilian Agents of the Naval Criminal Investigative Service

0175 Authority to Prescribe Regulations Relating to the Designation and Changing of Places of Confinement

0176 Forms Supplementing the Military Rules of Evidence

a. Interrogations
b. Search and seizure

0177 Recoupment of Advanced Education Assistance

a. Authority
b. Advisement
c. Application
d. No additional rights

0178 Search of Attorneys and Attorney Spaces

a. General
b. Definitions
c. Considerations
d. Procedures for obtaining search authorization
e. Documentation
f. Search procedures
g. Disclaimer

0179 Military Justice Forms Index

a. How to obtain forms
b. Forms prescribed by MCM

APPENDICES

a. Nonpunitive Letter of Caution
b. Nonjudicial Punishment, Accused's Notification and Election of Rights, Accused Attached to or Embarked in a Vessel
c. Nonjudicial Punishment, Accused's Notification and Election of Rights, Accused Not Attached to or Embarked in a Vessel (No Opportunity to Consult with Counsel)
d. Nonjudicial Punishment, Accused's Notification and Election of Rights, Accused Not Attached to or Embarked in a Vessel (Opportunity to Consult with Counsel)
e. Acknowledgment of Advanced Education Assistance Reimbursement
f. Nonjudicial Punishment Proceeding Guide
g. Nonjudicial Punishment, Accused's Acknowledgement of Appeal Rights
h. Punitive Letter of Reprimand
i. Officer Nonjudicial Punishment Report
j. Summary Court-Martial Waiver of the Appearance of Counsel
k. Grant of Testimonial Immunity and Order to Testify
l. Grant of Transactional Immunity and Order to Testify
m. Victim Preference for Jurisdiction
n. Request for Immediate Execution of Discharge
o. Suspect's Rights Acknowledgement/Statement
p. Record of Authorization for Search
q. Consent to Search

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 courts-martial process. Part D contains miscellaneous provisions, including a table of cross-references between Chapter One 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," 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 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 commanding officers are titled as commandant, commander, commanding general, commanding officer, director, and inspector-instructor. The approval of the Commandant of the Marine Corps is required to designate other Marine Corps commanders.

b. Types of administrative measures. To further the efficiency of their units, commanders should use appropriate administrative corrective measures. Administrative actions include counseling, admonition, reprimand, exhortation, disapproval, criticism, censure, reproach, rebuke, extra military instruction, or the administrative withholding of privileges. Administrative measures may be administered orally or in writing. Commanders will not use these measures as

punishment. The withholding of privileges and extra military instruction should normally occur only after counseling and normal training failed to accomplish the necessary objective, or when counseling and normal training would be insufficient to adequately remediate the deficiency. See R.C.M. 306(c)(2).

0103 Extra Military Instruction

a. Definition. Extra military instruction (EMI) is a bona fide training technique that attempts to improve an individual's performance by focusing additional effort on some deficiency in the individual's performance of duty. EMI must be logically related to the deficiency in performance for which it was assigned. EMI is neither hard labor without confinement nor extra duty, which may only be imposed by courts-martial or nonjudicial punishment, respectively.

b. Limitations. The following limitations apply to EMI:

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

(2) EMI conducted outside of normal working hours will be conducted consecutively with the Service member's workday, unless the commander determines that military exigencies require a deviation. Commanders of Reserve Component personnel will not assign EMI outside normal periods of inactive-duty training.

(3) When the deficiency is corrected, the EMI must cease.

(4) EMI will not be assigned on a Service member's religious day of observance.

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

(6) The authority to assign EMI during normal working hours is an inherent part of the authority that officers, noncommissioned officers, and petty officers have over subordinates. If warranted, any superior may withhold the authority of a subordinate to assign EMI.

(7) Only a commander or officer in charge (as defined in subsection 0106(b)) may assign EMI to occur outside of normal working hours. However, a commander or officer in charge may delegate, in writing, the authority to assign EMI outside of working hours to other officers and petty officers in connection with duties and responsibilities assigned to them.

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 through administrative actions are: special liberty; exchange of duty; special command programs; access to installation or ship libraries, installation or ship movies, or enlisted or officers' clubs; installation parking; installation driving privileges; and attendance at installation 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, rests at the level of authority empowered to grant that privilege.

b. Deprivation of liberty. Except as specifically authorized by the UCMJ and implemented through nonjudicial punishment or courts-martial proceedings, deprivation of normal liberty as a punishment is illegal. Nevertheless, commanders may lawfully restrict normal liberty for nonpunitive purposes such as pretrial restraint, liberty-risk programs for the protection of foreign relations, or when Service members are required to perform duties outside of normal working hours to accomplish essential tasks or work necessary to maintain operational readiness.

0105 Nonpunitive Censure and 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 Service 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 an adverse matter that is not censure is governed by 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). Any superior in the Service member's chain of command may issue a nonpunitive censure, which may be delivered orally or in writing. A sample nonpunitive letter of caution is located at Appendix A-1-a.

(1) A nonpunitive letter is not punishment. Rather, the letter conveys necessary information to remedy a deficiency in conduct or in the performance of duty. The contents of a nonpunitive letter may include, but are not limited to, 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 Service member and the superior issuing the nonpunitive letter. Only the recipient may cause the letter to be entered into the recipient's official service record or official documents and correspondence, with the exception of those instances described in subsection 0105(b)(3) below. Similarly, service-record entries, fitness reports, performance evaluations, and any other official records or documents cannot refer to the nonpunitive letter, though they may refer to the facts or circumstances that relate to the nonpunitive letter.

(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 Service 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 Service member's rebuttal. Under such circumstances, a nonpunitive letter may properly be included in the official service record of the Service member upon filing of the complete correspondence under the provisions of applicable service regulations.

(4) The DON 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 senior 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.

(a) In general, the 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.

(b) 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.

(c) Accordingly, in appropriate cases the fact of the issuance of the nonpunitive letter may be disclosed to the public. The actual letter may not be disclosed without the consent of the individual receiving the nonpunitive letter. The facts and circumstances underlying the letter may be disclosed. Similarly, the fact that counseling occurred may also be disclosed. Commanders considering public disclosure related to senior official misconduct should consult the staff judge advocate and the public affairs officer in their chain of command.

Part B – Nonjudicial Punishment

0106 Authority to Impose

a. Commander. As used in this section, the terms commander and commanding officer mean:

(1) A commissioned or warrant officer who, by virtue of rank and assignment, exercises primary command authority over a

military organization or prescribed territorial area, which under pertinent official directives is recognized as a "command";

(2) An officer empowered to convene general or special courts-martial;

(3) A commander of a joint command;

(4) An officer designated pursuant to U.S. Navy Regulation 0722; or

(5) An officer designated as a commander of a separate or detached command pursuant to U.S. Navy Regulation 0723.

(6) In the Navy, other titles, such as "Director," may designate Navy commanders. But a title alone does not indicate nonjudicial punishment authority. Rather, the title must be associated with a recognized command or activity listed on the Standard Naval Distribution List (SNDL) or other official directive. Official directives are available here: https://www.secnav.navy.mil/doni.

(7) In the Marine Corps, commanding officers are titled as Commandant, Commander, Commanding General, Commanding Officer, and Inspector-Instructor. Only the Commandant of the Marine Corps can designate other Marine Corps commanders. A Marine Corps command is a company or higher unit recognized in an official table of organization. A commander whose command does not meet these criteria, and who does not otherwise meet the definition of commander under subsection (a), may request nonjudicial punishment authority from the Deputy Commandant of the Marine Corps (Manpower and Reserve Affairs).

b. Officer in charge. Any commissioned officer who is an officer in charge may impose nonjudicial punishment upon enlisted persons assigned to the unit, but authorized punishment is limited to admonition or reprimand and one or more of the punishments listed in paragraph 5(b)(2)(A)(i) through (vi) of Part V, MCM. For purposes of this section, an officer in charge is defined as a commissioned officer who is designated as officer in charge of a unit by:

(1) Departmental orders;

(2) Tables of organization;

(3) Manpower authorizations;

(4) 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); or

(5) Orders of the senior officer present as defined under U.S. Navy Regulation 0901.

c. Principal assistant. After receiving written approval from the Chief of Naval Personnel or the Commandant of the Marine Corps, a flag or general officer in command may delegate in writing all or a portion of his or her nonjudicial punishment authority to an officer on his or her staff who is eligible to succeed to command in case of the absence of such officer in command. The designee will hold the same nonjudicial punishment authority as the flag or general officer who delegated the authority.

d. Joint commander. A joint commander may impose nonjudicial punishment on members of the naval service who are assigned or attached to the command via permanent or temporary written or oral orders. Alternatively, the commander may designate in writing one or more naval units, and further designate in writing for each unit a commissioned officer of the naval service as commanding officer for the administration of nonjudicial punishment authority. When the joint commander designates a commanding officer for the administration of nonjudicial punishment authority, the joint commander shall notify the Chief of Naval Personnel or the Commandant of the Marine Corps (JCA), as appropriate, and the Office of the Judge Advocate General (OJAG) (Code 20).

e. Withholding of nonjudicial punishment authority. Though no commander may direct that a subordinate impose nonjudicial punishment 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. Such limitations could be for certain types of offenses or certain categories of persons, in specific cases, or limits on imposition of certain types of punishment.

f. Terminology. "Nonjudicial punishment proceedings" refer to the procedure authorized by Article 15, UCMJ. "Nonjudicial punishment" is a term that describes the punishment imposed at the conclusion of an Article 15, UCMJ, proceeding.

0107 Jurisdiction

a. Individual.

(1) General. In order to initiate nonjudicial punishment proceedings, 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 via permanent or temporary written or oral orders. 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.

(a) Members assigned 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.

(b) 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.

(c) 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."

(d) Any general or special court-martial convening authority who has charges against the accused properly before him or her 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.

(e) Reserve commanding officers or inspector-instructors may exercise command authority over members of that officer's command or upon members that are assigned or attached to the command by written orders or as directed in the Marine Corps Reserve and Administration Management Manual. An inspector-instructor or site commander may supersede a supported unit's commanding officer and exercise command authority and administrative control over members of the supported reserve command in the absence of the reserve commanding officer or other reserve officers that could act for the commanding officer when the reserve officers are not in a duty status or are otherwise unavailable to execute command functions pursuant to

succession of command guidance issued by the appropriate commander.

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

(3) Action when accused is no longer with command. Except as provided in subsections 0107(a)(1) and 0107(a)(2), above, if the nonjudicial punishment authority no longer has jurisdiction over a member, the allegation should be forwarded 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. A member of a Reserve Component is also subject to the UCMJ during travel to and from active duty and to and from the inactive-duty training site of the member, pursuant to orders or regulations; intervals between consecutive periods of inactive-duty training on the same day, pursuant to orders or regulations; and intervals between inactive-duty training on consecutive days, pursuant to orders or regulations. 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 while subject to the UCMJ, and they may be ordered to active duty for disciplinary proceedings. See section 0123 regarding procedures for ordering members to active duty for disciplinary proceedings and for the subsequent release from active duty.

0108 Limitations on Initiation of Article 15, UCMJ, Proceedings

a. Right to refuse nonjudicial punishment. A member of the armed forces who is not attached to or embarked in a vessel has the right to refuse nonjudicial punishment and request trial by court-martial. A member of the armed forces who is attached to or embarked in a vessel does not have the right to refuse nonjudicial punishment. 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 aboard for passage; or is assigned

or attached to an embarked staff, unit, detachment, squadron, team, air group, or other regular organized body. The determination of whether a person is attached to or embarked in a vessel is based upon the totality of the circumstances. The orders may apply individually, or they may apply to the unit of which the person is a member. No one may be ordered to a vessel solely for the purpose of limiting the ability to refuse nonjudicial punishment.

b. Units attached to ships. The commander or officer in charge of a unit attached to a ship for duty will, unless authorized under subsection 0108(b)(1), below, refrain from exercising his or her nonjudicial punishment authority while the unit is embarked. All disciplinary matters will be referred to the commanding officer of the ship for initial disposition.

(1) This policy is a necessary corollary to the ship commanding officer's overall responsibility for the safety, well-being, and efficiency of the ship. Nevertheless, the commanding officer of a ship may determine whether, and under what circumstances, he or she will authorize a commander or officer in charge of a unit attached to, or embarked in, that ship to exercise his or her nonjudicial punishment authority.

(2) This policy does 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, the officer in command of that organized unit will ordinarily retain the authority possessed over such unit before embarkation, including disciplinary authority. Nothing in the foregoing will be construed as impairing the paramount authority of the commanding officer of the ship, including disciplinary authority, over all personnel of the armed forces embarked. In the case of units embarked for transportation only, however, the commanding officer of the ship should only take disciplinary action under the UCMJ over the members of such embarked units in unusual cases concerning incidents occurring aboard the ship.

c. Use of self-reporting of arrest, conviction, or criminal charges by civilian authorities. U.S. Navy Regulation 1137 requires Service members to report certain offenses. The Chief of Naval Operations and the Commandant of the Marine Corps may promulgate orders requiring self-reporting of instances of a Service member's own arrest, charging, or conviction to his or her command. If a self-report is mandated under these orders (e.g., OPNAVINST 3120.32 (Series), which is applicable to Navy

Service members) the person making the report is only required to report the date of arrest, charging, or conviction; the arresting or charging authority or jurisdiction; and the offense for which he or she was arrested, charged, or convicted. Under no circumstances is the member required to disclose the underlying facts related to the arrest, charging, or conviction. A commander's use of the information acquired through a mandated self-report is strictly limited as follows:

(1) No person subject to the UCMJ may question the person making the self-report without first advising that person of his or her rights under Article 31 of the UCMJ;

(2) Neither a nonjudicial punishment authority nor a court-martial convening authority may impose disciplinary action, or begin court-martial proceedings, unless that action is based solely on evidence derived independently of the required self-report. Commanders should consult the staff judge advocate in the chain of command before investigating and contemplating disciplinary action.

(3) Independent evidence may not be derived from information received from the Service member through a required self-report. If the only reason the command knows about the arrest, charging, or conviction is the self-report, then the command does not have independent evidence unless the Service member makes an incriminating statement after receiving notification of and waiving his or her Article 31, UCMJ, rights. Examples of independent evidence include, but are not limited to:

(a) News reports or social media;

(b) Third-party reporting;

(c) Unsolicited information conveyed by the arresting or charging authority; or

(d) Bona fide command programs to screen for criminal information involving Service members (e.g., weekly screen of arrest records for names of command members).

(3) Subject to the restrictions above, a commander may still investigate the matter and use any acquired evidence for administrative purposes. Examples include, but are not limited to: actions on security clearances, screening requirements, qualifications, processing for administrative separation,

detachment for cause, de-frocking, revocation of installation driving privileges, and referral for drug or alcohol screening or treatment.

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

e. Waiver of statute of limitations. In the event that the statute of limitations for nonjudicial punishment has expired (see MCM Part V, paragraph 1(f)(4)), an accused may choose to waive this protection and accept nonjudicial punishment. Such waiver must be in writing and must be attached to the record of nonjudicial punishment.

0109 Advice to Accused before Initiation of Article 15, UCMJ, Proceedings

a. Advice before nonjudicial punishment. Before the imposition of nonjudicial punishment, the nonjudicial punishment authority will ensure that the accused is fully advised of all applicable legal rights and that other required action is taken before the proceeding. See section 0110 if nonjudicial punishment is to be based on the report of a fact-finding body.

(1) There is no right for an accused to consult with a lawyer before nonjudicial punishment; however, commanding officers are encouraged to permit an accused to consult with a lawyer, 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 a lawyer before 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 0109(b)) and the potential use of the record (see subsections 0109(c) and 0109(d)) should be considered in determining whether to utilize Appendix A-1-b, Appendix A-1-c, or Appendix A-1-d.

(2) Before the imposition of nonjudicial punishment, a Service member having obligated service arising from receiving advanced education assistance must be advised that, if he or she is subsequently separated for misconduct, the government may require that the member 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 before accepting advanced education assistance. See section 0176 and Appendix A-1-e.

b. Accused attached to or embarked in a vessel. 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. See Appendix A-1-b.

c. Accused not attached to or embarked in a vessel; record cannot be used in aggravation. When the accused is not afforded the opportunity to consult a lawyer before 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, proceeding. See Appendix A-1-c.

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 before imposition of nonjudicial punishment, the record of nonjudicial punishment may be used in aggravation at a later court-martial for other offenses. See Appendix A-1-d.

(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 or her personal expense. The military lawyer consulted for these purposes should be free of conflicts of interest. A military lawyer who, in the course of his or her duties, acts as a legal advisor to the officer who would exercise nonjudicial punishment authority, is not "conflict free."

(2) If the accused does not elect to consult with a lawyer, the accused should so indicate in the appropriate space and complete the remainder of the form. If the accused states that he or she desires to consult with a lawyer before deciding whether to refuse nonjudicial punishment, Appendix A-1-d will so reflect, but the remainder of the form will not be completed until the accused has been given a reasonable opportunity to consult with a lawyer. Such consultation with a military lawyer should include an explanation of the direct consequences of nonjudicial punishment and may include a discussion of the relevant facts and circumstances of the member's case in order for the military lawyer to provide meaningful legal advice that

enables the member to make an informed decision. This consultation, while confidential, does not, per se, establish an attorney-client relationship, nor does it 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 will 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 video teleconferencing communication between an accused and a military or civilian lawyer is sufficient to satisfy the requirement to provide an opportunity to consult with a lawyer. Appendix A-1-d may be utilized.

(4) If, through no fault of the accused, he or she is not given an opportunity to consult a lawyer, use Appendix A-1-c in lieu of Appendix A-1-d.

e. Service record entries.

(1) In the event nonjudicial punishment is imposed, and Appendix A-1-d is used, or the accused is represented by a lawyer at the proceeding, commanders must make appropriate service-record entries, signed by appropriate personnel, on a NAVPERS 1070/613 (Navy) or NAVMC 118-11 (Marine Corps), or in such other manner as service directives may require. For 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, before (his)(her) nonjudicial punishment proceeding, which was held on (date of nonjudicial punishment proceeding).
>
> The accused [consulted with a lawyer before deciding whether to refuse nonjudicial punishment] [elected to waive (his)(her) right to consult with a lawyer before deciding whether to refuse nonjudicial punishment]. The accused was advised that acceptance of nonjudicial punishment does not preclude further administrative action against (him)(her), which may include being processed for an administrative discharge that could result in an other than honorable characterization of service. The accused accepted nonjudicial punishment.

(2) If the accused is represented by a military or civilian lawyer as a personal representative at nonjudicial punishment proceedings, 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 (name), a lawyer.

0110 Procedures for Initiation of Article 15, UCMJ, Proceedings

a. Article 15, UCMJ, guide. Service members 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 appearance at nonjudicial punishment proceedings. In accordance with Article 15(a), UCMJ, paragraph 4(d) of Part V, MCM, and section 0108 regarding refusal of nonjudicial punishment, there is an exception to this rule for cases decided on the basis of the record of proceeding of another fact-finding body. This exception is subject to the provisions of subsection 0110(e), below.

b. Standard of proof. Facts must be established at nonjudicial punishment proceedings by a preponderance of the evidence rather than beyond a reasonable doubt as required at courts-martial. A nonjudicial punishment proceeding is not a criminal trial. Rather, it is a disciplinary proceeding designed to address minor misconduct in a nonjudicial forum, without a record of a federal conviction, and provide punishment if appropriate.

c. Observers at nonjudicial punishment proceedings. The presence of representative members of the command as observers during personal proceedings 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 accused from requesting to confer privately with the nonjudicial punishment authority in order to relate matters that, in the opinion of the accused, are of a personal or embarrassing nature.

d. Alternatives to personal appearance. Ordinarily, before nonjudicial punishment may be imposed, the Service member is entitled to a personal appearance before the nonjudicial

punishment authority. When personal appearance is prevented by the unavailability of the nonjudicial punishment authority or when requested by the Service member, or by extraordinary circumstances, the proceedings may be conducted telephonically, by video teleconference, or through a 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 will be notified in writing before the imposition of nonjudicial punishment of the circumstances that warranted an alternative to personal appearance.

e. Nonjudicial punishment based on report of a fact-finding body.

(1) If nonjudicial punishment is contemplated on the basis of the record of a court of inquiry or other fact-finding body, a preliminary examination will 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 he or she does not exercise his or her right to refuse nonjudicial punishment, or if the individual does not have that right, the individual may submit in writing any matter in defense, extenuation, or mitigation to the nonjudicial punishment authority. If the individual was accorded the rights of a party with respect to the act or omission for which nonjudicial punishment is contemplated, 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 appropriate cases, the record of the fact-finding body may be returned for additional proceedings during which the individual will be accorded the rights of a party with respect to the act or omission for which nonjudicial punishment is contemplated.

(2) In these cases, a punitive letter may be issued, or its issuance recommended to higher authority, on the basis of an investigation or court of inquiry without further proceedings. The officer issuing the punitive letter will prepare a report concerning the action taken. The report must include a summary of the evidence considered including, as applicable: testimony of witnesses, statements, and affidavits submitted.

f. Advice after imposition of nonjudicial punishment. The officer who imposes punishment under Article 15, UCMJ, will again ensure that the Service member is fully informed of his or her right to appeal (see Appendix A-1-f). Appendix A-1-g is an Accused's Acknowledgment of Appeal Rights, which 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 5(b)(1)(A) of Part V, MCM, may not exceed 15 consecutive days when imposed by a commander below the grade of O-4 (major or lieutenant commander).

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

c. Confinement. This punishment may only be imposed on persons attached to or embarked in a vessel pursuant to subsection 0108(a), and in paygrade E-3 or below. This punishment is authorized when the punishment also includes an unsuspended reduction to paygrade E-3 or below. Pursuant to the Military Justice Act of 2016, the imposition of bread and water or diminished rations is no longer authorized. Calculating the release date by number of hours in confinement is not authorized. See DoD 1325-7M.

d. Extra duties. Subject to the limitations set forth in paragraph 5(c)(6) of Part V, MCM, this punishment will be considered satisfied when the enlisted person has performed extra duties during available time in addition to performing his or her military duties. Normally, the immediate commander 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 one or more hours; but normally extra duties should not extend to more than two 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 seven days, if reasonable accommodation can be made, extra duty will not be performed on the member's religious day of observance, though the member's religious day of observance counts in the computation of

the period for which such punishment is imposed. Guard duty will not be assigned as punishment.

e. Reduction in grade. Reduction in grade can only be imposed 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 by nonjudicial punishment. A nonjudicial punishment authority serving in the grade of W-1 through CWO-5 may not reduce enlisted personnel under any circumstances. A commander may exercise this authority on any member of the naval service under his or her command. Therefore, so long as a Navy commander holds authority to promote a Navy enlisted member of the same grade held by a Marine, then the commander may award that Marine a reduction in grade; the same is true for a Marine commander awarding a reduction in grade to a Navy member.

f. Arrest in quarters. An officer or warrant officer undergoing this punishment will not be permitted to perform duties involving the exercise of authority over any subordinate.

g. No punishment. If no punishment is awarded at an Article 15, UCMJ proceeding, the effect is the same as if the charges were dismissed at the proceeding. No section 0119 record of nonjudicial punishment will be made in the member's service record. The fact that the member went to an Article 15, UCMJ, proceeding 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, proceeding for other authorized purposes. If no punishment is awarded, or the charges were dismissed, a subsequent nonjudicial punishment proceeding may be held for the same allegations or offenses.

h. Suspended punishment. If a punishment is suspended, the nonjudicial punishment authority must indicate the period of suspension. Punishment may not be suspended, however, for a period of longer than six months from the date of the suspension, and the expiration of the current enlistment or term of service of the Service member involved automatically terminates the period of suspension. When any nonjudicial punishment is awarded, a record of the nonjudicial punishment shall be maintained in the member's service record even if all awarded punishment is suspended and later remitted.

i. Punishment involving forfeiture of pay. Pay subject to forfeiture refers only to basic pay, plus sea duty or hardship

duty pay. If nonjudicial punishment also includes reduction in grade, forfeiture will be based on the grade to which the accused is reduced.

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 will 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) 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. For inactive-duty training Reserve Component personnel ordered to active duty for punishment and released before collection of all forfeitures (see DoD 7000.14-R, Volume 7A, Chapter 58, section 580704).

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 on the date the suspension is vacated. Subsequent to the imposition of a punishment of forfeiture of pay and before the execution of this punishment, if an accused absents himself or herself without authority, that period of absence will interrupt the service of this punishment and will 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 must be completed before the latter begins. Reduction in rate may be executed in the accused's absence.

b. Punishments involving restraint and extra duties.

(1) General. The punishments of arrest in quarters, correctional custody, confinement, 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. Subsequent to the imposition and before the execution of nonjudicial punishment, if an accused absents himself or herself without authority, the period of absence will 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 before 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. Commanders and officers in charge may, when adequate facilities are not available or when the exigencies of the service require, defer execution of restriction, correctional custody, or confinement for a reasonable period of time, not to exceed 15 days. Also, commanders and officers in charge may, if the accused is found to be medically unfit for the service of the punishments of correctional custody or confinement 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, adequate facilities are unavailable, or exigencies of the service require, the commander or officer in charge who imposed the punishment may mitigate the punishment to one no more severe than the original punishment announced.

(4) Stay of punishment. A Service member who has appealed may be required to undergo any punishment imposed while

the appeal is pending, except that if action is not taken on the appeal within five days after the appeal was submitted, and if the Service member so requests, any unexecuted punishment involving restraint or extra duty shall be stayed until action on the appeal is taken. In rare instances (e.g., medical emergency) and only upon request of the accused, a commander may grant a stay of 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 at a later date. If the commander stays the punishment, such a stay should be noted in the accused's service record with 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 accused. 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. Punitive censure may only be imposed at nonjudicial punishment or court-martial. See section 0105 regarding nonpunitive censure; see section 0114a regarding the Secretarial letter of 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 their staff judge advocate and the public affairs officer in their chain of command. See subsection 0105(b)(4) for full discussion of senior official and public disclosure.

(1) 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.

(2) 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 courts-martial.

(3) 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 general court-martial convening authority (GCMCA) over the prospective addressee.

b. 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.

c. 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.

d. 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 1(e) 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. 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 proceeding afforded the offender. Where applicable, the letter will include a statement that the recipient was advised of the right to refuse nonjudicial punishment and request trial by court-martial in lieu of nonjudicial punishment and that such trial was not requested. See Article 15(a), UCMJ.

(3) Classification. Specific details requiring security classification must be omitted from punitive letters. A letter issued at nonjudicial punishment will 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 0153, will contain the following:

> You may appeal this action to the next superior authority, via [insert the official designation of the commanding officer issuing the letter or, if the officer is the immediate commanding officer of the offender, the official designations of the immediate commanding officer 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, you are directed to so inform the issuing authority in writing within five working days after the receipt of this letter.
>
> If you desire to appeal this action, you are advised that an appeal must be made within a reasonable time and that, in the absence of unusual circumstances, an appeal made more than five working 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 five working days, you will immediately advise the officer issuing this letter of

such circumstances and submit a written request for 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 will so state in writing within five days. You are advised that any statement submitted must be couched in temperate language and will be confined to pertinent facts. Opinions will not be expressed or 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).

e. 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 must be provided to the individual upon his or her request except where the interests of national security may be adversely affected. A copy will 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) Any statement submitted by the Service member must be couched in temperate language and confined to pertinent facts.

Opinions will not be expressed or the motives of others impugned. The statement may not contain countercharges.

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

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

(5) The standard of review for a punitive letter will be whether the language in the letter is "accurate and relevant to the offenses committed and the punishment imposed."

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

f. 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 Navy Personnel Command or the Commandant of the Marine Corps, together with the addressee's statement, a written declaration that he or she does not desire to make a statement, or a written declaration that a reasonable time after issuance has elapsed will be forwarded to the Commander, Navy Personnel Command (PERS-834 for officers and PERS-832 for enlisted) or the Commandant of the Marine Corps (JPL for officers and MMRB-20 for enlisted), as appropriate. If the punitive letter is not sustained on appeal, a copy of the letter will 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.

g. 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 Commander, 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 will be forwarded to the Commander, 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 will not be filed in or, if already filed, will be removed from, the member's official record and destroyed. The order or letter of removal or set aside or a copy thereof will 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 Commander, 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, proceedings. The Secretary's authority to issue censures is inherent in his or her

office. The Secretary may, within his or her 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 or her as chief officer of that department. Such censure is neither a nonpunitive measure nor a punitive sanction of the type that can be imposed as nonjudicial punishment or as the judgment of a court-martial. The Secretary's authority is in its own class. Such censures cannot be delegated. Unless otherwise directed, a copy of the letter will be filed in the official record of the member censured.

b. Rebuttal. The member to whom a Secretarial letter of censure is addressed has no right of appeal. If a copy of the letter is filed in the official record of the member, the individual may submit a rebuttal. Any such rebuttal must be temperate in language and confined to pertinent facts. Opinions will not be expressed or the motives of others impugned. Rebuttals will 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 Nonjudicial Punishment

a. Publication. Publication of nonjudicial punishment 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, the nonjudicial punishment authority may establish a policy whereby the disposition of Article 15, UCMJ, proceedings are announced to military personnel within his or her unit. Announcement may be made by any or all of the methods discussed below.

b. Plan of the day publication. The name, rank/rate, offense(s), and disposition of the offenses may be published in the plan of the day no earlier than five working days and no later than 30 calendar days after the imposition of nonjudicial punishment or, if the punishment is appealed and not ultimately set aside in its entirety, within 30 calendar days after the reviewing authority's action on the appeal. This information may be published in the plan of the day if it is only disseminated to military personnel. If the plan of the day is disseminated to other than military personnel, nonjudicial

punishment information may only be published without the accused's name.

c. Bulletin boards. The name, rank/rate, offense(s), and disposition of the individual case may be posted no earlier than five working days and no later than 30 calendar days after the imposition of nonjudicial punishment or, if the punishment is appealed and not ultimately set aside in its entirety, within 30 calendar days after the reviewing authority's action on the appeal. This information may be posted on command bulletin boards for military personnel only. If command bulletin boards are accessible to other than military personnel, nonjudicial punishment results may only be published without the name of the accused.

d. Daily formation or morning quarters. The name, rank/rate, offense(s), and disposition of nonjudicial punishment cases may be announced at daily formations or morning quarters no earlier than five working days and no later than 30 calendar days after the imposition of nonjudicial punishment or, if the nonjudicial punishment is appealed, within 30 calendar days after the appeal is denied.

e. Public censures. Commanders will not issue public censures. Oral censures to personnel during Article 15, UCMJ, proceedings do not violate this provision.

f. Release to the public. Information on nonjudicial punishment 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 nonjudicial punishment, commands receiving requests for individual nonjudicial punishment records should forward the request to their cognizant initial denial authority (IDA) with the recommendation that the existence of the records be neither confirmed nor denied, except when the requester is the individual upon whom nonjudicial punishment was imposed. In that situation, the request is processed under the Privacy Act.

(1) Disclosure should only be considered when the events leading to the nonjudicial punishment are particularly newsworthy or the case involves a senior official. See subsection 0105(b)(4) for discussion of senior officials. In general, the DON finds the public interest warrants disclosure of the results

of flag and general officer nonjudicial punishments in order to retain the public's confidence and trust in the integrity of the Department, the Navy, and the Marine Corps.

(2) 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 nonjudicial punishment, including a recitation of the charges, findings, and resulting punishment, may be disclosed to the public.

(3) If the award includes a punitive letter, the actual letter may not be disclosed without the consent of the individual receiving the nonjudicial punishment; however, the facts and circumstances underlying the letter may be disclosed.

(4) The decision to release nonjudicial punishment 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. When contemplating a release of information, commanders should consult with the staff judge advocate and the public affairs officer in their chain of command. Publication of the results of nonjudicial punishment under this section are not considered to be a public censure.

g. Release of results to victims. Upon request from a victim, or legal representative of the victim, in a case in which nonjudicial punishment has been imposed and the nonjudicial punishment has not been set aside in its entirety upon appeal, commands will promptly release the results of nonjudicial punishment to that victim. The information to be released will consist of the name and rank/rate of the accused, the offense(s) considered, and disposition of the offense(s) (including any punishment imposed). As used in subsection 0115(g), "victim" means an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense under the UCMJ. Nothing in subsection 0115(g) grants anyone a legal right of action, additional rights under the Freedom of Information Act, or a right to receive information in a particular format.

0116 Command Action on Nonjudicial Punishment Appeals

a. Time limit.

(1) In accordance with paragraph 7(d) of Part V, MCM, an appeal of nonjudicial punishment must be submitted within five working days, excluding weekends and holidays, of the imposition of nonjudicial punishment, or the right to appeal will be waived in the absence of good cause shown. In computing this appeal period, allowance will 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 must be submitted within five working days after the accused receives the letter.

(2) If it appears that good cause may exist that would make it impracticable or extremely difficult for the accused to prepare and submit the appeal within the five-day period, the accused should immediately advise the officer who imposed the punishment why good cause exists and submit a written request for an appropriate extension of time within which to submit the appeal. Upon receipt of such a request, the officer who imposed the nonjudicial punishment will determine whether good cause was shown and will advise the offender that an extension of time is or is not granted. Absent a request for extension, the officer acting on the appeal will determine whether good cause for delay exists in an appeal submitted more than five days after the imposition of the nonjudicial punishment.

b. Procedures.

(1) When the officer who imposed the punishment is not the accused's immediate commander, 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 commander 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, will, 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 will be referred to 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 nonjudicial punishment proceeding, the endorsement should so state and include any relevant comment made by appellant at the proceeding. Any other adverse factual information set forth in the endorsement, unless it recites matters already set forth in official service record entries, will be referred to the appellant for comment, and the appellant will be given an opportunity to submit a statement in regard thereto or state that he or she does not wish to make any statement.

(3) As an enclosure, a copy of the completed Report and Disposition of Offense(s) (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 proceeding 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 the Enlisted Performance Record NAVPERS 1070/609 (Navy) or NAVMC 118(3) (Marine Corps).

0117 Authority to Act on Nonjudicial Punishment Appeals

a. When the officer who imposed punishment is in a Navy chain of command. Any appeal of nonjudicial punishment in accordance with paragraph 7 of Part V, MCM will be forwarded as directed by a GCMCA superior in the operational chain of command. If no operational chain of command is available, direction will

be sought from the GCMCA in the administrative chain of command. The GCMCA may act on the appeal or direct that the appeal be forwarded to the Region Commander or to a subordinate commander who is a GCMCA and designated by the Region Commander to act on appeals. Any commander acting on an appeal must be superior in rank to the officer who imposed the punishment.

b. When the officer who imposed punishment is in a Marine Corps chain of command. Any appeal of nonjudicial punishment in accordance with paragraph 7 of Part V, MCM will, 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 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 of nonjudicial punishment will 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 commander in his or her organization who is senior in grade and in level of command to the officer who imposed punishment. In no case, however, will 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 or her 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 will, 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 force.

(1) In the case of Navy personnel, an appeal of nonjudicial punishment imposed by a joint force commander will be made to the nearest Navy Region Commander or to a subordinate GCMCA designated by the Region Commander for this purpose, unless the applicable Combatant Commander specifically directs otherwise. When the Region Commander or designated subordinate commander is not superior in rank to the officer who imposed the punishment, however, the appeal will be made to the Navy officer exercising GCMCA geographically nearest and superior in rank to

the officer who imposed the punishment, unless the Chief of Naval Operations specifically directs otherwise. If directed, or in the event that a Navy officer cannot be found who is superior in rank to the officer who imposed the punishment, the appeal will be made to the Chief of Naval Operations.

(2) In the case of Marine Corps personnel, an appeal of nonjudicial punishment imposed by a joint force commander will, in the absence of specific direction to the contrary by the Combatant Commander, 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 a Marine Corps officer cannot be found who is superior in rank to the officer who imposed the punishment, the appeal will 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 are from the naval service, and that immediate superior commander is authorized to convene general courts-martial, the appeal authority will be that immediate superior in command.

(4) An appeal of nonjudicial punishment imposed by an officer of the Marine Corps or Navy designated as a commander pursuant to subsection 0106(d) will 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 of nonjudicial punishment imposed by an officer of the Marine Corps will 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 force commander, an appeal of nonjudicial punishment imposed by an officer of the Navy will be made to the nearest Navy Region Commander or to a subordinate GCMCA designated by the Region Commander for this purpose. When such Region Commander or designated subordinate commander is not superior in rank to the officer who imposed the punishment, the appeal will be to the Navy GCMCA geographically nearest and superior in rank to the officer who imposed the punishment.

(5) When a Marine or Navy commander imposes nonjudicial punishment on a member who is not part of the naval service, the next superior authority for purpose of appeals will be the authority prescribed by the member's parent service. See AR 27-10 for Army personnel; AFI 51-201 for Air Force personnel; and

MJM COMDTINST M5810.1D for Coast Guard personnel. Other provisions of this regulation notwithstanding, an appeal by such member will be processed according to procedures contained in the governing regulation of the member's parent service.

d. Delegation of authority to act on appeals. Appellate authority may be delegated in accordance with the provisions of section 0106. An officer who has delegated his or her nonjudicial punishment powers to a principal assistant under section 0106 may not act on an appeal of 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. Proceedings 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 or her 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 proceeding 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 refuse nonjudicial punishment for those offenses for which the additional proceeding was authorized, unless the appeal was granted on a claim pertaining to the validity of the accused's prior waiver of the right to refuse nonjudicial punishment. But an individual who is not attached to or embarked in a vessel retains the right to refuse nonjudicial punishment 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), the commander who acts on an appeal of nonjudicial punishment, 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 officer in charge may only vacate a suspension of punishment if a violation of the conditions of suspension occurs during the period of suspension. Before vacating a suspension, a commander or officer in charge ordinarily will notify the Service member and give him or her the opportunity to respond. Though a proceeding is not required to vacate a suspension, if the punishment is of the kind set forth in Article 15(e)(1)-(7), UCMJ, 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 Three of this Manual. If the reason for vacation involves additional misconduct, Article 31, UCMJ, rights must be read to the accused before the commander asks if the accused wishes to make a statement on his or her own behalf.

0119 Records of Nonjudicial Punishment

a. Records. The records of nonjudicial punishment will 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 before nonjudicial punishment – Navy officers. Pursuant to section 1611-010 the Naval Military Personnel Manual, Navy officer misconduct must be reported to Commander, Navy Personnel Command (PERS-834). Navy officer misconduct will be reported if:

(a) The incident in question may be of public interest; or

(b) The misconduct will require action by Navy Personnel Command concerning the officer's status.

(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 Commander, Navy Personnel Command (PERS-834). See SECNAVINST 1920.6 (series) and the Naval 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 section 1611-010 of the Naval Military Personnel Manual for the letter report requirements.

(3) Report of misconduct – Marine Corps officers. Marine Corps officer misconduct must be reported to the Deputy Commandant for Manpower and Reserve Affairs via CMC(JPL), pursuant to MCO 5800.16 v.15 (Legal Support and Administration Manual). See Figures 15-5 and 15-9 of the Legal Support and Administration Manual for appropriate sample letters.

c. Report of enlisted misconduct.

(1) Report of misconduct before nonjudicial punishment - Navy enlisted in paygrades E-6 through E-9. Pursuant to section 1616-040 of the Naval Military Personnel Manual, report E-6 through E-9 misconduct before nonjudicial punishment if:

(a) The incident in question may be of widespread public interest; or

(b) The misconduct will require action by Navy Personnel Command concerning the Service 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 Commander, 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. In addition to those officers authorized to convene general courts-martial by Article 22(a)(5) through (7) and (22)(a)(9), UCMJ, the Secretary of the Navy, acting under Article 22(a)(8), UCMJ, has designated the following officers, when in an active duty or inactive-duty training status, to convene general courts-martial:

(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, 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. A list of general courts-martial authorities designated by the Secretary is maintained by OJAG (Code 20) or HQMC (JA), as appropriate.

(2) The Secretary of the Navy has designated and empowered the Commanding Officer, Navy-Marine Corps Appellate Leave Activity, and the Commanding Officer, Marine Detachment, U.S. Disciplinary Barracks, Fort Leavenworth, KS, to exercise limited general court-martial jurisdiction necessary to order the 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 0163a concerning the clemency powers of the Commanding Officer, Navy-Marine Corps Appellate Leave Activity, and the Commanding Officer, Marine Detachment, U.S. Disciplinary Barracks, Fort Leavenworth, KS.

(3) 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 in command of a naval service unit or activity, or the immediate temporary successor in command of such an officer.

b. Special courts-martial. Those officers empowered to convene general courts-martial may also convene special courts-martial. In addition to those officers authorized to convene special courts-martial by Article 23(a)(5) and (6), UCMJ, 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:

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

(2) All commanders who have a subordinate in the operational or administrative chain of command with the authority to convene special courts-martial.

(3) All commanders and commanding officers 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, does not, by itself, convey authority to convene special courts-martial. Commanders or commanding officers 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 commanding officers, Marine Corps Reserve organizations.

(7) Commanding officers and officers in charge 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) Commanding officers of Marine Expeditionary Units, and those Special Purpose Marine Air-Ground Task Force commanding officers in the grade of O-5 and above.

c. Summary courts-martial. Those officers who are empowered to convene general and special courts-martial may also convene summary courts-martial. In addition, the Secretary of the Navy, acting under Article 24(a)(4), UCMJ, has empowered all commanders, commanding officers, and officers in charge (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 preliminary hearing under Article 32, UCMJ. The authority to direct a preliminary hearing for certain sex-related offenses is withheld to an officer in the grade of O-6 or above with special courts-martial convening authority. See subsection 0128(g).

0121 Requests for Authority to Convene Courts-Martial

a. General courts-martial. If authority to convene general courts-martial is desired for a commander or commanding officer who is not empowered by statute or regulation to convene such courts-martial, a letter will be forwarded to OJAG (Code 20) or HQMC (JA), as appropriate, with the request that authorization be obtained from the Secretary of the Navy pursuant to Article 22(a)(8), UCMJ. If general court-martial convening authority is no longer desired or appropriate (e.g., reorganization of commands), a letter should be forwarded to OJAG (Code 20) or HQMC (JA), 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 commanding officers or officers in charge other than those listed in section 0120, and such officers are not empowered by statute or regulation to convene such courts, a letter will be forwarded

to OJAG (Code 20) or HQMC (JA), 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, may request via OJAG (Code 20) or HQMC (JA), as appropriate, that the JAG obtain from the Secretary of the Navy the authority for that organization's commanding officer or officer in charge to convene courts-martial. The request will state that the organization has been designated as separate or detached and will reference Article 22(a)(8), UCMJ, or Article 23(a)(7), UCMJ, as appropriate. See section 0106 regarding designation of authority to impose nonjudicial punishment.

d. Commanding officer of staff enlisted personnel. If authority to convene special or summary courts-martial is desired for an officer designated as the commanding officer of staff enlisted personnel, under the provisions of U.S. Navy Regulation 0722, the designating commander will request via OJAG (Code 20) or HQMC (JA), as appropriate, that the JAG obtain authorization from the Secretary of the Navy pursuant to Article 23(a)(7), UCMJ, or Article 24(a)(4), UCMJ, as appropriate.

e. Requests for courts-martial convening authority. Such requests will contain the following information, as 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 denied.

(4) The number of commands and tenant commands the prospective convening authority is responsible in both operational and administrative chains of command.

(5) The number of officers and enlisted personnel for whom the prospective convening authority is responsible in both operational and administrative chains of command.

(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 or interim designation based upon a deployment, contingency, or similar rationale.

(8) If the request is for temporary designation as a convening authority, the request will contain an acknowledgement that the requestor will send written notification to OJAG (Code 20) or HQMC (JA), 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 HQMC (JA), as appropriate.

0122 General Restrictions on Exercise of Court-Martial Jurisdiction

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

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

(2) Capital offenses. A special court-martial convening authority may not refer a capital offense to trial by special or summary courts-martial or dispose of the matter with nonjudicial 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 R.C.M. 306. Pursuant to R.C.M. 201(f)(1)(C), a general court-martial composed of a military judge alone does not have jurisdiction to try any person for any offense for which the death penalty may be adjudged unless the case has been referred to trial as noncapital.

(3) Exclusive jurisdiction for certain sexual offenses. Pursuant to R.C.M. 201(f)(1)(D), only a general court-martial has jurisdiction to try offenses under Article 120(a), 120(b), 120b(a), and 120b(b), and attempts thereof under Article 80. Such offenses cannot be referred to a special court-martial. This applies only to offenses committed on or after 24 June 2014.

b. Units attached to ships. The commanding officer or officer in charge 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 or she might possess to convene and order trial by special or summary court-martial, referring all such matters to the commanding officer 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 will retain the authority possessed over such unit before embarkation, including disciplinary authority. Under ordinary circumstances, the internal control and discipline of a unit embarked for transportation only will be left to the commanding officer of that unit. Nothing in the foregoing will be construed as impairing the paramount authority of the commanding officer of the ship, including disciplinary authority, over all embarked personnel of the naval service. In the case of units embarked for transportation only, however, the commanding officer of the ship should take disciplinary action against members of such embarked units only in unusual cases concerning incidents occurring aboard 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 subsection 0123(a) may not be recalled to active duty solely for trial by court-martial. Such members are subject 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 0123(a)(1), the JAG, via OJAG (Code 20), will indicate alternative action or actions, if any, to the convening authority.

b. Request for authorization. Requests will be addressed to the Secretary of the Navy, via OJAG (Code 20) or HQMC (JA), as appropriate. 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 the Secretary of the Navy; care should be exercised to avoid triggering the speedy trial provisions of R.C.M. 707);

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

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

(4) Whether civilian jurisdiction exists, and if so, whether the civilian jurisdiction has declined to prosecute the case at the time of the request; and in applicable cases, the victim's preference as to jurisdiction (see subsection 0128(a));

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

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

c. Apprehension and restraint. Specific authorization of the Secretary of the Navy is required before apprehension, arrest, or pretrial confinement of any person who is subject 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. No specific authorization is required for post-trial confinement after the Secretary of the Navy approves the request to exercise jurisdiction.

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 0123(e)(2), below, for the purpose of a preliminary hearing under Article 32, UCMJ, trial by court-martial, or imposition of nonjudicial punishment for offenses committed while subject to the UCMJ. Subsection 0123(e) pertains 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 subsection 0123(e) 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 subsection 0123(e) will contain the following information:

(a) Draft charge(s) and specification(s) (do not prefer charges until authorization has been received from the Secretary of the Navy; care should be exercised to avoid triggering the speedy trial provisions of R.C.M. 707);

(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, whether the civilian jurisdiction has declined to prosecute the case at that

time, and, in applicable cases, the victim's preference as to jurisdiction (see subsection 0128(a));

(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 offense(s);

(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) For Navy personnel, confirmation that Commander, Navy Reserve Forces Command, has been informed of the intention to bring a Navy reservist on active duty for disciplinary purposes. For Marine Corps personnel, confirmation that Commander, Marine Forces Reserve, has been informed of the intention to bring a Marine Corps 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 accordance with section 0120, who is superior in grade to the submitting officer. If, however, confinement authority is requested, address the request to the Secretary of the Navy. See sections 0127 and 0134.

(5) Unless the order to active duty was approved by the Secretary of the Navy, 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 ordered to active duty pursuant to subsection 0123(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 plea 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 the later of completion of disciplinary proceedings or service of the sentence to confinement or other restraint on liberty. See section 0134 and R.C.M. 202(c).

g. Tolling statute of limitations. The foregoing rules will 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 will 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 will 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 or 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 will 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 for 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 a 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 0124(b), however, will 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 will be reported by the GCMCA concerned by means of a letter addressed to OJAG (Code 20) for Navy cases or HQMC (JA) for Marine cases. The GCMCA will 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 described in subsection 0124(a).

(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 Government, such as U.S. District Courts, will 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 authority will have jurisdiction to investigate and prosecute major crimes in particular cases (see DoDI 5525.07). The administration of this program on behalf of the naval service has been assigned to Naval Criminal Investigative Service (NCIS). Guidelines are set forth in SECNAVINST 5430.107 (series).

b. Limitations 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 will ensure that appropriate consultation under the Memorandum of Understanding between the DoD and the Department of Justice has taken place before issuance of a grant of immunity, approval of a plea agreement, or trial by court-martial (see DoDI 5525.07). Accordingly, commanding officers 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, will refrain from taking action with a view to trial by court-martial, but will 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 will be reported immediately to OJAG (Code 20) or HQMC (JA), 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 will be referred to OJAG (Code 20) or HQMC (JA), as appropriate, for disposition.

d. Related matters. See Chapter Six concerning the interview of naval personnel by federal investigative agencies and the delivery of personnel to federal authorities. See sections 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 in M.R.E. 505(b)(2) and further defined at R.C.M. 305(h)(2)(B). A case will be defined and designated as a national security case if, in the opinion of one of the National Security Case Disposition Authorities listed in subsection 0126(f) below, it is a case that, 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 (series) and U.S. Navy Regulations), 103, 103a, 103b, 107, and 134; and provisions of the U.S. Code, such as 18 U.S.C. §§ 641, 792-93, 798, 1001, 1030, 2151-56, 2331-39B, 2381-85, 2388-90; 42 U.S.C. §§ 2272-77; and 50 U.S.C. §§ 783, 3121.

b. Case not designated as a national security case. Though a case may involve matters or materials relating to the security of the United States, it does not need to be designated a national security case if, in the opinion of the cognizant National Security Case Disposition Authority, 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. See subsection 0126(f) for disposition options in this situation.

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 0126(a) above. Commanders and commanding officers will immediately refer any such incident to NCIS for investigation. SECNAVINST 5430.107 (series) and SECNAVINST 5510.36 (series) also pertain. Upon the initiation of any NCIS national security investigation, NCIS will notify the appropriate Department of Justice investigative agency in compliance with DoDI 5525.07 and 50 U.S.C. § 3381(e).

d. Preliminary inquiry. Concurrent with NCIS notification and consistent with the NCIS investigative prerogative, the commander or commanding officer will 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 will not be delayed awaiting a complete assessment of the potential compromise and will be viewed as a continuing duty to report as details of possible lost or compromised information are received by the commander or commanding officer. In addition, the commander or commanding officer will notify Deputy Under Secretary of the Navy for Policy (DUSN(P)) in all cases involving sensitive compartmented information or intelligence information.

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

f. Limitations on convening courts-martial. Commands authorized under R.C.M. 306(a) and 401(a) to initially dispose of cases involving national security, as defined in subsection 0126(a), shall forward such cases to the appropriate National Security Case Disposition Authority 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). This provision is promulgated for the exclusive benefit of the government and does not confer any benefit upon an accused. It will 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 will, after taking action prescribed in subsections 0126(c)-(e), forward the completed investigation of such reports or charges for disposition directly and without delay to an appropriate National Security Case Disposition Authority listed below. Second-echelon commanders who report to the Chief of Naval Operations in the administrative chain of command who are not themselves National Security Case Disposition Authorities will forward such reports to Commander, U.S. Fleet Forces Command. Marine Corps commanders who report to the Commandant of the Marine Corps in the administrative chain of command who are not themselves National Security Case Disposition Authorities will forward such reports to the Commanding General, Marine Corps Combat Development Command. National Security Case Disposition Authorities listed below may dispose of such reports or charges by any means authorized under R.C.M. 306(c) or 401(c) to include returning the case for disposition to any convening authority they may designate. The following officers are designated National Security Case Disposition Authorities:

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

(6) Commanders, U.S. Marine Corps Forces Command, U.S. Marine Corps Forces Pacific, U.S. Marine Corps Forces Central Command, U.S. Marine Corps Forces Reserve;

(7) Commanders, U.S. Sixth and Seventh Fleets;

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

(9) Commander, Naval Education and Training Command;

(10) Commander, Naval Special Warfare Command;

(11) Commanding General, Marine Corps Combat Development Command;

(12) Commanding General, Marine Corps Training and Education Command;

(13) Commanding Generals, Marine Expeditionary Forces; and

(14) Commander, Marine Corps Installations Command.

See section 0137 regarding plea agreements in national security cases. See section 0163a 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, and R.C.M. 806 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 in section 0126(e) 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 will notify OJAG (Code 30) and, in Marine Corps cases, HQMC (JA):

(1) When criminal prosecution is contemplated. However, OJAG (Code 30) or HQMC (JA) 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, etc.); 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 National Security Case Disposition Authority. Include DUSN(P) in the notification for all cases involving sensitive compartmented information or intelligence information.

i. Reporting requirements by National Security Case Disposition Authority. Once informed of a potential national security case, the National Security Case Disposition Authority will report to CNO WASHINGTON DC/N09/DNS/N09N/DUSN(P)/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 HQMC (JA). Include DUSN(P) in the report for all cases involving sensitive compartmented information or intelligence information. Each report will 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 disposition authority 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; disposition authority points of contact; and the official responsible for the next step, as of the time of the report.

j. Plea agreements. A National Security Case Disposition Authority, as with any convening authority, is authorized to enter into a plea agreement. See section 0138 regarding plea agreements involving grants of immunity in national security cases.

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).

b. Counsel. Before the initial review of the confinement, counsel will be provided, if requested, to an accused in pretrial confinement. The accused has no right, however, 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 commanding officer, 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 commanding officer, 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 commanding officer within 48 hours of the imposition of confinement; or

(c) The seven-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 general court-martial convening authorities 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). For hearings conducted on installations with a military confinement facility, the GCMCA exercising jurisdiction over the confinement facility will assign the initial review officers to specific cases. For hearings conducted on installations without a military confinement facility, the GCMCA of the confinee's parent command or Regional Commander (if applicable) will assign the initial review officer.

(1) The initial review officer must follow the procedures outlined in R.C.M. 305(i)(2)(A), to include permitting the victim to be reasonably heard. The initial review officer will forward a copy of the documents considered and memorandum prepared under R.C.M. 305(i)(2)(D) in each case to the confinee's brig file and to the commander that ordered the Service member into confinement.

(2) 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 will not be placed in pretrial confinement, unless ordered to active duty with the approval of the Secretary. See section 0123.

0128 Disposition of Charges

a. Victim preference for jurisdiction for sex-related offenses. In accordance with the National Defense Authorization Act for Fiscal Year 2015, the Services are required to ensure consultation with victims of alleged sex-related offenses to obtain the victim's preference for prosecution by court-martial or a civilian court with jurisdiction over the offense. This consultation must be documented and that documentation must be maintained with the trial counsel's case file. For purposes of subsection 0128(a) through (d):

(1) A "sex-related offense" is defined as any allegation arising under Articles 120, 120a, 120b, 120c, or 125, UCMJ, including attempts thereof, for an act that occurred prior to 1 January 2019; or any allegation arising under Articles 120, 120b, 120c, or 130, UCMJ, including attempts thereof, for an act that occurred on or after 1 January 2019.

(2) "Victim" is defined as an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an alleged sex-related offense.

(3) "Cognizant Commander" is the Sexual Assault Initial Disposition Authority (SA-IDA), GCMCA, or any other appropriate commander taking action on the case.

b. How to obtain and document a victim's preference for jurisdiction for sex-related offenses.

(1) In all cases involving a sex-related offense that occurred in the United States, the trial counsel or trial paralegal (military or civilian) must obtain the victim's preference as to whether the case should be prosecuted by the military or in civilian court. The victim must be provided an opportunity to express these views prior to the cognizant commander making a disposition decision.

(2) A victim's preference for jurisdiction will be documented using the standard Victim's Preference Letter (VPL) contained in Appendix A-1-m, signed by the victim and the trial counsel or trial paralegal. The VPL will, at a minimum, document that the alleged victim was asked about the preference for jurisdiction, the victim's preference for jurisdiction, if provided, and the date when such preference was provided. A copy of this form must be maintained in the original case file with the appropriate Region Legal Service Office (RLSO) or Legal Service Support Section (LSSS) as well as uploaded into the electronic case management system.

(3) If the victim is unavailable after reasonable attempts to contact the victim, or otherwise declines to provide input, the trial counsel will sign the VPL and document the steps taken to contact the victim and ascertain the victim's preference. Periods of leave or deployments by the victim are normally not grounds for determining a victim is unavailable. All requests to consult with the victim and ascertain a victim's preference will be routed through the SVC or VLC, if the victim is represented by counsel.

(4) If the alleged sex-related offense was committed in an area of concurrent or proprietary jurisdiction and the victim indicates a preference for civilian prosecution, the trial counsel or trial paralegal will determine whether the victim prefers prosecution by the state or federal government or has no preference. If the alleged sex-related offense was committed in an area of exclusive federal jurisdiction, trial counsel or trial paralegal will determine whether the victim prefers prosecution by the federal United States Attorney's Office, military prosecution, or has no preference. Matters of jurisdiction for an alleged offense should be considered and explained by the trial counsel when obtaining victim preference.

(5) The trial counsel must provide a copy of the completed VPL to the cognizant commander prior to preferral of charges and to the convening authority, via the cognizant Staff Judge Advocate (SJA), prior to the referral of charges.

c. Consideration of victim's preference for jurisdiction. Although the victim's preference for jurisdiction is not binding, at every stage of the process, the cognizant commander shall consider any victim input, if available, before making any disposition decision.

d. Procedures if civilian prosecution is preferred.

(1) If the victim of an alleged sex-related offense expresses a preference for prosecution in a civilian court, the trial counsel will ensure that the civilian authority with jurisdiction over the offense is notified of the victim's preference. In areas of exclusive federal jurisdiction, the trial counsel must notify the United States Attorney's Office concerned. In areas of concurrent or proprietary jurisdiction or where the alleged sex-related offense occurred outside the military installation, the trial counsel must notify the prosecutorial agency or agencies in that jurisdiction of the victim's preference. The agency notified and the date of notification must be documented in the VPL.

(2) The cognizant commander will ensure the victim is notified of the decision by the civilian authority to prosecute or not prosecute the offense in civilian court. The trial counsel will assist the cognizant commander in notifying the victim. The date the victim was notified must be documented in the VPL.

e. Consideration of victim's views regarding disposition.

(1) For purposes of subsection 0128(e)-(k) except subsection 0128(i):

(a) A "sex-related offense" is defined as any allegation arising under Articles 120 (a) or (b), or 125, UCMJ, including attempts thereof, for an act that occurred prior to 1 January 2019; or any allegation arising under Articles 120 (a) or (b), UCMJ, including attempts thereof, for an act that occurred on or after 1 January 2019. See MCO 5800.16 for Marine Corps definition of sex-related offenses.

(b) Unless otherwise noted, the term "victim" means an individual who has suffered direct physical, emotional, or pecuniary harm as a result of an offense listed in subsection 128(e)(1)(a).

(2) In considering preferral of charges for sex-related offenses identified in subsection 0128(e)(1), a SA-IDA will ensure victims are notified of the opportunity to express their views on disposition of alleged offenses for consideration by the convening authority. The SA-IDA will consider the statements of victims, the effect of the offense on the victims, and any views expressed by the victims regarding disposition of the case. The SA-IDA, and any other convening authority, will document that the alleged victim's statements and views concerning disposition of any sex-related offense were in fact considered in the disposition decision.

f. Victim input on nature of offense. Either at the time of making an unrestricted report of the allegation or during the criminal investigation of the allegation, all alleged victims of a sex-related offense identified in subsection 0128(e)(1)(a), UCMJ, will be given the opportunity to state whether or not the victim believes that the offense alleged is a sex-related offense.

g. Sexual Assault Initial Disposition Authority. The authority to make the initial disposition of the sex-related offenses identified in subsection 0128(e)(1)(a) is withheld to an officer in the grade of O-6 or above with special court-martial convening authority.

h. Decisions not to refer charges for sex-related offenses.

(1) Staff judge advocate recommends referral. In any case in which a staff judge advocate, pursuant to Article 34, UCMJ recommends that any specification(s) of sex-related offenses identified in subsection 0128(e)(1)(a) be referred for trial by court-martial and the convening authority does not refer to court-martial all of those specification(s) recommended by the staff judge advocate for referral, the convening authority will forward those specification(s) not referred along with a copy of the case file, as detailed in subsection 0128(h)(5) below, to the Secretary of the Navy for review. A specification recommended for referral by a staff judge advocate, but not referred by the convening authority, need not be forwarded if the specification was charged only as an

alternative theory of proof to a specification that was referred to court-martial.

(2) Staff judge advocate does not recommend referral. In any case in which a staff judge advocate, pursuant to Article 34, recommends that specification(s) of a sex-related offense identified in subsection 0128(e)(1) above not be referred for trial by court-martial and the convening authority does not refer to court-martial the specification(s), the convening authority will forward the specification(s) not referred along with a copy of the case file, as detailed in subsection 0128(h)(5), below, to the next superior commander authorized to exercise general court-martial convening authority for review. A specification not recommended for referral by a staff judge advocate, and not referred by the convening authority, need not be forwarded if the specification was charged only as an alternative theory of proof to a specification that was referred to court-martial.

(3) Requesting review by the Secretary of the Navy. In any case involving a sex-related offense identified in subsection 0128(e)(1)(a) reviewed by the next superior commander but not referred to a court-martial, the detailed trial counsel may request the Chief Prosecutor, as defined by service regulation, seek Secretary of the Navy review of the case file. The Chief Prosecutor will seek Secretary of the Navy review of the case file if he or she determines that the case has prosecutorial merit.

(4) Case file for review. When forwarding a case file for review under subsection 0128(h), the file will contain copies of the following:

(a) All charges and specifications related to the case, whether or not subject to review under this section;

(b) Reports of investigations related to the specifications submitted for review, including those prepared by NCIS or another investigative agency and, if applicable, the report prepared pursuant to Article 32, UCMJ;

(c) Certification that the alleged victim was given the opportunity to state whether or not the victim believes that the offense alleged is a sex-related offense;

(d) Certification that the alleged victim was notified of the opportunity to express his or her views

regarding disposition of the alleged offense for consideration by the convening authority;

(e) Certification that the alleged victim was notified of the opportunity to express his or her preference for jurisdiction;

(f) All statements made by the alleged victim to NCIS or another investigative agency, the chain of command, and the convening authority regarding the victim's views on and preference for disposition of the alleged offense;

(g) The advice of the staff judge advocate provided pursuant to Article 34;

(h) A written statement explaining the reasons for the convening authority's decision not to refer the specification(s) subject to this review; and

(i) A written statement asserting that the alleged victim was informed of the convening authority's decision to forward the specification(s) subject to this review.

(5) Action on specifications under review. Before forwarding any specification(s) for review by higher authority pursuant to this provision, the convening authority will dismiss without prejudice those specification(s) being forwarded unless there is a substantial likelihood that the statute of limitations for those specification(s) will run before the higher authority has an opportunity for review.

(a) In no case will any higher authority direct a subordinate commander to take any specific action to dispose of any specification(s) subject to review. See R.C.M. 104.

(b) The higher authority may take any action discussed in R.C.M. 306.

(6) Notification to victim. Upon completion of any review by higher authority under this provision, the victim of the alleged sex-related offense will be notified by higher authority of the results of the review conducted.

i. Timeline following determination not to refer based on insufficient evidence.

(1) If the convening authority determines there is insufficient evidence to support the prosecution of a sex-related offense and decides not to refer a preferred sex-related offense to a general or special court-martial, when practicable, any further disposition decision or disposition recommendation, including no action, must be made within 60 days of the convening authority's non-referral decision. This 60-day timeline includes providing notice of the disposition decision or disposition recommendation to the alleged victim. If it is not practicable for the disposition decision or disposition recommendation to be made within 60 days, at or before the 60-day mark, and for each 30 days until disposition decision or disposition recommendation is made, the reason for the delay must be explained and memorialized in the notice to the alleged victim, consistent with section 0142a of this chapter.

(2) For purposes of this requirement, a commander's determination not to refer occurs when the preferred sex-related offense is dismissed pursuant to R.C.M. 401(c)(1). Additionally, for purposes of this requirement, a "sex-related offense" is defined as the offenses of Articles 120, 130 (Article 120a if alleged to have been committed prior to 1 January 2019), 120b, 120c, 125 (if alleged to be nonconsensual and to have been committed prior to 1 January 2019), and 80 (attempts of these offenses) of the UCMJ.

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

(1) General court-martial cases. When a commanding officer, in taking action on charges, deems trial by general court-martial to be appropriate but is not empowered to convene a general court-martial, the charges and necessary allied papers will be forwarded as directed by a GCMCA superior in the chain of command. Commanding officers in an operational chain of command will seek direction from the GCMCA in that chain of command. If there is no operational chain of command, direction will be sought from the GCMCA in the administrative chain of command. The GCMCA in the chain of command has discretion to convene courts-martial and may direct they receive such charges, as required to maintain good order and discipline within their commands. The GCMCA may also direct that the charges and allied papers 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 deployable units, the Region Commander or designated subordinate commander for this purpose is the Region Commander or designated

subordinate commander most accessible to the deployable 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.

(2) Special and summary court-martial cases. When a commanding officer or officer in charge, in taking action on charges, deems trial by special or summary court-martial to be appropriate but is not empowered to convene such court-martial, the charges and necessary allied papers will be forwarded to the superior competent authority authorized to convene the type of court-martial deemed appropriate. Commanding officers in an operational chain of command will seek direction from the superior competent authority in that chain of command. If there is no operational chain of command, direction will be sought from the superior competent authority in the administrative chain of command. The superior competent authority in the chain of command has discretion to convene courts-martial and may direct they receive such charges, as required to maintain good order and discipline within their commands. The superior competent authority may also direct that the charges and allied papers be forwarded to the Region Commander or to the subordinate commander authorized to convene special or summary courts-martial and designated by the Region Commander for this purpose. For deployable units, the Region Commander or designated subordinate commander for this purpose is the Region Commander or designated subordinate commander most accessible to the deployable 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.

k. Forwarding of charges by an officer in a Marine Corps chain of command. For sex-related offenses identified in subsection 0128(e)(1)(a), officers in a Marine Corps chain of command will follow the procedures laid out in MCO 5800.16. In other cases, when a commanding officer or officer in charge, in taking action on charges, deems trial by general, special, or summary court-martial to be appropriate but is not empowered to convene court-martial of that type, 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 type of court-martial jurisdiction deemed appropriate. See R.C.M. 401(c)(2); 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 commanding officer is an accuser, as defined in Article 1, UCMJ, the "superior competent authority" for purposes of Articles 22(b) and 23(b), UCMJ, 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 commanding officer's chain of command. For deployable units, the Region Commander or designated subordinate commander for this purpose is the Region Commander or designated subordinate commander most accessible to the deployable 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 will be forwarded to any superior officer exercising the appropriate court-martial jurisdiction. See R.C.M. 401 and 601(c).

b. Accuser in a Marine Corps chain of command. Whenever a commanding officer 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 special or general courts-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 will be forwarded to any superior officer exercising the appropriate court-martial jurisdiction. See R.C.M. 401 and 601(c).

0130 Personnel of Courts-Martial and Victims' Counsel

a. Military judges.

(1) Detailing. Military 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.

(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 or her 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.

(a) Judge advocates assigned to Navy commands may be detailed as trial counsel, defense counsel, or victims' counsel by the judge advocate's commanding officer, officer in charge, or other proper authority or means.

(b) Judge advocates assigned to Marine commands may be detailed as trial counsel, defense counsel, or victims' counsel pursuant to MCO 5800.16.

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

(d) See JAGINST 5817.3 for guidance related to detailing defense counsel to a capital case.

(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 0130(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).

(4) The following oath should 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).

(2) Oaths. Court members may be given one oath for all cases that are referred to the court-martial 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 will 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).

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

(1) Qualifications of court reporters. At a minimum, court reporters must be proficient in using courtroom equipment (hardware and software) to make a primary and alternate audio record of each judicial proceeding, preparing a transcript of the proceeding, and compiling the record of trial. Each judicial proceeding will have an assigned court reporter that is responsible for certifying the record of trial.

(2) Appointment of reporters and interpreters.

(a) Reporters. In each case before a general or special courts-martial or before a military commission, a court reporter or reporters will be detailed by competent authority. Detailed reporters must be proficient in recording 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 a preliminary hearing under Article 32, UCMJ, or by the officer who directs the taking of a deposition. The reporter will preserve the complete mechanical, voice, or digital record of the

proceedings as provided in section 0151. Additional clerical assistants may be detailed when necessary. See R.C.M. 501(c).

(b) Interpreters. In each case before a court-martial or military commission, in each preliminary hearing conducted under Article 32, UCMJ, and in each instance of the taking of a deposition, the convening authority or the officer directing such proceeding will appoint, when necessary, a properly qualified and sworn interpreter for the court, commission, preliminary hearing, 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 or, at his or her discretion, by any other designated 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 or she 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).

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

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

(5) Duties. The duties of reporters, interpreters, escorts, bailiffs, clerks, and guards will be as prescribed in R.C.M. 502(e)(3), the Uniform Rules of Practice for U.S. Navy-Marine Corps Trial Judiciary, individual circuit rules, and by the military judge or trial counsel. A bailiff should be present at every court-martial unless his or her presence is excused by the military judge.

(6) Source and expenses of court reporters and interpreters. Whenever possible, reporters, interpreters, and clerical assistants will 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 or her 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, a preliminary hearing under Article 32, UCMJ, or at the taking of a deposition. No expense to the government will be incurred by the employment of a reporter, interpreter, or other person to assist in a court-martial, military commission, Article 32 preliminary hearing, 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 Navy Personnel Command or Commandant of the Marine Corps, as appropriate, requesting that such assistance be provided or authorized.

e. Article 32 preliminary hearing officers in sexual assault cases. The preliminary hearing officer in an Article 32, UCMJ, preliminary hearing involving sex-related offenses will be a judge advocate, qualified and certified in accordance with Article 27(b), UCMJ, and sworn in accordance with Article 42(a), UCMJ. For the purposes of this subsection, "sex-related offenses" are violations of Articles 120, 120b, 120c, 125 (forcible sodomy for offenses committed prior to 1 January 2019), UCMJ, or attempts to commit any of these offenses in violation of Article 80, UCMJ.

f. 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) will be used.

g. 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 for U.S. Navy-Marine Corps Trial Judiciary.

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 a preliminary hearing under Article 32, UCMJ, by military counsel of his or her 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 or under regulations of the Secretary concerned for the Department in which such counsel are members. Because 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 will 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 a preliminary hearing under Article 32, UCMJ.

(2) Determining authority.

(a) Judge advocates assigned to Navy commands. For counsel assigned to a Region Legal Service Office or Defense Service Office, the determining authority of the requested counsel is defined as the commanding officer of the cognizant office or, in cases of conflict, the respective Chiefs of Staff as defined in the Naval Legal Service Command Manual; for counsel assigned to the Naval Civil Law Support Activity, the Commanding Officer, Naval Civil Law Support Activity; for counsel assigned to the Navy-Marine Corps Appellate Review Activity, the Officer in Charge, 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 commanding officer 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 to Marine commands has been established by the Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC) in MCO 5800.16.

(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 that 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 that 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 preliminary hearing 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 conducted by a government agency, where the accused has followed such advice by so submitting; offering a plea 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; 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 0131(b)(4)(a) through (c) below, may be determined to be

"reasonably available" by the determining authority. In making this decision, the determining authority will assess the effect on the counsel's unit should the requested counsel be made available. In so doing, the determining authority 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 below are not reasonably available:

(a) Counsel who are flag or general officers;

(b) Counsel who are performing duties as trial counsel; victims' legal counsel (VLC); trial or appellate military judge; appellate defense or government counsel; court commissioner; principal legal advisor to a command, organization or agency having general court-martial convening authority, or the principal assistant to such legal advisor; instructor or student at a college, university, service school, or academy; or assigned as a commanding officer, executive officer, or officer in charge; and

(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 Military Commissions; 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 (except those assigned to Office of the Chief Defense Counsel); National Security Agency; Defense Intelligence Agency; Office of the Navy Judge Advocate General; Navy-Marine Corps Appellate Review Activity; Naval Civil Law Support Activity; Office of Legislative Affairs; Office of DoD or DON Inspectors General; or any agency or department outside the DoD.

(5) Requests for Navy counsel who are assigned 500 miles or more from the situs of the proceedings, or who are permanently assigned OCONUS for proceedings in CONUS or

permanently assigned in CONUS for proceedings OCONUS, will be approved by the Chief of Staff-Defense Service Office or the Chief Defense Counsel as required, taking into account the effects that approval of the request may have on the fair and efficient administration of justice.

(6) Requests for Marine Corps counsel will be approved in accordance with MCO 5800.16.

(7) Notwithstanding the limitations regarding officers in charge set forth above, the determining authority has discretion to make personnel serving as a commanding officer, executive officer, or officer in charge 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 will be made in writing by the accused, or by counsel for the accused on the accused's behalf, and will be submitted to the convening authority via the trial counsel. The burden is on the accused or 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 will 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 Military Services, the convening authority will promptly deny the request and inform the accused, in writing, citing this provision.

(b) If the requested counsel is on active duty in the Military Services, 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 0131(b)(4) above, the convening authority will promptly deny the request and inform the accused, in writing, citing this provision.

(c) In all other cases, the convening authority will forward the request to the determining authority, 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 appropriate information or comments.

d. Action by the determining authority.

(1) Determining whether an attorney-client relationship exists. Applying the criteria enumerated in subsection 0131(b)(3), above, the determining authority will 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 determining authority finds 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 0131(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 determining authority will promptly deny the request and inform the accused, in writing, citing this provision. If there is good cause to sever an attorney-client relationship, the determining authority will apply the criteria and procedures in subsection 0131(d)(3) below.

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

(a) If the determining authority finds that requested counsel is not reasonably available as defined in subsection 0131(b)(4), above, the determining authority will promptly deny the request and inform the accused, in writing, citing this provision.

(b) If the determining authority finds that requested counsel is reasonably available, the requested counsel will be made available to represent the accused at the proceeding, and the determining authority will 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 determining authority. If the determining authority declines to make the requested counsel available, the accused may request a review of that determination to the next higher commander or level of supervision in accordance with R.C.M. 506(b)(2).

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 will 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 Article 32 Preliminary Hearings

a. The preliminary hearing officer. The preliminary hearing officer presiding over the Article 32, UCMJ, hearing will be a judge advocate, qualified and certified in accordance with Article 27(b), UCMJ, and sworn in accordance with Article 42(a), UCMJ. In exceptional circumstances and in the interest of justice, a line officer may be detailed as a preliminary hearing officer. However, only a judge advocate may be detailed as a preliminary hearing officer in cases involving sex-related offenses under Articles 120, 120b, 120c, 125 (forcible sodomy for offenses committed prior to 1 January 2019), UCMJ, or attempts thereof under Article 80, UCMJ. See MCO 5800.16 for additional Marine Corps preliminary hearing officer requirements.

b. Counsel for accused request to interview victim of alleged sex-related offense prior to Article 32 hearing.

(1) In any case where offenses involve violation of Articles 120, 120a, 120b, 120c, or 125 (for forcible sodomy offenses committed prior to 1 January 2019), UCMJ, or attempts thereof under Article 80, UCMJ, counsel for the government, if intending to call any victim(s) of such an offense to testify during the Article 32 preliminary hearing will notify, in writing, the counsel for the accused with the name of such victim(s).

(2) Following receipt of notice under subsection 0132(b)(1) above, counsel for the accused will make any request to interview the named victim through VLC, if applicable. If requested by an alleged victim who is subject to a request for interview, any interview of the victim by counsel for the accused shall take place only in the presence of trial counsel, VLC, or, if applicable, a victim advocate.

(3) As used in subsection 0132(b), "victim" means an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense under the UCMJ identified in subsection 0132(b)(1).

c. Audiovisual technology. The preliminary hearing officer may order the use of audiovisual technology, such as video-teleconferencing technology, among the parties and the preliminary hearing officer for purposes of Article 32, UCMJ, proceedings, consistent with similar provisions guiding Article 39(a), UCMJ, sessions and R.C.M. 804 and 805. 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 or her location or when the accused consents to presence by remote means with the opportunity for confidential consultation with defense counsel during the proceeding. Such technology may include two or more remote sites as long as all parties can see and hear each other.

0132a Certain Proceedings Conducted Before Referral

a. Scope of Article 30a proceedings. A military judge or military magistrate may be detailed to conduct pre-referral proceedings consistent with Article 30a, UCMJ, and R.C.M. 309.

b. Procedures for Article 30a hearings.

(1) If a counsel requests an Article 30a proceeding, that counsel will submit a request in writing to the circuit

military judge or circuit military judge's designee. The request will include the basis for the proceeding and any evidence the counsel requests the court consider.

(2) Generally, information establishing probable cause should be submitted in an affidavit unless exigent circumstances require sworn oral testimony and the military judge agrees to take sworn oral testimony. If the applicant for a warrant or order wishes to offer sworn oral testimony to establish probable cause, the trial counsel must request in writing an *ex parte* closed hearing under Article 30a, UCMJ. This hearing must be recorded and the record of the proceeding will be provided to the convening authority or commander with authority to dispose of the charges or offenses in the case.

0132b Investigative Subpoenas

a. Contents of investigative subpoenas. In the case of a subpoena issued before referral for the production of evidence for use in an investigation, the subpoena shall command each person to whom it is directed to produce the evidence requested for inspection by the Government counsel who issued the subpoena or for inspection in accordance with an order issued by the military judge under R.C.M 309(b).

b. Notice required. After preferral, a subpoena requiring the production of personal or confidential information about a victim may be served on an individual or organization in possession of such evidence. Before issuing a subpoena, unless there are exceptional circumstances, the victim must be given notice so the victim may move for relief or otherwise object.

c. Requests for relief and orders of enforceability. If a victim named in a specification whose personal or confidential information has been subpoenaed under R.C.M. 703(g)(3)(C)(ii) objects to the subpoena, or a person subpoenaed requests relief, the military judge will order a session of court under Article 30a, UCMJ, at which the military judge will consider any arguments presented by the person subpoenaed, victim or VLC, and trial counsel. This hearing must be recorded and the record of the proceeding will be immediately provided to the convening authority or commander with authority to dispose of the charges or offenses in the case. At the conclusion of the hearing, the military judge may quash, modify, or order compliance with the investigative subpoena, as appropriate.

0132c Warrants and Orders

a. Contents of applications for warrants and orders. An application for a warrant or order for electronic communications under R.C.M. 703A, should contain, at a minimum, all of the following information:

(1) Name of the accused, if known;

(2) Identity of the service provider from whom the electronic information is sought;

(3) Description of the electronic information sought;

(4) Identity of the person to whom the information pertains;

(5) The crime(s) to which the evidence relates (UCMJ article and title of offense);

(6) Information that establishes a sufficient basis for granting the request:

(a) If seeking a warrant, the application must contain pertinent facts that establish probable cause that the information sought contains evidence of a crime. Ordinarily, information establishing probable cause should be submitted in a written affidavit.

(b) If seeking an order, the application must contain specific and articulable facts that establish reasonable grounds to believe that the information sought is relevant and material to an ongoing criminal investigation.

(7) Request for non-disclosure order if applicable; and

(8) Draft warrant or order enclosed for a military judge to sign, which should contain, at a minimum, the following information:

(a) Identity of the service provider who is being required to disclose the information;

(b) Description of the electronic information to be obtained;

(c) A deadline for executing the warrant, not to

exceed 14 days from the date on which the warrant is granted; and

(d) Written requirement for an inventory of the electronic content obtained in the execution of the warrant, to be returned to the trial counsel along with the original warrant.

b. Non-disclosure orders. The applicant may seek a non-disclosure order in conjunction with the warrant or order if there is reason to believe that notification to the subscriber or customer by the service provider would result in:

(1) Endangering the life or physical safety of any individual;

(2) Flight from prosecution;

(3) Intimidation of witnesses; or,

(4) Otherwise seriously jeopardizing the investigation or unduly delaying a trial.

c. Submission of applications for warrants and orders. All applications for warrants or orders will be presented by a trial counsel in the applicable circuit to the circuit military judge or circuit military judge's designee in the circuit where the warrant or order is sought. Only a trial counsel in the applicable circuit may present the application. The application must be sworn to and signed by the applicant or his or her designee. If, after reviewing the application, the military judge determines that the evidentiary basis is met, the military judge will grant the warrant or order, subject to any limitations that the military judge deems appropriate under the circumstances. If the military judge determines the evidentiary basis has not been met, he or she will return the application to the trial counsel. The applicant may modify the application for further review. *Ex parte* communications will be kept to a minimum during the military judge's review, except at a recorded Article 30a, UCMJ, hearing.

d. Requests for relief and orders of enforceability. If, after granting a warrant or order for electronic communications under R.C.M. 703A, the military judge receives a motion from the service provider to quash or modify the warrant or order, the military judge will order a session of court under Article 30a, UCMJ, at which the military judge will consider any arguments

presented by the service provider and trial counsel. This hearing must be recorded and the record of the proceeding will be immediately provided to the convening authority or commander with authority to dispose of the charges or offenses in the case. At the conclusion of the hearing, the military judge may quash, modify, or order compliance with the warrant or order, as appropriate.

0133 Additional Matters in Convening Orders

a. General. Each convening order will be assigned a court-martial convening order number. The convening order will be personally signed by the convening authority and will show his or her name, grade, and title, including organization or unit. A copy of the convening order will be furnished to each person named in the order. A convening order is not valid if signed "by direction" (i.e., the authority to sign a convening order cannot be delegated), but it may be signed by an officer to whom command has devolved in accordance with U.S. Navy Regulations or applicable case law.

b. Alternates. Every convening order must designate the members, if any, as outlined in R.C.M. 504(d). Every convening order shall state whether alternate members are authorized in accordance with R.C.M. 503(a)(1)(C). If the convening authority authorizes the use of alternate members, the convening order will state whether the military judge is (1) authorized to impanel a specified number of alternate members; or (2) authorized to impanel alternate members only if, after the exercise of all challenges, excess members remain.

c. Military judge alone special court-martial pursuant to Article 16(c)(2)(A), UCMJ. A convening authority may refer a case to a military judge alone special court-martial pursuant to Article 16(c)(2)(A), UCMJ, when all offenses are alleged to have been committed on or after 1 January 2019. A military judge alone special court-martial authorized by Article 16(c)(2)(A) is convened with the use of a convening order or at the time of referral by annotating section V of the charge sheet as follows: "Referred for trial to the special court-martial convened by (name of convening authority) (date), subject to the following instructions: This case is to be tried as a special court-martial consisting of a military judge alone pursuant to UCMJ, Article 16(c)(2)(A)."

d. Summary courts-martial. A convening authority may refer a case to a summary court-martial pursuant to Article

16(d), UCMJ, by using a convening order appointing a commissioned officer as the summary court-martial officer, or, at the time of referral, by annotating section V of the charge sheet as follows: "Referred for trial to the summary court-martial convened by (name of convening authority) on (date)."

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 such status by an officer empowered to convene courts-martial for not more than two full working days past the end of the last inactive-duty training period if:

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

(b) Approval, either oral or written, for holdover is obtained before expiration of inactive-duty training from a 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 IAW section 0123 is taken to order the member to active duty for trial by court-martial.

(2) An accused held over under subsection 0134(b) may be placed in pretrial confinement as circumstances warrant (see R.C.M. 304-305). The order to active duty in such a case, however, must be approved by the Secretary of the Navy, Under Secretary of the Navy, or Assistant Secretary of the Navy, no later than two full working days past the end of the last inactive-duty training period. The request for an order to active duty under subsection 0134(b) will state the reasons why pretrial confinement is deemed necessary. See subsection 0123(c).

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

c. Extension of reserve term of service.

(1) Reserve Component personnel that are nearing the end of their reserve term of service may have their term of service involuntarily extended if they are being actively investigated with a view toward court-martial pursuant to R.C.M. 202 and 204.

(2) All requests to involuntarily extend members of the Reserve Component beyond their reserve term of service must be approved by the GCMCA with administrative control over the individual.

d. 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 will 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 will be based on the total amount subject to forfeiture at the time adjudged.

e. Sentences 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 will 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. Any counsel may request an Article 39(a) session to present oral argument or have an evidentiary hearing concerning the disposition of written motions, but such motions may be disposed of without a session. Where there is a VLC in the case, VLC shall be notified of the Article 39(a) session in advance. 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. Audiovisual technology. Consistent with R.C.M. 804 and 805, the military judge may order the use of audiovisual technology, such as video-teleconferencing technology, among counsel, the military judge, and witnesses for purposes of Article 39(a), UCMJ, sessions. Such technology may include two or more remote sites as long as all parties can see and hear each other, and the Article 39(a), UCMJ, session can be properly recorded.

0136 Delegation of Authority to Excuse Members

A general court-martial or special court-martial convening authority may delegate authority to excuse members before assembly to the staff judge advocate or to a principal assistant consistent with R.C.M. 505(c)(1)(B), MCM.

0137 Plea Agreements

a. Major federal offenses. The authority of court-martial convening authorities to refer cases to trial and to approve plea agreements extends only to trial by court-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 will ensure that appropriate consultation under the Memorandum of Understanding between the Departments of Defense and Justice has taken place before trial by court-martial or approval of a plea agreement in cases where such consultation is required, See DoD Instruction 5525.07.

b. Consultation. Convening authorities should consult with the staff judge advocate or trial counsel before acting on an offer to enter into a plea agreement. Some of the factors to be considered when entering into a plea agreement are listed in the Non-Binding Disposition Guidance, Appendix 2.1, MCM. Pursuant to R.C.M. 705(e)(3)(B), convening authorities must provide a victim an opportunity to provide input on a proposed plea agreement. If the victim chooses to provide input, then the convening authority must consider that input.

c. Limitations. For limitations that apply to the authority of court-martial convening authorities to agree to terms in a plea agreement. See Article 60a, UCMJ, and R.C.M. 1107.

d. Cases with charged offenses that occurred both before and after the effective date of the Military Justice Act of 2016 (1 January 2019). In these cases, the convening authority may enter into a plea agreement that uses the Military Justice Act of 2016 (MJA 16) sentencing rules if:

(1) The accused agrees to plead guilty to at least one offense that occurred on or after 1 January 2019;

(2) The accused affirmatively elects to have the MJA 16 sentencing rules apply; and,

(3) The plea agreement contains a provision stating that the accused elected to have the MJA 16 sentencing rules apply.

Otherwise, the sentencing rules in effect prior to MJA 16 apply, as long as the accused pleads guilty to at least one offense that occurred prior to 1 January 2019. Compare R.C.M. 705(d)(2), (MCM 2019) with R.C.M. 705, (MCM 2016); see also R.C.M. 902A, (MCM 2019).

0138 Authority to Grant Immunity from Prosecution

a. General. A GCMCA, or his or her designee, has the authority to grant immunity to a witness. See R.C.M. 704(c)(3)

for limitations on a GCMCA's ability to delegate this authority. 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 will be forwarded to any officer competent to convene a general court-martial for the witness for whom immunity is requested. Such recommendation will be forwarded by the trial counsel or defense counsel in cases referred for trial, the preliminary hearing officer conducting an investigation upon preferred charges, the counsel or recorder of any other fact-finding body, or the investigator before the preferral of charges. The recommendation will 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, or his or her designee, will act upon such request after referring it to his or her 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 or her 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 or her 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 or her designee, must be obtained before the execution or issuance of an order to testify to such civilian witness. The cognizant GCMCA, or his or her designee, must obtain the approval of the Attorney General by forwarding a request using the Department of Justice form in the Department of Justice Criminal Resource Manual at 721 (available online at: https://www.justice.gov/jm/criminal-resource-manual-720-authorization-procedure-immunity-requests), via OJAG (Code 20) for Navy cases, via HQMC (JA) in Marine cases, and via OJAG (Code 30) in all national security cases. Requesters should allow at least eight weeks for action on such requests, and must

send copies of the charge sheet, relevant portions of the investigation, and the draft grant of immunity and order to testify.

d. Cases involving national security. In all cases involving national security or foreign relations of the United States, the cognizant GCMCA will forward a proposed grant of immunity using the Department of Justice form prescribed in subsection 0138(c) to OJAG (Code 20) or HQMC (JA), as appropriate, via OJAG (Code 30) for 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 0162 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 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-k (testimonial) and Appendix A-1-l (transactional).

0139 Post-Testimony Procedure When Authority to Grant Immunity Was Obtained from the Attorney General

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

(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; and,

(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 Government Appeals Under Article 62, UCMJ, Petitions for Extraordinary Relief, and Victim Petitions for Writs of Mandamus

a. Government appeals under Article 62, UCMJ. Trial Counsel will coordinate with Navy or Marine Corps Trial Counsel Assistance Program (TCAP) and 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 TCAP and 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 will decide whether the notice of appeal will be filed with the cognizant military judge. Government appeal packages will 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 must 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 must 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 begin 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)that contains: a statement of the issues appealed; explanation of why the appeal is being taken; and a description of the anticipated relevant consequences should the military judge's ruling be permitted to stand; the effect on other pending cases; the unique import of the case to discipline, morale, or the integrity of military justice; and any 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 will state his or her essential findings of fact and conclusions of law in support of the decision being appealed. Except in extraordinary circumstances, an original certified record of trial, prepared in accordance with R.C.M. 1112(b) to the greatest extent possible, including the military judge's essential findings of fact and conclusions of law, will be submitted as part of the appeal package. A certified verbatim transcript of the relevant portions of the trial proceedings must also be attached to the certified record of trial. A digital copy of the certified record of trial with all attachments will be provided on either CD or DVD or sent through secure electronic means to OJAG (Code 46). If any delay involving preparation of the record of trial or certification is anticipated, the trial counsel will promptly notify the Director, Appellate Government Division (Code 46), and forward the uncertified record of trial as soon as it is available, to be followed by the certified record of trial.

b. Government petitions for extraordinary relief. The Director, Appellate Government Division (Code 46), will decide whether the Government will petition for extraordinary relief. Trial counsel will coordinate with the Director, TCAP (Navy or Marine Corps) and 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 should consult with DCAP (Navy or Marine Corps) and 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, must 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. Victim petitions for writs of mandamus.

(1) A victim may petition the Navy-Marine Corps Court of Criminal Appeals for a writ of mandamus to require the court-martial or preliminary hearing officer in an Article 32 UCMJ, hearing to comply with Article 6b, UCMJ, and Military Rules of Evidence 412, 513, 514, and 615. A victim may also petition the Navy-Marine Corps Court of Criminal Appeals for a writ of mandamus to quash an order to testify at a deposition. To the extent practicable, such petitions will have priority over all other proceedings before the court.

(2) Petitions for writs of mandamus, which are filed by or on behalf of a victim, will be forwarded directly to the appropriate court, with a copy forwarded to: Director, Appellate Government Division (Code 46) and Director, Appellate Defense Division (Code 45).

(3) As used in this subsection, "victim" means an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense under the UCMJ.

e. No rights given. Nothing in this section creates or is intended to create an independent right by an accused or victim 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 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 (defined as Protected Personal Information by SECNAVINST 5211.5 (series), DON Privacy Program),

should ordinarily be omitted from all dockets, filings, pleadings, court records, and exhibits that counsel intend to use at any court proceeding including the Article 32, UCMJ, preliminary hearing, or that may otherwise be included in the record of trial. The responsible counsel must redact all documents, dockets, filings, pleadings, court records, and exhibits prior to submitting the document to the court or preliminary hearing officer in accordance with JAGINST 5813.2(series).

b. Matters under seal. When any Federal law, the Rules for Courts-Martial, or the Military Rules of Evidence preclude omission or redaction, the counsel submitting such filing or court record should request that such matters be placed under seal or the military judge issue a protective order.

c. Race, ethnicity, and gender data. In accordance with Section 540I(b)(1) of the National Defense Authorization Act (NDAA) for Fiscal Year 2020, the Secretary of Defense has mandated the Military Departments record race, ethnicity, and gender of the accused and victim(s) in all courts-martial. In order to meet this requirement, the race, ethnicity, and gender of the accused and victim(s) must be documented in the electronic case management system. This data will be obtained from the NCIS Report of Investigation (ROI), or for cases not within NCIS purview, from service specific personnel systems such as the Navy Standard Integrated Personnel System (NSIPS) or the Marine Corps Total Force System (MCTFS). If the victim is a civilian, the cognizant RLSO or LSSS will request this information from the civilian victim or legal representative. A civilian victim is under no obligation to provide this information.

(1) Only the following categories may be used for race:

(a) American Indian/Alaska Native

(b) Asian

(c) Black or African American

(d) Native Hawaiian or Other Pacific Islander

(e) White

(f) Other: Use this definition for an accused or victim who associates with multiple races or a race is not listed.

(g) Civilian victim declined to provide

(2) Only the following categories may be used for ethnicity:

(a) Hispanic or Latino

(b) Not Hispanic or Latino

(c) Civilian victim declined to provide

(3) Only the following categories may be used for gender:

(a) Male

(b) Female

(c) Civilian victim declined to provide

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 will 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 will 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 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, will be accomplished primarily via the convening authority's public affairs officer or communication strategy and operations officer. Requests for information received from representatives of news media will be referred to the public affairs officer or communication strategy and operations officer for action. When an individual is suspected or accused of an offense, any public statement regarding the case must indicate that the individual is presumed innocent unless and until proven guilty and that charges are only allegations until proven otherwise in a court of law. The public affairs officer or communication strategy and operations officer will not answer specific questions or requests for information regarding the accused's defense and will forward all such requests to the cognizant Defense Service Office or the Defense Counsel Assistance Program. Where public interest is evident, information in subsection (d) below and other appropriate information about the proceedings may be disseminated to the public.

d. 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 (c) above, may generally be released through the cognizant public affairs officer or communication strategy and operations officer, without elaboration:

(1) After charges are referred to a general or special court-martial, the accused's name, grade, age, unit, duty station, gender, and a releasable biography may be released. A charge sheet that has been redacted to comply with the Privacy Act shall also be released after referral, and it may be released prior to referral in exceptional circumstances at the discretion of the convening authority. A statement explaining that the charge is merely an accusation and that the accused is presumed innocent unless and until proven guilty shall accompany the release of this information.

(2) In the case of Article 32, UCMJ, preliminary hearing, the purpose of which is to develop a pre-decisional recommendation regarding disposition of charges, the accused's name will not be released except in those cases where the accused's identity has otherwise been made public (e.g., if members of the media attend the Article 32, UCMJ, preliminary hearing).

(3) The identity of the apprehending and investigating agency.

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

(5) The result of any stage in the judicial process (e.g., referral of charges, pre-trial proceedings and motions, panel selection, findings, sentencing, etc.).

(6) The denial by the accused of any offense or offenses of which he or she may be accused or suspected when release of such information is approved by the counsel of the accused.

e. 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 (f). The prohibitions under this section are not meant to be restrictive of information that has otherwise become part of the public record.

(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.

(6) Statements or comments concerning information or evidence which is known, or which reasonably should be known, to be inadmissible before a court-martial.

(7) 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.

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

(9) Statements or opinions regarding the credibility, reputation, motives, or character of DoD military or civilian officials.

(10) 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.

f. 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. Before 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).

g. Public access to court-martial information. In order to facilitate public awareness, further understanding, instill trust, and to afford access to information about the military justice system, information pertaining to the results of military justice proceedings will be made public via appropriate methods, unless contrary to national security interests.

(1) Court dockets.

(2) Results of courts-martial, including the general nature of the charges and sentence and, upon conviction, the name of the accused. In the case of an acquittal, the rank of the accused will be released, but not his or her name.

(3) Upon certification of the record of trial, certain other records will be disseminated in accordance with Article 140a, UCMJ, and JAGINST 5813.2 (series).

(4) Freedom of Information Act. The general public may obtain more detailed records of trial from the OJAG Code 40's (Military Justice Information) Freedom of Information Act Branch.

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

0142a Victim Notification Requirements – Military Justice Process

a. General. All individuals (military or civilian) who report to law enforcement or a command an allegation of sexual assault naming a member of the Armed Forces as the alleged offender must be apprised of the significant events involving any

investigation, prosecution, and confinement resulting from their allegation(s).

b. Definitions. For the purposes of this requirement, "sexual assault" is defined as the sex-related offenses of Articles 120, 130 (Article 120a if alleged to have been committed prior to 1 January 2019), 120b, 120c, 125 (if alleged to have been committed prior to 1 January 2019), and 80 (attempts of these offenses).

c. Significant events. The following are considered "significant events" for the purposes of this notification requirement:

(1) Conclusion of the investigation;

(2) The initial disposition decision;

(3) Pre-trial confinement hearings;

(4) Preferral of charges;

(5) Article 32 hearings;

(6) Referral of charges;

(7) All court proceedings, including arraignment, motions hearings, and trial dates;

(8) Withdrawal of charges;

(9) Dismissal of charges;

(10) Post-trial hearings;

(11) Vacation hearings;

(12) Clemency submissions;

(13) Appellate filings;

(14) Appellate hearings; and

(15) Appellate decisions.

d. Documentation. The RLSOs and LSSSs will ensure that all alleged victims of sexual assault are provided reasonable,

timely, and accurate notification of significant events (1) through (12) above, unless the victim affirmatively declines to receive such notifications. Additionally, the cognizant RLSO or LSSS are required to document the date of each notification and any additional input resulting from such notification in the electronic case management system. Additionally, the Appellate VWAP Program Manager is responsible for providing notice of significant events (13) through (15) above and documenting the notification in the electronic case management system.

e. Additional requirements. The notification requirements in this section are in addition to the requirements and victim rights set forth in Article 6b, UCMJ; R.C.M. 705; DoDI 1030.02; SECNAVINST 5800.11B; OPNAVINST 5800.7A; MCO 5800.14; and JAG/COMNAVLEGSVCCOMINST 5800.4A.

f. Exceptions. Any notification of the significant events listed above, except those in which notification is mandated by Article 6b, UCMJ, may be limited to avoid endangering the safety of the individual making the report or another witness jeopardizing an ongoing investigation, disclosing classified or privileged information, or unduly delaying the disposition of an offense. If notification does not occur for one or more of the aforementioned reasons, that decision must be documented in the electronic case management system, including the name of the responsible individual making the decision not to provide the notification, the specific rationale for the decision, and the support for the decision.

g. Termination of notification requirement. The responsibility of the RLSOs and LSSSs to notify victims of significant events in the court-martial process ends when steps (1) through (12) of paragraph (c) above are complete, when charges are dismissed, or when the commander makes the initial disposition decision not to proceed with court-martial and the victim is notified of that decision.

0142b Additional Victim Notification Requirements by Commander

a. General. A commander, who makes a determination not to refer a preferred sexual assault offense for trial by court-martial, must provide monthly updates to the victim concerning the status of a final determination regarding further action of such case, whether nonjudicial punishment, other administrative action, or no action. These monthly notifications must continue until a final disposition is taken.

b. Definitions. For the purposes of this requirement, "sexual assault" is defined as the sex-related offenses of Articles 120, 130 (Article 120a if alleged to have been committed prior to 1 January 2019), 120b, 120c, 125 (if alleged to have been committed prior to 1 January 2019), and 80 (attempts of these offenses).

c. Notification requirement.

(1) Prior to contacting the victim, the commander shall consult with the cognizant Military Criminal Investigative Organization to determine whether the victim is represented by counsel. If the victim is represented by counsel, all communications shall be provided directly to the victim's counsel.

(2) The commander who makes the determination not to refer a preferred sex-related offense to court-martial is responsible for ensuring the victim is provided monthly status updates through the final disposition of that sex-related offense, including the results of any disciplinary or administrative proceeding. For purposes of this requirement, a commander's determination not to refer occurs when the preferred sex-related offense is dismissed pursuant to R.C.M. 401(c)(1).

(3) These notifications may be made verbally or in writing and may be provided by the commander or a designee, with documentation required by subsection 0142b(d) below.

(4) If a victim elects not to receive status updates, the commander or the commander's designee will document that decision in writing. A victim who elects not to receive status updates may elect to resume receiving updates at any time.

(5) In the event that the commander or the commander's designee cannot confirm that the notification has been received by the victim, the commander or the commander's designee will document the attempts to contact the victim and make reasonable attempts to ensure they are using current contact information. If a victim is non-responsive for more than 90 days, the victim will be deemed to have waived periodic status updates. A previously non-responsive victim may, upon written request, resume receiving updates at any time.

d. Documentation. The commander must ensure that all victims of sex-related offenses receive reasonable, timely, and accurate notification of the status of the final disposition

decision, unless the victim affirmatively declines in writing to receive such notifications. Additionally, the commander is required to document the date of each notification and any additional input resulting from such notification.

0143 Spectators at Proceedings

a. Courts-martial. See R.C.M. 806, MCM. Summary courts-martial will be treated the same as general and special courts-martial.

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

0144 Security of Classified Matter in Judicial Proceedings

a. General. Every precaution will be taken by convening authorities, military judges, summary court-martial officers, preliminary hearing officers, trial counsel and trial support personnel, defense counsel and defense support personnel, and court reporters 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, preliminary hearing 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), and M.R.E. 505.

b. Security clearance of personnel. If classified material or testimony will be introduced or discussed during any portion of a judicial proceeding, appropriate security clearances in accordance with SECNAVINST 5510.30 (series) must be coordinated and granted to any personnel who may be required to participate in those proceedings to include, but not limited to: members of

the prosecution and defense, court reporters, interpreters, and all other persons whose presence will be required when classified material or testimony 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 or her. 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 proceeding that classified matter will be disclosed, and if the provisions of this subsection have not been complied with, the military judge, preliminary hearing officer, or summary court-martial officer will adjourn the proceeding 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. Pay, 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 OJAG. When a Reserve Military Judge is detailed, pay, allowances, and travel costs are paid from Reserve Component funding sources (i.e. annual training (AT), active duty for training (ADT), inactive duty training (IDT), or inactive duty training with travel (IDTT)).

(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 Department of the Navy Financial Management Policy Manual, Section III.

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

(4) When a reserve judge advocate is supporting a court-martial at their assigned operational support center or at other units local to their residence, any required travel will be paid by the reservist. All pay and allowances are paid by the reserve command and are not incurred by the convening authority.

(5) When a reserve judge advocate is supporting a court-martial at a location other than their assigned operational support center, the convening authority is responsible for all travel and per diem costs. If the requirements of the court-martial exceed the reservist's available IDT periods, including Additional Training Periods (ATPs), and annual training days, the reservist's pay, allowances, and travel must be paid from other Reserve Component funding sources.

b. Involuntary recall and extension on active duty of members in the Reserve Component. Funding for orders to recall or extend a Service member of the Reserve Component on active duty 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 does 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) – IDT, AT, 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 a court-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 total $100.00 or more in a calendar month; and

(b) Costs that arise under contracts that were entered into in support of the court-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, to include expert consultants prior to being identified as a witness, will 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 preliminary hearing. If, however, a deposition is taken before charges are referred for trial, the fees and mileage of the witness concerned will 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 or her 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, including 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 preliminary hearing, and by an order from the convening authority or appointing authority, subscribed by him or her 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 will furnish the disbursing officer concerned with a proper receipt.

d. Reimbursement. If an officer charged with serving a subpoena pays from his or her personal funds the necessary fees and mileage to a witness, taking a receipt therefore, he or she 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 or her 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 or her 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 or her 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 will 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 or her 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 will 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 before 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 will be paid as authorized by Joint Travel Regulations.

k. Supplemental construction of section. Nothing in this section will 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 necessity in accordance with R.C.M. 703, MCM.

l. Expert witnesses.

(1) The convening authority will authorize the employment of an expert consultant or 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 to 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. The expert witness fee prescribed by the convening authority, however, 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 or her 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, will 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 or Territory of the U.S. will 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 the military judge, or, if before referral, a military judge detailed under Article 30a or a GCMCA, issues a warrant of attachment pursuant to R.C.M. 703(g)(3)(H), trial counsel or the cognizant staff judge advocate will notify OJAG (Code 20) or HQMC (JA), 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(g)(3)(H), MCM.

Subpart C3 - Post-Trial Matters

0148 Effective Dates Relating to Post-Trial Processing and Post-Trial Sentencing Procedures

a. For cases referred before 1 January 2019, follow the post-trial process as outlined in the 2012 version of the JAGMAN.

b. For cases referred on or after 1 January 2019, follow the post-trial sentencing process as outlined in this section.

0149 Post-Trial Representation of a Convicted Accused

a. Representation for submission of matters under R.C.M. 1106. Fulfillment of duties under R.C.M. 502(d)(5) requires that trial defense counsel will, for a trial which results in a conviction, advise the accused in detail concerning his or her appellate rights. Included in this explanation will be advice with regard to the accused's right to post-trial representation, request clemency, and request deferment of any sentence to confinement pursuant to Article 57, UCMJ. Trial defense counsel will inform the accused of the responsibilities and powers of the convening authority, and as applicable, the possibility of review pursuant to Articles 64 through 69, UCMJ, including the possibility of review by Navy-Marine Corps Court of Criminal Appeals (NMCCA), the U.S. Court of Appeals for the Armed Forces (CAAF), or the Supreme Court of the United States (SCOTUS).

(1) In order to comply with R.C.M. 502(d)(5), the following procedures apply in all cases:

(a) The accused, after being advised of his or her appellate rights, acknowledge advisement of his or her appellate rights and provide necessary information for forwarding to his or her appellate defense counsel. The Standardized Post-Trial and Appellate Rights form is available at http://www.jag.navy.mil/trial judiciary.htm.

(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 will be provided to the accused and duplicate originals or

certified copies will be attached to each copy of the record of trial.

(d) The accused will also be advised of his or her authority to designate, by power of attorney, an attorney-in-fact as his or her agent to petition NMCCA and CAAF for review on his or her behalf. If the accused executes such a power of attorney, the defense counsel shall use the template for a Special Power of Attorney – Appellate Process. This template is available at http://www.jag.navy.mil/trial judiciary.htm. The original power of attorney will be attached to the original appellate rights advisement in the original record of trial and copies attached to the appellate rights advisement in each copy of the record of trial. The power of attorney will be revoked if the accused waives appellate review.

(2) Unless impracticable, the trial defense counsel shall consult with the accused on matters to be submitted under R.C.M. 1106. The trial defense counsel may submit such matters on behalf of the accused without the signature of the accused.

b. 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 will 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 will 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 will 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 will 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 or her successor in a court-martial not involving a punitive discharge or confinement for six months or less to request relief from defense counsel duties after review has been completed pursuant to Article 65, UCMJ.

c. Representation during Article 66(b), UCMJ, appellate review.

(1) A convicted accused is entitled to request post-trial representation by a defense counsel qualified in

accordance with Article 27(b), UCMJ, until completion of appellate review in his or her case. Article 70(c), UCMJ, prescribes the detailing of counsel to represent accused before the NMCCA, CAAF, or the SCOTUS. Appellate defense counsel will represent an accused before NMCCA, CAAF, or the SCOTUS under Articles 62, 66, 67, 67a, or 73, UCMJ, or for petitions for extraordinary relief when requested by an accused, if the United States is represented by counsel, the JAG certifies a case originally under his or her cognizance pursuant to Article 69, UCMJ, or the government appeals the sentence under Article 56(d), UCMJ. An accused may be represented by civilian counsel of his or her 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 preliminary hearings under Article 32, UCMJ. While Article 38, UCMJ, provides that an accused may be represented by military counsel of his or her own selection if that counsel is reasonably available, no such provision for the selection of individual appellate counsel appears in Articles 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 SCOTUS, with the exception of civilian counsel provided by an accused.

0150 Statement of Trial Results

a. General. After a general or special court-martial adjourns, the military judge shall sign the Statement of Trial Results (STR). This form is included in the JAG/CNLSCINST 5814.1 (series) and is available at http://www.jag.navy.mil/library/instructions.htm. The STR replaces the Report of Result of Trial for all purposes, including confinement, pay, and any other personnel action associated with the result of a trial of the accused. Unless otherwise directed by the military judge, the trial counsel will ensure the STR is prepared in accordance with R.C.M. 1101(a) and is ready for review and signature by the military judge as soon as possible after the sentence is announced. In addition to the contents required pursuant to R.C.M. 1101(a), the STR shall include the following information:

(1) Name, rate/rank, and DoD ID number of the accused.

(2) All crime reporting notifications, including:

(a) Whether sex offender registration is required in accordance with 34 U.S.C. § 20901 et seq., or DoDI 1325.07;

(b) Whether deoxyribonucleic acid (DNA) processing is required in accordance with 10 U.S.C. § 1565; and

(c) Whether Gun Control Act reporting is required under 18 U.S.C. § 922.

(3) Any companion cases tried separately.

(4) Any other information directed by the military judge.

b. Distribution. Trial counsel will ensure that the STR is distributed in accordance with R.C.M. 1101(d) and included in the record of trial in accordance with R.C.M. 1112(b)(7). For purposes of R.C.M. 1101(d), the convening authority's designee is the SJA or legal advisor who provides the convening authority with clemency advice.

(1) If the sentence includes confinement, escorts for post-trial prisoners shall carry a copy of the signed STR for delivery to the confinement facility with the prisoner. In addition, the trial counsel will forward a copy of the STR to the commanding officer or officer in charge of the brig or confinement facility where the accused will be confined. A copy of the STR will be provided to the accused or the accused's defense counsel and any crime victim or victims' counsel, if applicable, without regard to the outcome of the court-martial.

(2) If the sentence includes forfeitures or reduction in grade, trial counsel will forward the STR to the appropriate Personnel Support Detachment/Installation Personnel Administrative Center (IPAC) (see https://www.public.navy.mil/bupers-npc/psd/Pages/PSD-Locations.aspx) or Unit Diary Clerk, as appropriate, and include, if applicable, information regarding approved requests for deferments of adjudged or automatic forfeitures and adjudged reductions in grade.

(3) Trial counsel will provide a copy of the STR to the military law enforcement agency that investigated the case. If

no military law enforcement agency investigated the case, trial counsel will provide a copy of the STR to NCIS.

0151 Accused and Crime Victim Access to Court-Martial Records Following Adjournment

a. Access for submission of matters. To facilitate preparation of matters, the defense counsel or accused and the crime victim or crime victims' counsel may request a copy of the court-martial recording and copies of, or access to, the evidence admitted at trial and the appellate exhibits. When preparing these records for release, the government should be cognizant that delays in providing the requested information may serve as grounds for the defense to request a delay in the submission of matters.

b. Audio recording. Pursuant to R.C.M. 1112(a), all courts-martial proceedings shall be audio recorded in order to create a substantially verbatim recording of the courts-martial proceedings. Upon receipt of a written request, a copy of the audio recording shall be provided to the accused or defense counsel, and the crime victim or crime victims' counsel as soon as practicable. This audio recording provided pursuant to R.C.M. 1106 and 1106A may be unredacted, however, it must not include any closed sessions, sealed or classified court-martial material or recordings unless authorized by a military judge. To obtain access to any sealed or classified proceedings, the accused or crime victim must submit a formal request to the military judge demonstrating good cause.

c. Access to exhibits. In accordance with R.C.M. 1106 and 1106A and upon receiving a written request, the government must provide access to all appellate exhibits, prosecution exhibits, and defense exhibits admitted at trial to the accused or defense counsel, and the crime victim or crime victims' counsel. Copies of these documents may be provided in circumstances where it is not feasible for the accused or defense counsel, and the crime victim or crime victims' counsel to access the documents at the appropriate RLSO, LSSS, or Law Center (LC). These documents must not include any sealed or classified sessions or materials unless authorized by the military judge. Personally Identifiable Information must be redacted from all copies and photographs.

d. Timing. The RLSO or LSSS will ensure compliance with subparagraphs 0151(a)-(c) within five (5) duty days of receiving a written request.

0152 Matters Submitted by Accused and Crime Victims

a. Notification to crime victim of right to submit matters. In any case resulting in a guilty finding for an offense that involved a victim who has suffered direct physical, emotional or pecuniary harm, the trial counsel must provide each crime victim with a notification of post-trial rights using the Crime Victim Post-Trial Rights Form included in the JAG/CNLSCINST 5814.1 (series) and available at http://www.jag.navy.mil/library/instructions.htm. The trial counsel shall inform each crime victim of such rights after the announcement of the findings or sentence. After the sentence is announced, any crime victim of an offense may submit matters to the convening authority for consideration, consistent with R.C.M. 1106A. All matters submitted by a crime victim must be provided to the convening authority for consideration and provided to the accused to allow an opportunity to respond. A crime victim must submit matters within 10 calendar days after the sentence is announced. The convening authority may extend the time period to submit matters up to an additional 20 calendar days if the crime victim shows good cause for the extension. Extension requests must be submitted in writing to the convening authority or the convening authority's designee.

b. Accused's right to submit matters. Before the adjournment of a court-martial, the defense counsel must advise the accused of his or her post-trial rights using the Appellate Post-Trial Rights and Advisement Form. This form is available at http://www.jag.navy.mil/trial judiciary.htm. This form shall be appended to the record of trial as an appellate exhibit. After the sentence is announced, the accused may submit matters to the convening authority for consideration, consistent with R.C.M. 1106. The accused must submit matters within 10 calendar days after the sentence is announced. The convening authority may extend the time period to submit matters up to an additional 20 calendar days if the accused shows good cause for the extension. Extension requests must be submitted in writing to the convening authority. If a crime victim elects to submit matters to the convening authority for consideration, the accused may submit a rebuttal to those matters within five calendar days of receipt of such submission by the victim. If submitting any matters directly to the convening authority, counsel for the accused shall provide a copy to the cognizant RLSO or LSSS post-trial processing entity.

0153 Convening Authority Action

a. General. If a case was referred to trial on or after 1 January 2019, the post-trial procedures contained in section 0153 and Articles 60a and 60b, UCMJ, as well as R.C.M. 1109 and 1110, MCM 2019 must be used. In a case that was referred to trial before 1 January 2019, section 0153 is not applicable, and the post-trial procedures (to include the requirement for SJA recommendations) contained in R.C.M. 1107, MCM 2016 must be used.

(1) When action may be taken. The convening authority, or other person authorized to act under subsection 0153(c), may take action only after the applicable time periods under R.C.M. 1106 and 1106A, MCM 2019, have expired; however, action may be taken sooner if the accused and, if applicable, the crime victim, have waived the right to submit matters under R.C.M. 1106 and 1106A, MCM 2019. In any case that results in a full acquittal (or findings of not guilty by the military judge under R.C.M. 917), the convening authority will take no action with regard to those findings.

(2) Documentation. In all cases, the RLSO or LSSS will ensure that actions taken at every step in the post-trial process are properly documented, including justification for any delay that occurs in the case management system. Consult JAG/CNLSCINST 5814.1 (series)), available at http://www.jag.navy.mil/library/instructions.htm, and R.C.M. 808.

(3) Convening authority clemency power. Granting clemency is entirely within the discretion of the convening authority. The scope of authority to grant clemency is based on the date of the earliest offense of which the accused was convicted.

(a) In a case in which the accused was found guilty of an offense that occurred before 24 June 2014, the convening authority must take action in the case and will consider clemency submissions within the limits of his or her authority described in Article 60 and R.C.M. 1107, MCM 2012.

(b) In a case in which the earliest offense of which the accused was found guilty was before 1 January 2019, but on or after 24 June 2014, the convening authority must take action in the case and will consider clemency submissions within the limits of his or her authority described in Article 60 and R.C.M. 1107, MCM 2016.

(c) In a case in which all offenses of which the accused was found guilty occurred on or after 1 January 2019, use Articles 60a and 60b, UCMJ, and R.C.M. 1109 and 1110, MCM. When deciding whether to grant relief under these rules, the convening authority has two options: take action on the findings and sentence or take no action on the findings and sentence. A decision to take action is tantamount to granting relief, whereas a decision to take no action is tantamount to not granting relief.

(d) In all cases, regardless of the date of the offenses, the convening authority may suspend a sentence in accordance with a military judge's recommendation as annotated on the STR. See Article 60a(c), UCMJ.

(4) Staff judge advocate or legal officer review. An SJA or legal officer recommendation is not required before the convening authority's action for any case referred on or after 1 January 2019, regardless of when the offense to which an accused was convicted was committed. But, before determining what action, if any, should be taken in a particular court-martial, the convening authority shall consult with the SJA or legal officer to confirm compliance with Articles 60a and 60b, UCMJ, and R.C.M. 1109 and 1110. The SJA or legal officer must provide the convening authority all post-trial matters submitted by the accused and crime victim, if any, along with any details of a military judge's suspension recommendation for consideration. The SJA or legal officer will document all post-trial matters received in the convening authority's action form using the standard template available in JAG/CNLSCINST 5814.1 (series).

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

(6) Documenting convening authority's action. Regardless of which version of clemency authority applies, and even if the convening authority decides to take no action, the SJA will ensure that the convening authority complies with the requirements of R.C.M. 1109(g) or R.C.M. 1110(e). The decision by the convening authority to take no action, or the action taken by the convening authority, will be memorialized in the Convening Authority's Action Form included in JAG/CNLSC 5814.1 (series) and available at http://www.jag.navy.mil/library/instructions.htm. The action (or no action) by the convening authority will be

promptly forwarded to the RLSO or LSSS responsible for the case and incorporated as an attachment to the record of trial. A decision by the convening authority to take action or no action on a case may be signed by the convening authority's delegate with the convening authority's verbal approval provided that any verbal approval is subsequently memorialized in writing.

(7) Timing of convening authority's action. The convening authority must generally act before the entry of judgment. However, the convening authority may grant relief upon recommendation of trial counsel for substantial assistance by the accused after the entry of judgment. See R.C.M. 1109(e)(3)(B) and (e)(7); see also R.C.M. 1110(c)(2). If trial counsel's recommendation is made more than one year after the entry of judgment, the GCMCA over the command to which the accused is assigned may reduce the sentence only if the criteria in R.C.M. 1109(e)(5)(B) are met.

(8) Service of convening authority's action and related matters. The RLSO or LSSS shall provide a copy of the convening authority's action to the accused and any crime victims, or their respective counsel, as soon as practicable after receipt. If the action is served on counsel, counsel will, by expeditious means, provide the accused or crime victim, as applicable, with a copy. If the judgment is entered within 10 duty days of the convening authority's action, service of the entry of judgment upon the accused, any crime victims, or their respective counsel will satisfy this requirement.

b. Suspension of sentences. When authorized under the applicable version of Article 60, UCMJ, convening authorities are encouraged to consider suspending, for a probationary period, all or any part of a sentence, under appropriate circumstances, such as when suspension would promote good order and 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.

(1) Suspension recommendation by military judge. In cases referred to trial on or after 1 January 2019, after receiving a suspension recommendation from the military judge, the convening authority may suspend all or any part of certain adjudged sentences in accordance with R.C.M. 1109(f) regardless of when the offense was committed. The authority to suspend a sentence under R.C.M. 1109(f) is in addition to any other suspension power the convening authority may have. See R.C.M. 1109(c)(5) and 1110(c).

(2) Suspension recommendation by trial counsel. Upon the recommendation of the trial counsel for substantial assistance to the government by an accused, the convening authority may disapprove, commute, or suspend the adjudged sentence, in whole or in part, even with respect to an offense for which a mandatory minimum sentence applies. However, a sentence of death may not be suspended.

c. When impracticable for convening authority to act. A convening authority may forward a case for post-trial processing as long as the following procedures are followed:

(1) For Navy commands, if it is impracticable for the convening authority to act, he or she will forward the record of trial to a superior GCMCA, to the Region Commander, or a subordinate commander authorized to convene general courts-martial and designated by the Region Commander for this purpose. For deployable units, the appropriate Region Commander or designated subordinate commander is the one most convenient at the time of forwarding of the record. The letter or message requesting the record of trial to be forwarded will contain a justification as to why the normal convening authority could not take action in the case.

(2) Unless directed differently by a superior GCMCA, Marine Corps convening authorities who find it impracticable to take action will forward the record of trial to another 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 requesting the record of trial to be forwarded will contain a justification as to why the normal convening authority could not take action in the case.

d. Electronic signatures. Electronic signatures may be used in the convening authority's action, charge sheet, and other court-martial documents, if using a DoD Common Access Card and following all other technical requirements per SECNAVINST 5239.21, DON Electronic Signature Policy. However, electronic signatures are not required in these documents.

0154 Actions on Specific Types of Sentence

a. Summary courts-martial. The convening authority may take any action permitted under Article 60b(a)(1), UCMJ.

b. Sentences including reprimand.

(1) General. Reprimands issued in execution of court-martial sentences must be in writing. Except as otherwise prescribed in section 0155, subsection 0114(d) applies 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 will include in the action any reprimand that the convening authority has ordered executed.

(3) Contents. The punitive letter will include the time and place of trial, type of court-martial, and a statement of the specific charges and specifications of which the accused was convicted. It will also contain the following:

> 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 this action a statement concerning this letter for inclusion in your record. If you elect not to submit a statement, you will so state officially in writing within the time prescribed. In connection with your statement, any statement submitted will be couched in temperate language and will be confined to pertinent facts. Opinions will not be expressed nor the motives of others impugned. Your statement will not contain countercharges.

(4) Procedure for issuance. The original punitive letter will be delivered to the accused and a copy appended to the convening authority's action. The action should refer to the letter as follows:

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

(5) Insertion into service record. Upon receipt of the accused's written statement or a written declaration that he or

she does not desire to make a statement, an additional copy of the punitive letter, with the statement or declaration, will be forwarded to Commander, Navy Personnel Command (PERS-834 for officers and PERS-832 for enlisted) or HQMC (JA) for officers and MMSB-20 for enlisted, as appropriate.

(6) Appeals. Review, including appellate review of punitive letters issued as part of a 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. Sentences extending to dismissal. Under the authority of Article 57(a)(4), UCMJ, the Under Secretary of the Navy and the Assistant Secretaries of the Navy have been designated by the Secretary of the Navy 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.

d. Sentences including adjudged or automatic forfeitures. The ability of a convening authority to defer or waive forfeitures of pay and allowances depends on whether the forfeitures are adjudged or automatic.

(1) Adjudged forfeitures are those forfeitures imposed by the military judge or the members as part of a court-martial sentence (see Article 57(a)(1), UCMJ, and R.C.M. 1103). Adjudged forfeitures of pay or allowances take effect 14 calendar days after the sentence is announced, or, in a summary court-martial, the date the sentence is approved by the convening authority.

(2) Automatic forfeitures are forfeitures that take effect by operation of law pursuant to Article 58b, UCMJ, 14 days after the sentence is announced and only during the period of confinement. Automatic forfeitures take effect if an accused is sentenced to confinement for more than six months, death, or confinement for six months or less and a punitive discharge.

(3) Upon written application of the accused, the convening authority may defer adjudged and automatic forfeitures until the entry of judgment or, in the case of a summary court-martial, until a convening authority acts on the sentence. The action of the convening authority shall be in writing. The convening authority may rescind a deferment at any time.

(4) The convening authority may waive automatic forfeitures for no more than six months after the entry of judgment for the benefit of the accused's dependent(s). Waived forfeitures are paid directly to the accused's dependent(s). The convening authority may not waive adjudged forfeitures. The convening authority may, however, take action under Articles 60, 60a or 60b, UCMJ, to defer, suspend, mitigate, or disapprove all or part of adjudged forfeitures, then waive any automatic forfeitures.

(5) The convening authority's action will indicate if adjudged forfeitures were deferred, or if automatic forfeitures in accordance Article 58b, UCMJ, were deferred and waived. If waiver of forfeitures is approved and included in the action, the waiver must state the person to whom the forfeitures are to be paid.

e. Automatic reduction in pay grade. Automatic reduction to the lowest enlisted pay grade by operation of Article 58a, UCMJ, will be effected in the Naval service only in accordance with this subsection.

(1) For any conviction for an offense committed before 1 January 2019, reduction to the lowest enlisted pay grade will be automatically effected only when the sentence as approved by the convening authority, includes, whether or not suspended, either:

(a) a dishonorable or bad-conduct discharge, or

(b) confinement in excess of 90 days, if the sentence is awarded in days, or in excess of 3 months, if the sentence is awarded in months or years.

(2) For any conviction for an offense committed on or after 1 January 2019 and before the President delegated authority to the Secretary of the Navy to establish conditions for automatic reductions, automatic reduction in pay grade is not authorized.

(3) For any conviction for an offense committed on or after 1 January 2019 and after the President has delegated authority to the Secretary of the Navy to establish conditions for automatic reductions, reduction to the lowest enlisted pay grade will be automatically effected for any sentence that includes:

(a) A dishonorable or bad-conduct discharge, or

(b) Confinement in excess of 90 days, if the sentence is awarded in days or in excess of 3 months, if the sentence is awarded in months or years.

(4) The convening authority has the sole discretion to remit the automatic reduction, or may retain the accused in the pay grade held at the time of the sentence or in an intermediate pay grade and suspend the automatic reduction to pay grade E-1 that would otherwise be effective under Article 58a, UCMJ, and this subsection. 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 for cases referred prior to 1 January 2019 or the date of the Entry of Judgment for cases referred on or after 1 January 2019.

0155 Service and Execution of Sentences

a. General. Pursuant to R.C.M. 1102, and unless otherwise specified, a sentence is executed and takes effect as follows:

(1) General and special courts-martial. A sentence is executed and takes effect when the judgment is entered into the record under R.C.M. 1111.

(2) Summary courts-martial. A sentence is executed and takes effect when the convening authority acts on the sentence.

b. Confinement.

(1) Timing. Confinement takes effect on the date the sentence is announced.

(2) Designation of places of confinement. Subject to section 0175, the convening authority or the convening authority's designee is a competent authority to designate the

initial place of confinement of naval prisoners. The designation of the initial place of confinement will be documented on the confinement order (DD 2707).

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

(4) Execution of confinement. See SECNAVINST M-1640.1 (series).

c. Punitive discharge and dismissal.

(1) Execution of dishonorable and bad conduct discharges. A dishonorable or bad conduct discharge will be executed when the court-martial is final in accordance with R.C.M. 1209. OJAG (Code 40) will issue a Notification of Completion of Appellate Review (NOCAR) and will forward to the cognizant GCMCA, who will order the dishonorable or bad conduct discharge executed.

(2) Execution of dismissals. A dismissal will be executed when a court-martial is final in accordance with R.C.M. 1209 and the dismissal is ordered executed by the Secretary of the Navy, or his or her designee.

(3) Naval Clemency and Parole Board action. 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 SECNAV-M 5815.1 (series) have been fulfilled.

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

e. Hard labor without confinement. R.C.M. 1003(b)(6) 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 5(c)(6) of Part V, MCM. A sentence to hard labor without confinement is executed when the entry of judgment is signed by the military judge.

0156 Entry of Judgment

a. General. The entry of judgment reflects the results of the court-martial after all post-trial actions, rulings, and orders. The entry of judgment terminates trial proceedings and the deferral and suspension of a sentence. This form is included in JAG/CNLSCINST 5814.1 (series), available at http://www.jag.navy.mil/library/instructions.htm.

b. Contents of entry of judgment. The entry of judgment must include all items listed in R.C.M. 1111(b). Additionally, any modification made by reason of any post-trial action by the convening authority, or any post-trial rule, order, or other determination by the military judge must be included.

c. Timing. The military judge will enter the judgment of the court within 20 days of the later of either: (1) receipt of the convening authority's action or (2) receipt of the record of trial for verification in accordance with Section 0156(d). The military judge may also delay the entry of judgment for an additional reasonable amount of time in order to resolve post-motions filed pursuant to R.C.M. 1104. If the military judge is no longer available, the circuit military judge or the Chief Judge of the Navy-Marine Corps Trial Judiciary will designate a military judge to complete the entry of judgment. When a court-martial results in a full acquittal or when a court-martial terminates before findings, the judgment shall be entered as soon as practicable. When a court-martial results in a finding of not guilty of all charges and specifications only by reason of lack of mental responsibility, the judgment shall be entered as soon as practicable after a hearing is conducted under R.C.M. 1105.

d. Service of entry of judgment. The accused, designated defense counsel, convening authority, and upon request, the crime victim or victims' counsel shall receive a copy of the entry of judgment as soon as practicable. If an accused is in confinement, service is satisfied when a copy is provided to the designated defense counsel.

e. Distribution of entry of judgment. The entry of judgment must 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 entry of judgment, along with the appropriate copies as described below, will 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). In cases involving Navy personnel, if applicable, forward to the Personnel Support Detachment (https://www.public.navy.mil/bupers-npc/psd/Pages/PSD-Locations.aspx) maintaining the accused's service record. In cases involving Marine Corps personnel, if applicable, forward to the Installation Personnel Administration Center.

(3) Duplicate originals must also be provided to the following:

(a) The commanding officer of the accused;

(b) The commanding officer of the brig or confinement facility, if the accused was sentenced to confinement;

(c) Commander, Navy Personnel Command (PERS-834 in the case of officers, or PERS-832 in the case of enlisted) or HQMC, Manpower and Reserve Affairs (M&RA), as appropriate;

(d) The GCMCA or SPCMCA over the accused at the time of trial, and to the current GCMCA over the accused, if different. The GCMCA will be identified by the command name;

(e) The Directorate of Debt and Claims Management (DFAS);

(f) The accused;

(g) The commanding officer of the RLSO, LSSS, or LC at which the accused was tried;

(h) The military judge, trial counsel, and defense counsel of the court-martial before which the case was tried; and

(i) The commanding officer of the Defense Service Office or the Regional Defense Counsel that represented the accused, as appropriate.

0157 Certification of Record of Trial – General and Special Courts-Martial

a. Record of trial. The official record of trial is a substantially verbatim recording of the court-martial proceedings. This recording may be accomplished via videotape, audiotape, or by other forms of technology that capture the audio of the proceedings completely and accurately.

b. Preparation of the certified record of trial. All records of trial will be prepared as prescribed in R.C.M. 1112(b). If the court-martial resulted in a guilty finding, the court reporter shall ensure all documents provided in R.C.M. 1112(f) are included in the certified record of trial prior to forwarding to OJAG (Code 40) or the cognizant SJA for appellate review. The certification of a record of trial must be completed as soon as practicable after the adjournment of a court-martial. Consult JAG/CNLSCINST 5814.1 (series) for the post-trial process requirements. The RLSO or LSSS will provide reasons in writing for any delay in certification and append them to the certified record of trial. See section 0160 below.

c. Preparation of transcript. All special and general courts-martial that result in a guilty finding, regardless of the sentence adjudged, will receive a verbatim written transcript prepared in accordance with R.C.M. 1114 and JAGINST 5813.1 (series). If the proceedings resulted in an acquittal of all charges and specifications or in termination of the proceedings before or after findings, a summary of the trial proceedings up to the disposition of the case will be prepared in accordance with JAGINST 5813.1 (series).

d. Verification of record of trial. The court reporter will compile the record of trial (including the verbatim transcript as applicable) and provide it to the military judge for verification. The military judge's verification will be appended to the record of trial. If the military judge is no longer available, the circuit military judge or the Chief Judge of the Navy-Marine Corps Trial Judiciary will designate a military judge to verify the record of trial. For purposes of this section, verification means that the military judge has reviewed the record of trial and accompanying transcript for completeness. The military judge must verify that the record of trial contains all of the items required pursuant to R.C.M. 1112(f), and the pleas, findings, and sentence are accurately reflected in the transcript and the accompanying record of trial.

e. Certification of record of trial. A court reporter will prepare all records of trial in accordance with R.C.M. 1112(b). If a court-martial results in a guilty finding, a court reporter will prepare the record of trial in accordance with R.C.M. 1112(b) and (f). A court reporter will certify the record of trial was prepared in accordance with R.C.M. 1112(b) and (f), and append the certification in the record of trial. If the court reporter is not available to certify the record of trial, the military judge will certify the record of trial. The RLSO or LSSS will forward the certified record of trial for appellate review within 120 days after the adjournment of the court-martial or the final post-trial 39a hearing. Any delays beyond 120 days must be documented and appended to the record of trial prior to forwarding.

f. Retention of court reporter notes and court-martial audio recordings. In every general and special court-martial, including acquittals and termination of proceedings prior to findings, the RLSO or LSSS will 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 for two years after adjournment in all cases or until the completion of the appellate review process pursuant to R.C.M. 1209, whichever is later.

g. Security classification. Records of trial containing classified matter will be properly classified in accordance with the provisions of R.C.M. 1112(e)(3)(A) and SECNAVINST 5510.36 (series). Copies of such records for delivery to the accused will be prepared and handled in accordance with R.C.M. 1112(e)(3)(A). Attention is directed to the fact that, while SECNAVINST 5510.36 (series) requires that a classified 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.

h. 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 Article 134, UCMJ, (Paragraph 95) or of what appears to be child pornography (hereinafter referred to as child pornography), the court

reporter will ensure that the exhibits containing child pornography are properly sealed .

(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 will retain images or material of child pornography obtained during the course of their representation. The trial counsel will 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 five days of the final adjournment of the court-martial or dismissal of the charges related to the child pornography. Under no circumstances will 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 shall be placed on a compact disc (CD) or digital versatile disc (DVD) and shall be password protected. The password should remain in the files of the senior trial counsel and the NCIS Resident Agent and a copy provided by the senior trial counsel to the Clerk of the Court for the Navy-Marine Corps Court of Criminal Appeals (NMCCA). The senior trial counsel will provide all passwords to his or her relief as a turnover item upon transfer from the billet. Trial counsel will request the military judge issue a protective order for the CD or DVD, and for any exhibits containing images of child pornography that cannot be placed on the CD or DVD. A password-protected CD or DVD may be left in the record of trial during the certification and appellate process.

(3) Nothing in subsection 0157(h) 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, establishes grounds to challenge or object to the offer or admission of such images in a court-martial or other forum.

i. 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 will 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 0167. OJAG (Code 30) will notify OJAG (Code 40) when any classified records of trial have been received.

0158 Certification of Record of Trial – Summary Courts-Martial

The summary court-martial officer shall complete a written record of trial of a summary court-martial in accordance with the requirements of R.C.M. 1305, and the use of DD Form 2329 (Record of Trial by Summary Courts-Martial)(see Appendix 9, MCM). The record of trial shall include: (1) the pleas, findings, and sentence, and if the accused was represented by counsel at the summary court-martial, a notation to that effect; (2) the fact that the accused was advised of the matters set forth in R.C.M. 1304(b)(1); and (3) if the summary court-martial is the convening authority, a notation to that effect.

0158a Summary Courts-Martial – Service of Record and Action

a. Service of record of trial. In accordance with R.C.M. 1305(d) the court-martial convening authority will serve a copy of the certified record of trial on the accused as soon as it is certified. The summary court-martial officer will forward the original record of trial to the convening authority after the accused has been served with a copy. After completion of the convening authority's action, the record of trial shall be disposed of under SECNAV Manual 5210.1 (series) and prescribed service regulations governing records management.

b. Service of convening authority's action. The convening authority shall take action on the sentence of a summary court-martial and in the discretion of the convening authority, the findings of the summary court-martial. See section 0154 and R.C.M. 1306(b) for details on available actions. The convening authority shall cause a copy of the convening authority's action to be served on the accused or on defense counsel. If a victim requests a copy of the convening authority's action, a copy shall be provided to the victim or the victims' counsel.

0158b Review of Summary Court-Martial

a. General. In each summary court-martial in which there is a finding of guilty, a judge advocate designated by the GCMCA superior in the chain of command to the convening authority

shall review the record and append a written review of the case in accordance with R.C.M. 1307. A copy of the review shall be attached to the record of trial and forwarded to the accused or defense counsel.

b. Action. If the judge advocate reviewing the summary court-martial recommends corrective action, the record of trial with the completed review must be forwarded to the GCMCA superior in the chain of command to the convening authority for action in accordance with R.C.M. 1307(f).

c. Review by the Judge Advocate General. If the judge advocate who reviews the case under R.C.M. 1307 states that corrective action is required as a matter of law and the officer reviewing the action does not take action that is at least as favorable to the accused as that recommended by the judge advocate, the record of trial and the action shall be forwarded to OJAG (Code 20) for a mandatory review under R.C.M. 1201(j).

d. Application for review by the Judge Advocate General. Not later than one year after the completion of the review pursuant to R.C.M. 1307, the accused may apply for review by the Judge Advocate General under R.C.M. 1201(h). Apply the procedures described in section 0167 (Article 69 reviews).

0159 Service of Record of Trial to the Accused and Victims - General and Special Courts-Martial

a. General. The RLSO or LSSS will provide the contents of the certified record of trial as listed in R.C.M. 1112(b) to the accused and, if applicable, a qualifying victim pursuant to Article 54, UCMJ, and R.C.M. 1112(e).

b. Accused copy. Except as provided in R.C.M. 1112(e)(3) and subsections 0141a, 0144 and 0157 (h), the accused will receive a copy of the record of trial immediately upon certification. In preparing the record of trial for the accused, redact the items listed in subparagraph (c)(1) through (9) below.

c. Victim copy. Qualifying victims, as defined in R.C.M. 1112(e)(1), will receive upon request a copy of the record of trial immediately upon certification except as provided in R.C.M. 1112(e)(3), subparagraph 0141a, 0144, and 0157(h), and 5 U.S.C. § 552a, the Privacy Act of 1974. In preparing the record of trial for the victim, the following material must be redacted if not previously removed or sealed:

(1) Social security numbers;

(2) All taxpayer ID numbers;

(3) All birthdates;

(4) The names of all minor witnesses and victims;

(5) Financial account numbers;

(6) Closed M.R.E. 412, 513, or 514 hearings;

(7) Home addresses;

(8) Personal e-mail addresses and telephone numbers; and

(9) Any unsealed medical records.

0160 Transmittal and Review of Records of Trial

a. JAG supervision. Records of all trials by court-martial in the naval service are under the supervision of the JAG.

b. Records of trial requiring digital transmittal to Navy-Marine Corps Appellate Review Activity – OJAG (Code 40). Within seven (7) days of certification of any general or special court-martial record of trial, the cognizant RLSO or LSSS will provide a digital, unredacted copy of the certified record of trial to Navy-Marine Corps Appellate Review Activity (OJAG, Code 40) via the OJAG (Code 40) SharePoint site for public release pursuant to Article 140a, UCMJ. If the certified record of trial cannot be uploaded to the OJAG (Code 40) SharePoint site, a digital, unredacted copy of the certified record of trial will be placed on a CD or DVD and mailed directly to OJAG (Code 40). OJAG (Code 40) will ensure the Naval Clemency and Parole Board is able to access all unredacted records of trial on the OJAG (Code 40) SharePoint site.

c. Records of trial requiring physical transmittal to Navy-Marine Corps Appellate Review Activity – OJAG (Code 40). All general and special courts-martial certified records of trial must be mailed to OJAG (Code 40) with the following two exceptions: any special court-martial record of trial of an enlisted accused without a finding of guilty (i.e., full acquittal) or any special court-martial record of trial of an enlisted accused where the sentence does not include a punitive discharge or confinement for more than six months. Even if one

of the exceptions applies, the certified record of trial must be sent to OJAG (Code 40) for any case previously returned by an appellate authority for further action.

(1) Unless subject to local review under Article 65(d), UCMJ, all certified records of trial under this section will be forwarded to OJAG (Code 40) not later than 120 days after the announcement of the sentence (Post-Trial I).

(2) For any case subject to review under Article 65(d)(2) or (3), UCMJ, the certified record of trial and results of the review will be forwarded to OJAG (Code 40) not later than 14 days after completion of the review.

(3) The RLSO or LSSS will mail the original, certified record of trial to Navy-Marine Corps Appellate Review Activity (Code 40), 1254 Charles Morris Street SE, Ste B01, Washington Navy Yard, DC, 20374-5124 via USPS Priority Mail Express, USPS Registered Mail, Federal Express, UPS Express, or DHL Express only. Due to the requirement for speedy post-trial processing and to prevent the compromise or loss of the original certified record of trial and the Personally Identifiable Information contained therein, neither regular nor certified USPS mail service will be used to forward records of trial to OJAG or to any other addressee in the court-martial record certification or review process. Use of the required delivery services, listed above, will provide tracking capability, reliable handling, and maximum security. Consult JAGINST 5814.1 (series) and appropriate Marine Corps guidance for supplemental post-trial processing timelines. The RLSO or LSSS will provide reasons in writing for any delay in forwarding the record and append them to the record of trial.

d. Records of trial not requiring physical transmittal to OJAG (Code 40). For any certified records of trial not covered by section 0160c, including summary courts-martial, the certified record of trial and results of any review under Articles 64 and 65(d), UCMJ, shall be retained as follows:

(1) Shore activities will retain original certified records of trial for a period of two years after Articles 64 or 65(d), UCMJ, review or adjournment in cases of a full acquittal.

(2) Fleet activities, including Fleet Air Wings and Fleet Marine Forces, will retain original certified records of trial for a period of three months after Articles 64 or 65(d), UCMJ, review or adjournment in cases of a full acquittal.

(3) At the termination of such retention period, commands must contact the OJAG (Code 60) Records Manager for Navy cases and Marine Corps Records Manager (ARDB) for Marine Corps cases to coordinate the transfer of the original records of trial to the National Personnel Records Center, Military Personnel Records, General Services Administration.

e. Compliance with crime reporting requirements. Before forwarding the record of trial to OJAG (Code 40), the appropriate documents necessary for crime reporting must be complete and uploaded to the respective case management systems. Additionally, any fields in the electronic case management system relating to crime reporting must be completed. Records of trial will be deemed complete and accepted for appellate review only when, in addition to the hard copy record being received at NAMARA, the responsible RLSO or LSSS has ensured a copy of the STR, convening authority's action, all charge sheets, entry of judgment, and, as applicable, any rulings pursuant to R.C.M. 1104 are also uploaded into appropriate electronic case management systems. Consult JAG/CNLSCINST 5814.1 (series) and appropriate Marine Corps guidance for specific documentation requirements.

f. Review of cases.

(1) Cases eligible for review at the Court of Criminal Appeals in which the accused has waived or withdrawn appellate review or failed to file an appeal. If the accused waives the right to appellate review prior to transmittal of the certified record of trial to OJAG (Code 40) in accordance with section 0160, review the record in accordance with section 0160f(2) below before transmitting the record of trial to OJAG (Code 40). If the accused waives or withdraws the right to appellate review or does not file a timely appeal after transmittal of the record of trial to OJAG (Code 40), OJAG (Code 40) will deliver the case to the commanding officer of the Reserve Preliminary Hearing Officer Unit or his or her immediate supervisor to designate a judge advocate to review the record in accordance with Article 65(d)(3)(B), UCMJ, and R.C.M. 1201(e).

(2) Cases not eligible for appellate review at a Court of Criminal Appeals. If a case is not eligible for direct review under Article 66(b), UCMJ, a judge advocate designated by the GCMCA superior in the chain of command to the convening authority must review the record pursuant to R.C.M. 1116 and in accordance with Article 65(d), UCMJ, and R.C.M. 1201(d). Upon

completion of the review, if the reviewing judge advocate believes corrective action may be required, the reviewing judge advocate shall forward the record of trial along with the request for corrective action to the JAG or the JAG's designee via OJAG (Code 20) for action in accordance with Article 65(e), UCMJ.

(3) Cases eligible for appeal by an accused pursuant to Article 66(b)(1), UCMJ. If a sentence includes more than six months of confinement, but less than two years of confinement and no punitive discharge, the accused will be notified of his or her right to appeal by OJAG (Code 40) in accordance with Article 66(b)(1), UCMJ. A copy of this notice will also be provided to the Appellate Defense Division (Code 45). The accused will have 90 days from the date the notice of the right to appeal is post-marked to notify the NMCCA of his or her intent to appeal. If the accused elects not to file an appeal or withdraws from this appeal process, an Article 65(d)(3), UCMJ, review is conducted in accordance with section 0160(f)(1) above.

(4) Cases reviewed by a Court of Criminal Appeals. NMCCA shall review cases forwarded to it by the JAG under Article 65(b)(1), UCMJ, as well as cases eligible for review in which the accused made a timely appeal from the judgment of a court-martial, in accordance with Articles 66(b)(1) and 66(h), UCMJ, and R.C.M. 1203.

0161 Appeal of Sentence by the Government

a. Submission of request to appeal. If the government seeks to appeal the announced sentence under R.C.M. 1007 for a case convened by a Navy convening authority, the Chief Prosecutor of the Navy must obtain approval from the JAG or the JAG's designee in accordance with R.C.M. 1117. In order to request the approval of the JAG, the Chief Prosecutor of the Navy shall submit the request to JAG or JAG's designee via OJAG (Code 46). For a case convened by a Marine Corps convening authority, the Chief Trial Counsel of the Marine Corps must obtain approval from the JAG or the JAG's designee in accordance with R.C.M. 1117. In order to request the approval of the JAG, the cognizant Regional Trial Counsel shall submit the request to the JAG or the JAG's designee via OJAG (Code 46).

b. Contents of request. This request shall include the following:

(1) A statement of reasons to support an appeal;

(2) Statement of the law at issue and the facts in the record that demonstrate a violation of the law;

(3) Identification of facts that demonstrate by clear and convincing evidence that the sentence was plainly unreasonable; and

(4) Input, if provided, from the military judge, the accused, parties, and the crime victim.

c. Timing. A government appeal of a sentence must be filed with the Court of Criminal Appeals within 60 days after the entry of judgment.

0162 JAG Orders Implementing Appellate Court Rulings

a. Background. Upon issuance of an appellate judicial ruling (including Article 62 rulings, extraordinary writs, writ-appeals, mandates, opinions, orders, decisions, or any other ruling by NMCCA or CAAF, or SCOTUS), and after applicable waiting periods have expired, OJAG (Code 40), acting on behalf of the JAG, will return the record with the appellate ruling to the convening authority for appropriate action. No action may be taken on an appellate ruling until the ruling is returned by OJAG (Code 40) via order to the appropriate convening authority.

b. Returned cases. When an appellate ruling issued by NMCCA, CAAF, or SCOTUS returns a record of trial to the JAG for further action, that record of trial will be retained by OJAG (Code 40). OJAG (Code 40) will forward the following: (i) a certified copy of the record of trial to the appropriate convening authority via the cognizant RLSO or LSSS; and (ii) the JAG order directing the required action on the appellate ruling. No party may take any action on an appellate ruling until directed by the JAG in accordance with section 0161. The following rules apply:

(1) Returned NMCCA cases. In cases where NMCCA issues an appellate ruling, OJAG (Code 40) will retain control of the record of trial until the time for filing a petition for reconsideration at NMCCA expires and no petition for further review has been filed, except as provided below.

(a) OJAG (Code 40) will not return records of trial before the expiration of applicable waiting periods, unless informed in writing by both OJAG (Code 46), and appellate

defense counsel of record, that neither party intends to seek reconsideration, certification, petition, or further appellate review, and both parties desire the record of trial be returned to the convening authority or the Navy and Marine Corps Appellate Leave Activity (NAMALA).

(b) If a petition for review or certificate is filed at CAAF, or appellate review is otherwise granted at NMCCA, CAAF, or SCOTUS, then OJAG (Code 40) will maintain the record or forward the record of trial to CAAF or SCOTUS, if applicable.

(c) If NMCCA has ordered further proceedings or post-trial processing, once complete, the convening authority will return the record of trial to OJAG (Code 40) via the cognizant RLSO, LSSS, or LC.

(2) Returned CAAF cases. In cases where CAAF issues a ruling, OJAG (Code 40) will retain control of the record of trial until the time for filing a petition for reconsideration expires , and no petition for further review has been filed, except as provided below.

(a) If reconsideration of a ruling is filed at CAAF, OJAG (Code 40) will wait until CAAF rules on the reconsideration (and in the case of opinions, until CAAF issues an official mandate) and until expiration of any other applicable periods that begin to run after the ruling on reconsideration is issued (e.g., the time for filing a petition for writ of certiorari to SCOTUS).

(b) Where CAAF instructs, OJAG (Code 40) will return the record of trial to NMCCA for further review or to the JAG. OJAG (Code 40) will not, however, return records of trial to the convening authority before the expiration of applicable waiting periods unless informed in writing by both OJAG (Code 46), and the appellate defense counsel of record, that neither party intends to seek reconsideration, certification, petition, or further appellate review, and both parties desire the record be returned to the convening authority.

(c) If CAAF has ordered further proceedings or post-trial processing, once complete, the convening authority will return the record to OJAG (Code 40) via the cognizant RLSO or LSSS.

(d) If petition for further review is filed and granted, or appellate review is otherwise granted at NMCCA,

CAAF, or SCOTUS, then OJAG (Code 40) will maintain the record or forward the record of trial to the appropriate court.

c. When confinement is affected. In accordance with Article 57a, UCMJ, when a court-martial sentence to confinement has been ordered executed, but the court-martial is pending review under Article 67(a)(2), UCMJ, the Secretary concerned may defer further service of the sentence to confinement while that review is pending. Deferment requests pursuant to Article 57a will be addressed to the Secretary of the Navy via OJAG (Code 20).

0163 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 0163a, the Under Secretary of the Navy, the Assistant Secretaries of the Navy, the JAG, and, subject to the limitations in Article 60a, UCMJ, 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, however, may not be suspended.

b. Authority to remit or suspend sentences. Notwithstanding the limitations in section 0163a , if the accused's commander has authority to convene a court-martial of the kind that adjudged the sentence, that commander, subject to the limitations of Article 60a, UCMJ, may suspend or remit any part of the unexecuted part of any sentence that does not include a sentence of death, dishonorable discharge, bad-conduct discharge, dismissal, or confinement for more than six months. See R.C.M. 1107(b).

c. Probationary period. Suspensions will conform to the conditions, limitations, and termination requirements of R.C.M. 1107(c)-(e). See also R.C.M. 1108(b)(4), 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 section 0163 on any sentence including a punitive discharge or confinement for 12 months or more will 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.

0163a 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. See R.C.M. 1107(b)(4).

c. Flag and general officers. Notwithstanding section 0163, 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 section 0163, 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 Commanding Officer, Navy-Marine Corps Appellate Leave Activity, and the Commanding Officer, Marine Detachment, U.S. Disciplinary Barracks, Fort Leavenworth, KS. The Commanding Officer, Navy-Marine Corps Appellate Leave Activity, and the Commanding Officer, Marine Detachment, U.S. Disciplinary Barracks, Fort Leavenworth, KS (or its successor command), may:

(1) Effect actions directed by the Secretary of the Navy following clemency review;

(2) Remit uncollected forfeitures of courts-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 five days may be granted when specifically authorized by the Commander, 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 of the Navy.

0164 Restoration of the Accused

In a case where an executed portion of a court-martial sentence has been set aside or disapproved, the accused must be restored unless a new trial or rehearing is ordered and such executed portion is included in a sentence imposed at a new hearing. For the period of time after the date on which an executed part of a court-martial sentence is set aside, an accused pending a rehearing or new trial should receive pay and allowances at the restored grade until the completion of the new trial or rehearing.

0165 Vacation of Suspension of Sentence

a. Review of confinement of probationer pending vacation proceedings. The officers appointed under section 0127 to conduct a review of pre-trial confinement under R.C.M. 305 will also conduct reviews of confinement under R.C.M. 1108(c)(4). The same procedures set forth on section 0127 shall be used.

b. Notice of proceedings. In the case of a court-martial under review, immediate notice of the vacation of any punishment will be made to the command or activity conducting the review. In the case of a court-martial in which the approved sentence includes a punitive discharge, dismissal, death, or confinement of six months or more, and appellate review has not been waived, notice will 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. 1108, will be included in the certified record of trial (see R.C.M. 1112(f)). If the authority ordering the vacation is not in possession of the record of trial, that authority will 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 suspended special court-martial sentence including a bad-conduct discharge, a digital copy of the record of any vacation proceedings will be forwarded to OJAG (Code 40) 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 0155 and R.C.M. 1102(b).

0166 Request for Waiver or Withdrawal of Appellate Review

a. General. See section 0160 on transmission of the certified record of trial.

b. Waiver or withdrawal. A waiver may be signed at any time after entry of judgment and withdrawal from appellate review may be made at any time before such review is completed. An accused cannot, however, effectively waive appellate review until after service of the entry of judgment. An accused who wishes to waive or withdraw from appellate review has the right to consult with counsel before such waiver or withdrawal. The waiver or withdrawal of appellate review must be in writing and forwarded for inclusion into the original record of trial as an enclosure. For sample forms, see Appendices 13 and 14, MCM.

0167 Article 69, UCMJ, Reviews

a. General. Upon application by the accused, the JAG, or his or her designee, may modify or set aside, in whole or in part, the findings and sentence of a court-martial that is not reviewed under Article 66, UCMJ. An Article 69, UCMJ, review occurs after a review under Article 64 or 65, UCMJ.

b. Time limits. An application by an accused for an Article 69, UCMJ, review must be filed in OJAG (Code 20) within one year after the date of the completion of the review under Article 64 or 65, UCMJ, unless the accused establishes good cause for failure to file within that time. The period in which to request a review under Article 69, UCMJ, cannot, however, exceed three years. Any command in receipt of an application for Article 69, UCMJ, review will immediately forward an advance copy of the application to OJAG (Code 20) to ensure the timely submission of the application.

c. Scope of review.

(1) In a case previously reviewed under Article 64, UCMJ, (summary courts-martial) or cases previously reviewed under Article 65(d)(2), UCMJ (cases not eligible for direct appeal), the JAG may set aside the findings or sentence, in whole or in part, on the grounds 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 appropriateness of the sentence.

(2) In a case previously reviewed under Article 65(d)(3), UCMJ, the review is limited to the determination of whether the waiver, withdrawal, or failure to file an appeal was invalid.

d. Submission procedures. Applications for relief will be submitted in writing to OJAG (Code 20). If the accused is on active duty, the application will be submitted via the applicant's commanding officer, the command that convened the court-martial, and the command that reviewed the case under Article 64 or 65, UCMJ, if applicable. If the original record of trial is held by the command that reviewed the case under Article 64 or 65, UCMJ, it will 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 0160), 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 will 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 will be submitted directly to OJAG (Code 20).

e. Contents of application. All applications for relief will contain:

(1) Full name of the applicant;

(2) Applicant's DoD ID 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) Command title of the officer that performed the Article 65(d), UCMJ, review, if applicable;

(10) Type of court-martial that convicted the applicant, and sentence adjudged;

(11) 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.

(12) 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;

(13) Any other matter the applicant desires to submit;

(14) Relief requested;

(15) Facts and circumstances to establish "good cause" for a failure to file the application within the time limits prescribed in subsection 0167(b), if applicable; and

(16) If the application is signed by a person other than the applicant or the applicant’s counsel pursuant to subsection

0167(f), an explanation of the circumstances rendering the applicant incapable of making application.

f. Signatures on application. The applicant, or the applicant's counsel, will sign the application. 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. For purposes of this subsection, one is considered incapable of making application when they are unable to sign the application due to death or physical or mental incapacity.

g. Notification of JAG review. Upon completion of the Article 69, UCMJ, review, OJAG (Code 40) will mail a copy of the decision made by the JAG or the JAG's designee to the accused . An accused is notified when the decision is mailed to the address provided by the accused or the address listed for the accused in the official service record. This notification will inform the accused of his or her right to request the Court of Criminal Appeals review the case under Article 66(b)(1)(D). This notification begins the 60-day period for the accused to seek NMCCA review.

h. Court of Criminal Appeals review of Article 69, UCMJ, appeals. The NMCCA may review a case after Article 69, UCMJ, review is complete in two situations: (1) in a case sent to the NMCCA by order of the JAG; or (2) when an accused applies for NMCCA review subsequent to the decision made by the JAG, or his or her designee. If an accused seeks NMCCA review, the accused must submit an application within 60 days of receiving notification of the decision of the JAG, or his or her designee, or within 60 days of when the decision was mailed to the accused in accordance with subsection 0167(g). The accused's application for NMCCA review must demonstrate a substantial basis for concluding that the decision constituted prejudicial error.

0168 Petition for New Trial - Article 73, UCMJ

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

0169 Substitution of Discharge – Article 74(b), UCMJ

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 of the Navy 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 will contain:

(1) Applicant's full name, DoD ID number, 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 entered by the court;

(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 such 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 and 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 0169(c)(12); and

(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 consideration will be the applicant's record in the civilian community subsequent to his or her punitive separation from the naval service.

d. Signature on application. The applicant, or the applicant's counsel, will sign the application. 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. For purposes of this subsection, one is considered incapable of making application when they are unable to sign the application due to death or physical or mental incapacity.

0170 Notification to Accused of Court of Criminal Appeals Decision

a. Service of NMCCA decision upon accused. Upon receipt of the decision of NMCCA, OJAG (Code 40) will provide the accused a copy of the decision by first-class certified mail. If the accused's address is not contained in the certified record of trial, the GCMCA over the accused will provide OJAG (Code 40) the accused's last known address. If the accused is in a military confinement facility, absent contrary directions from the accused, OJAG (Code 40) will forward the decision to the commanding officer or officer in charge of the confinement facility for delivery to the accused. The commanding officer or officer in charge of such facility will ensure personal service on the accused and that the certificate of personal service is completed and returned to OJAG (Code 40).

b. Contents. The contents of the above service must include a copy of the NMCCA decision containing the endorsement notifying the accused of his or her right to petition for review by CAAF.

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

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

e. Completion of appellate review. OJAG (Code 40) will forward 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 CAAF or SCOTUS) to the cognizant GCMCA for compliance with sections 0162 and 0170, if applicable.

0171 Request for Immediate Execution of Discharge

a. General. Before completion of appellate review, an accused may request immediate execution of the unexecuted portion of his or her sentence, following completion of the confinement portion thereof, if any, in those cases in which the sentence as affirmed by 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 before

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 or her case;

(2) That the accused has had fully explained to him or her the right to petition CAAF for grant of review;

(3) That the accused does not have a petition or case pending before CAAF;

(4) That the accused does not intend to petition CAAF, but he or she understands that the request for immediate release does not affect the right to petition CAAF;

(5) That the accused has consulted counsel of his or her 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 will 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-n. The request will be transmitted to OJAG (Code 40) by the appellant or the appellate defense counsel.

0172 Inspection of Record of Trial Containing Classified Information

After the completion of the appellate review process, an appellant desiring to personally inspect the original, certified record of trial that contains classified information must submit a request to OJAG (Code 40) via OJAG (Code 30). Such requests are subject to the requirements of SECNAVINST 5510.36 (series). If an appellant makes such a request during the appellate review process, refer to subsection 0156(i) for applicable procedures.

0173 Setoff of Indebtedness of a Person Against Pay

a. Court-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 (see 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. 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 0173(a), the amount of such loss will be set off as described in subsection 0173(a). "Competent authority," as used herein, will be the commanding officer of such persons and the administrative determination will be made through an investigation pursuant to this Manual, 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 will be effected in accordance with subsection 0173(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 concerning the possibility of remission or cancellation of an enlisted member's indebtedness. Nothing herein precludes a setoff against final pay in other cases when such action is directed by competent authority.

Part D - Miscellaneous

0174 Apprehension by Civilian Agents of the Naval Criminal Investigative Service

Pursuant to the provisions of R.C.M. 302(b)(1), 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 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 or her commanding officer 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 or her commanding officer or other appropriate military authority.

0175 Authority to Prescribe Regulations Relating to the Designation and Changing of Places of Confinement

Commander, 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.

0176 Forms Supplementing the Military Rules of Evidence

a. Interrogations. Appendix A-1-o contains a suggested format that investigative personnel can use when a criminal suspect desires to waive his or her rights concerning self-incrimination and to make a statement. See M.R.E. 301-305.

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

0177 Recoupment of Advanced Education Assistance

a. Authority. 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 of time as a condition of that Service member's receipt of advanced education financial assistance from the Government. Whether voluntarily or as a result of misconduct, if the Service member fails to complete the term of active-duty service specified in the agreement, the Secretary of the Navy can require the member to reimburse the United States. 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 advanced education assistance must be advised that he or she 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. This advice (see Appendix A-1-e) must be given to the member before he or she:

(1) Accepts nonjudicial punishment or a summary court-martial;

(2) Requests voluntary separation;

(3) Waives an administrative discharge board or board of inquiry; or

(4) Enters a guilty plea at a court-martial (whether in accordance with a plea agreement or otherwise).

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 subsections 0177(a) and (b) above, before the member submits a request for retirement or makes a personal decision regarding administrative separation, nonjudicial punishment, or judicial actions will not create any cause for relief against an otherwise valid nonjudicial, judicial, or administrative proceeding process.

0178 Search of Attorneys and Attorney Spaces

a. General. There are occasions when effective law enforcement may require the issuance of a search authorization for attorneys or attorney spaces. Because of the potential effect of this type of search on attorney-client relationships and because of the possibility that, during such a search, the government may encounter material protected by a legitimate claim of privilege, it is important that close control be exercised over this type of search. *See* United States v. Betancourt, 2017 CCA LEXIS 386 (N-M.C.C.A. June 6, 2017).

b. Definitions.

(1) For purposes of section 0178 only, "subject" includes:

(a) An attorney who is a suspect, subject, or target of a criminal investigation;

(b) An attorney who is related by blood or marriage to a suspect, subject, or target of a criminal investigation; or

(c) An attorney who is believed to be in possession of contraband or the fruits or instrumentalities of a crime.

(2) Attorney "spaces" may include the office, residence, personal items, or person of the attorney.

(3) Exigent circumstances is defined as an emergency situation requiring swift action to prevent imminent danger to

life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence.

c. Considerations. In order to avoid impinging on attorney-client relationships, trial counsel and law enforcement agencies are expected to take the least intrusive approach consistent with vigorous and effective law enforcement when evidence is sought from an attorney actively engaged in the practice of law. Consideration should be given to obtaining information from other sources or through the use of a subpoena, unless such efforts could compromise the criminal investigation or prosecution, or could result in the obstruction or destruction of evidence, or would otherwise be ineffective. An application for such a search authorization is appropriate when there is a strong need for the information or material and less intrusive means have been considered and rejected.

d. Procedures for obtaining search authorization. Should trial counsel believe there are no viable, less-intrusive alternatives available, including seeking a court order when a court has jurisdiction over the matter, then prior consultation is ordinarily required before requesting the issuance of a search authorization. Absent exigent circumstances, the following consultation procedures apply:

(1) Prior consultation with Trial Counsel Assistance Program (TCAP). Trial counsel or law enforcement agents must first consult with the cognizant Director, TCAP (either Navy or USMC, as applicable) prior to requesting approval for such searches. Trial counsel or law enforcement agents should consult with the cognizant Director, TCAP as early as possible regarding a possible search of an attorney or an attorney's spaces. To facilitate the consultation, the cognizant Director, TCAP should be provided the grounds for requesting the search, the relevant information about the proposed search, a draft copy of the proposed search authorization, affidavit in support thereof, and any special instructions to the searching agents regarding search procedures and procedures to be followed to ensure that trial counsel (or the trial counsel team) is not "tainted" by any privileged material inadvertently seized during the search.

(2) The following procedures should be discussed with the cognizant Director, TCAP during consultation concerning the prospective search. This is not an exhaustive list of considerations, and the matters considered will vary according the facts of each case:

(a) The privilege team (see subsection 0178(f)(2)) that will conduct the review;

(b) Whether copies of all seized materials will be provided to the subject attorney (or a legal representative) in order to minimize adverse effects on the attorney's legal practice and to ensure that the subject counsel is afforded an opportunity to participate in the process of disputing determinations of privilege. To the extent possible, providing copies of seized records is encouraged, where such disclosure will not impede or obstruct the investigation; and

(c) Whether appropriate arrangements have been made for storage and handling of electronic evidence and procedures developed for searching computer data (i.e., procedures that recognize the unique nature of computer seizure and are designed to avoid review of materials implicating the privilege of unrelated clients).

(3) After consultation, Director, TCAP must provide a recommendation on the requested search authorization to the Chief of Staff, Region Legal Services Office (COS RLSO) or the Deputy Director, HQMC (JA), as appropriate. COS RLSO or Deputy Director, HQMC (JA) will then make a written recommendation to the commander with authority to grant the search. Absent exigent circumstances, trial counsel or law enforcement agents may not request search authorization from a commander with authority to grant the request until after consultation with the COS RLSO or Deputy Director, HQMC (JA) and receiving his or her written recommendation. Before advising that commander, the cognizant judge advocate must consult with the law enforcement officials seeking the authorization and the COS RLSO or the Deputy Director, HQMC (JA), as appropriate.

(4) Should exigent circumstances prevent prior consultation, the trial counsel should notify the cognizant TCAP and COS RLSO or Deputy Director, HQMC (JA) of the search immediately and provide a copy of any command authorized search authorization, search authorization affidavit, and any special instructions to the searching agents as soon as possible.

e. Documentation. The draft of the proposed search authorization should be drawn as specifically as possible, consistent with the requirements of the investigation, to minimize the need to search and review privileged material to which no exception applies. The affidavit in support of the

proposed search authorization may attach any written instructions or, at a minimum, should generally state the government's intention to employ procedures designed to avoid impinging on valid attorney-client privileges.

f. Search procedures. In conducting the search, the following procedures shall apply:

(1) Procedures should be designed to ensure that privileged materials are not improperly viewed, seized or retained during the course of the search. The procedures to be followed should be tailored to the facts of each case and applicable mission needs and command structure. In all cases, trial counsel and law enforcement agents must employ adequate precautions to ensure that any searched materials are promptly reviewed for privilege claims and that privileged documents are returned to the attorney from whom they were seized.

(2) While every effort should be made to avoid viewing privileged material, the search may require limited review of arguably privileged material to ascertain whether the material is covered by the search authorization. Therefore, to protect the attorney-client privilege and to ensure that the investigation is not compromised by exposure to privileged material relating to the investigation or to defense strategy, COS RLSO or OIC, LSSS should designate a "privilege team." The privilege team will consist of agents or investigators and a judge advocate who are not involved in the underlying investigation. The judge advocate assigned to the privilege team should not be connected to the investigation, or to the prosecution or defense departments involved in the case.

(3) The judge advocate assigned to the privilege team will give instructions that set forth procedures designed to minimize the intrusion into privileged material, and should ensure that the privilege team does not disclose any information to the investigation and trial counsel team unless and until so instructed by the judge advocate assigned to the privilege team. The privilege team judge advocate should be available either on or off-site, to advise the agents during the course of the search, but should not participate in the search itself.

(4) Once granted, the execution of the search authorization should be planned to minimize disruption to the operation of the attorney's office and should occur at a time when clients are unlikely to be present. If clients are present, the search will not be conducted until clients can

depart the spaces unless exigent circumstances require the search to be conducted immediately.

(5) Reasonable efforts should be made to limit the scope of the search to the evidence sought. The search should end when the object of the search is located and seized to avoid a continuing, unnecessary search of privileged spaces. If feasible, consideration should be given to securing or "freezing" the place being searched to confirm the recovery of the object of the search.

(6) If it is anticipated that computers, to include cell phones, will be searched or seized, investigators should follow procedures similar to those set forth in the current edition of the Department of Justice, Criminal Division, Computer Crime and Intellectual Property Section's Searching and Seizing Computers manual.

g. Disclaimer. These guidelines are set forth solely for the purpose of internal DON guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, nor do they place any limitations on otherwise lawful investigative or litigation prerogatives of the DON.

0179 Military Justice Forms Index

a. How to obtain forms. DD forms used in courts-martial are available from the DoD Forms Management Program site at http://www.esd.whs.mil/DD/.

b. 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.

NONPUNITIVE LETTER OF CAUTION

Date

From: Commander, U.S. Pacific Fleet
To: [Rank], [Name of officer receiving NPLOC], [Corps (if applicable)], USN/[Designator]

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__, on 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 aboard 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 this experience will cause you to become a more proficient Naval officer.

[Signature]

NONJUDICIAL PUNISHMENT
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 _____, 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 will be entitled to the following rights at the proceeding:

(1) To be informed of your rights under Article 31, 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 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 United States 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.

_____ I desire to submit written matters for consideration by the nonjudicial punishment authority. Written matters are/are not (circle one) attached.

b. Elections at personal appearance. (Check and complete

as applicable)

_____ 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 Accused and Date) (Signature of Witness and Date)

_____ _____
(Name of Accused) (Name of witness)

NONJUDICIAL PUNISHMENT
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
(See JAGMAN 0109)

Notification and election of rights concerning the contemplated imposition of nonjudicial punishment in the case of _____, 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 refuse nonjudicial punishment and request 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 will be entitled to the following rights at the proceeding:

(1) To be informed of your rights under Article 31, 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 who 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 United States 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.

_____ I desire to submit written matters for consideration by the nonjudicial punishment authority. Written matters are/are not (circle one) attached.

c. Elections at personal appearance. (Check and complete as applicable)

_____ 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 Accused and Date) (Signature of Witness and Date)

_____ _____

(Name of Accused) (Name of witness)

NONJUDICIAL PUNISHMENT
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 _____, 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 refuse nonjudicial punishment and request 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 will be entitled to the following rights at the proceeding:

(1) To be informed of your rights under Article 31, 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 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 who 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 United States 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 refuse nonjudicial punishment or to exercise any of the rights explained above should you decide to accept nonjudicial punishment, you may obtain the advice of a lawyer before 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) (Date)

(Note: If the accused wishes to talk to a lawyer, the remainder of this form will 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) (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.

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

_____ I desire to submit written matters for consideration by the nonjudicial punishment authority. Written matters are/are not (circle one) attached.

d. Elections at personal appearance. (Check and complete as applicable)

_____ 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 Accused and Date) (Signature of Witness and Date)

_____ _____
(Name of Accused) (Name of witness)

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 before accepting advanced education assistance.

_____
Signature

_____
Date

_____
Witness

NONJUDICIAL PUNISHMENT PROCEEDING GUIDE

(Note: The formalities before and at the termination of the nonjudicial punishment proceeding 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-p of the JAGMAN, will be obtained from the accused, before or during the hearing, before proceeding further.)

CO: You are advised that a nonjudicial punishment proceeding 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: _____.

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 or her 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: _____.

(Note – CO may wish to briefly dismiss the accused to deliberate on whether the offenses have been proved by a preponderance of the evidence and an appropriate punishment)

CO: I find that you have committed the following offenses:

_____

Accordingly, 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, _____, 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 five 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 seven days, correctional custody for seven days, forfeiture of seven 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: [Rank], [Name of officer receiving PLOR], [Corps (if applicable)], USN/[Designator]
Via: (if applicable)

Subj: PUNITIVE LETTER OF REPRIMAND

Ref: (a) Report of investigation of collision between USS _____ (___), and USS _____, 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 0153, 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 USS _____ 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 the U.S. Navy Regulations.

b. Employ all means and devices available to you for detecting and avoiding danger from collision as required by USS _____ Standing Night Orders and the U.S. Navy Regulations.

c. Inform your commanding officer when you made a course

and speed change at about 6 minutes before the collision as required by the U.S. Navy Regulations.

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 subsection 0114(f)(3)(d).]

[Signature]

OFFICER NONJUDICIAL PUNISHMENT REPORT
(See JAGMAN 0119)
[LETTERHEAD]

SSIC
[Ser]
[Date]

From: Commanding General, 1st Marine Aircraft Wing
To: [Commandant of the Marine Corps (JPL)] [Commander, Navy Personnel Command PERS-834)]
Via: Commanding General, III Marine Expeditionary Force

Subj: REPORT OF NONJUDICIAL PUNISHMENT ICO FIRST LIEUTENANT JOHN J. JONES, USMC, [Designator]

Ref: (a) MCO 5800.16 v.15 (LSAM)/NAVPERS 15560D
(b) Article 15, UCMJ
(c) Part V, MCM
(d) JAGMAN, Chapter 1, Part B
(e) U.S. Navy Regulation 1122

Encl: (1) Record of Hearing under Article 15, UCMJ
(2) Punitive Letter of Reprimand
(3) 1stLt Jones's ltr 1621 of [date]
(4) 1stLt Jones's statement regarding adverse matter

1. This report is forwarded for inclusion in 1stLt Jones' official records pursuant to paragraph 010603 of reference (a).

2. On 4 December 2018, in accordance with references (b), (c), and (d), nonjudicial punishment was imposed on 1stLt Jones for conduct unbecoming an officer. As a result, [he or she] 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 2018.

5. I recommend that 1stLt Jones be retained on active duty until the expiration of his or her obligated active service. (I recommend he or she (not) be required to show cause for retention in the naval service.)

6. By copy hereof, 1stLt Jones is notified of his or her right, per reference (e), to submit his or her 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 or her official records. His or her 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 [SSIC] Ser of [DATE]

From: Commanding Officer, Marine Wing Aircraft Squadron 1

To: First Lieutenant John J. Jones, USMC, 1369

Subj: PUNITIVE LETTER OF REPRIMAND

1. Delivered.

[Signature]
By direction

SUMMARY COURT-MARTIAL ACKNOWLEDGEMENT OF RIGHTS AND WAIVER

I, [ACCUSED], assigned to [COMMAND], understand the following facts and rights regarding summary courts-martial:

1. I have the right to consult with a lawyer before 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;
Forfeiture of two-thirds pay for 1 month; and
Reduction to the lowest paygrade.

On E-5 and above:
60 days restriction;
Forfeiture of two-thirds 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 court-martial, in addition to those rights set forth above with respect to a summary court-martial, I would also have the following rights:

a. The right to be represented at trial by a military lawyer, free of charge, including a military lawyer of my own selection if that lawyer is reasonably available. I would also have the right to be represented by a civilian lawyer at my own expense.

b. At a general court-martial, the right to be tried by a member panel composed of eight officers or, at my request, at least one-third of the members would be enlisted personnel. If tried by a court-martial with members, three-fourths of the members, voting by secret written ballot, would have to agree in any finding of guilty, and three-fourths of the members would also have to agree on any sentence to be imposed should I be found guilty.

c. At a special court-martial not referred to a military judge alone, the right to be tried by a member panel composed of four officers or, at my request, at least one-third of the members would be enlisted personnel. If tried by a court-martial with members, three-fourths of the members, voting by secret written ballot, would have to agree in any findings of guilty, and three-fourths of the members would also have to agree on any sentence to be imposed should I be found guilty.

d. At a special court-martial referred to a military judge alone, the military judge alone would determine my guilt or innocence and, if found guilty, the military judge alone would determine the sentence. However, the military judge may not award a bad-conduct discharge or confinement for more than six months if the charges are referred to a special court-martial consisting of a military judge alone.

e. In either a general or special court-martial (not referred to a military judge alone), the right to request trial by a military judge alone. If tried by a military judge alone, the military judge alone would determine my guilt or innocence and, if found guilty, the military judge 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, a fine, and reduction to the lowest enlisted pay grade.

Special Court-Martial referred to a military judge alone: confinement for six months, forfeiture of two-thirds pay per month for six months, 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, I may request that a military lawyer be appointed (the detailing authority may, as a matter of discretion, detail or otherwise make available a military attorney). 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 results of the summary court-martial will be admissible as impeachment evidence under M.R.E. 609 at any subsequent court-martial. On the other hand, if I am not represented by a lawyer, the results of the court-martial will not be admissible as impeachment evidence under M.R.E. 609 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

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. [ACCUSED] [RANK/RATE/GRADE] [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. [Accused], [Service] 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, 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 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 United States set forth in enclosure 1 annexed hereto.]

[CONVENING AUTHORITY]

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. [ACCUSED] [RATE/RATE/GRADE] [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. [Accused], [Service] 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, 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 United States set forth in enclosure 1 annexed hereto.]

[CONVENING AUTHORITY]

VICTIM PREFERENCE FOR JURISDICTION
ICO _____

Right to express preference for jurisdiction:

1. As a victim, you have the opportunity to express your views as to whether the alleged offense should be prosecuted by the (Navy)(Marine Corps) in a court-martial or by civilian authorities in a civilian court with jurisdiction over the offense. Expressing your preference for jurisdiction does not guarantee that any jurisdiction will prosecute the case.

2. If you choose to express your views, you may do so through counsel, including victims' legal counsel if you have one. Your views are not binding but will be considered by the initial disposition authority and by the convening authority before the referral of charges to a court-martial. If you express a preference for prosecution by civilian authorities, the civilian authority with jurisdiction over the offense will be notified of your preference. When the (Navy)(Marine Corps) learns of a decision by the civilian authority as to whether or not to prosecute the offense in a civilian court, you will be notified.

3. Expressing your preference for jurisdiction is separate from your right to express your preference as to the disposition of the case or the scope of your involvement in the investigation and/or prosecution. At any time until the final disposition of the case, you may express your views on matters such as whether you are willing to participate in investigative and legal proceedings and testify in-person, under oath, at a court-martial.

Documentation of preference for jurisdiction:

In order to facilitate timely processing of the case, I ask that you provide your preference for jurisdiction by (date).

____ I prefer the (Navy)(Marine Corps) exercise jurisdiction over the offense, including potential prosecution of the offense in a court-martial.

____ I prefer (office of civilian authority with jurisdiction) exercise jurisdiction over the offense, including potential prosecution of the offense in a civilian court. I

understand the (Navy)(Marine Corps) will notify (office of civilian authority with jurisdiction) of my preference and the (Navy)(Marine Corps) will notify me if the (Navy)(Marine Corps) learns of a decision by (office of civilian authority with jurisdiction) whether or not to prosecute.

____ I have no preference or choose not to express a preference on military or civilian jurisdiction.

____ I do not want to participate in any investigative and legal proceedings and testify in-person, under oath, at a court-martial or civilian court proceeding.

_____ _____
(Witness signature and date) (Victim signature and date)
(Print Victim Full Name)

____ If unable to obtain the victim's signature, trial counsel certifies that this form was discussed in its entirety with the victim on (date) and accurately reflects the victim's input provided on (date).

_____
(Trial Counsel signature and date)

____ Unable to obtain victim's preference. The following steps were taken to obtain the victim's preference: (Detail steps taken and dates of steps.)

_____
(Trial Counsel signature and date)

Notification of Civilian Prosecutorial Agency
If civilian prosecution was preferred, trial counsel notified the following prosecutorial agency:

_____

on this date:

_____
_____
(Trial Counsel signature and date)

Notification to Victim of Civilian Prosecutorial Decision

Trial Counsel notified _____ that the _____:
(Name of victim) (Name of prosecutorial agency)

_____ Accepts jurisdiction of the case.
_____ Declines jurisdiction of the case.
_____ Accepts jurisdiction of the case in part.
_____ Other: _____

_
_____
(Trial Counsel signature and date)

REQUEST FOR IMMEDIATE EXECUTION OF DISCHARGE
(See JAGMAN 0170)

United States	)	[SPCM] [GCM] NCM _____
	)	REQUEST FOR IMMEDIATE EXECUTION
v.	)	OF [BAD CONDUCT][DISHONORABLE]
	)	DISCHARGE ADJUDGED ON _____
[Name, grade or	)	BY [SPECIAL] [GENERAL] COURT-MARTIAL
rate and armed	)	CONVENED BY _____
service]	)	
	)	[AT] [ON BOARD] _____

To: [Officer exercising general court-martial jurisdiction]

1. I, 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 [Rank, if applicable] [Name of counsel] [Corps, if applicable], [Service, if applicable], counsel of my own choice.

_____
[Signature of Accused]

CERTIFICATE

I, the undersigned officer of the grade, and branch of service below stated, certify I explained to the above named accused his or her rights, 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 or her the foregoing request; and he or she thereafter signed the same and acknowledged that he or she did so as his or her free and voluntary act.

[Signature]
Name, grade

SUSPECT'S RIGHTS ACKNOWLEDGEMENT/STATEMENT

(See JAGMAN 0175)

FULL NAME (ACCUSED/SUSPECT)	RATE/RANK	SERVICE
ACTIVITY/UNIT	DATE OF BIRTH	
NAME (INTERVIEWER)	RATE/RANK	SERVICE
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, the interviewer 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 considered by the convening authority and used as evidence against me in trial by court-martial; ---------- ☐

(4) I have the right to consult with lawyer counsel before 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 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 before 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 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 OR SHE IS WILLING TO MAKE A STATEMENT, HE OR SHE SHOULD FIRST BE ASKED WHETHER HE OR SHE HAS MADE A STATEMENT IN RESPONSE TO QUESTIONS ABOUT THE SUSPECTED OFFENSE TO ANYONE HE OR SHE BELIEVED WAS ACTING IN A

LAW ENFORCEMENT CAPACITY BEFORE THE PRESENT INTERVIEW. IF THE SUSPECT INDICATES HE OR SHE 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, the interviewer 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 0175)

RECORD OF AUTHORIZATION FOR SEARCH

1. At _____ [time] on _____ [date], I was approached by _____ [name] in his or her capacity as _____ [duty] who having been first duly sworn, advised me that he or she suspected _____ [name] of _____ [offense] and requested permission to search his or her_____ [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 or her 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, before 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 or her 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 (e.g., 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 (e.g., marijuana, etc.); or (4) evidence of crime (e.g., 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 person 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 0175)

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 Date

CHAPTER TWO

ADMINISTRATIVE INVESTIGATIONS

CHAPTER II

ADMINISTRATIVE INVESTIGATIONS

PART A -- OVERVIEW

0201 SCOPE

a. General
b. Relation to UCMJ investigations
c. Relation to other investigations
d. Coordination with other investigations

0202 ASSISTANCE

PART B –- PRELIMINARY CONSIDERATIONS

0203 PRELIMINARY INQUIRY

a. Purpose
b. Responsibility
c. Method
d. Preliminary inquiries into incidents involving potential claims or litigation
e. Time limitations
f. Major incidents

0204 COMMAND OPTIONS

a. General
b. Options
c. Factors to consider
d. Commander’s action
e. Review

PART C –- ADMINISTRATIVE INVESTIGATIONS

0205 COMMAND RESPONSIBILITIES

a. General
b. Request another command to investigate
c. Different commands involved
d. Other department involved
e. Incidents involving Marine Corps personnel
f. Incidents involving reservists
g. Costs

0206 CONVENING ORDERS

a. General
b. Designation
c. Elements of a convening order
d. Amendments

0207 STANDARDS OF PROOF AND EVIDENCE

a. Standards of proof
b. Evidence
c. Witnesses and warnings
d. Witness statements from other investigations
e. Personally Identifiable Information and the Privacy Act

0208 INVESTIGATION REPORT FORMAT

a. General
b. Classification
c. Preliminary statement
d. Findings of fact
e. Opinions
f. Recommendations
g. Enclosures
h. Signatures

PART D –- THREE TYPES OF ADMINISTRATIVE INVESTIGATIONS

0209 TYPE ONE: COMMAND INVESTIGATIONS

a. Purpose
b. Limitations
c. Convening order
d. Investigatory approach
e. Command investigation

report
f. CA action
g. Review
h. Forwarding and retention policies
i. Release of command investigations

0210 TYPE TWO: LITIGATION-REPORT INVESTIGATIONS

a. Purpose
b. General
c. Convening order
d. Investigatory approach
e. Litigation-Report investigation
f. CA action
g. Review
h. Release of Litigation-Report investigations

0211 TYPE THREE: COURTS AND BOARDS OF INQUIRY

a. Overview
b. Court of Inquiry characteristics
c. Board of Inquiry characteristics
d. Advisors and non-voting members
e. Responsibilities
f. Convening order
g. Method
h. Participation by non-parties
i. Time limitations
j. Action
k. Review
l. Advance copies of investigations
m. Release

PART E -- LINE OF DUTY/MISCONDUCT

0212 WHEN LINE OF DUTY/MISCONDUCT DETERMINATIONS ARE REQUIRED

a. General
b. Death cases
c. Warning required

0213 WHY LINE OF DUTY/MISCONDUCT DETERMINATIONS ARE REQUIRED

a. General
b. Disability retirement and severance pay
c. Survivor benefits

0214 STANDARDS OF PROOF FOR LINE OF DUTY/MISCONDUCT DETERMINATIONS

0215 WHAT CONSTITUTES LINE OF DUTY

a. General
b. Active service defined
c. Active duty defined for death cases
d. Unauthorized absence

0216 WHAT CONSTITUTES MISCONDUCT

a. Generally
b. Presumption
c. Examples

0217 RELATIONSHIP BETWEEN MISCONDUCT AND LINE OF DUTY

a. General
b. Possible findings

0218 MENTAL RESPONSIBILITY

a. General rule
b. Presumption
c. Suicide attempts or suicides

0219 INTOXICATION AND DRUG ABUSE

a. Intoxication
b. Presumption
c. Alcohol and drug-induced disease

0220 REFUSAL OF MEDICAL AND DENTAL TREATMENT

0221 RELATIONSHIP TO DISCIPLINARY ACTION

0222 HOW LINE OF DUTY/MISCONDUCT

DETERMINATIONS ARE RECORDED

a. General
b. Reporting
c. Entry in health or dental record
d. Command Investigations

0223 ACTION BY REVIEWING AUTHORITIES

a. Action by convening authority
b. Action by general court-martial convening authority
c. Follow-up actions

0224 SPECIAL CONSIDERATIONS IN RESERVE COMPONENT CASES

a. Interim line of duty determination
b. Statutory authority
c. Annual training
d. Investigation

PART F -- SPECIAL CONSIDERATIONS IN DEATH CASES

0225 GENERAL

a. Special considerations
b. Casualty Office notification
c. Family Member Notification
d. NCIS notification
e. Time limitations
f. Release of death investigations

0226 WHEN INVESTIGATIONS OF DEATH CASES ARE REQUIRED

a. No investigation required
b. Investigation required
c. Limited investigation required

0227 STANDARD OF PROOF

0228 AUTOPSIES

a. General
b. Unavailability of documents

0229 DETERMINATIONS CONCERNING LINE OF DUTY/MISCONDUCT IN DEATH CASES

a. Modifications to Survivor Benefit Plan programs
b. Calculations of SBP annuities
c. SBP modifications in line of duty determinations
d. Process

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
b. Deceased service member contributing cause to incident

0231 INDEPENDENT REVIEW

a. General
b. Qualifications of reviewer
c. Duties of reviewer
d. Action

0232 SPECIAL ROUTING

APPENDICES

a. Definitions
b. Parties - Definitions and Rights
c. Sample Documentation of Preliminary Inquiry
d. Sample Command Investigation Convening Order
e. Sample Command Investigation Report
f. Sample Litigation-Report Investigation Convening Order
g. Sample Litigation-Report Investigation

h. Sample Privacy Act Statement Format – JAGMAN Investigation
i. Sample Privacy Act Record of Disclosure
j. Sample Warning Advisement About Statements Regarding Origin of Disease or Injury
k. Line of Duty/Misconduct Investigations
l. Sample Line of Duty Health or Dental Record Entry
m. Claims for or Against the Government
n. Aviation Mishaps
o. Accidents Aboard Ships or Submarines (General)
p. Stranding of a Ship of the Navy
q. Collision and Allision Incidents
r. Accidental or Intentional Flooding of a Ship
s. Fires
t. Explosions
u. Motor Vehicle Accidents
v. Loss or Excess of Government Funds or Property
w. Sonic Booms, Jet Noise and Artillery Noise
x. Firearm Accidents
y. Other Incidents

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 not 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).

CHAPTER THREE

COMPLAINTS OF WRONGS

TABLE OF CONTENTS

0301 Purpose

0302 Authority, Policy, and Applicability

a. Article 138, Uniform Code of Military Justice (UCMJ)
b. Article 1150, U.S. Navy Regulations
c. Delegated authority
d. Policy
e. Applicability
f. Alleged wrongs involving senior officials

0303 Definitions of Terms Used in this Chapter

a. Complaint of wrongs
b. Complainant
c. Commanding officer
d. Superior
e. Respondent
f. General courts-martial convening authority (GCMCA)
g. Wrong
h. Redress

0304 Improper Complaint of Wrongs

a. Improper complainant
b. Improper respondent
c. Improper subject of a complaint of wrongs
d. Improper redress of a complaint of wrongs

0305 Procedures Applicable to the Complainant, Respondent, and Intermediate Endorsers Subordinate to the GCMCA

a. Submitting and routing an Article 138 complaint
b. Submitting and routing an Article 1150 complaint
c. Time limitations
d. Form of complaint
e. Joinder
f. Respondent’s response
g. Intermediate Endorsements (other than respondent)
h. Withdrawal of complaint

0306 Review of the Complaint by the GCMCA

a. General rule
b. Support and Coordination
c. Initial review
d. Returning improper complaints
e. Procedurally defective complaints
f. Complaints alleging recommendations as wrongs
g. Inquiry
h. Time limitations
i. Delay due to separate inquiry
j. Personal action by GCMCA
k. Redress

0307 GCMCA Response to Complainant; GCMCA Report to SECNAV

a. Written response to complainant
b. GCMCA report to SECNAV
c. Signature of GCMCA
d. Forwarding the GCMCA report to SECNAV

0308 Final Action on the Complaint

a. Review for substantial compliance
b. Determination of no substantial compliance
c. Determination of substantial compliance
d. Special circumstances
e. Finality
f. Other remedies

APPENDICES

a. Sample Complaint
b. Complaint of Wrongs Processing Checklist for GCMCA
c. GCMCA Report to Complainant - Complaints Returned as Improper or Procedurally Defective
d. GCMCA Written Response to Complainant (GCMCA Action)
e. GCMCA Report to SECNAV

0301 Purpose

To establish procedures for preparing, submitting, and processing complaints of wrongs under Article 138, UCMJ, and Article 1150, U.S. Navy Regulations.

0302 Authority, Policy, and Applicability

a. Article 138, UCMJ. 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." In the Navy and Marine Corps, an Article 138 complaint can be submitted against a commanding officer or a commander. See subsection 0303(c).

b. Article 1150, U.S. Navy Regulations. Article 1150, U.S. Navy Regulations, paragraph 1, states: "If any person in the naval service considers him- or herself wronged by an act, omission, decision, or order of a person who is superior in rank or command, that person shall not fail in maintaining a respectful bearing toward such superior, but may report the wrong to the proper authority for redress in the manner provided in this article. The report should clearly identify the respondent (the superior against whom it is made), the wrong complained of and the redress desired. A complainant (the person submitting a report under this article) may be held accountable by the officer responsible for the resolution of the report if the report is found to be vexatious, frivolous, or false. The report may not be joined with reports by other complainants."

c. Delegated authority.

(1) The Assistant Secretary of the Navy (Manpower and Reserve Affairs) (ASN(M&RA)) is delegated the authority of the Secretary of the Navy (SECNAV) to take final action on a complaint of wrongs in accordance with Article 138, UCMJ,

Article 1150, U.S. Navy Regulations, and this Chapter.

(2) The Judge Advocate General of the Navy (JAG), the Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC), the Deputy Assistant JAG (Administrative Law), Office of the Judge Advocate General (OJAG (Code 13)), and the Branch Head, Civil and Administrative Law (JCA), in Headquarters, Marine Corps (HQMC), Judge Advocate Division (JAD), are delegated the authority of the SECNAV to take final action on a complaint of wrongs in accordance with Article 138, UCMJ, Article 1150, U.S. Navy Regulations, and this Chapter, except the authority to grant redress, or set aside redress, that was beyond the statutory or regulatory authority of the officer who granted it.

d. Policy. Department of the Navy (DON) policy is to resolve complaints at the lowest level of command and provide adequate administrative procedures for such resolution.

e. Applicability. This chapter applies to Navy and Marine Corps Service members in the Regular and Reserve components.

f. Alleged wrongs involving senior officials. Any commander or commanding officer who receives a complaint of wrongs against a subordinate who is a senior official, as that term is defined by SECNAV Instruction 5800.12 (Series), will report the alleged wrong(s) to the Naval Inspector General (NAVIG) or the Deputy Naval Inspector General for Marine Corps Matters/Inspector General of the Marine Corps (DNIG/IGMC) before taking further action on the complaint. The NAVIG or DNIG/IGMC will determine whether the complaint contains a credible allegation of misconduct pursuant to SECNAV Instruction 5800.12 (Series), identify the appropriate process to investigate any such allegation, and notify the reporting commander or commanding officer of this determination. The timelines in this chapter for the processing of complaints of wrongs will be tolled until this notification is received. A determination that the complaint contains a credible allegation of misconduct by a senior official, or that the complaint is not credible and does not warrant investigation, will terminate further inquiry and processing under this chapter with respect to those particular alleged wrong(s), unless otherwise directed by the NAVIG, DNIG/IGMC, or the DoD Inspector General (DoDIG). In such cases, the commander or commanding officer who received the complaint will notify the complainant that the complaint, or

portion of the complaint, has been referred to the cognizant Inspector General, which will follow its normal procedures for notifying the complainant of the complaint's status and disposition. For any of the alleged wrongs returned to the commander or commanding officer as not involving a matter under the cognizance of the Inspector General, the complaint will be processed in accordance with this chapter and the respondent may respond to the remaining complaint(s) in accordance with subsection 0305(f).

0303 Definitions of Terms Used in this Chapter

a. Complaint of wrongs. A Service member's formal request to superior authority for relief from an alleged wrong or wrongs committed against the member by a superior.

b. Complainant. The Navy or Marine Corps Service member who files a complaint of wrongs under this chapter. When the complaint is submitted, the complainant must either be on active duty and allege a wrong that occurred while the complainant was on active duty, or be in a Reserve component and allege a wrong committed by the respondent in the capacity as a commanding officer or a superior in rank or command. A change to the complainant's status after the submission of the complaint does not affect the processing of the complaint under this chapter.

c. Commanding officer. A "commanding officer" is 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 a complainant is assigned, and which official directives recognize as a "command." For an Article 138 complaint, the term "commander" is synonymous with "commanding officer"; an Article 138 complaint can be submitted against a commanding officer or a commander. An "officer-in-charge" is not a "commanding officer" for the purpose of an Article 138 complaint, but is a "superior in rank or command" for the purpose of an Article 1150 complaint.

d. Superior. A Service member who is superior in rank or command to the complainant, and who is not the complainant's commanding officer.

e. Respondent. The Service member who committed the alleged wrong(s) against the complainant, and against whom the

complaint of wrongs is made. A complaint must be against an individual Service member, not a command or position.

(1) Under Article 138, UCMJ, the respondent must be the complainant's commanding officer at the time the complaint is submitted. See subsection 0303(c).

(2) Under Article 1150, U.S. Navy Regulations, the respondent must be a Service member who is superior in rank or command to the complainant, and who is not the complainant's commanding officer at the time the complaint is submitted.

(3) A change to the respondent's status after the submission of the complaint does not affect the processing of the complaint under this chapter.

(4) The SECNAV, the Under Secretary of the Navy, the Assistant Secretaries of the Navy, the General Counsel of the Department of the Navy, or any civilian employee of the Department of the Navy cannot be a respondent to a complaint of wrongs.

f. General courts-martial convening authority (GCMCA). The first officer superior in the chain of command exercising GCMCA jurisdiction over the respondent at the time of the alleged wrong(s). If the Chief of Naval Operations (CNO) or the Commandant of the Marine Corps (CMC) is the first officer superior in the chain of command exercising general courts-martial jurisdiction over the respondent at the time of the alleged wrong, then the Vice Chief of Naval Operations or the Assistant Commandant of the Marine Corps, respectively, may act on and process the complaint as the GCMCA. In cases where the respondent is the CNO, the CMC, or a departmental level officer who does not report to the CNO or CMC, the ASN(M&RA) will act on and process the complaint as the GCMCA. See section 0306(a).

g. Wrong. Any act, omission, decision or order, except those excluded by subsection 0304(c), taken, caused, or ratified by a respondent, pursuant to naval authority, that:

(1) Results in personal detriment, harm, or injury to a subordinate Service member; and

(2) Is a violation of law or regulation; unauthorized; arbitrary, capricious, or an abuse of discretion; or unjust.

h. Redress. Any lawful action by the commanding officer, the GCMCA, or any officer in the chain of command, except those excluded by subsection 0304(d), that remedies a wrong against a complainant.

0304 Improper Complaint of Wrongs

If a complaint of wrongs has an improper complainant, an improper respondent, an improper subject of a complaint of wrongs, or requests improper redress of a complaint of wrongs, then it is an improper complaint and must be returned by the GCMCA to the complainant in accordance with section 0306(d).

a. Improper complainant. A complainant who does not meet the requirements of subsection 0303(b) is an improper complainant.

b. Improper respondent. A respondent who does not meet the requirements of subsection 0303(e) is an improper respondent.

c. Improper subject of a complaint of wrongs. An improper subject of a complaint of wrongs is:

(1) An act, omission, decision, or order not taken, caused, or ratified by the respondent;

(2) An act that is 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 wrong; if a recommendation has been acted upon by another authority, the complaint of wrong will be processed under subsection 0306(f);

(3) A general policy of the DoD, the DON, the Navy, or the Marine Corps, including an instruction and other documents promulgating such a policy;

(4) The GCMCA's action on a complaint of wrongs, except for the GCMCA’s failure to forward the complaint;

(5) A complaint that may be redressed under other DON procedures that provide the complainant with 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 other DON procedures include, but are not limited to:

(a) Proceedings, findings, or final action of a board of inquiry convened under title 10, U.S. Code, Chapters 60 or 1411 (involuntary separation of Regular or Reserve officers for substandard performance of duty or for certain other reasons);

(b) Review is provided specifically by the UCMJ, or the action is otherwise reviewable by a court authorized by the UCMJ or by a military judge or military magistrate.

(c) Proceedings, findings, or final actions of nonjudicial punishment (NJP), including all requests for set aside, courts-martial, and administrative discharge procedures and results; however, if no other due process procedure exists to examine an action (e.g., vacation of a suspended NJP) or no other superior authority may review the final action (e.g., administrative discharge procedures and results where the Service member's CO is the separation authority), then such an action is a proper subject of a complaint of wrongs;

(d) Detachment for cause and relief for cause proceedings;

(e) Fitness report or evaluation review processes that provide the complainant notice, a right to rebut or a hearing, as appropriate, and review and action by higher authority. Accordingly, a final Navy fitness report or evaluation is a proper subject of a complaint of wrongs where the member believes the fitness report or evaluation to be inaccurate, unjust, or wrongly submitted; however, final Marine Corps fitness reports and pro/con marks are not proper subjects of a complaint of wrongs because the Marine Corps Performance Evaluation Review Board properly qualifies as "other DON procedures" under this subsection;

(f) Personnel detailing decisions in which the Service member has been afforded an opportunity for flag or general officer review;

(g) Filing of adverse information (for example, administrative counseling or reprimand) in official personnel

records;

(h) The revocation, removal, or suspension of a professional qualification, designation, or status where the Service member is afforded notice of the action, the right to submit a statement, and/or the right to a hearing or board. Examples include, but are not limited to, the removal of flying status upon the recommendation of a Field Naval Aviator Evaluation Board (Navy) or Field Flight Performance Board (Marine Corps); and

(i) Military whistleblower allegations reported pursuant to SECNAV Instruction 5370.7 (Series).

(6) The availability of review by the Board for Correction of Naval Records (BCNR) does not render a complaint improper under this subsection.

d. Improper redress of a complaint of wrongs. The following actions are improper redress of a complaint of wrongs:

(1) Action against or on behalf of another person, including but not limited to, courts-martial charges, NJP, or apologies; or

(2) Changes to military records, except as outlined below:

(a) A complaint of wrongs will not be used to modify a military record unless the Service member initiates a complaint within 90 calendar days after he or she knows of the record's submission for entry into the appropriate record or within one 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 Procedures Applicable to the Complainant, Respondent, and Intermediate Endorsers Subordinate to the GCMCA

a. Submitting and routing an Article 138 complaint.

(1) Before submitting an Article 138 complaint, the complainant must request, in writing, that the commanding officer redress the alleged wrong(s). Failure to request redress from the complainant's commanding officer will render the complaint procedurally defective under subsection 0306(e). The commanding officer must act upon a request for redress within 30 calendar days of receipt, and notify the complainant in writing of the action taken, if applicable. If the commanding officer does not respond to the request within 30 calendar days or denies the requested redress, then the complainant may submit an Article 138 complaint to the GCMCA via the commanding officer, as the respondent.

(2) If the complainant, the respondent, or both, detach before the submission of an Article 138 complaint, then the complainant may submit an Article 1150 complaint against the respondent in accordance with subsection 0305(b)(3).

b. Submitting and routing an Article 1150 complaint.

(1) An Article 1150 complaint can only be filed against a Service member who is superior in rank or command to the complainant, and who is not the complainant's commanding officer at the time the complaint is submitted. See subsection 0303(e)(2).

(2) When an Article 1150 complaint is filed, if the complainant and respondent are under the command of the same commanding officer, then that commanding officer will resolve the complaint. The commanding officer is not required to forward a report or resolution to a higher authority unless it is necessary for a higher authority to effect redress. If the complainant is not satisfied with the resolution made by the commanding officer, then the complainant may file an Article 138 complaint against that commanding officer in accordance with this chapter.

(3) If the respondent and complainant are not under the command of the same commanding officer, then the complainant will submit the complaint to the GCMCA over the respondent at the time of the alleged wrong(s) via the complainant's commanding officer, the respondent, and the respondent's commanding officer.

(4) If the complainant, respondent, or both, detach before the submission of an Article 1150 complaint, or if the respondent becomes the complainant's commanding officer before the complaint is resolved, then 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, the respondent, and the commanding officer of the respondent at the time of the alleged wrong.

c. Time limitations. A complaint must be submitted within 90 calendar days after the complainant discovers the alleged wrong, absent exceptional circumstances as detailed in writing by the complainant. The 30-day period during which the commanding officer is considering a complainant's written request for redress under subsection 0305(a) is not included in this 90-day period. The GCMCA should deny relief solely because the complaint is untimely unless exceptional circumstances prevented timely submission of complaint. If the GCMCA determines that exceptional circumstances justify the delay in submission, the GCMCA may consider the complaint and act on it, thereby waiving this 90-day time limitation. The GCMCA must document the waiver in writing in the GCMCA's written response to the complainant and the report to the SECNAV. See subsection 0306(e)(1)(b).

d. Format of complaint. A complainant must use the complaint format in appendix A-3-a of this chapter. This format must be completed in its entirety, unless a particular subparagraph, such as that providing for an explanation for untimely submission, does not apply.

(1) For each alleged wrong, the complaint must specify the wrong alleged and the specific redress requested, followed thereafter by explanatory information. The complaint will use temperate language.

(2) The complainant should submit all relevant evidence with the complaint as numbered enclosures, including affidavits, statements, documents, and, if applicable, the written request for redress and the commanding officer's response.

e. 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 will submit a separate complaint against each respondent, not against a group of respondents such as "the chain of command."

f. Respondent's response. The respondent will respond, in writing, to the complaint and forward the response, along with the complaint and any endorsements, to the GCMCA within ten calendar days after receipt of the complaint. A “by direction” response from a subordinate in the respondent’s command is not authorized. If the response is not completed within ten calendar days of receipt, then the response must explain the delay. Subject to applicable law, regulations, and policy governing classified material, the respondent must provide the complainant with a copy of the response, including enclosures. If the GCMCA receives a complaint of wrongs without a respondent’s response, then it must be returned to the respondent with direction to provide a written response in accordance with this subsection. The GCMCA will not act on a complaint without the respondent’s response.

g. Intermediate Endorsements (other than respondent). Intermediate endorsers, subordinate to the GCMCA, may comment on the merits of the complaint, add pertinent evidence, and, if empowered to do so, grant redress, noting such action on the endorsement. Intermediate endorsers will forward the complaint within ten calendar days after receipt. Endorsements not completed within ten calendar days of receipt must explain the delay. Subject to applicable law, regulations, and policy governing classified material, intermediate endorsers must provide the complainant with copies of their endorsements, including enclosures.

h. Withdrawal of complaint. A complainant may withdraw a complaint at any time. The withdrawal must be in writing, signed by the complainant, and addressed to the GCMCA with a copy to the respondent. The GCMCA will file the complaint and the withdrawal letter without further action, and maintain the file for two years from the date of withdrawal.

0306 Review of the Complaint by the GCMCA

a. General rule. The GCMCA, as defined in subsection 0303(f), has the primary responsibility to conduct an inquiry into the complaint of wrongs, take action on it, and submit a report to the SECNAV. As outlined below, a Navy Region

Commander may assume the duties as the GCMCA, and special procedures apply to complainants assigned to joint commands.

(1) Review of complaints by Navy Region Commanders. A Navy Region Commander will act as the GCMCA when that officer is the GCMCA over the respondent, or if specifically requested and authorized in writing to do so by the original GCMCA over the respondent.

(a) The original GCMCA's letter requesting a Region Commander to act upon a complaint should detail the reasons for the request. The Region Commander and the original 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 wrong, 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. A Region Commander may decline for appropriate reasons to act on a complaint.

(b) The original GCMCA over the respondent retains responsibility for the complaint. If the Region Commander accepts a complaint from the original GCMCA, the original GCMCA will maintain a file on the complaint for two years. The file will 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.

(2) Review of complaints from joint commands. Where the complainant is assigned to a joint command, and the GCMCA over the respondent is an officer of the Army, Air Force, or Coast Guard, the complaint will be forwarded to the GCMCA via the senior naval officer in the joint command, the designated Navy or Marine Corps commanding officer of the complainant, or the cognizant Navy Region Commander, as appropriate, who will review the complaint to determine whether it raises issues unique to the naval service and addressable only under DON regulations and instructions. The GCMCA should, in such a circumstance, request the Navy Region Commander or the appropriate Navy or Marine

Corps component commander to act on the complaint.

b. Support and coordination. Upon receipt of the complaint, the GCMCA may contact OJAG (Code 13) or Headquarters, Marine Corps (HQMC), Judge Advocate Division (JAD) Civil and Administrative Law (JCA), as applicable, for support.

c. Initial review. Using the checklist at appendix A-3-b, the GCMCA will conduct an initial review the complaint to ensure that:

(1) The complainant is a proper complainant (see subsections 0303(b), 0304(a));

(2) The respondent is a proper respondent (see subsections 0303(e), 0304(b);

(3) The complaint is a proper subject of a complaint of wrongs (see subsections 0303(g), 0304(c));

(4) The complaint requests proper redress (see subsections 0303(h), 0304(d));

(5) The complainant has requested redress from the commanding officer, in writing, if filed under Article 138, UCMJ (see subsection 0305(a));

(6) The complaint has been properly forwarded (see subsection 0305(a)-(b));

(7) The complaint is timely (see subsection 0305(c));

(8) The complaint is complete and in proper format (see subsection 0305(d));

(9) The complaint does not join two or more complainants or two or more respondents (see subsection 0305(e));

(10) The respondent has responded to the complaint in writing (see subsection 0305(f)); and

(11) Whether there is an ongoing, independent inquiry or proceeding (e.g., Inspector General investigation) (see subsection 0306(i)).

d. Returning improper complaints. There are four types of improper complaints under section 0304. The GCMCA will return an improper complaint to the complainant with an explanation as to why it is improper, but will not address the merits of the complaint. If appropriate, the GCMCA should inform the complainant about other channels available to resolve the alleged wrong. See appendix A-3-c for a sample letter to the complainant. The GCMCA will prepare and forward a report on the improper complaint to OJAG (Code 13) or, HQMC, JAD (JCA), in accordance with section 0307.

e. Procedurally defective complaints.

(1) A procedurally defective complaint is a complaint that does not satisfy the requirements of:

(a) Subsection 0305(a)(1), request for redress from a commanding officer under Article 138, UCMJ;

(b) Subsection 0305(c), time limitations;

(c) Subsection 0305(d), format of complaint; or

(d) Subsection 0305(e), joinder.

(2) If, pursuant to subsection 0306(e)(1), the GCMCA determines a complaint is procedurally defective, then the GCMCA may:

(a) Waive the defect(s) and address the merits of the complaint; or

(b) Return the procedurally defective complaint to the complainant via written correspondence that explains why it is defective, but does not address the merits of the complaint. See appendix A-3-c for a sample letter to the complainant. The GCMCA will prepare and forward a report on the procedurally defective complaint to OJAG (Code 13) or HQMC, JAD (JCA), in accordance with section 0307.

f. 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, then the officer who approved or acted on the recommendation will be substituted as respondent in place of

the original respondent. The complaint will be forwarded, via the GCMCA over the original respondent and the substituted respondent, to the GCMCA over that substituted respondent. The GCMCA over the substituted respondent will review all actions taken, and grant or deny redress, in accordance with this chapter.

g. Inquiry. The GCMCA will inquire into the merits of the alleged wrong(s) unless the complaint is returned to the complainant because it is an improper complaint under section 0304 or is procedurally defective under subsection 0306(e)(1). The following guidance applies to the GCMCA’s inquiry.

(1) Method. 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. 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.

(2) Standard of review. The GCMCA will determine if each alleged wrong committed by the respondent was in violation of law or regulation; unauthorized; arbitrary, capricious, or an abuse of discretion; or unjust.

(3) Standard of Proof. The GCMCA will apply a "preponderance of the evidence" standard of proof when evaluating the facts in the administrative record.

(4) Presumption. If the evidence made available upon inquiry does not establish that the respondent committed an alleged wrong, then the respondent is presumed to have acted properly.

(5) The GCMCA may request that the complainant, respondent, or both submit additional explanatory statements or other relevant documents. The GCMCA should review SECNAVINST 5211.5 (Series) to determine if Privacy Act statements are required.

h. Time limitations. The GCMCA will act on the complaint within 90 calendar days of receipt. If the GCMCA action is not

completed within 90 calendar days of receipt, then the written response to the complainant and the report to the SECNAV will explain the delay in accordance with subsections 307(a)-(b).

i. 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 will not extend beyond ten calendar days after the GCMCA has received notification that the action is completed in the other independent inquiry or proceeding. The GCMCA will explain the basis for the delay in the written response to the complainant and the report to the SECNAV.

j. Personal action by GCMCA. The GCMCA must take personal action on the complaint. The GCMCA cannot delegate authority for taking action in a complaint of wrongs to a subordinate command or officer.

k. Redress.

(1) If the GCMCA determines the complaint is without merit, then the GCMCA will deny redress.

(2) If the GCMCA determines the complaint has merit, then the GCMCA will grant such redress as is appropriate and within his or her authority. In certain situations, a complaint may have merit, but redress may not be available or appropriate within the context of a complaint of wrong. In such cases the GCMCA should acknowledge the merits of the complaint, even if the requested redress is denied.

(3) If the GCMCA determines the complaint has merit, but does not have authority to effect the appropriate redress (e.g., removal of a fitness report or performance evaluation from a service record), the GCMCA will forward the report in accordance with section 0307 via the officer who can effect the redress, requesting that the specific redress be granted. The officer so requested will effect the redress and endorse the GCMCA’s report by explaining the details of this action, unless the officer determines that the redress 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 action by OJAG (Code 13) or HQMC, JAD

(JCA), and will provide an endorsement setting forth the reasons why the requested redress has been delayed.

0307 GCMCA Response to Complainant; GCMCA Report to SECNAV

a. Written response to complainant. The GCMCA will advise the complainant in writing of the action taken on the complaint.

(1) Improper complaint. The GCMCA will return an improper complaint to the complainant in accordance with subsection 0306(d). See appendix A-3-c.

(2) Procedurally defective complaint. Absent a waiver, the GCMCA will return a procedurally defective complaint to the complainant in accordance with subsection 0306(e). See appendix A-3-c.

(3) If the complaint is proper, the GCMCA's letter to the complainant will specify each alleged wrong; state whether or not each wrong has merit; provide a sufficient justification and explanation concerning why each wrong has merit or not; specify the relief granted, if applicable; and discuss the reasons why one or more procedural defects were waived, or the basis for any delay, if applicable. See appendix A-3-d.

b. GCMCA report to SECNAV. All actions taken by the GCMCA, including a return of an improper or procedurally defective complaint to the complainant under subsections 0306(d)-(e) and the granting of all requested redress, must be documented in a report to the SECNAV. The GCMCA report will include:

(1) A forwarding letter in the format of appendix A-3-e;

(2) The GCMCA's written response to complainant;

(3) The complaint with all enclosures and endorsements;

(4) A copy of relevant correspondence with the complainant, respondent, or other intermediate endorsers;

(5) A copy of any pertinent investigations or other documentation used in the decision and provided to the complainant; and

(6) The signed GCMCA checklist using appendix A-3-c.

c. Signature of GCMCA. The GCMCA must personally sign the written response to the complainant and the GCMCA report.

d. Forwarding the GCMCA report to SECNAV. The GCMCA will forward the report to OJAG (Code 13) or HQMC, JAD (JCA), as applicable, in a timely manner following completion of the inquiry into the complaint.

(1) Navy. A Navy GCMCA should submit the report electronically using the OJAG (Code 13) Share Point site, the DoD Safe Access File Exchange system, or by encrypted e-mail to OJAG (Code 13) Branch 134 personnel. GCMCA reports may also be mailed to the Office of the Judge Advocate General (Code 13), 1322 Patterson Ave SE, Suite 3000, Washington Navy Yard, DC 20374-5066.

(2) Marine Corps. A Marine Corps GCMCA should submit the report electronically using the DoD Safe Access File Exchange system or by encrypted e-mail to the HQMC, JAD (JCA). GCMCA reports may also be mailed to the Commandant of the Marine Corps (JCA), Headquarters, United States Marine Corps, 3000 Marine Corps Pentagon, Washington, DC 20350-3000.

0308 Final Action on the Complaint

a. Review for substantial compliance. Upon receipt of the GCMCA's report, OJAG (Code 13) or HQMC, JAD (JCA), will review the report on behalf of the SECNAV and ensure that there has been substantial compliance with Article 138, UCMJ, or Article 1150, U.S. Navy Regulations, as applicable, and with this chapter.

b. Determination of no substantial compliance.

(1) If there has not been substantial compliance, the Deputy Assistant JAG (Administrative Law), OJAG (Code 13), or the Branch Head, JCA, will return the file to the GCMCA for additional investigation or further action. Upon receipt, the GCMCA will take all necessary action to achieve substantial compliance with Article 138, UCMJ, or Article 1150, U.S. Navy Regulations, as applicable, and this chapter. No later than 30 calendar days after receiving the returned file, the GCMCA will submit a revised GCMCA report to OJAG (Code 13) or HQMC, JAD (JCA), in accordance with section 0307.

(2) If there has not been substantial compliance because the redress granted to the complainant was beyond the statutory or regulatory authority of the officer granting the redress, then only ASN(M&RA) or SECNAV may set aside the redress. In such a case, the Deputy Assistant JAG (Administrative Law), OJAG (Code 13), or the Branch Head, JCA, will forward the GCMCA's report, with appropriate recommendations, to ASN(M&RA) for final action and notice to the complainant.

c. Determination of substantial compliance.

(1) If there has been substantial compliance and the GCMCA's report only documents the return of an improper or defective complaint under subsections 0306(d)-(e), then the GCMCA's written response to the complainant serves as final notice to the complainant under this chapter.

(2) If there has been substantial compliance and no redress is required, the Deputy Assistant JAG (Administrative Law), OJAG (Code 13), or the Branch Head, JCA, will issue final notice to the complainant.

(3) If there has been substantial compliance and additional redress is required, the Deputy Assistant JAG (Administrative Law), OJAG (Code 13), or the Branch Head, JCA, will forward the GCMCA's report, with appropriate recommendations, to ASN(M&RA) for final action and notice to the complainant.

d. Special circumstances. The Deputy Assistant JAG (Administrative Law), OJAG (Code 13), and the Branch Head, JCA, exercise discretion to forward a GCMCA's report to the JAG or SJA to CMC for final review and action, or to ASN(M&RA) or SECNAV for final action, as appropriate. Examples include, but are not limited to:

(1) When ASN(M&RA) is the GCMCA over the respondent;

(2) When an officer in the grade of vice admiral, lieutenant general, admiral, or general is the respondent;

(3) When the JAG is GCMCA or respondent, or the SJA to CMC is the respondent; or

(4) When the alleged wrongs or underlying facts relate to a significant event that is widely known to the general public.

e. Finality. Final notice to the complainant constitutes exhaustion of administrative remedies under Article 138, UCMJ, or Article 1150, U.S. Navy Regulations, as applicable, and this chapter.

f. Other remedies. The exhaustion of redress under Article 138, UCMJ, or Article 1150, U.S. Navy Regulations, and this chapter does not affect remedies that may be available under other statutes or regulations, including a petition to the Board for Correction of Naval Records.

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 before GCMCA)

Subj: COMPLAINT OF WRONG 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) JAGINST 5800.7G, 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 wrong 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. Current mailing address and e-mail address:

e. 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 Alleged Wrong: (e.g., improper evaluation report)

(1) Date alleged wrong discovered:

(2) Date written request for redress was submitted to complainant's commanding officer: (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 calendar days between alleged wrong and submission of complaint (and if over 90 calendar days, explanation for delay): (difference between date in subparagraph 4a(1) above and date this form is submitted, excluding the period respondent considered the written request for redress, which can be determined from subparagraphs 4(a)(2) and 4(a)(3) above; if complaint is submitted more than 90 calendar days after discovery of the wrong, the delay must be explained)

(5) Specific, detailed explanation of alleged wrong committed: (explain what the alleged wrong was, and how respondent was responsible for it)

(6) Relief requested: relief must be personal in nature and directly connected to the alleged wrong; it may not include, for example, a demand for public apology or initiation of action against another.

b. Type of Alleged Wrong: list additional alleged wrongs, if any, in separate lettered subparagraphs that address the same requirements listed in subparagraph 4(a).

(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, 8013.

2. Principal purpose(s). Used by command authorities and the Office of the Judge Advocate General 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 wrong.

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 Secretarial review, or the inability to notify complainant of the Secretary's decision.

Complaint of Wrong Processing Checklist for GCMCA

Case name: _____

References to JAGINST 5800.7G, Chapter III unless otherwise noted.

COMPLAINT

Complainant

☐ Is complainant a proper complainant? (§ 0303(b)) If not, see § 0306(d).**

☐ Complaint does not join more than one complainant? (§ 0305(e)) If it does, complaint may be returned to complainant in accordance with § 0306(e)(2)(b).*

Respondent

☐ Complaint is against a specific person, not a command or position? (§ 0303(e)) If not, see § 0306(d).**

☐ Is respondent the proper respondent? (§ 0303(e)/NAVREGS 1150).**

- ☐ If 138, respondent was complainant's commanding officer at the time the complaint was submitted (§§ 0303(c),(e)). If not, return under § 0306(d).
- ☐ 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), 0305(b)(2)). All other 1150s are processed using 138 rules.
- ☐ See § 0305(b)(4) if one of the parties has transferred or promoted since the alleged wrong.

☐ Complainant does not join more than one respondent? (§ 0305(e)). If he or she does, complaint may be returned to complainant in accordance with § 0306(e)(2)(b).*

Alleged Wrong(s) and Relief Requested

☐ Each alleged wrong is a proper subject of a complaint of wrong? (§§ 0303(g), 0304(c)).**

- ☐ 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(c)(1)).

☐ Complaint makes a proper request for relief? (§§ 0303(h) and 0304(d)).**

Procedural Requirements

☐ Complainant submitted written request for redress to respondent before submitting Art 138 complaint? (§ 0305(a)) If not, complaint may be returned to complainant in accordance with § 0306(e)(2)(b).* This does not apply to 1150s.

☐ Complaint is timely, or late submission justified? (§ 0305 (c)). If not, complaint may be returned to complainant in accordance with § 0306(e)(2)(b).*

☐ Complaint is properly forwarded? (§ 0307).

☐ Addressed to proper GCMCA, via intermediate endorsers, including respondent. If not, readdress and forward properly.

☐ Complaint is in the proper format? (§ 0305(d), 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 § 0306(e)(2)(b).*
- ☐ Includes complainant's and respondent's personal information?
- ☐ Includes date wrong discovered and number of calendar 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?

* Procedural defect that may be waived by GCMCA.
** Impropriety that **may not** be waived by GCMCA; requires finding

that the particular allegation or redress is not proper.

GCMCA REVIEW

☐ Complainant provided a copy of all materials received, including all endorsements and enclosures? (§§ 0305(f)-(g)).

☐ Is this command the proper GCMCA? (§ 0306(a)).

- ☐ If a Region Commander is acting as GCMCA, written request from original GCMCA must be included.

☐ If complaint returned to complainant because it is improper or procedurally defective, has complainant been provided with an explanation for return? (§§ 0306(d)-(e)).

☐ GCMCA's action completed within 90 calendar days of receiving complaint? (§ 0306(h)).

- ☐ Delay must be explained in letter to complainant.

GCMCA REPORT TO SECNAV

☐ Written response to complainant and GCMCA report to SECNAV and complainant signed personally by GCMCA? (§§ 0306(k), 0307(c)).

☐ For allegations that are procedurally defective (and such defect(s) not waived) or improper, the report does not discuss the merits (§§ 0306(d)-(e)).

☐ If GCMCA cannot effect redress granted, file forwarded to SECNAV via officer who may effectuate redress (e.g., CNP) (§ 0306(k)(3)).

☐ Report to complainant in proper format, including complaint and all enclosures and endorsements? (§ 0307(a)). Report must discuss **each** allegation of wrong and conclude:

- ☐ Whether procedural defects existed and whether they were waived;
- ☐ Whether the complaint(s) is proper;
- ☐ If the allegation is proper, whether it has merit; and,
- ☐ If the allegation has merit, whether relief is appropriate.

☐ The report is in the format specified in appendix A-3-d or A-3-e.

☐ Report to SECNAV sent via OJAG (Code 13) for USN reports and via Commandant of the Marine Corps (JCA) for USMC reports. (§ 0307(d)).

_____
Signed by reviewing official

GCMCA Written Response to Complainant
Complaints Returned as Improper or Procedurally Defective

SSIC
Ser
Date

From: (General Courts-Martial Convening Authority)
To: (Complainant)

Subj: COMPLAINT OF WRONG 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) JAGINST 5800.7G, 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 or procedurally defective) for the following reasons:

(a) – (x) (discuss each type of wrong under a separate letter heading, explaining why improper or procedurally defective; do not discuss the merits of the allegation(s))

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)

Copy to:
Respondent
Any previous endorsers
[OJAG Code 13] or [HQMC, JAD (JCA)]

GCMCA Written Response to Complainant (GCMCA Action)

SSIC
Ser
Date

From: (General Courts-Martial Convening Authority)
To: (Complainant)

Subj: COMPLAINT OF WRONG 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) JAGINST 5800.7G, Chapter III

Encl: (1) Original complaint with enclosures and endorsements
(2) Respondent's response to complaint
(3) Inquiry or investigation (if any completed; all enclosures should have been previously provided to complainant)
(4) Miscellaneous correspondence (related documents, reports, and investigations; ordered as appropriate)

1. Per references (a) and (b), enclosure (1) has been investigated.

2. If any procedural defects, explain why they are being waived and why the merits of the complaint are being addressed.

3. 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 in a separate subparagraph. If the alleged wrong is an improper subject of a complaint of wrongs or procedurally defective, state the reason (e.g. complaint about a general DON policy, which is improper under section 0304(c)(3) of reference (b)), and do not address the merits. If the alleged wrong is neither improper nor defective or if the defect has been waived, address whether it has merit, whether it warrants the relief requested or other relief, and the rationale for the GCMCA's decision)

4. This action (was/was not) completed within 90 calendar days of receipt as required by subsection 0306(h) of reference (b). (If the GCMCA action is not completed within 90 calendar days of receipt, the report must explain the delay.)

5. As required by subsection 0307 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.

_____
(PERSONALLY SIGNED BY THE GCMCA
OR OFFICER ACTING IN SUCH CAPACITY)

Copy to:
Respondent (w/o encl)
Any previous endorsers (w/o encl)

GCMCA Report to SECNAV

SSIC
Ser
Date

From: [GCMCA]
To: Secretary of the Navy
Via: (1) [Any command requested to effect redress per JAGMAN section 0306(m)(3)]
(2) Office of the Judge Advocate General (Code 13) OR Commandant of the Marine Corps (JCA)

Subj: COMPLAINT OF WRONGS UNDER [ARTICLE 138, UCMJ] [ARTICLE 1150, U.S. NAVY REGULATIONS, 2019], BY [COMPLAINANT'S RANK FIRST MI. LAST, USN/USMC]

Ref: (a) Article 138, UCMJ or Article 1150, U.S. Navy Regulations, 2019
(b) JAGINST 5800.7G, Chapter III

Encl: (1) [GCMCA's written response to Complainant] (w/o encl)
(2) [Complaint] (w/ encl)
(3) [Respondent's response] (w/ encl)
(4) [Intermediate endorsements on complaint, if applicable] (w/ encl)
(5) [Any additional GCMCA inquiry or enclosure to GCMCA action not included above, e.g., command investigation] (w/ encl)
(6) GCMCA Checklist

[*Identify enclosures in brackets in accordance with the Correspondence Manual, SECNAV M-5216.5 CH-1*]

1. In accordance with references (a) and (b), enclosures (1) through (*X*) are forwarded for final review.

2. The subject complaint was filed on *DD Month YYYY* by [Complainant] against [Respondent], who was the Complainant's [Commanding Officer/Title] at [Command]. The complaint alleged [summarize all alleged wrongs in one sentence]. The Complainant requested [summarize all requests for redress in one sentence]. The Respondent provided a response on *DD Month YYYY*.

3. [If applicable, describe any procedural issues addressed by the GCMCA, e.g. incorrectly routed, delay beyond 90 days, initially filed under incorrect authority.]

4. GCMCA Action. [Include a brief description of GCMCA action on the complaint by selecting the applicable subparagraph(s) below, omitting the bracketed language. If the complaint included more than one alleged wrong or request for redress, address each one in a separate subparagraph.]

a. The complaint was improper under section 0304*(x)* of reference (b) with regard to *alleged wrong or request for redress* [e.g. imposition of NJP] and was returned without addressing the merits.

b. The complaint was procedurally defective under section 0305*(x)* of reference (b) with regard to *alleged wrong or request for redress* [e.g. alleged wrong by second respondent] and was returned without addressing the merits.

c. The complaint was procedurally defective under section 0305*(x)* of reference (b) with regard to *alleged wrong or request for redress* [e.g. alleged wrong more than 90 days before submitting complaint] but the defect was waived. However, the complaint was without merit and so requested redress was denied.

d. The complaint was procedurally defective under section 0305*(x)* of reference (b) with regard to *alleged wrong or request for redress* [e.g. alleged wrong not preceded by request for redress] but the defect was waived and the complaint had merit. Accordingly, I have directed the requested redress be provided (identify method by with redress will be effected).

e. The complaint was proper and not procedurally defective with regard to *alleged wrong or request for redress* [e.g. adverse fitness report or evaluation]. However, the complaint was without merit and so requested redress was denied.

f. The complaint was proper and not procedurally defective and had merit with regard to *alleged wrong or request for redress* [e.g. vacation of suspended NJP]. Accordingly, I have directed the requested redress be provided [identify

method by with redress will be effected].

5. My point of contact on this matter is [identify POC]. *He/She* may be reached at *(XXX) XXX-XXXX* or by e-mail at [official e-mail address].

_____
(PERSONALLY SIGNED BY THE GCMCA
OR OFFICER ACTING IN SUCH CAPACITY)

Copy to:
[Complainant] (w/o encl)
[Respondent] (w/o encl)
[Intermediate Endorsers] (w/o encl)

CHAPTER FOUR

ARTICLE 139 CLAIMS - REDRESS OF DAMAGE TO PROPERTY

TABLE OF CONTENTS

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 (GCMCA)

a. GCMCA action required
b. Multiple offenders
c. GCMCA review

0407 Reconsideration

a. Original action by GCMCA
b. Original action by OJAG (Code 15) or SJA to the CMC (JCA)

0408 Assessment of Pecuniary Liability

0409 Effect of Courts-Martial Proceedings

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, 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 Service member. Charges against pay under these regulations will 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 U.S. 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 must 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 must be personally signed by the claimant or his duly authorized representative or agent.

b. Claim submission. A claim must 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 must 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 must be forwarded to the Chief of Naval Personnel or the Deputy Commandant for Manpower and Reserve Affairs, as appropriate, for action.

(1) Upon receipt of the claim, the commanding officer must 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 must convene an investigation under Chapter Two to inquire into the circumstances surrounding the claim.

(a) The investigation must 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 must 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 for an explanation of the various standards of proof.

(c) The investigation must make recommendations about the amount to be assessed against the pay of the responsible parties. If more than one person is found responsible, recommendations must 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 or she 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 must forward the investigation to the staff judge advocate of the command that convened the investigation. This assistance may also be provided by the Region Legal Service Office (RLSO) or Legal Services Support Section (LSSS) servicing that area or command. Commands without a staff judge advocate assigned should request assistance from the cognizant RLSO or LSSS, the next superior command with a staff judge advocate, or the nearest command with a staff judge advocate or any judge advocate assigned.

d. Judge advocate review. The judge advocate must 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 or her review to the commanding officer.

0406 Action by the Commanding Officer and General Court Martial Convening Authority (GCMCA)

a. GCMCA action required. If the commanding officer is not a GCMCA, the claim, the investigative report, the offender's statement (if any), and the commanding officer's recommendations thereon must 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 must be forwarded to the common superior GCMCA over the commands to which the alleged offenders are assigned.

(2) Forwarding to OJAG (Code 15) or SJA to the CMC (JCA). Where it is not practical or possible to forward the investigation to a common superior GCMCA, the investigative report will be forwarded to OJAG (Code 15) or the SJA to the CMC (JCA), who will take action on the matter, as appropriate. In such a situation, commanding officers are not to make charges against the pay of their members until directed by OJAG (Code 15) or the SJA to the CMC (JCA), as appropriate.

c. GCMCA review. The GCMCA will 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 or she must 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 OJAG (Code 15), or the SJA to the CMC (JCA), as appropriate, for review. After review, OJAG (Code 15) or the SJA to the CMC (JCA) will return the claim file to the GCMCA for action.

(3) After the claim has been fully reviewed by the GCMCA, and OJAG (Code 15) or the SJA to the CMC (JCA) if

required, and a final determination has been made, the GCMCA must 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) or the SJA to the CMC (JCA), as appropriate, 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 (OJAG), Claims and Tort Litigation (Code 15), 1322 Patterson Avenue, SE, Suite 3000, Washington Navy Yard, DC 20374-5066; or The Judge Advocate Division, Commandant of the Marine Corps Headquarters, U.S. Marine Corps (JCA), 3000 Marine Corps Pentagon, Room 4D558, Washington, DC 20350-3000; as appropriate. 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 must notify the parties that the claim has been forwarded to the SJA to the CMC (JCA) or OJAG (Code 15), as

appropriate, for review and final action.

b. Original action by OJAG (Code 15) or SJA to the CMC (JCA). A claimant or member who has been assessed pecuniary liability by OJAG (Code 15) or the SJA to the CMC (JCA), under subsection 0406(b)(2), may submit a request for reconsideration of the decision to OJAG (Code 15) or the SJA to the CMC (JCA), as appropriate, within five working days of receipt of the original decision.

0408 Assessment of Pecuniary Liability

a. Pecuniary liability will not be assessed under section 0408 until the Service 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 must 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 will not exceed one-half of basic pay, as defined in R.C.M. 1003(b)(2).

e. The action of the commanding officer in ordering the assessment will be conclusive on any disbursing officer for payment to the claimant of the damages assessed, approved, charged, and collected.

0409 Effect of Courts-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, will 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 Service member who has been assessed pecuniary liability.

CHAPTER SIX

DELIVERY OF SERVICE MEMBERS, CIVILIANS, AND DEPENDENTS; SERVICE OF PROCESS AND SUBPOENAS; STATE TAX AND REGULATORY AUTHORITY

TABLE OF CONTENTS

0601 Scope

0602 Authority of the JAG and the General Counsel (GC)

a. Authority of the JAG
b. Authority of the GC
c. Points of contact
d. Coordination with 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
b. Considerations when delivery is to state authorities

0604 Delivery When Persons are Within Territorial Limits of the Requesting State

0605 Delivery When Persons are Beyond Territorial Limits of the Requesting State

a. General
b. Waiver of extradition
c. Fugitive warrants

0606 Delivery When Persons are Stationed Outside the United States

0607 Order to Return

0608 Delivery of Persons to Federal Authorities

a. Authority to deliver
b. Service members located overseas

0609 Delivery of Persons to Foreign Authorities

0610 Circumstances in Which Delivery Is Refused

a. When delivery may be refused
b. Reports required

0611 Service Members Released by Civil Authorities on Bail or on Their Own Recognizance

0612 Interviewing Service Members or Civilian Employees by Federal Civilian Investigative Agencies

0613 Request for Delivery of Service Members Serving Sentence of Court-Martial

a. General
b. Interstate Agreement on Detainers Act
c. Article 14, UCMJ
d. Forms

0614 Request for Delivery of Service Members Serving Sentence of a State Court

a. General
b. Interstate Agreement on Detainers Act

Part B — Service of Process and Subpoenas upon Personnel

0615 Service of Process upon Personnel

a. Service of process of federal or state courts arising from unofficial acts
b. Service of process arising from official duties
c. Service of process of foreign courts
d. Leave or liberty to be granted persons served with process
e. Report where service not allowed

0616 Requests for Government Information and Government Witnesses by State and Federal Courts

0617 Repossession of Personal Property

Part C — Liaison with the Department of Justice (DOJ)

0618 Litigation Reports and Pleadings

0619 Liaison with the U.S. Attorney and Other Officials of the

DOJ, Including Officials of the U.S. Marshals Service

Part D — Misdemeanors Committed on Navy and Marine Corps Installations

0620 General

0621 Prosecution before Federal Magistrates

a. Responsibility of the DOJ
b. Designation of Navy and Marine Corps officers to conduct prosecutions

Part E — Appearances by Judge Advocates in Civil Court or Civil Administrative Proceedings

0622 Practice of Law on Behalf of Service Members in Civilian Proceedings

Part F — State Tax and Regulatory Authority

0623 Background

0624 State Regulation of Federal Functions, Including Sales

a. Application of state law
b. Federal immunity
c. Private individuals
d. Demands for compliance

0625 State and Local Taxation of On-Base Sales

0626 State and Local Taxes, Including Hotel Taxes, and the Federal Traveler

0627 Liability of Service Members and Dependents for State and Local Taxes

a. General
b. Income taxes
c. Personal property taxes and vehicle registration
d. Assistance

APPENDICES

a. Waiver of Extradition
b. Order to Return
c. Delivery Refusal Notification Letter
d. DON Litigation Points of Contact

0601 Scope

This chapter provides direction and guidance for various situations where civilian authorities ask a military commander to provide or, at a minimum, permit the taking of personnel, property, or records from a military installation. Part A deals with requests by authorities for the surrender of Service members or civilians pursuant to arrest warrants or similar process, usually in connection with a criminal prosecution. Parts B and C provide procedures for responding to civil litigation matters, whether or not the DON is a party. Part D provides guidance for dealing with the DOJ in criminal and civil prosecutions. Part E discusses the 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 JAG and the General Counsel (GC)

a. Authority of the JAG. The JAG, the Deputy Judge Advocate General (DJAG), the Assistant Judge Advocates General (AJAG), and the Deputy Assistant Judge Advocate General (DAJAG)(General Litigation)/Division Director (DivDir), General Litigation Division (Code 14) are authorized to act for the Secretary of the Navy (SECNAV) in the performance of functions under this chapter. Authority is delegated to the DAJAG/DivDir of the specified division within OJAG to act on the specific sections noted:

(1) National Security Law (Code 10) - section 0609;

(2) Claims and Tort Litigation (Code 15) - sections 0615 through 0617; and

(3) Admiralty (Code 11) - sections 0615 through 0617 (as the matters pertain to admiralty).

b. Authority of the General Counsel (GC). The authority of the GC of the Navy is prescribed by federal regulation, 32 C.F.R. § 700.327, and by applicable departmental 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 the matters addressed in this chapter that pertain to civilian personnel and both can 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 should seek advice from their judge advocates 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 OJAG and OGC.

d. Coordination within the Marine Corps. The SJA to the CMC (JCA) will be advised of all matters referred to the JAG relating to Navy and Marine Corps personnel and information located at Marine Corps commands. Counsel to the CMC (CL) will be advised of matters referred to OGC related to Navy and Marine Corps personnel and information located at Marine Corps commands. 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. It is the policy of DON to cooperate with state authorities unless the best interests of the Navy or Marine Corps will be prejudiced. See subsection 0603(b) below and section 0610. Navy and Marine Corps commanders will assist in the expeditious delivery of a Service member, civilian employee, civilian contractor and his or her employee, or a dependent when state authorities present proper credentials and legally sufficient documentation. 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 or her employee, or the dependent.

b. Considerations when delivery is to state authorities. Responding to a state authority’s request for delivery of a Service member involves a 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. 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 state authorities request the delivery of any person 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 vessel within the waters subject to the state's jurisdiction, commanding officers are authorized to, and normally will, deliver such person when state authorities present proper credentials and legally sufficient documentation. Additionally, the Navy Region Commander, or the equivalent Echelon II Marine Corps Commander may, after coordination with the OJAG (Code 14), issue guidance authorizing local commanders to deliver any such persons to state authorities who are acting without a warrant under conditions in which state law permits warrantless arrest.

b. Before the delivery to state authorities of a Service member of the Navy or Marine Corps, the member's commanding officer, or designee, will provide the member with a written order in accordance with section 0607. Delivery will only be effected upon compliance with section 0607, subject to the exceptions in section 0610 or, when state authorities are acting without a warrant, subject to any additional exceptions prescribed by the member's commanding officer. A Navy or Marine Corps judge advocate should be consulted before delivery is effected.

c. Before the delivery to state authorities of a civilian employee, civilian contractor and his or her employee, or a dependent located on a Navy or Marine Corps installation, the cognizant commanding officer should consult with a Navy or

Marine Corps judge advocate or Navy OGC attorney.

d. Commands should normally not become actively involved in civilian law enforcement. See SECNAVINST 5820.7 (series). When a command determines that a person may be delivered to state authorities in response to a valid warrant, the following guidance applies.

(1) If the person to be delivered is a Service member, the member may be ordered to report to a location designated by the commanding officer (e.g., to the base legal office) and surrendered to state 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, then the state 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 secure area.

(3) Delivery should be effected with minimum interference to good order and discipline.

0605 Delivery When Persons are Beyond Territorial Limits of the Requesting State

a. General. When state authorities request delivery of any Service 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 or vessel within the requesting state’s juridisction, the following action will be taken.

(1) Any officer exercising general courts-martial jurisdiction, or officer designated by him or her, or any commanding officer, after consultation with a Navy or Marine Corps judge advocate, is authorized, upon compliance with the provisions of section 0605 and section 0607, and subject to the exceptions in section 0610, to deliver the Service member to the appropriate state authority. The Service member may be delivered upon formal waiver of extradition or in accordance with subsection 0605(b), or upon presentation of a fugitive warrant, in which case the procedures of subsection 0605(c) apply.

(2) Any officer exercising general courts-martial jurisdiction, or officer designated by him or her, or any commanding officer, after consultation with a Navy or Marine Corps judge advocate or Navy OGC attorney, is authorized to deliver a civilian employee, civilian contractor and his or her employee, or a dependent located on a Navy or Marine Corps installation to the appropriate state authority.

b. Waiver of extradition.

(1) Any Service member may waive extradition. The 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 before 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 will be resolved against its use and all persons concerned will be advised to comply with the procedures set forth in subsection 0605(c) below.

(3) Executed copies of any waiver of extradition must be mailed to OJAG (Code 14) after its execution.

(4) When a Service member declines to waive extradition, the nearest Region Legal Service Office (RLSO) or Marine Corps staff judge advocate must be informed and will confer with the state authorities. Unless a fugitive warrant is obtained as set forth in subsection 0605(c), the Service member concerned will not be transferred or ordered out of the state in which he or she is then located without the permission of the SECNAV or the SECNAV’s designee.

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 Service member. Normally, a state requesting delivery of a Service member from another state will issue a fugitive warrant to the state where the member is then located; however, some states permit the state in which the Service member is located to issue a fugitive warrant. Before assisting

in the delivery of any Service member, commanding officers must verify that arresting authorities have complied with applicable state law.

(2) Upon issuance of a fugitive warrant by the requesting state to the state in which the Service 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 0605(a)(1), upon compliance with the provisions of section 0607, and subject to the requirements of subsection 0605(c)(3) and section 0610.

(3) Upon receipt of a request for delivery of a Service member under a fugitive warrant to state authorities, if the member voluntarily waives extradition, then subsection 0605(b) applies. If the Service member is delivered to state authorities but refuses to waive extradition, then he or she will have the opportunity to contest extradition in the courts of the state in which he or she is located.

0606 Delivery When Persons Are Stationed Outside the United States

If delivery of any Service 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 located outside the United States, then the cognizant commanding officer will comply with DoD Instruction 5525.09, Compliance of DoD Members, Employees and Family Members Outside the United States with Court Orders, as implemented in SECNAVINST 5820.9 (series), Compliance with Court Orders by DON Members, Employees, and Family Members Outside the United States. In all such cases, the nearest Navy or Marine Corps judge advocate, or Navy OGC attorney, as appropriate, must be consulted before any action is taken.

0607 Order to Return

a. Issuance of Order to Return. Any Service member of the Navy or Marine Corps taken into custody by federal or state authorities has a duty to return to his or her parent organization upon release. When delivery of a Service member to civilian authorities is authorized, the member’s commanding officer, or designee, will provide the member with a written

order that generally conforms to Appendix A-6-b, a copy of which will be provided to civilian authorities. If the Service member is not sooner discharged from naval service, the member's command should coordinate with civilian authorities, as appropriate and necessary, to ensure the member's return and compliance with the requirements stated in the order to return. This section does not apply to civilians.

b. 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 through 0615 for a detailed discussion of the Interstate Agreement on Detainers Act. Those with further questions regarding delivery under this paragraph should be directed to OJAG (Code 14).

0608 Delivery of Persons to Federal Authorities

a. Authority to deliver. When federal law enforcement authorities display proper credentials and legally sufficient federal warrants for the arrest of Service members, civilian employees, civilian contractors and their employees, or dependents residing at or located on a DON installation, commanding officers can and should allow the arrest of the individual sought, unless the exceptions in section 0610 apply. A Navy or Marine Corps judge advocate, or Navy OGC attorney, as appropriate, should be consulted before delivery is effected. Though not required when released to federal authorities, an arrested Service member should, if appropriate, be issued an order to return as set forth in section 0607.

b. Service members located overseas. When the DOJ requires a Service member of the Navy or Marine Corps to appear at a trial in a federal court, DOJ must make an appropriate notification to the JAG, or his or her representative. Upon receipt of this notification, the DON will, at its own expense, return the Service member to the United States and hold the member at a military facility convenient to both the DON and DOJ. Delivery may be accomplished subject to the exceptions in section 0610.

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 Service members or civilian employees of the DON, or their dependents residing at or located on a DON installation, to foreign authorities. Detailed information concerning the delivery of Service 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 must be sought from OJAG (Code 10) or Navy OGC, as appropriate.

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 of this manual;

(2) When disciplinary proceedings involving military offenses are pending and after consultation with 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. A Navy or Marine Corps judge advocate should be consulted before delivery is refused on this basis.

b. Reports required. When delivery will be refused, the commanding officer must report the circumstances to OJAG (Code 14) by telephone, record message traffic, or e-mail. The initial report must be confirmed by letter setting forth a full statement of the facts (see Appendix A-6-c). A copy of the report must be forwarded to the cognizant Navy Region Commander or equivalent echelon II Marine Corps Commander.

0611 Service Members Released by Civil Authorities on Bail or on Their Own Recognizance

A Service member of the Navy or Marine Corps arrested by

foreign, federal, or state authorities and released on bail or on his or her own recognizance has a personal duty to return to his or her parent command. Accordingly, when a Service member is released by foreign, federal, or state authorities and returns to his or her ship or station, the commanding officer, after considering the charges, date of trial, and approximate length of time that should be covered by the member's absence, must grant liberty or leave to permit appearance for trial, unless this would have a serious negative effect on the command. In the event that liberty or leave is not granted, a Navy or Marine Corps judge advocate should immediately be requested to act as liaison with the court. Nothing in this section is to be construed as permitting the Service member arrested and released to avoid the obligations of bond or recognizance by reason of military service. Service members must be advised that, in the event the member is ordered not to leave the jurisdiction of the court, the member must immediately contact his or her command and request further instructions. The command may make arrangements for the Service member to remain in the court's jurisdiction through no-cost temporary duty to the nearest Naval vessel, activity, or installation. If temporary duty arrangements are impractical, or if it appears that the matter cannot be resolved in 30 days, the Service member's command must seek guidance and assistance from the Navy Personnel Command or from Headquarters Marine Corps.

0612 Interviewing Service 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 Service members, civilian employees, civilian contractors or their employees, or dependents suspected or accused of crimes should be promptly honored. Any refusal of such a request must be immediately reported to OJAG (Code 14) or Navy OGC, as appropriate, by telephone, record message traffic, or e-mail. When the employee in question is a member of an exclusive bargaining unit, the command must consult with a Navy OGC attorney to determine whether the employee has a right to have a bargaining unit representative present during the interview.

0613 Request For Delivery of Service Members Serving Sentence of Court-Martial

a. General. Article 14, UCMJ, provides authority to honor requests for delivery of Service 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 (IADA), 18 U.S.C. Appendix §§ 1-9, which applies to the federal agency holding the prisoner. The DON, as an agency of the Federal Government, must comply with the IADA. It 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 IADA 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 subsection 0610(b).

b. Interstate Agreement on Detainers Act. Upon request under the IADA by either state authorities or the prisoner, the cognizant Navy or Marine Corps staff judge advocate, as appropriate, must communicate with the appropriate state officials, and monitor and ensure that the cognizant commanding officer acts on all such requests. The IADA provides that courts-martial sentences continue to run during temporary custody. The IADA does not apply to requests between federal authorities. Intra-federal requests use the procedures set forth below in subsection 0613(c).

(1) State request. State officials may request delivery of prisoners in military custody under section 2, Article IV of the IADA. Where (1) a state detainer (a summons or writ authorizing detention) 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 IADA also applies to a prisoner’s request to be delivered to state authority. Section 2, Article III(c) of the IADA 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 IADA.

c. Article 14, UCMJ. When a request for custody does not invoke the IADA, delivery of custody will be governed by Article 14, UCMJ, and sections 0603 through 0610 of this Manual. Commanding officers will honor the request unless, in the exercise of discretion, he or she determines 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). Unlike delivery under the IADA, delivery of custody pursuant to Article 14, UCMJ, interrupts execution of the court-martial sentence. After consultation with OJAG (Code 14) or SJA to the CMC (JCA), as appropriate, the delivering command will execute an agreement with state authorities that addresses the delivery and return of the member, associated costs, and responsibilities.

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 Service Members Serving Sentence of a State Court

a. General. Ordinarily, Service members serving sentences of six months or more resulting from a state criminal conviction will be processed for administrative discharge by reason of misconduct. See MILPERSMAN 1910-144; 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 or Marine Corps may obtain temporary custody of incarcerated members for prosecution with a request to the state under the IADA. The DON may use the IADA 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 IADA to obtain temporary custody of a Service 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 IADA, the commanding officer of the cognizant RLSO or the Marine Corps staff judge advocate must file a detainer with

the warden, commissioner of corrections, or other state official having custody of the Service member. The detainer must identify the Service 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, must prepare a written request for temporary custody of the Service member addressed to the state official charged with administration of the state penal system. The request must designate the person to whom the Service member is to be delivered and must be transmitted via the military judge to whom the member's case has been assigned. If the request is properly prepared, the military judge must approve, record, and transmit the request to the addressee official. The IADA 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 must ensure that the responsibilities of a receiving jurisdiction, delineated in section 2, Article IV of the IADA, are discharged. In particular, the receiving jurisdiction must:

(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 or her 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.

Part B — Service of Process and Subpoenas Upon Personnel

0615 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 Service members, civilian employees, civilian contractors or their employees, or dependents 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 will require that the process be served in his or her 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 civilian counsel for service in personal matters, or from an appropriate U.S. 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 installation is located requests permission to serve process aboard that 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, and 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 Service member may be directed to report to the designated location. A civilian employee, contractor, or dependent 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 employee or contractor may be required to leave a secure area in order that the process server may have access to him or her. If unusual circumstances require that the command not permit service, see subsection 0615(e).

(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 or she 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 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 must immediately deliver all such process and pleadings to the commanding officer. The commanding officer must ascertain the pertinent facts and notify OJAG (Code 11,

Code 14, or Code 15, as appropriate), or Associate General Counsel (Naval Litigation Office) (AGC NLO), and by the most expeditious means possible forward the pleadings and process to the relevant office. Points of contact are listed in Appendix A-6-d.

(2) OJAG (Code 11, Code 14, or Code 15), or AGC NLO, as appropriate, will advise the Service member or civilian employee 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. Requests for representation must be addressed to OJAG (Code 14), OJAG (Code 15), or AGC NLO, as appropriate per Appendix A-6-d, and must be endorsed by the commanding officer, who will 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.

(3) If the service of process is for injunctive relief (such as for habeas corpus or a temporary restraining order), or the Service 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, the nearest judge advocate of the Navy or Marine Corps or attorney with OGC must be immediately contacted, who will immediately contact OJAG (Code 14) or AGC NLO, as appropriate per Appendix A-6-d. Notification must 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 NLO, as appropriate per Appendix A-6-d, along with a detailed explanation of the circumstances under which the Service member or civilian employee has been detained. When the hearing has been completed and the court has issued its order in the case, a copy of the order must be forwarded promptly to OJAG (Code 14) or to the AGC NLO, as appropriate per Appendix A-6-d.

(4) 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 15 or Code 11) or AGC NLO. See Appendix A-6-d.

(5) Federal courts consider lawsuits against DON personnel arising from actions taken in their official capacity to be suits against the United States. The DON OGC is the only office within DON authorized to receive service of process on behalf of the United States (SECNAVINST 5820.8 series).

(6) The costs for attendance of DON personnel as a witness in a proceeding under subsection 0615(b) will be borne by the party requesting the witness. When DON funding is authorized or required by SECNAVINST 5820.8A, the activity where the witness is currently assigned or employed will pay for the attendance of the witness.

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 NLO, 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 NLO, as appropriate per Appendix A-6-d, will arrange

through DOJ for defense of the suit against the United States 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, contractors, and their dependents stationed or located 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 0615(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 0615(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 must 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 NLO, 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 Service 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 adversely affect Naval operations. If the United States is a party, liaison with 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 0619). When a Service 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. Service 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 Service members and civilian employees as witnesses as provided in the Joint Travel Regulations. Responsibility for the payment of the Service member's mileage and allowances will be determined pursuant to the Joint Travel Regulations. Questions on this section should be referred to OJAG (Code 14) or AGC NLO, 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 Service 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 must be made by telephone, or message if telephone is impractical, to OJAG (Code 14) or AGC NLO, as appropriate. See Appendix A-6-d.

0616 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 DoD Instruction 5405.02 and SECNAVINST 5820.8 (series). Those regulations are published at 32 C.F.R. Parts 97, 725. 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 NLO, as appropriate. See Appendix A-6-d.

0617 Repossession of Personal Property

a. Repossession of personal property, located on a Navy or Marine Corps installation, belonging to a Service 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. Before permitting physical repossession of any property, the commanding officer must 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 or she wishes to relinquish the property voluntarily. Repossession must be carried out in a manner prescribed by the commanding officer.

b. 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

0618 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 by OJAG (Codes 11, 14 and 15, as appropriate) unless authority to prepare the report is specifically delegated by the JAG to a different designee.

0619 Liaison With the U.S. Attorney and Other Officials of the DOJ, Including Officials of the U.S. Marshals Service

In matters other than those under the cognizance of the GC, (see subsection 0602(b) and Appendix A-6-d), OJAG (Codes 11, 14 and 15, as appropriate) will act as liaison to local U.S. Attorneys and other officials of the DOJ, including officials of the U.S. Marshals Service. 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 must be maintained by the AGC NLO, unless otherwise delegated.

Part D — Misdemeanors Committed on Navy and Marine Corps Installations

0620 General

The Federal Magistrates Act, 18 U.S.C. §§ 3401-3402, 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).

0621 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 or the staff judge advocate 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 or Civil Administrative Proceedings

0622 Practice of Law on Behalf of Service 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 Service 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. 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 0710 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 or supervising authority of the judge advocate, or installation staff judge advocate, as appropriate. The request must contain: the identity of the Service 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 (Code 13), 1322 Patterson Ave. SE, Suite 3000, 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, must 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, courts-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 or her office.

c. If the request for appearance is approved, 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 57, UCMJ, must, 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 0622(c) do not apply.

Part F – State Tax and Regulatory Authority

0623 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.

0624 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 areas 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 instances, such as the age for sale of alcoholic beverages and operation of bingo games, the SECNAV 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, will 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, including Service members and employees acting in a personal capacity, 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 owned or operated by Service 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 OGC 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 region environmental counsel.

0625 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 that 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.

0626 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 the expenses are reimbursed by the Federal Government.

0627 Liability of Service Members and Dependents For State and Local Taxes

a. General. There is no general exemption for Service members or dependents from state and local taxation. Service members are provided some relief by the Servicemembers Civil Relief Act (SCRA), 50 U.S.C. §§ 3901-4043, which limits the right of states to tax military income and motor vehicles owned by Service members. Spouses of Service members are provided some relief by the Military Spouses Residency Relief Act (MSRRA), Pub. L. No. 111-97, 123 Stat. 3007, which amends several parts of the SCRA and ensures that a spouse of a Service member may maintain his or 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 permanent change of station move with his or her military spouse to a new jurisdiction, so long as the spouse is in the jurisdiction solely to be with the Service member serving in compliance with military orders. Additionally, pursuant to the Veterans Benefits and Transitions Act of 2018, the SCRA was amended at 50 U.S.C. § 4001(a)(2). Under this SCRA amendment the spouse of a service member may, effective 2018, for any taxable year of the marriage, elect to use the same residence for purposes of taxation as the Service member regardless of the date on which the marriage of the spouse and the member occurred.

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) The SCRA states that a Service member does not

acquire residence or domicile in a state merely because he or she 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. § 4001). Thus, a Service 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 Service 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 domiciliary 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 nonresidency 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 nonresidency, 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 Service member's domicile normally starts out as the state where he or she lived, was or would have been registered to vote if he or she desired to vote, and under which laws he or she was subject to state personal income taxation before entering the military service. 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 Service member validly to change domicile, he or she must meet both tests. Thus, it is not possible to validly declare domicile in a state where the Service member has never lived. Also, to ensure respect for a choice of domicile, Service members should retain all possible contacts, such as 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 Service member to be held a domiciliary of more than one state and subjected to multiple taxation. Service members with domicile problems should be referred to a legal assistance attorney.

(5) Dependents, unlike Service 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 member’s state of domicile. 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-domiciliary state. Interest income, as well as income from a business or rental property in the non-domiciliary 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 Service 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 Service members generally is taxable only in the state of domicile. See 50 U.S.C. § 3991.

(2) If a non-business vehicle owned by and titled in the name of a Service 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 Service member actually resides. That non-domiciliary 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 Service member does not maintain registration in his or her state of domicile, he or she must re-register the vehicle after each interstate permanent change of station move.

(4) Vehicles owned by dependents are subject to tax and registration wherever the vehicle is located unless protected under the SCRA, 50 U.S.C. § 4001 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 titled to the Service member or the spouse 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 Service member's state of domicile and the state where the vehicle is located. In most cases, however, the Service 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 Service members' jointly owned vehicles from taxation.

d. Assistance. Assistance for individual Service 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 pursuant to SECNAVINST 5840.8 (series).

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 0605, 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] [date]

WITNESSED:

_____
[Signature of witness] [date]

Order to Return

5800
Ser
Date

From: Commanding Officer (or Designee)
To: Sailor T. B. Delivered

Subj: ORDER TO RETURN AFTER RELEASE FROM CIVILIAN CUSTODY

1. You are being released to the custody of civilian authorities pursuant to the provisions of JAGINST 5800.7G, section 0603 for action within the civilian criminal justice system. This action does not constitute discharge or separation from military service.

2. In the event you are released from civilian custody and not sooner discharged from naval service, you are ordered to report immediately, and in person, to [Service member's command] or the nearest Navy or Marine Corps installation, unit, or activity for further instructions. Before or upon your release, you must contact [Service member's command] or the nearest installation, unit, or activity for reporting guidance. You will advise the command of your name, rank, DoD identification number, organization, the circumstances of your release from custody, and the contents of this letter.

3. Certain restrictions may be placed upon you by the civilian jurisdiction in connection with your release from custody. You will request that the civilian authorities provide you a written copy of all documentation setting forth any such restrictions. This order does not relieve you of restrictions imposed upon your release, so if there is a restriction that affects your ability to return to your command or the nearest installation, you must contact [Service member's command] or the nearest installation, unit, or activity for further guidance.

4. Upon reporting, the commander to whom you report will notify [member's command] or [Commander, Navy Personnel Command or Headquarters, U.S. Marine Corps, as appropriate] of the circumstances surrounding your release. Command contact information is provided for your convenience: [command contact information; quarterdeck phone number; duty officer phone number, etc…].

SIGNATURE
(Commanding Officer)

ACKNOWLEDGMENT

_____ _____
(signature of Service member) (date)

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) JAGINST 5800.7G, section 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 JAG was the appellate authority. Responsibility for environmental suits is shared with the OGC.

The subject matter of the correspondence forwarded will determine the appropriate code:

(1) Suits against the United States or U.S. citizens in foreign courts – Code 10 (National Security Law)

(2) Admiralty cases – Code 11 (Admiralty and Maritime Law)

(3) Tort claims and affirmative claims, including actions under the Federal Tort Claims Act, Military Claims Act, Personnel Claims Act, Federal Claims Collection Act, Medical Care Recovery Act, and Third Party Payers Act; individual requests for DOJ representation or removal and substitution under the Federal Employees Liability Reform and Tort Compensation Act for tort actions arising out of the performance of official duties 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) National Security Law (Code 10), 703-697-9161/9162

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 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 GC denied the appeal. Responsibility for environmental law is shared with OJAG.

B. ADDRESS: Associate GC Naval Litigation Office (NLO)
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 OGC is the AGC NLO, telephone 202-685-7039, FAX 202-685-7036.

III. Marine Corps Points of Contact

A. SJA to the CMC (JCA) 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 OGC.
703-614-2150
DSN: 224-2150 FAX: 703-693-4453

CHAPTER SEVEN

LEGAL ASSISTANCE

TABLE OF CONTENTS

0701 Scope

0702 Supervision of Legal Assistance

0703 Legal Assistance Attorneys

0704 Nonlawyer Personnel

0705 Persons Eligible for Legal Assistance

a. Members of the Military Services on active duty for 30 days or more
b. Fiduciary
c. Other persons eligible

0706 Personal and Privileged Character of Service

a. General
b. Information requests by commanding officer

0707 Legal Assistance Service Tiers

a. Priority for services
b. Other services

0708 Limitations on Scope of Legal Assistance Services

a. Personal legal matters only
b. Advice or assistance in official military matters
c. Representation of opposing parties or interests
d. Proceedings involving the United States
e. Telephone inquiries
f. Advice to third parties

0709 Referrals and Fees

a. Referral to a civilian attorney or law firm
b. Prohibition of fees

0710 Expanded Legal Assistance Program

a. General
b. Eligibility
c. Temporary civilian restraining or protective orders for crime victims

0701 Scope

a. This chapter provides information concerning the DON legal assistance programs for the Navy and the Marine Corps. Additional regulations are contained in JAGINST 5801.2 (series), Navy Legal Assistance Program, and MCO 5800.16, Legal Support and Administration Manual, and other related directives.

b. JAGINST 5800.7G implements 10 U.S.C. § 1044, which authorizes legal assistance services to eligible persons, and 10 U.S.C. §§ 806, 8013(g), 8046, and 8088, which provide authority to the JAG to authorize legal assistance to other eligible persons.

c. "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.

d. DON legal assistance programs promote increased readiness of active-duty and reserve members of the DON, and enhance 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.

e. Legal assistance is not separately funded; the programs are 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. DON legal assistance programs are established and supervised by the JAG and the SJA to CMC.

b. Commanding officers of legal service offices, senior staff judge advocates to officers exercising general court-martial convening authority, and Marine Corps judge advocates designated by the SJA to CMC, will 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 the SJA to CMC 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 crime victim. Provision of legal assistance services must not undermine the delivery of zealous and effective representation of any client, including a victim of a crime (see subsection 0708(c) below). Practitioners will seek guidance from their chain of command regarding appropriate conflict management in providing legal assistance.

0704 Nonlawyer Personnel

Legal officers, Legalmen, independent duty Legalmen, civilian paralegals, and legal clerks may not provide legal advice or services that call for the professional judgment of an attorney. Nonlawyer personnel may provide assistance not requiring the professional judgment of an attorney, such as notarizations, intake questionnaire preliminary screening, and inserting customer information into routine attorney provided powers of attorney.

0705 Persons Eligible for Legal Assistance

a. Members of the Military Services 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.

(1) For reservists on active duty for less than 30 days, see subsections 0705(c)(4) and 0705(c)(5) except as provided for in subsection 0705(a)(2) below.

(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, are eligible for Disability

Evaluation System (DES) services and other legal services that relate to serious wounds, illnesses, or injuries incurred during the period of mobilization.

b. Fiduciary. Legal assistance may also be provided to a legally-appointed fiduciary on behalf of any 10 U.S.C. § 1044 eligible person who is incapacitated or otherwise incapable of seeking such assistance personally.

c. 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 as indicated by their DoD Identification Card, including those on the Permanent Disability Retired List, Temporary Disability Retired List, or who are under age 60 and entitled to retirement 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 military legal readiness of Reserve personnel for mobilization, pre-mobilization legal 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, powers of attorney that address incapacity, and routine powers of attorney. Other assistance may be provided if it relates to recall or mobilization. Examples of such assistance include advice concerning rights pursuant to the Servicemembers Civil Relief Act (SCRA), 50 U.S.C. §§ 3901-4043, or the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §§ 4301-4334.

(6) Dependents of members of the Reserve Components listed in subsection 0705(a)(2) above.

(7) 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. In order to address legal issues related to or arising from deployment, JAG and SJA to CMC may authorize the provision of legal assistance services to DoD civilian personnel and their dependents for a reasonable period – not to exceed 30 days – after returning from deployment.

(b) DoD civilian personnel who are U.S. citizens, other than local hire employees, employed by, serving with, or accompanying the Military Services, when they are assigned to a foreign country, or when they are assigned to and physically present onboard a vessel or a unit of the Military Services deployed in excess of 30 days. Dependents who accompany DoD civilian personnel authorized under subsection 0705(c)(7)(b) 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 Military Services, where legal assistance from non-military legal assistance providers is not reasonably available. Such legal assistance is generally limited to ministerial services (e.g., notarial services), legal counseling (e.g., the review and discussion of legal correspondence and documents), legal document preparation (e.g., limited to powers of attorney and advance medical directives), and help with retaining civilian lawyers.

(d) Civilian contractor personnel who are U.S. citizens and accompanying U.S. forces overseas, and produce documentation of an employment contract that requires the U.S. Government to provide legal assistance, may receive legal assistance as specified in the contract if such services are in accordance with authorized legal assistance services. If the contract does not specify services, services will be limited to notarizations and provision of pre-deployment and deployment-related powers of attorney.

(8) Members of allied forces and their dependents in the United States, serving with the Military Services.

(9) A 20/20/20 (20 years of creditable military service by the Service member during which the marriage of at least 20 years or more overlaps with 20 years of that creditable military service) un-remarried former spouse as defined in 10 U.S.C. § 1072.

(10) Individuals who qualify for benefits under 10 U.S.C. § 1408(h).

(11) Dependents and former dependents of Service members separated for dependent abuse consistent with the transitional compensation provisions of 10 U.S.C. § 1059.

(12) Officers of the commissioned corps of the Public Health Service and the National Oceanic and Atmospheric Administration, who are on active duty or entitled to retired or equivalent pay, as well as their dependents as defined in 10 U.S.C. §§ 101, 12732.

(13) DoD civilian employees may receive notarial services consistent with Chapter Nine on matters relating to their official duties.

(14) Other persons authorized by the JAG or the SJA to CMC in accordance with 10 U.S.C. §§ 806, 8013(g), 8046, 8088, and SECNAVINST 5430.27 (series).

0706 Personal and Privileged Character of Service

a. General. Information and files pertaining to legal assistance clients are privacy protected information and privileged under law and applicable professional rules and guidelines. Such information and files will not be disclosed to anyone, except upon the specific permission of the client to the legal assistance attorney providing the service 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. Priority for service. The following provides the priority for military legal readiness services.

(1) Tier I services. Tier I services are standard military legal readiness services and 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 housing foreclosure advice.

(b) Consumer finance issues, including:

1. Consumer fraud and identity theft advice, counseling, and pre-litigation actions to resolve;

2. Consumer protection statutes (federal and state) advice, and pre-litigation action to resolve;

3. Consumer services contracts, motor vehicle contract and financing review, counseling (excluding real estate purchase and sale contracts), and action to resolve;

4. Credit and debt collection advice;

5. Credit report advice;

6. Advice concerning general indebtedness, government indebtedness, involuntary allotment, and garnishment issues when consistent with limitations contained in subsection 0708(d); and

7. Payday loan and predatory lending advice.

(c) Crime victim information (regardless of whether a victim elected unrestricted or restricted (confidential)

reporting of a sexual assault), to include:

1. Victim and Witness Assistance Program (VWAP), 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 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 unrestricted reporting of sexual assaults;

3. General information concerning the military justice system including the roles and responsibilities of trial counsel, defense counsel, victims' counsel, and the investigators;

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 protective 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 victim compensation programs; and

7. 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 Program Procedures, SECNAVINST 1752.3 (series) Family Advocacy Program, JAGINST 5801.2 (series) Navy Legal Assistance Program, COMNAVLEGSVCCOMINST 5800.1 (series) Naval Legal Service Command Manual, MCO 5800.14 (series) Victim-Witness Assistance Program, MCO 1752.5 (series) Sexual Assault Prevention and Response Program, and other service-specific or subsequent regulations.

(d) Demobilization briefings, to include information on the USERRA.

(e) Dependent nonsupport advice and document drafting (regarding service support obligations).

(f) Deployment briefings and assistance.

(g) Disaster relief support and advice.

(h) Family care plan and court custody orders advice.

(i) Family law advice, including:

1. Basic child custody, child support, and child visitation advice;

2. Basic divorce, dissolution, and annulment advice; and

3. Basic separation agreement and spousal support agreement advice.

(j) Military rights under the SCRA.

(k) Military naturalization advice and forms review.

(l) Notary services.

(m) Paternity advice.

(n) Power of attorney advice and drafting.

(o) Preventive law briefings.

(p) Simple estate planning to include advice, drafting, and document execution of:

1. Basic wills;

2. Advance health care directives;

3. Death gratuity, unpaid pay and allowances

advice, and DD Form 93 drafting;

4. Durable financial and property management powers of attorney;

5. Health care powers of attorney;

6. Pre-residuary and residuary trusts for minors, including transfers under the Uniform Gifts to Minors Act and Uniform Transfer to Minors Act and nomination of guardians or conservators;

7. Servicemembers' Group Life Insurance (SGLI) advice and beneficiary designation; and

8. U.S. Navy "Page 2" (NAVPERS 1070/602) and USMC Record of Emergency Data dependent designations.

(q) Tenant advice, to include security deposits, early termination and SCRA protections.

(r) Wounded, ill, and injured Service member Physical Evaluation Board advice limited to providing a recommendation to consult with a DON DES attorney and provision of a DON DES attorney current contact roster.

(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 limited to:

1. Step-parent adoption; and

2. DON and DoD adoption reimbursement, adoption tax credit, and tax deduction.

(b) Guardianship (conservatorship) of the person.

(c) Guardianship of the estate, limited to the estates of dependent minor children of Service members who died while on active duty.

(d) United States Citizenship and Immigration Services required immigration paperwork review, and advice for dependents.

(e) Small claims court pro se pleadings.

(f) Service as a temporary guardian or trustee to a mentally incompetent Service member for purposes of DoD proceedings conducted pursuant to 37 U.S.C. §§ 601-604, and under Bureau of Medicine and Defense Finance and Accounting Service regulations. This service will only extend until the appointment of a guardian by a qualified court.

(3) Tier III services. Active-duty military legal assistance attorneys do not routinely provide Tier III services. For the Marine Corps, Tier III services will be provided by fully qualified attorneys as authorized by the SJA to CMC or his or her designee. For the Navy, Tier III services will only be provided by fully qualified military legal assistance civilian or Reserve judge advocate subject matter experts or by active-duty military legal assistance attorneys under the direct supervision of a fully qualified military legal assistance civilian or Reserve judge advocate subject matter expert with the express permission of the unit commanding officer. In circumstances where Tier I and Tier II support is fully established, addressed, and sustainable, support in the following matters will only be extended to eligible clients as follows:

(a) Bankruptcy advice.

(b) Drafting of family law or domestic relations documents, including:

1. Drafting of child custody, child support, and child visitation documents;

2. Drafting of divorce, dissolution, and annulment documents; and

3. Drafting of separation and spousal support agreements.

(c) Federal and state tax advice.

(4) Tier IV services. Active-duty military legal assistance attorneys do not routinely provide Tier IV services. For the Marine Corps, Tier IV services will be provided by fully qualified attorneys as authorized by the SJA to CMC or his or her designee. For the Navy, Tier IV services will only be provided by fully qualified military legal assistance civilian or Reserve judge advocate subject matter experts or by active-duty military legal assistance attorneys under the direct supervision of a fully qualified military legal assistance civilian or Reserve judge advocate subject matter expert with the express permission of the unit commanding officer. With the sole exception of the service listed in subsection 0707(a)(4)(a)(7) below, the Tier IV services described here are subject to the requirements contained in section 0710 below. In 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 as follows:

(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; and

7. Temporary civilian restraining or protective orders for victims of crimes including domestic violence. Advice, forms drafting, and (if authorized under local state bar rules of court) attorney representation of crime victims may be provided for the limited purpose of seeking a temporary civilian court restraining order or a protective order. Representation in court must first be authorized by the respective unit commanding officer or, for the Marine Corps, the SJA to CMC or his or her designee, notwithstanding eligibility limitations as defined in section 0710.

(b) Complex estate planning to include advice, drafting and document execution of the following:

1. Credit shelter trusts and disclaimer credit shelter trusts;

2. Marital deduction trusts;

3. Qualified domestic trusts when a foreign national spouse is the client's beneficiary;

4. Qualified terminable interest property trusts;

5. Special needs trusts or supplemental needs trusts under the supervision of a fully qualified Region Legal Service Office (RLSO) civilian legal assistance attorney, Marine Corps civilian legal assistance attorney, or a fully qualified Navy or Marine Corps Reserve subject matter expert; and

6. Tax and cost analysis of a Survivor Benefit Plan election.

(c) Real estate purchase agreement contract review and explanation of terms. Drafting of real estate purchase or sale contracts is not 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 Commander, Naval Legal Service Command or the SJA to CMC, or their respective designees, as appropriate.

0708 Limitations on Scope of Legal Assistance Services

a. Personal legal matters only. Legal assistance is authorized for personal civil legal affairs with only one business venture related exception: a Service member who leases out his or her personal residence may obtain assistance regarding the leasing of that single personal residence.

b. Advice or assistance in official military matters. Service members accused or suspected of offenses or conduct that

may result in disciplinary or judicial proceedings under the UCMJ, or processing for administrative discharge, will be referred to a defense counsel. Legal assistance duties are separate from responsibilities of trial counsel, defense counsel, victims' counsel, or others involved in processing courts-martial, nonjudicial punishment proceedings, administrative boards or proceedings, and investigations.

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 comply with JAGINST 5803.1 (series) when determining the conflicted party's (or parties') eligibility for services. When providing legal assistance to a crime victim, refer to JAG/COMNAVLEGSVCCOM 5800.4 (series) and COMNAVLEGSVCCOM 5800.1 (series), and for the Marine Corps, MCO 5800.16 and the Marine Corps Legal Assistance Program (MCLAP) Policy and Practice Manual before forming an attorney-client relationship with that victim.

d. Proceedings involving the United States. Legal assistance attorneys will not represent or assist an individual in a matter in which the United States has a direct and substantial interest, whether or not the U.S. 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, Deputy Assistant Judge Advocate General (DAJAG) (Code 16), or the SJA to CMC or his or her designee.

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, as specified in JAGINST 5801.2 (series) or for the Marine Corps, MCO 5800.16 and the MCLAP Policy and Practice Manual.

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 before execution of the client's will. When command representatives seek information or assistance on behalf of Service members, they will normally be instructed to have the Service member obtain a legal assistance appointment. Bona fide requests for command services will 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. Referrals must strictly avoid the appearance of preferential treatment of any civilian attorney or law firm and must not imply endorsement by the Navy or Marine Corps. See JAGINST 5801.2 (series) section 8-8, and for the Marine Corps, MCO 5800.16 and the MCLAP Policy and Practice Manual.

b. Prohibition of fees. Services provided in the DON legal assistance programs are at no cost to eligible personnel. All legal assistance personnel are prohibited from accepting or receiving any fee or compensation from eligible clients or attorneys or firms to whom cases have been referred. 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 ELAP, as approved by the JAG, DAJAG (Code 16), or the SJA to CMC or his or her designee, 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), and for the Marine Corps, MCO 5800.16 and the MCLAP Policy and Practice Manual.

b. Eligibility. Persons eligible:

(1) Active-duty military personnel in pay grades E-3 and below.

(2) Active-duty military personnel in pay grades E-4 and below 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, DAJAG (Code 16), or the SJA to CMC or his or her designee.

(5) Service members with cases that involve a significant issue that affects other Service members, if approved by the JAG, DAJAG (Code 16), or the SJA to CMC or his or her designee.

c. Temporary civilian restraining or protective orders for crime victims. Due to the urgent nature of representation, temporary civilian restraining or protective orders for crime victims are not subject to the pre-approval and eligibility limitations of section 0710. See subsection 0707(a)(4)(a)(7).

CHAPTER EIGHT

GENERAL CLAIMS PROVISIONS

TABLE OF CONTENTS

Part A - General

0801 Scope

0802 Responsibilities

0803 Investigations - General

0804 Claims - General

a. Claims against the United States
b. Claims in favor of the United States

0805 Claims – Action by Receiving Command

a. Record date of receipt
b. Forward the claim to OJAG (Code 15), Tort Claims Unit (TCU)
c. Initiate an investigation
d. Assistance to claimants

0806 Claims – Action When Suit Filed

Part B - Foreign Claims

0807 Definition

0808 Single-Service Claims Responsibility

0809 International Agreements

a. International Agreements Claims Act (IACA)
b. Foreign Claims Act (FCA)
c. Region Legal Service Office (RLSO) Europe, Africa, and Southwest Asia (EURAFSWA)
d. Claims arising in other countries

0810 Foreign Claims Act (FCA)

a. General
b. Purpose
c. Construction

0811 Filing the Claim

a. General
b. Presentation of the claim
c. Appropriate authorities
d. Form of the claim
e. Amending the claim
f. Statute of limitations

0812 Claims Payable

a. General
b. Covered claimants
c. Covered incidents
d. Scope of employment

0813 Claims Not Payable

0814 Computation of the Amount of Payment

a. General
b. Compensation
c. Apportionment
d. Joint liability
e. Insurance
f. Negligence of the claimant
g. Currency

0815 Foreign Claims Commissions

a. Purpose
b. Authority to appoint
c. Claims presented
d. Composition of the Commission
e. Qualifications of members
f. Adjudicating authority

0816 Processing of Cases

a. Action by the staff judge advocate
b. Action by the appointing authority
c. Action by the claims investigating officer
d. Action by the Commission

0817 Reports Required

0818 Forwarding Reports

a. Claims within adjudicating authority
b. Claims in excess of adjudicating authority

0819 Action on Forwarded Claims

0820 Notification to the Claimant

0821 Reconsideration, Appeal, and Suit

a. Reconsideration
b. Appeal
c. Suit

0822 Payment

a. Documentation
b. Voucher
c. Accounting data
d. Settlement agreement and release
e. Advance payments
f. Currency

APPENDIX

Settlement Agreement and Release

Part A – General

0801 Scope

This chapter provides information about responsibilities for the supervision and management of the DON'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. For the DON, the 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), Third Party Payers Act, and 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 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). OJAG (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 Two 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 Eleven. The

Deputy Assistance Judge Advocate General (DAJAG) (Admiralty and Maritime Law (Code 11)) adjudicates all claims, for and against the Navy, that are within admiralty jurisdiction.

0803 Investigations - General

Chapter Two addresses administrative investigations. Whenever an investigation is conducted primarily for claims purposes, it will be conducted as a litigation-report investigation in accordance with section 0210. 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 - General

a. Claims against the United States. Claims against the United States must 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 at: http://www.jag.navy.mil/organization/code_15.htm. For questions regarding tort claims, contact the TCU at (757) 341-4583 or via TORT_CLAIMS_UNIT@navy.mil. For questions regarding PCA claims, contact the PCU at (888) 897-8217.

b. Claims in favor of the United States. 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 will stamp or mark the date of receipt on the letter or claim form. The envelope in which the claim was received will be preserved.

b. Forward the claim to OJAG (Code 15), Tort Claims Unit (TCU). The receiving command will immediately send the original

claim to the Tort Claims Unit, 9620 Maryland Avenue, Suite 205, Norfolk, VA 23511-2989. Send the original claim 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, will immediately convene a litigation-report investigation in accordance with Chapter Two, if one has not already been convened. Upon completion, forward an advance copy of the investigation to OJAG (Code 15), Investigations Branch, 1322 Patterson Ave SE, Suite 3000, Washington Navy Yard, DC 20374-5066. The advance copy can also be forwarded via encrypted email, or via a DON approved system for transmitting personally identifiable information (PII). Waiting until endorsements have been obtained before providing a copy of the investigation to OJAG (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, send the original report and one copy to OJAG (Code 15) at the physical address noted above. See Chapter Two, section 0210, for further information on litigation-report investigations.

d. Assistance to claimants. Immediately refer claimants or potential claimants who inquire concerning their rights or the procedures 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 must be reported immediately to the TCU at (757) 341-4583. Report immediately civil actions involving admiralty incidents to OJAG (Code 11) at (202) 685-5040. OJAG (Code 14)

must 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. Inform the Navy Office of General Counsel (OGC) immediately of all other lawsuits involving the DON. Refer to Chapter Six, 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, as defined in section 0812 below, 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 pursuant to two federal statutes already mentioned in this chapter: the IACA and the FCA.

0808 Single-Service Claims Responsibility

a. Department of Defense Instruction (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 27 February 2018 further assigned single-service responsibility for specified countries in Southeast Asia. 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, Togo, Cambodia, Laos, Thailand, and Vietnam. DoDI 5515.08 also provides the 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 alleged tortfeasor is responsible for adjudication.

c. Claims arising in countries assigned to the Department of the Army and the Department of the Air Force must be forwarded promptly to the assigned military department. Claims must not be processed by DON activities in accordance with 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, 2734b, when there is a Status of Forces Agreement (SOFA) between the United States and the country where the claim arises 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 (FCA). 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. Region Legal Service Office (RLSO) Europe, Africa, and Southwest Asia (EURAFSWA). The Commanding Officer, RLSO 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 or her area

of designated claims 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 arises should be directed to OJAG (Code 15) at (202) 685-4600. If required, OJAG (Code 15) will consult with OJAG, National Security Law Division (Code 10) for guidance.

0810 Foreign Claims Act (FCA)

a. General. The FCA, 10 U.S.C. § 2734, authorizes the filing, investigating, processing, and settling of foreign claims in accordance with 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 two 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 SOFA or other applicable treaty or agreement. Claims must 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 give 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 section 0808). A commander who receives a claim over which he or she does not have authority must forward the claim promptly to the appropriate authority and will 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 FCA arising in Italy, Greece, Portugal, Spain, and those countries in Southwest Asia and Africa for which DON has single-service responsibility (see section 0808). The Commanding Officer, RLSO EURAFSWA has authority to pay claims filed in any amount when payment is less than $50,000.00 and has 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 present evidence of their legal capacity and 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 authorized agent.

f. Statute of limitations. A claim must be filed within two 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. To compute the statutory time period, exclude the day the claim accrues, and include the day the claim is received.

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. "Inhabitants" 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 arises 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, civilian employees, sponsored dependents, or as U.S. civilian contractors performing work pursuant to an agreement with the U.S. Government, or dependents sponsored by or accompanying such civilian contractors.

(4) A corporation or other organization doing business in a foreign country on a permanent basis, even if organized under U.S. law, provided that the corporation or organization is not providing work pursuant to a contract with the U.S. Government.

(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 occurs outside the United States and is 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 causes 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 should be settled if local law imposes liability on the owner of the vehicle under the circumstances.

0813 Claims Not Payable

a. Claims of insurers and other subrogees.

b. Claims of U.S. Armed Forces Service members, U.S. Government employees, and their sponsored dependents.

c. Claims of U.S. civilian contractors present in the foreign country for the purpose of performing work pursuant to a contract with the U.S. Government.

d. Claims of dependents sponsored by or accompanying U.S. civilian contractors present in the foreign country for the purpose of performing work pursuant to a contract with the U.S. Government.

e. 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 Service member or civilian employee of the U.S. Armed Forces, acting within the scope of employment, unless a treaty specifically provides for recovery.

f. Claims of civilian employees of the U.S. Government, including local inhabitants, injured incident to their employment. Compensation for such injuries is separately provided for in federal statutes and agreements with foreign governments.

g. Claims of national governments or their political subdivisions engaging in combat with the United States or its allies.

h. 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.

i. 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.

j. Claims previously paid or denied.

k. Claims purely contractual in nature.

l. Claims involving private contractual and domestic obligations between individuals.

m. Claims based solely on compassionate grounds.

n. Claims for paternity or illegitimacy.

o. Claims payable under other federal statutes.

p. Claims for damage caused by naval vessels, unless payment is specifically authorized by OJAG (Code 11) under section 1116.

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 attachés, 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 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 future medical care. 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 U.S. dollars.

0815 Foreign Claims Commissions

a. Purpose. The purpose of a foreign claims commission (Commission) is to settle meritorious claims fairly and promptly. A Commission will adjudicate certain claims referred to it, and for those claims outside its adjudicating authority a Commission will forward recommendations to appropriate higher authorities.

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 SJA to the CMC; the Commanding Officer, RLSO EURAFSWA; chiefs of naval missions, including chiefs of the naval section of military missions; and 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 will refer the claim to a Commission appointed in accordance with these regulations.

d. Composition of the Commission. A Commission will 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 will 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 must ask the Director, Claims and Tort Litigation (OJAG, Code 15) to request such an appointment from the claims chief of the other service. This request is made pursuant to a 1998 Memorandum of Understanding among the Army, Navy, and Air Force. If approval is granted, the 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 must seek the approval of the Director, Claims and Tort Litigation (OJAG, Code 15).

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 the settlement agreement is forwarded to the claimant for signature. Likewise, its authority to deny a claim is determined by the claimed amount in U.S. dollars on the date the notification of denial of the claim is forwarded to the claimant. 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 $5,000.00 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 will 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 will 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 presented with a claim is responsible for providing advice to the commanding officer, Commission, and claims investigating officer on the policies and procedures in these regulations. Commands without a staff judge advocate should request assistance from the first judge advocate in their chain of command.

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 will: 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 in accordance with 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 Two 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 will 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 as outlined in subsection 0815(f), or make a recommendation to a higher authority. The decisions of the Commission will 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 Appendix A-8-a form. 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 will 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 must 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 will be forwarded to the appointing authority for retention, and a copy will be forwarded through the appointing authority to OJAG (Code 15) or Commanding Officer, RLSO EURAFSWA, as appropriate, for further action.

0819 Action on Forwarded Claims

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 subsection 0815(f).

a. Claims up to $50,000.00. The Deputy Judge Advocate General (DJAG), the Assistant Judge Advocate General (AJAG) (Civil Law), the Director, Claims and Tort Litigation (OJAG, Code 15), and also, for claims arising in his or her area of authority, the Commanding Officer, RLSO EURAFSWA, have unlimited denial authority;

b. Claims from $50,000.00 through $100,000.00. The JAG (who has unlimited denial authority); and

c. 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 will 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. Do not inform the claimant of the amount of the recommendation to higher authority for payment and do not show the claimant the report of the Commission. The notification will 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 the U.S. laws governing foreign claims.

c. Suit. The U.S. laws governing foreign claims are not intended in any way to evidence that the United States has consented to be sued.

0822 Payment

a. Documentation. When a Commission determines that a payment should be made within its adjudicating authority, it must submit the original and one copy of the approved report of the Commission and a completed Standard Form 1034, Public Voucher for Purchases and Services Other Than Personal (or equivalent, as required), 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 voucher for payment must be signed by a duly appointed certifying official on a DD577 in accordance with

the Department of Defense Financial Management Regulation (DoD FMR) Volume 5, Chapter 33. The command adjudicating the foreign claim is responsible for immediately forwarding a legible copy (with PII redacted) of: (1) every voucher, (2) the certifying official's DD Form 577, and (3) the Commission's report (minus enclosures), to the Comptroller, Office of the Judge Advocate General (Code 64), via one of the following means:

E-mail: JAG_FCC_Claims@navy.mil
Fax: (202) 685-5455 (DSN – 325)
Mail: 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 FMR. The Standard Document Number that must appear on every Foreign Claim Voucher is:

(1) "N00013$$PVA1001" where "$$" is the last two digits of the fiscal year when the payment is actually made.

(2) The Line of Accounting Data that must appear on every Foreign Claim Voucher is: "AA 17+1804.11T1 420 07923 056521 2D +##### 013$$PVA1001" where "+" is the last digit of the fiscal year when the payment is actually made, and where "#####" is the five-digit Unit Identification Code of the command making the payment, and "$$" is the last two digits of the fiscal year.

d. Settlement agreement and release. A settlement agreement and release must be obtained from the claimant when payment of an award is accepted. The settlement amount will be set forth in U.S. dollars. 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.

e. Advance payments. Advance payments may be paid under section 0822.

f. Currency. Due to federal currency restrictions, all payments under this chapter must be made in the local currency of the country in which the claim arises 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 equivalent to $[amount] USD (to be paid in local currency at the exchange rate in effect on the date payment is issued) 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:
Swift Code:
IBAN:
Name of Account:
Account Number:

CLAMAINT:

_____		_____
NAME	DATE	ADDRESS

WITNESSES:

_____	_____
NAME	ADDRESS
_____	_____
NAME	ADDRESS

CHAPTER NINE

AUTHORITY OF ARMED FORCES PERSONNEL TO PERFORM NOTARIAL ACTS

TABLE OF CONTENTS

0901 Scope

Part A – Authority to Perform Notarial Acts

0902 Federal Authority to Administer Oaths and Perform Notarial Acts

a. Relationship to state authority
b. Authority to administer oaths with regard to military administration and military justice
c. Oaths for appointment, enlistment, or commissioning
d. Authority to act as a notary
e. No fees
f. Duties and responsibilities of notaries
g. Proof of authority
h. Legal effectiveness
i. Formats

0903 Non-Federal Authority to Perform Notarial Acts

a. Non-federal authority
b. Exercise of non-federal authority
c. Legal effectiveness
d. Civil notaries

Part B – General Instructions for the Performance of Notarial Acts

0904 Introduction

0905 General Responsibilities of a Notary

0906 General Instructions for Notarial Acts

a. Acknowledgements
b. Sworn instruments
c. Certified true copy of documents originating within the certifying command
d. Consul of the United States
e. Oaths and affirmations
f. Seal of the person executing document
g. Seal of the person performing notarial act

h. Witnesses
i. Identifying the person requesting the notarial act

0907 Notary Logs

0908 Certificates of Full Faith and Credit

APPENDICES

a. Format for Signature Block, Witness Block, and Acknowledgment Certificate
b. Format for a Sworn or Affirmed Instrument

0901 Scope

This chapter designates individuals authorized to perform notarial acts and compiles existing laws, regulations, and guidelines on the authority of Service members and certain civilian employees to administer oaths; take affidavits, sworn statements, or depositions; take acknowledgments; and perform other notarial acts as described in section 0906.

Part A – Authority to Perform Notarial Acts

0902 Federal Authority to Administer Oaths and Perform Notarial Acts

a. Relationship to state authority. The authority to perform notarial acts in accordance with 10 U.S.C. § 1044a is separate 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.

(1) Pursuant to the authority of 10 U.S.C. § 936(a) and as so designated by this subsection 0902(b)(1) below, 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, and 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) Legalmen and all Marine Corps legal services specialists while serving in legal billets under the direct supervision of a judge advocate or a civilian legal assistance attorney, when authorized by the SJA to CMC; 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, 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 and as so designated by this subsection 0902(d)(1) below, and subject to subsection 0902(d)(2) below, the following persons may perform the notarial acts listed in subsection 0902(d)(3) below for persons listed in section 0705 of this Manual as eligible for legal assistance:

(a) All civilian attorneys serving as legal assistance attorneys and all civilian legal assistance attorney volunteers after being duly authorized by the JAG or SJA to CMC in accordance with DoD Instruction 1100.21 (series);

(b) For the performance of notarial acts at locations outside the United States, all civilians employed by the 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 and executive officers;

(f) All commissioned legal officers and commissioned or enlisted assistant legal officers;

(g) All commissioned administrative officers;

(h) All Marine Corps officers with MOS of 4430 while assigned as legal administrative officers;

(i) All judge advocates, including Reserve judge advocates regardless of duty status;

(j) All legalmen;

(k) All Marine Corps legal services specialists while serving in legal billets under the direct supervision of a judge advocate or a legal assistance civilian attorney, when

authorized by the SJA to CMC;

(l) Military personnel who are temporarily or permanently assigned to a Region Legal Service Office (RLSO) who are appointed by the RLSO commanding officer to perform 10 U.S.C. § 1044a notarial acts under the direct supervision of a legal assistance attorney or a command services attorney at such RLSO. All notary seals or stamps issued to such military personnel will be retained by the RLSO commanding officer's authorized designee and destroyed upon termination of assignment to the RLSO; and

(m) All civilian paralegals serving at military legal assistance offices, supervised by a military or civilian legal assistance counsel (as defined in 10 U.S.C. § 1044d(g)).

(2) All persons identified in subsection 0902(d) who will provide notarial acts for the Navy must complete all notarial training and certification requirements as promulgated by the Office of the Judge Advocate General (OJAG, Code 16), or, for the Marine Corps, such persons must complete notarial training and certification as promulgated by the SJA to CMC.

(3) 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 as limited by subsection 0906(c).

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 will 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 or

her office is prima facie evidence that the signature is genuine, that the person holds the office designated, and that he or she has the authority to so act. No seal is required on the document being notarized.

h. Legal effectiveness. Notarial acts performed pursuant to the authority of 10 U.S.C. § 1044a are legally effective notarial acts for all purposes. Oaths administered pursuant to 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 appendices 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 subsection 0902(a)), the laws of most states, U.S. possessions, territories, and commonwealths authorize certain Military Services members to perform for Military Services 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 is 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 vary as to who, when, where, and for whom acknowledgments and sworn instruments may be taken. Notaries should verify the state law provisions. If state formats are not available, use the formats in JAGINST 5801.2 (series) for effective execution. Any instruction from a civilian attorney who prepares and forwards an instrument for execution should be followed carefully. When necessary, consult with a judge advocate.

d. Civil notaries. Though both federal and state law authorize a variety of federal officials to perform notarial acts, it is permissible to use locally appointed notaries public in the United States, or a U.S. consul when abroad.

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. Nonlawyer notaries will not engage in the practice of law and, accordingly, may not draft legal documents, such as wills, contracts, mortgages, or deeds.

b. Notaries will neither sign their names to blank instruments nor certify the authenticity of public, registered, or court records or documents, or issue certified copies of such documents or records. They will not take an affidavit or an acknowledgment unless the person who signed the instrument is physically in their presence. Except when swearing in military justice or administrative separation board witnesses who are providing testimony remotely, notaries must administer oaths, where an oath is authorized or required, in person. Notaries will not falsely execute certificates, such as predating or postdating the document. The notarial authority cannot 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 or her act or deed. It includes the certificate or written evidence of the act of acknowledgment made by the notarial 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 will be made in the presence of the notary, who will identify the person (in accordance with subsection 0906(i)) and verify the person's eligibility. Notaries must decline to take the acknowledgment if proper identification is impossible or if the person is not eligible under the authorizing statute. Notaries cannot: take their own acknowledgments; acknowledge a document pursuant to which they are an appointee or beneficiary; or acknowledge a document if they are related by blood or marriage to the principal. Notaries will 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 must verify, affirm, and acknowledge the signature on the acknowledgment or affidavit. The notary will 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 will sign his or her name and print or stamp his or her name and authorizing title, rank, and Corps (if applicable) (see subsection 0902(d) and JAGINST 5801.2 (series)). The notary will 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. The proper venue for federal notary acts should be prefaced as follows: "With the United States Armed Forces at (Insert Name of Command)" which indicates the notarial act is pursuant to federal authority vice state authority.

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 or her 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 subsection 0906(e) on taking oaths.

(1) See subsection 0906(a)(3) for guidance on the signature block for the notary. Additional signature block requirements for the Navy are provided in JAGINST 5801.2 (series) and for the Marine Corps are provided in the Marine Corps Legal Assistance Program (MCLAP) Policy and Practice Manual.

(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 must 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 pursuant to 10 U.S.C. § 1044a, may, with the commanding officer's or officer in charge'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 or she says he or 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 is the sole body capable of verifying the authenticity of a document. Therefore, notaries will 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 cannot be certified as true copies based upon the assertion of the requester. See also subsection 0905(b).

(2) 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, 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) Notaries cannot certify any documents that on their

face, or otherwise, indicate they may not be copied (e.g., naturalization certificates). Notaries cannot certify any documents that are public records (e.g., birth certificates, marriage certificates, or court documents).

d. Consul of the United States. Overseas, the U.S. State Department runs consulates 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 United States."

e. Oaths and affirmations. Oaths and affirmations are pledges whereby affiants, having satisfactorily proven their identity in accordance with subsection 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 subsection 0902(b) and JAGINST 5801.2 (series).

(1) Persons administering the oath should tell the affiant to raise his or her 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.

(4) Notaries who administer an oath or affirmation must note the performance of a ″jurat″ in their notary log for the journal entry along with the balance of the required information pursuant to section 0907 below.

f. Seal of the person executing document. Though 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 the notarial act. Federal and state statutes authorize the performance of 10 U.S.C. § 1044a notarial acts without an impressed or raised seal. The formats in JAGINST 5801.2 (series) provide evidence of a notarial officer's authority to take acknowledgments or sworn instruments.

h. Witnesses. Though many jurisdictions require one or more witnesses to any power of attorney affecting title to real estate, other jurisdictions require no witnesses. Accordingly, judge advocates must check the particular state statute to verify whether witnesses are required for any powers of attorney affecting real property. If a power of attorney requires witnesses, each witness and the grantor under the instrument must sign the notary log book recording the execution and witnessing of the instrument.

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 with a signature. The notary will compare the signature on the document with the signature appearing on the state or federally issued identification card, driver's license, or passport.

(1) Common Access Card (CAC) exception. In limited circumstances it is permissible to rely on a CAC for identifying active-duty Service members but only when it is impossible or impractical for the active-duty member to retrieve his or her state or federally issued identification card with a signature, and only for notaries acting under 10 U.S.C. § 1044a. In these

limited circumstances, the commanding officer or officer in charge (or his or her authorized designee) may authorize a 10 U.S.C. § 1044a notary to perform the notarial act without a federal or state issued identification card, driver's license, or passport with a signature by relying on a valid CAC for active-duty personnel.

(2) Use of credible witness exception. 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, 10 U.S.C. § 1044a notaries or state notaries may use personal knowledge of an active-duty Service member or the personal knowledge of a credible witness to verify the active-duty Service member's identity without comparing the Service member's signature to a state or federally issued identification card or passport. A state notary will 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

a. Notaries must be able to confirm specific notary acts they performed many years after the act. A notary log, therefore, must be maintained and kept indefinitely by each notary, even after his or her release from active duty. The log must minimally include the 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 as, 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 must 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.

b. In addition to complying with the requirements of section 0907, state notaries are required to maintain their notary logs in compliance with the rules and regulations of the state pursuant to 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, Navy personnel should contact OJAG (Code 16) and Marine Corps personnel should contact the Judge Advocate Division (JLA).

0908 Certificates of Full Faith and Credit

The JAG, the Deputy Judge Advocate General of the Navy, and the Assistant Judge Advocates General of the Navy may execute certificates of full faith and credit certifying the signatures and authority of officers of the DON. For the Marine Corps, the SJA to CMC may execute certificates of full faith and credit certifying the signatures and authority of officers of the Marine Corps.

Format for Signature Block, Witness Block, and Acknowledgment Certificate

[Signature]
WITNESS the following signature [and seal (if required for a nonfederal 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 Locator Address or permanent home address)

(signature of witness)
(name of witness)
(rank/rate and branch of service)
(Military Locator Address or permanent home address)

(signature of witness)
(name of witness)
(rank/rate and branch of service)
(Military Locator Address or permanent home address)

[Venue]
With the U.S. Armed Forces
At (location**)

[Acknowledgement]
I, _____, the undersigned officer or other person authorized to serve as a federal notary under 10 U.S.C. § 1044a, do hereby certify that on this __day of_____, 20___, before me, personally appeared (name of person whose signature is being acknowledged), (status***), and presented a valid government issued photo 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 notary)
(name of notary)
(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 "With the United States Armed Forces at (Insert Name of Command)" in which instrument is acknowledged. If military considerations preclude disclosure of exact place of execution or command name, insert "In a Foreign Country" or "In a possession of the United States outside the continental United States."

*** "A U.S. Armed Forces member on active duty," "the spouse or 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 section 0902" (for general federal authority to notarize documents); "10 U.S.C. § 936 (Article 136, UCMJ), and JAGMAN section 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 or other person authorized to serve as a federal notary under 10 U.S.C. § 1044a, 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), whose permanent home address is_____, and who is proven to me to be (status**). And I do further certify that I am on 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 notary
(name of notary)
(rank/rate and branch of service)
Notary and Consul of the United States (optional)
(command or organization - optional)

Commission expires: (EAOS for enlisted, “Indefinite” for officers and civilians – optional)
Authority: (authority***) (optional)
No Seal Required (optional)

_____

* Insert country, state, and "With the United States Armed Forces at (Insert Name of Command)" in which instrument is acknowledged. If military considerations preclude disclosure of exact place of execution or command name, insert "In a Foreign Country" or "In a possession of the United States outside the continental United States."

** "A U.S. Armed Forces member on active duty," "the spouse or 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 section 0902" (for general federal authority to notarize documents); "10 U.S.C. § 936 (Article 136, UCMJ), and JAGMAN section 0902" (for federal authority to administer oaths for purposes of military administration, including military justice); or "_____" (indicate state statutory authority).

CHAPTER TEN

INTERNATIONAL LAW & APPLICATION OF U.S. LAW OVERSEAS

TABLE OF CONTENTS

1001 Scope

1002 References

1003 International Agreements

a. General
b. Negotiation of agreements
c. Requirement to forward agreements to OJAG (Code 10)
d. Additional guidance

1004 Status of Forces Agreements

a. General
b. Diplomatic notes
c. Foreign personnel in the United States

1005 Foreign Criminal Jurisdiction

a. General
b. Policy
c. Exercise of jurisdiction
d. Waiver of jurisdiction
e. Custody
f. Fees
g. Solatia
h. Official duty
i. Reporting requirements
j. Military Extraterritorial Jurisdiction Act of 2000 (MEJA)

1006 Enforcement of U.S. Law Overseas

1007 Acceptance of Gifts from Foreign Governments

1008 Additional Resources

1001 Scope

This chapter highlights a number of significant international law issues that often arise in the context of military operations overseas. In lieu of reprinting detailed reference material that is available elsewhere, this chapter guides the reader to those sources. See section 1008 for these additional resources.

1002 References

a. DoD Instruction (DoDI) 5530.03, International Agreements

b. CJCS Instruction 2300.01 (series), International Agreements

c. SECNAVINST 5710.32 (series), International Agreements and Arrangements

d. OPNAVINST 5710.25 (series), International Agreements

e. 22 C.F.R. Ch. 1, sub. S, Part 181, Case-Zablocki Act Implementation

f. DIAD 2000.200, International Defense Intelligence and Counterintelligence Liaison Relationships

g. DoDI 5525.01, Foreign Criminal and Civil Jurisdiction

h. SECNAVINST 5820.4 (series), Status of Forces Policies, Procedures, and Information

i. 32 C.F.R. Ch. 1, sub. E, Part 151, Status of Forces Policies and Information

j. MILPERSMAN 1160-050, Voluntary or Involuntary Extension of Enlisted Personnel Beyond Expiration of Enlistment, Fulfillment of Service Obligation, or Expiration of Tour of Active Service

k. MCO P1900.16 (series), MARCORSEPMAN

l. 10 U.S.C. § 1037, Counsel before foreign judicial tribunals and administrative agencies; court costs and bail

m. Department of the Navy Financial Management Policy Manual

n. OPNAVINST F3100.6 (series), Special Incident Reporting (OPREP-3 PINNACLE, OPREP-3 NAVY BLUE, and OPREP-3 NAVY UNIT SITREP) Procedures

o. MCO 3504.2 (series), Operations Event/Incident Report (OPREP-3) Reporting

p. 18 U.S.C §§ 3261-3267, Military Extraterritorial Jurisdiction

q. 32 C.F.R. Ch. 1, sub. E, Part 153, Criminal Jurisdiction over Civilians Employed by or Accompanying the Armed Forces outside the United States, Certain Service Members, and Former Service Members

r. DoDI 5525.11, Criminal Jurisdiction over Civilians Employed by or Accompanying the Armed Forces outside the United States, Certain Service Members, and Former Service Members

s. DoDI 3025.21, Defense Support of Civilian Law Enforcement Agencies

t. SECNAVINST 5820.7 (series), Cooperation with Civilian Law Enforcement Officials

u. DoD Directive (DoDD) 1005.13, Gifts and Decorations from Foreign Governments

v. SECNAVINST 1650.1 (series), Navy and Marine Corps Awards Manual

1003 International Agreements

a. General. DoDI 5530.03 lays out procedures for the negotiation and conclusion of international agreements. In it, the Secretary of Defense delegates his or her authority to negotiate and conclude certain international agreements. No uniformed or civilian employee of the DoD may negotiate or conclude an international agreement except in accordance with DoDI 5530.03 and the applicable CJCS Instruction 2300.01 (series) (for agreements under the authority of the Chairman of the Joint Chiefs of Staff) or SECNAVINST 5710.32(series) (for

agreements under the authority of the Secretary of the Navy). Additionally, once the agreements have been concluded, SECNAVINST 5710.32 (series) requires that they be forwarded to the Office of the Judge Advocate General (OJAG, Code 10), pursuant to guidance below.

b. Negotiation of agreements. Members of the U.S. Navy and U.S. Marine Corps must have both procedural and substantive authority to negotiate or conclude international agreements. Further, they may only negotiate or conclude international agreements if authorized by the cognizant approval authority as provided in SECNAVINST 5710.32 (series) and OPNAVINST 5710.25 (series). Discussions regarding the formation of any international agreement are not permitted until written authorization to initiate negotiations has been received. Once authorized to negotiate an international agreement, the cognizant representative of the United States must not deviate significantly from the guidance provided in the letter of the authorization. For matters under the cognizance of the DON, authorization to negotiate and conclude an international agreement must 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, the Combatant Commander chain of command gives the authority to negotiate and conclude.

(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

1. Identifying any existing agreements to which the agreement relates;

2. Explaining provisions that significantly deviate from the template contained in a blanket authorization, if applicable;

3. Addressing any new legal issues raised by the

request;

4. Reciting the applicable constitutional, statutory, or other legal authority to carry out each obligation to be assumed by the United States, DoD, or DON;

5. Identifying the applicable C-175 authorization and attaching a copy of such authorization, if possible;

6. Explaining other relevant legal considerations;

(c) A fiscal memorandum specifying the estimated cost and appropriations authority or source for each obligation assumed by the United States, DoD,, or DON; and

(d) A policy memorandum explaining in detail why the proposed international agreement is necessary or desirable, including any particular policy issues, the meaning of particular provisions, and a summary of the risks and benefits relevant to any transfer of technology or disclosure of information addressed in the agreement;

(e) For international agreements under the authority of the USD(A&S) or USD(P), the legal, fiscal, and policy memoranda may be combined into a single coordinated document.

(f) For international agreements that allow for the provision or generation of classified or controlled unclassified information, a delegation of disclosure authority letter (DDL) or other written authorization approved by the DoD Component's foreign disclosure office is required as part of the request for authority to conclude an international agreement. The format in DoDI 5530.03, Figure 2, should be used for this purpose.

(g) Paragraphs (a)-(e) do not apply to standard form data or information exchange annexes that are negotiated under the authority of a master agreement prescribing the format of annexes, provided that such annexes do not have policy significance and the requirements in DoDI 5530.03, paragraph 5.1.p. have been met.

(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 has 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. OJAG (Code 10) conducts prior consultation with the Department of State.

(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 Department of State.

(d) Each international agreement and any of its amendments concluded by DoD officials must include the dates and places of signature and the typed name and title of each signatory. The month should be spelled out.

c. Requirement to forward agreements to OJAG (Code 10). Within 10 days of conclusion, the U.S. Navy or U.S. Marine Corps signatory must forward four 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. Non-binding arrangements must also be forwarded to OJAG Code 10 for inclusion in the DON repository.

d. Additional guidance. See OPNAVINST 5710.25 (series), Case-Zablocki Act implementation (22 C.F.R. Ch. 1, sub. S, Part 181), and Defense Intelligence Agency Instruction 2000.200 concerning intelligence agreements. Questions on international agreements may be directed to OJAG (Code 10), or, for Marine

components, SJA to CMC (JAO).

1004 Status of Forces Agreements

a. General. Status of Forces Agreements (SOFAs) govern the rights, obligations, and privileges of military personnel stationed in foreign countries. DoD uses a Department of State approved global SOFA template as the baseline agreement for SOFA negotiations. The NATO SOFA also provides an example of a long-standing multinational SOFA in effect for decades. Note that 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 status protections under the Chief of Mission rather than under the applicable DoD SOFA.

b. Diplomatic notes. Where a SOFA or other international agreement regarding the status of foreign forces does not exist, legal status protections of U.S. military personnel assigned overseas may be provided through an exchange of diplomatic notes, typically extending a status equivalent to that of administrative and technical staff of embassies under the Vienna Convention on Diplomatic Relations.

c. 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 military service personnel in the United States not protected by a SOFA are subject to applicable federal, state, and local laws and regulations, and any working arrangements with the various states. For example, NATO SOFA Art X(1) provides that foreign military service personnel serving in the United States are exempt from U.S. income tax on non-U.S. source income. NATO SOFA Art XI further provides that such personnel are also exempt from some customs duties.

1005 Foreign Criminal Jurisdiction

a. General. Every SOFA includes provisions for the exercise of criminal jurisdiction. DoD and DON policies regarding status of forces and foreign criminal jurisdiction (FCJ) are provided in DoDI 5525.01, SECNAVINST 5820.4 (series), and 32 C.F.R. Ch. 1, sub. E, Part 151. For each country where U.S. forces are regularly stationed, there is an appointed Designated Commanding Officer (DCO) responsible for

administration and oversight of all FCJ cases in that country. Any FCJ matter in a foreign country must be brought to the attention of the assigned DCO. In the absence of a DCO, the U.S. Defense Attaché at the U.S. Embassy will perform the functions of the DCO. Combatant Command-specific FCJ instructions include a list of the appointed DCOs for the countries in that area of responsibility, and describe policies, procedures, responsibilities, and reporting requirements to be followed.

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. 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 concurrent jurisdiction over others. Where a SOFA or other international agreement regarding legal status protections addresses concurrent jurisdiction, the agreement may also establish primary and secondary rights to exercise that jurisdiction.

d. Waiver of jurisdiction. SOFAs that provide for concurrent jurisdiction generally include a procedure for one state to waive its right to exercise primary jurisdiction if so requested by the other state. In some states, 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 or other international agreement that

addresses legal-status protections. If there is no SOFA, U.S. personnel should not be delivered to foreign authorities pending guidance from OJAG (Code 10) or the SJA to CMC (JAO), as appropriate.

(2) Personnel in foreign custody, whether before or after trial, must be visited on a regular basis in accordance with SECNAVINST 5820.4 (series). Particular attention should be given to legal assistance, medical care, adequacy of food and clothing, health and comfort, and accountability for personal property. Certain reporting requirements must also be met regarding their confinement, pursuant to DoDI 5525.01 and SECNAVINST 5820.4 (series).

(3) For issues regarding extension beyond the expiration of enlistment for enlisted personnel confined in foreign jails, see MILPERSMAN 1160-050 or MCO P1900.16 (series).

f. Fees. Under U.S. law, counsel fees, court costs, bail, and other expenses associated with the exercise of FCJ over military members, members of the civilian component, and their dependents, may be paid by the U.S. Government. But the use of U.S. Government funds to pay fines is not authorized. See 10 U.S.C. § 1037, DoDI 5525.01, and SECNAVINST 5820.4 (series).

g. Solatia. In some countries, it is customary to offer a victim or his or her family a token gift of fruit, flowers, or money for injury, death, or property damage. A solatia payment may be appropriate in the event an incident occurs involving U.S. forces personnel or DoD civilian employees that results in damage to, or loss of, real property of any foreign country or of any political subdivision or inhabitant of a foreign country. Depending on the local culture, such token expressions of remorse can influence the resolution of criminal charges. The guidelines for administration of solatia claims and payments are contained in instructions issued by the appropriate U.S. military commander in the applicable country, in accordance with the DON Financial Management Policy Manual. Consult the combatant or region commander, the servicing staff judge advocate, or the nearest Region Legal Service Office or Legal Services Support Section, 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 must be handled in strict compliance with the applicable SOFA, or other applicable international agreement addressing legal-status protections.

i. Reporting requirements. The exercise of FCJ creates a number of reporting requirements. See DoDI 5525.01 regarding informal and immediate reporting regarding new cases or important developments in pending cases to DoD GC, Combatant Command, DoN General Counsel, and JAG and/or SJA to CMC. The most important for the operational unit is the serious incident report described in OPNAVINST F3100.6 (series), MCO 3504.2 (series), SECNAVINST 5820.4 (series), and any regulations or special instructions issued by the cognizant combatant or region commander. See also subsection 1005(a) above.

j. Military Extraterritorial Jurisdiction Act of 2000 (MEJA). MEJA expanded the criminal jurisdiction of the United States to civilians accompanying U.S. forces overseas. Generally, this applies to conduct committed outside the United States that would constitute a felony-level federal crime if the conduct had been committed within the special maritime and territorial jurisdiction of the United States. The availability of criminal sanctions for conduct overseas may assist in obtaining a waiver of host nation jurisdiction over offenses committed by civilians. See 18 U.S.C. §§ 3261-3267; 32 C.F.R. Ch. 1, sub. E, Part 153; DoDI 5525.11.

1006 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 host nation SOFA provisions and the Uniform Code of Military Justice (UCMJ). Generally, assistance by DoD personnel to U.S. civilian law enforcement agencies is provided pursuant to DoDI 3025.21 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.

1007 Acceptance of Gifts from Foreign Governments

Military personnel and civilian employees of the DON, as well as their dependents, may not accept gifts from foreign governments except as provided for in DoDD 1005.13 and SECNAVINST 1650.1 (series). Refer all questions to the ethics counselor in the chain of command.

1008 Additional Resources

a. NWP 1-14M/MCTP 11-10B/COMDTPUB P5800.7A, The Commander's Handbook on the Law of Naval Operations, August 2017

b. U.S. Navy Regulations, 1990, as amended

c. DoD Law of War Manual, June 2015

d. DoDD 2311.01 (series), DoD Law of War Program

e. CJCS Instruction 3121.01 (series), Standing Rules of Engagement/Standing Rules for the Use of Force

f. DoDD 2310.01 (series), DoD Detainee Program

g. DoDD 3115.09, DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning

h. OPNAVINST 3461.6, Enemy Prisoners of War, Retained Personnel, Civilian Internees, and Other Detainees

i. DoDI 3020.48, Guidance for Maritime Operational Threat Response (MOTR)-Related Conferencing Coordination Activities Implementation

j. NAVADMIN 158/16, Sovereign Immunity Policy (Includes information on Sovereign Immunity, Port Visits, and Crew Lists as they apply to Warships and Naval Auxiliaries)

k. OPNAVINST 5090.1 (series), Environmental Readiness Program

l. OPNAVINST 6210.2 (series), Foreign and Domestic Quarantine Regulations

m. OPNAVINST 5721.1 (series), Release of Information on Nuclear Weapons and on Nuclear Capabilities of U.S. Navy Forces

n. OPNAVINST 5711.96C, United States/Russian Federation Incidents at Sea and Dangerous Military Activities Agreements

o. DoDD 3025.18, Defense Support of Civil Authorities

p. OPNAVINST 3440.16 (series), Navy Defense Support of Civil Authorities Program

q. DoDI 5000.68, Security Force Assistance

r. Defense Security Cooperation Agency (DSCA) 5105.38-M, The Security Assistance Management Manual

s. SECNAVINST 4950.4 (series), Joint Security Cooperation Education and Training

t. DoD 7000.14-R, Department of Defense Financial Management Regulation

u. DoDI 2000.11, Procedures for Handling Requests for Asylum and Temporary Refuge

v. SECNAVINST 5710.22 (series), Asylum and Temporary Refuge

w. DoDD 3025.14, Evacuation of U.S. Citizens and Designated Aliens from Threatened Areas Abroad

x. MCO 3300.4 (series), Marine Corps Law of War Program

y. Field Manual 6-27/MCTP 11-10C, The Commander’s Handbook on the Law of Land Warfare, August 2019

z. MCO 3440.7 (series), Marine Corps Roles and Responsibilities in Defense Support of Civil Authorities (DSCA)

aa. MCO 5710.6 (series), Marine Corps Security Cooperation

CHAPTER ELEVEN

ADMIRALTY AND MARITIME LAW

TABLE OF CONTENTS

Part A - Introduction

1101 Scope

a. General application
b. Guidance and procedures
c. Notice

1102 Organization

a. Secretary of the Navy
b. Judge Advocate General
c. Other organizations

Part B - Reporting and Investigating Admiralty Incidents

1103 Admiralty Incidents

a. Generally
b. Collision
c. Allision
d. Personal injury or death
e. Property damage
f. Swell wash or wake damage
g. Maritime target ranges
h. Morale, Welfare, and Recreation (MWR) and special services boats and marinas
i. Naval aircraft and weapons
j. Salvage
k. Vessel seizures
l. Groundings
m. Significant maritime incidents

1104 Initial Report of Admiralty Incident

a. Means of initial report
b. Initial report
c. Notice

1105 Subsequent Investigative Report

a. Generally
b. Admiralty Letter Report (ALR) investigation

c. Command Investigation
d. Dual-Purpose Investigation
e. Court of Inquiry
f. Relation to damage survey
g. Release of investigative report

1106 Surveys

a. Claim asserted
b. Determination of damage
c. Timeliness
d. Acceptance of survey invitation

1107 Evidence Preservation

a. Original documents
b. Use of documents at trial
c. Photographs and video
d. Logs
e. Electronic files
f. Physical evidence

1108 Collision, Allision, and Grounding Cases – Preserving Ship's Operation Evidence

a. Documentary evidence
b. Safeguard records
c. Conflicts of time
d. List of officer and enlisted watchstanders

1109 Documenting Damage and Repair Costs

a. Elements of admiralty damages
b. Collision repairs
c. Repair costs
d. Non-collision work
e. Commercial shipyard repairs
f. Detention costs
g. Prompt repairs

1110 Personal Injury Cases

a. Generally
b. Potential claimants
c. Considerations in death and personal injury

investigations
d. Shore worker injuries
e. General visiting and ship tours

1111 Correspondence with Private Parties

a. Forward to OJAG (Code 11)
b. DON personnel
c. Admissions of liability

1112 Maritime Oil or Hazardous Substance Spills

1113 Disturbance of Navy Shipwrecks, Aircraft Wrecks, and Other Submerged Property

Part C — Admiralty Claims

1114 Administration of Defensive Admiralty Claims

a. Generally
b. Assistance to claimants

1115 Adjudicating Admiralty Cases As Foreign Claims

a. Foreign Claims Act
b. Copy to OJAG (Code 11)

1116 Authority for Affirmative Claims Settlement

a. Generally
b. Authority of Secretary of the Navy (SECNAV)

1117 Salvage

1118 Federal Inter-Governmental Admiralty Incidents

a. Waiver doctrine
b. Report of incident

1119 Foreign Government Claims

a. Report to OJAG (Code 11)
b. Jurisdictional process
c. Immunity
d. Waiver agreements

e. Status of Forces Agreements

APPENDICES

a. Sample Admiralty Letter Report Appointing Letter
b. Sample Admiralty Letter Report
c. Sample Dual Purpose Litigation Report Appointing Letter
d. Sample Dual Purpose Litigation Report

Part A - Introduction

1101 Scope

a. General application. This chapter applies to admiralty tort claims, including claims against the DON for death, personal injury, or property damage caused by a DON vessel or other property under the jurisdiction of the DON, or resulting from an admiralty tort committed by any agent or employee of the DON, and affirmative admiralty tort claims by the DON for damage to DON property. Also, this chapter briefly discusses salvage claims by or against the DON and claims by the DON for towage services rendered to privately owned vessels. This chapter does not apply to admiralty incidents involving damage to U.S. Government vessels or property caused by the U.S. Government. See section 1118.

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 the process for adjudicating admiralty claims.

c. Notice. Effective handling of admiralty claims depends on commanders making immediate notice of any admiralty incident, however trivial, to the 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 and policy issues addressed in this chapter. Notifications in accordance with this chapter to Office of the Judge Advocate (OJAG, Code 11) suffice 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 (SECNAV) statutory claims settlement authority or results in litigation.

1102 Organization

a. Secretary of the Navy. The SECNAV is authorized to administratively settle admiralty tort claims for personal injury or property damage caused by DON vessels or other property under the DON’s jurisdiction, or by an agent or employee of the DON, and for towage or salvage services rendered to DON vessels, when the amount paid does not exceed

$15,000,000.00 and the matter is not in litigation (see 10 U.S.C. §§ 8822, 8823). The SECNAV is also authorized to assert affirmative admiralty tort claims for damage to property under the DON's jurisdiction.

b. Judge Advocate General. The SECNAV has delegated the authority to settle DON admiralty claims to the JAG and the DAJAG (Code 11) when the amount paid or received does not exceed $500,000 and $250,000, respectively. OJAG (Code 11) also serves as principal liaison to the Department of Justice (DOJ) for DON admiralty tort cases in litigation. 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 (MSC) chartered vessels, including claims for charter hire, cargo damage, general average, and redelivery repairs, are handled by Office of Counsel, MSC. Damages arising out of other contracts may be resolved by the responsible contracting officer in accordance with the Contract Disputes Act (41 U.S.C. Chapter 71). However, all tort claims arising from the operation of any DON 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, amphibious watercraft or vehicle, 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. Similarly, damage to DON vessels caused by non-federal entities or damage to DON property caused by the operation of non-federal vessels are considered admiralty incidents. Subsections 1103(b) through 1103(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 U.S. Government — the affected command must 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 aboard or on shore as a result of the operation of a DON vessel on navigable waters (including small boats such as tugs, gigs, and barges) or on the brow, gangway or ladders of a DON vessel, is an admiralty incident.

(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) Examples include injuries caused by objects thrown or dropped from a DON 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 DON vessel, damage to a DON vessel caused by a non-federal entity, or damage to DON property caused by a non-federal vessel is an admiralty incident. Examples include:

(1) Fishing nets, lines, lobster pots, or other gear in the water, cut or damaged by DON vessels, including amphibious vehicles. Also, fishing gear damaged or lost by becoming fouled on DON submarine cables, unmanned maritime vehicles, sunken DON vessel or aircraft wreckage, or DON ordnance.

(2) Automobiles or other property located on a pier damaged by an object thrown or dropped from a DON 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. Such incidents may eventually be resolved in accordance with environmental regulations, but must also be reported as admiralty incidents. Further information about pollution claims can be found in section 1112.

(4) Damage or loss of a civilian contractor's property onboard a DON vessel.

(5) Damage to DON piers, dolphins, fenders, marinas, degaussing or deperming facilities, dry-docks, ships, yard craft, security boats, or barges caused by non-federal vessels.

f. Swell wash or wake damage. Civilian personal injury or

property damage resulting from the wake or swell created by a DON vessel is an admiralty incident. Property damage includes damage to other vessels, shore structures, oyster beds, or clam flats. Similarly, damage to DON property from the wake or swell from a non-federal vessel is an admiralty incident.

g. Maritime target ranges. Civilian personal injury or property damage resulting from DON maintenance or use of a 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-federal vessels moored, anchored, or stored at MWR or special services marinas resulting from DON negligence must 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 on navigable waters caused by DON aircraft is an admiralty incident. Likewise, damage on shore or at sea caused by embarked DON aircraft or weapons launched from a DON vessel or embarked DON aircraft 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 DON property by a non-federal entity from navigable waters and salvage of non-federal property by DON personnel are admiralty incidents. Likewise, if any DON 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. DON seizure, interdiction of, or attack on any civilian vessel is an admiralty incident. Examples include drug interdiction operations, counter-piracy actions, and United Nations Security Council Resolution enforcement operations.

l. Groundings. The grounding of a DON vessel is an admiralty incident. Damage to a DON vessel resulting solely from the actions of DON 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 requiring the report to OJAG (Code 11). Additionally, OJAG (Code 11) can advise on liability considerations for use of commercial salvage or tow services.

m. Significant maritime incidents. Proximity of a DON 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 to OJAG (Code 11) (see subsection 1103(a)). This initial report is in addition to other reports required by this chapter (e.g., Admiralty Letter Report or 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, Marine Corps situation report, 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 (including the identities of the DON vessel, aircraft, or command; other vessels and their owners or husbanding agent; individuals; or organizations).

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 Navy or Marine Corps 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 with proper consideration given to 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 DON 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 incident, such as that accomplished during a repair period for convenience to the DON.

1105 Subsequent Investigative Report

a. Generally. The initial report of an admiralty incident, discussed in section 1104, must 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 must consult with OJAG (Code 11) as soon as possible after the incident. OJAG (Code 11) will evaluate the likelihood of litigation, may consult with DOJ, and will advise the convening authority as to the most appropriate investigation format. Note that incidents involving death of, or injury to, U.S. military personnel will trigger the Casualty Assistance process, among other administrative and legal requirements. Use of a privileged investigation format will preclude or delay the sharing of the investigation and parts thereof.

b. Admiralty Letter Report (ALR) investigation. The ALR is used to investigate an admiralty incident that is reasonably anticipated to result in a claim or civil litigation. It 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 conducting the investigation under the supervision of an OJAG (Code 11) attorney or other designated attorney.

(1) An ALR should be completed within 30 days of the incident. It must 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 will include as enclosures, unsworn summaries of witness statements (written witness statements will not be taken, but if a statement is already in existence, it must be preserved and forwarded with the report), copies of documents, photographs (including negatives), contracts, port services agreements, insurance policies, medical records, and other supporting information. Also, include the full name, rate or rank, DoD identification number, e-mail address and billet for all: witnesses; principals in the chain of command (commanding officer, executive officer, command master chief, department head, division officer, leading chief petty officer, leading petty officer); watchstanders; and medical response personnel as appropriate. All non-federal entities, including governments, individuals, companies, organizations, vessels, vessel owners, and husbanding agents, must be completely identified.

(2) 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 must be forwarded directly (advance copy by encrypted e-mail or via SharePoint, AMRDEC, or fax) to OJAG (Code 11).

(3) The investigating officer must 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.

(4) The information contained in an ALR must not be disseminated to any individual or organization not directly involved with the investigation without prior authorization of OJAG (Code 11). Any unauthorized dissemination may affect the litigation position of the United States.

c. Command Investigation. For some admiralty incidents, a convening authority may determine, after consultation with OJAG (Code 11), that concerns regarding safety, operations, public affairs, international relations, casualty assistance or accountability outweigh the risk to U.S. litigation interests that could result from the creation of a non-privileged investigative report. Under these circumstances, the command investigation format discussed in Chapter Two is appropriate. An advance copy of any investigation involving an admiralty incident must be forwarded to OJAG (Code 11) as soon as

possible, with endorsements to follow when completed. All endorsements will follow immediately upon completion.

d. Dual-Purpose Investigation. When the primary purpose for conducting an investigation of an admiralty incident is to gather facts and evidence to protect the legal interests of the DON and the United States in claims and litigation, but a convening authority also seeks to investigate other issues such as operational requirements or accountability, a Dual-Purpose Investigation may be used. The Dual-Purpose Investigation report must adhere to the procedures set forth for an ALR whenever possible and should be completed within 30 days of the incident. However, the Dual-Purpose Investigation report may include opinions or recommendations and may be endorsed by the convening authority or chain of command. The report must 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. Confirm Naval Safety Center's intended response to the underlying incident and provide a point of contact for deconfliction with the Dual-Purpose Investigation.

e. Court of Inquiry. The following additional considerations are relevant in admiralty cases involving courts of inquiry. See Chapter Two for more information on 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 DON 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 DON 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 DON vessel because the record of the DON 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. An American Bureau of Shipping inspection or 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. Without first coordinating with OJAG (Code 11), no individual or command 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 United States (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 must 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) must be consulted to determine if DON 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. 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 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 joint survey is the formal, technical, survey held by representatives of 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 DON material. A joint marine survey of damage should not 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, as vessel operations constantly create opportunities for additional damage from other sources. Surveys are arranged and funded by OJAG (Code 11). The survey of a DON vessel should occur only with the participation of a surveyor representing the DON. Additional or substitute participation by DON personnel should be coordinated with OJAG (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 DON property, and request representation by a marine surveyor at the survey. If any DON activity receives an invitation to attend a survey of damage, OJAG (Code 11) must be notified immediately.

1107 Evidence Preservation

a. Original documents. The United States' position in litigation 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. When litigation is initiated or anticipated, OJAG (Code 11) will issue a litigation hold letter describing specific actions required by the command to preserve evidence.

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 pertinent identifying information on each photograph. This can be done digitally if photographs are stored electronically, by writing on the reverse side of each photograph if stored in hard-copy, or ideally by both means. Pertinent information must include: the hour and date the image was 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 photograph was taken. Similar information should be affixed or digitally marked on any other stored or transmitted media (e.g., videotape, DVD, CD-ROM, other types of computer generated media). This information is important so photographs or video can be authenticated and identified by witnesses during litigation. Storage redundancy is recommended (e.g., hard-copy, hard drive, cloud storage), as appropriate under existing regulations at the time of evidence collection.

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, Allision, and Grounding Cases – Preserving Ship's Operation Evidence

a. Documentary evidence. Commanding officers must ensure that all documentary evidence, including electronic data, is collected and safeguarded immediately after any collision or allision. Witnesses will 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 must 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, must 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 the Electronic Chart System, Electronic Chart and Display Information System, Voyage Data Recorder, Automatic Identification System, Long Range Identification and Tracking, Global Positioning System, Global Maritime Distress and Safety System, Navigation System Sensor Interface, or Vessel Monitoring System). Furthermore, the hardware necessary to extract and

review that data must be identified and preserved. The unique technical requirements for preserving electronic navigation data must be taken into consideration when assigning an investigating officer or personnel to assist in the investigation of incidents where appropriate navigation of the vessel is an issue;

(3) Deck log;

(4) Engineering log;

(5) Bell books (bridge and engineering);

(6) Electronic engineering data;

(7) Combat Information Center (CIC) or Combat Direction Center (CDC) watch log;

(8) Electronic CIC or CDC data;

(9) Surface or 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 or Electrostatic Gyro Navigator);

(14) Contact Evaluation Plot (onboard submarines);

(15) Fathometer log;

(16) Dead Reckoning Tracer plot (annotated with the DRT operator's name, scale, and time period covered);

(17) Global Command and Control System - Maritime track data;

(18) Maneuvering board worksheets (bridge and CIC or CDC);

(19) Photographs of status boards (bridge and CIC or

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 (commanding officer's and engineering) (with signature log);

(25) Night orders (with signature log);

(26) Ship's Standard Organization and Regulations Manual 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 or 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 watchstanders. Completely list all officer and enlisted watchstanders 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 must contain the full name, rank and rate, e-mail address, and watchstation of each individual.

1109 Documenting Damage and Repair Costs

a. Elements of admiralty 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 DON vessel. Establishing the value of the DON's damage claim is often difficult. Detailed repair data is unlikely to be available soon after an incident. Completion of an ALR or Dual-Purpose Investigation should not be delayed pending receipt of this information. 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 delivery of this data. Usually, original repair specifications, job orders, time and material cards, dry-docking reports, and departure reports are needed. 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 DON 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, its 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 DON 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 United States 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 must provide 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) contain 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 DON vessel should be made as expeditiously as practical, especially when a detention claim is being presented by DON. 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 death or injury aboard a DON vessel is a reportable admiralty incident, unless the individual is a member of the armed forces or an employee of the federal government (see subsections 1103(a) and 1103(d)). This reporting requirement extends to death or injury that occurs while embarking or disembarking a DON vessel and death or injury that occurs on shore or on a non-DON vessel, if caused by the operation of a DON vessel. Notify OJAG (Code 11) immediately of such accidents.

b. Potential claimants. Potential claimants include: 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 death and personal injury investigations. 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 DON and other 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 DON personnel, include the member's full name, rank and rate, command, and e-mail address. For other witnesses, include the person's full name, e-mail address, and telephone number. If the witness 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 (e.g., division officer, leading petty officer, leading chief petty officer) so they may be contacted to comment on the space's cleanliness, upkeep, and general repair.

(3) Witness statements. The investigating officer must 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 OJAG (Code 11)) prior to contacting the injured person or any witness not employed by the federal government.

(4) Inspection of the accident site. A claim or suit for death or injury is based on the contention that the vessel was negligently maintained or operated. A post-accident inspection can be corroborated by evidence of other inspections (i.e., zone, safety, or health and comfort) closely preceding the incident. Evidence that qualified personnel (e.g., departmental chief petty officer, leading chief petty officer, 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 person was injured in a fall, the inspection should include the quality of the footing (e.g., 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 subsection 1107(c)). 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 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 DON 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 DON reports and records.

d. Shore worker injuries. For a shore worker injury investigation, an accident report 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.

e. General visiting and ship tours. Investigative reports of an injury occurring during general visiting or tours of the ship should address warnings given to visitors (e.g., conspicuous signs, printed warnings on brochures provided, and verbal warnings by a tour guide) and safety briefs, and the 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, must be forwarded expeditiously to OJAG (Code 11) for reply. Under SECNAVINST 5820.8 (series) and SECNAVINST 5720.42 (series), OJAG is responsible for processing requests for DON records, for access to DON property and information, or for interviews of DON personnel in admiralty matters. These requests often precede claims or lawsuits against the United States.

b. DON personnel. All DON 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, staff judge advocate, or command counsel, who will inform OJAG (Code 11).

c. Admission of liability. DON personnel must not make statements to potential claimants or others implying that the DON or the United States will accept responsibility for payment for injury or damage. Off-hand comments such as "We'll take care of it" may mislead 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 Maritime Oil or Hazardous Substance Spills

a. 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). OJAG (Code 11) strongly encourages dissemination of information necessary for effective cleanup to authorities outside DoD while spill response and cleanup is underway. The U.S. Government 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 DON 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 or hazardous material was spilled, a description of the DON's response efforts, and estimates of amounts of oil or hazardous material 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 DON oil or hazardous material 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 U.S. 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, OJAG (Code 11) may direct 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 directed 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 or hazardous material spill may be released only after approval by OJAG (Code 11) in light of the U.S. 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 must be in accordance with the provisions and limitations of SECNAVINST 5820.8 (series).

1113 Disturbance of Navy Shipwrecks, Aircraft Wrecks, and Other Submerged Property

a. The attempted salvage or other disturbance of DON 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

1114 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 reached.

b. Assistance to claimants. Refer claimants or potential claimants inquiring about rights or procedures to OJAG (Code 11). The cognizant admiralty attorney will provide the individual the address where the notice of claim should be mailed. An officer or employee of the U.S. 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).

1115 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) only when authorized by 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) must be provided a copy of the Foreign Claims Commission proceedings and, if an award is made to claimant, a copy of the executed release.

1116 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. §§ 8703, 8823, and 32 C.F.R. Part 752.

b. Authority of Secretary of the Navy. The SECNAV 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. § 8823). The SECNAV also has settlement authority for damage to property for which the DON is responsible, 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 DON 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.

1117 Salvage

Salvage claims may be filed against the DON for compensation for towage and salvage services, including contract salvage, rendered to a DON vessel or other property under the DON's jurisdiction. The Navy Supervisor of Salvage may initially assert claims for salvage services rendered by DON 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.

1118 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 federal agency, are subject to waiver. The waiver doctrine is based upon Comptroller General decisions that appropriations of one federal department are not available to pay the claims of another.

b. Report of incident. When it appears only U.S. 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) may confirm the status of the vessels or property involved with the other federal agency, and the waiver is made a matter of record.

1119 Foreign Government Claims

a. Report to OJAG (Code 11). Admiralty incidents involving DON 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 DON vessels (including MSC vessels) are immune from arrest. If an attempt is made to arrest a DON 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 in addressing 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

5830
Ser
[Date]

From: Commanding Officer, USS _____
To: LT _____

Subj: ADMIRALTY LETTER REPORT INVESTIGATION OF _____
INVOLVING _____ ON _____

Ref: (a) JAGINST 5800.7G, Chapter Eleven

1. Pursuant to 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

5830
Ser
[Date]

From: LT _____, USN, ALR Investigating Officer
To: Office of the Judge Advocate General (Code 11)

Subj: ADMIRALTY LETTER REPORT INVESTIGATION OF _____
INVOLVING _____ ON _____

Ref: (a) Appointing Ltr Ser ____ of ____
(b) JAGINST 5800.7G, Chapter Eleven

Encl: (1) [See sections 1107-10]_____

1. Pursuant to references (a) and (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, Staff 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 will 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. JAGINST 5800.7G Chapter Eleven is generally applicable and sections 1107 through 1110 provide helpful

Subj: ADMIRALTY LETTER REPORT INVESTIGATION OF _____ INVOLVING _____ ON _____

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:
E-MAIL:

Summarized content of statement.]

4. The investigating officer in this matter is [name and rank]; and may be contacted at [telephone number] or by e-mail at [e-mail address].

X. X. XXXXX
LT, USN

[Do not send the report to any other addressee unless specifically authorized by Admiralty Counsel]

SAMPLE DUAL PURPOSE LITIGATION REPORT APPOINTING LETTER

5830
Ser
[Date]

From: Commanding Officer, USS _____
To: LT _____

Subj: DUAL-PURPOSE LITIGATION REPORT INVESTIGATION OF _____ INVOLVING _____ AND _____ ON _____

Ref: (a) JAGINST 5800.7G, Chapters Two and Eleven

1. Pursuant to 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 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

Subj: DUAL PURPOSE LITIGATION REPORT INVESTIGATION OF _____ INVOLVING _____ AND _____ ON _____

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 must 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 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

Subj: DUAL PURPOSE LITIGATION REPORT INVESTIGATION OF _____ INVOLVING _____ AND _____ ON _____

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

5830
Ser
[Date]

From: LT _____, USN, Investigating Officer
To: Commanding Officer, USS_____

Subj: DUAL-PURPOSE LITIGATION REPORT INVESTIGATION OF _____ INVOLVING _____ AND _____ ON _____

Ref: (a) Appointing Ltr Ser ____ of ____
(b) JAGINST 5800.7G

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 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.

Subj: DUAL PURPOSE LITIGATION REPORT INVESTIGATION OF _____ INVOLVING _____ AND _____ ON _____

2. [The form of the Dual-Purpose Investigation Report can be the same as a JAGINST 5800.7G Chapter Two 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 JAGINST 5800.7G Chapter Two 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 Dual-Purpose Investigation report is in the form of a JAGINST 5800.7G, Chapter Two investigation, please include your interview summaries as enclosures. If it is not in the Chapter Two 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 witnesses.]

4. The investigating officer in this matter is [name and rank]; and may be contacted at [telephone number] or by e-mail at [e-mail address].

X. X. XXXXX
LT, USN

Copy to:
OJAG (Code 11) (w/orig encls)
[original documents enclosed with the report should be sent to OAJG (Code 11)]

[Note: if the commanding officer formally endorses the investigation or takes any action, then he or she must send a copy of the action to OJAG (Code 11) as well; any other commands that endorse this report must send a copy of their endorsement to OJAG (Code 11)]

MANUAL
OF THE
JUDGE ADVOCATE GENERAL
(JAGMAN)

Office of the Judge Advocate General
Department of the Navy
1322 Patterson Avenue, Southeast
Suite 3000
Washington Navy Yard
Washington, DC 20374-5066