

GENERAL OFFICER LEGAL REFERENCE HANDBOOK

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POINT PAPER

Subj: ETHICS/STANDARDS OF CONDUCT -- COMMON ISSUES

Ref: (a) 5 C.F.R. § 2635 (1995)
(b) DoD Directive 5500.7-R, Joint Ethics Regulation,
of 30 Aug 93

1. **Bedrock Standards.** Standards of conduct exist to ensure public confidence in the Government by promoting ethical conduct and avoiding fraud, waste, and abuse. Marines achieve these aims by adherence to the following bedrock standards when confronted with an ethics issue. We are prohibited from:

- a. using or appearing to use public office for private gain;
- b. giving or appearing to give preferential treatment to any individual or entity;
- c. impeding or appearing to impede Government efficiency or economy;
- d. losing or appearing to lose complete independence or impartiality;
- e. making or appearing to make Government decisions outside Government channels; and
- f. doing or appearing to do anything that adversely affects the confidence of the public in the integrity of the Government.

2. **Authority.** Ethics and standards of conduct regulations are found in the references. Reference (b) has specific sections for DoD military and civilian personnel and also republishes reference (a).

3. **Scope of Coverage.** All naval personnel are covered. This includes active duty military personnel, civilian personnel, nonappropriated fund employees, special Government employees, and Reservists.

4. **Applicable Sanctions.** Military: administrative action, nonjudicial punishment, courts-martial, or civil criminal prosecution. Civilian: appropriate administrative action, and in some cases, criminal prosecution.

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5. **Summary of Common Issues**

a. **Conflict of Interests.** DoD employees must avoid conflicts of interests. "Conflict of interest" is defined as any personal, business, professional activity, or financial interest that places an individual in a position of conflict between private interests and the public interests related to the duties of the individual's official position, including an organization that the employee serves as officer, director, trustee, general partner or employee. Interests of the servicemember include those of spouse, children, and other household members. DoD employees must report conflicts to an appropriate supervisor. Conflicts of interest are resolved by disqualification from duties related to conflict, divestiture of the interest, or removal from the position.

b. **Confidential Financial Disclosure Report (OGE FORM 450).** Personnel of the grade O-6/GS-15 and below are required to submit an annual Office of Government Ethics (OGE) Form 450 on 31 Oct of each year if their responsibilities require them to exercise judgment in making Government decisions or in taking Government action for contracting or procurement, regulating or auditing private or other non-Federal enterprises, or other activities in which the final decision or action may have economic impact on the interests of any non-Federal activity. The reporting period is the preceding 12 months ending 30 September of each year (or any portion thereof not covered by a new entrant report). The OGE Form 450 is reviewed by the filer's immediate superior and an ethics counselor.

c. **Executive Personnel Financial Disclosure Report (SF 278).** Regulations require general officers and Senior Executive Service officials to file a Public Financial Disclosure Form (SF 278) as a "new entrant," when promoted to O-7, "annually" by 15 May of each year, and upon retirement. Wrongful failure to do so warrants a \$200.00 fine. SJA to CMC notifies general officers of this requirement by personal letter and maintains these reports. Filers should submit their reports to their supervisor (their reporting senior). Your local ethics counselor (usually the SJA) will assist you in preparing the report. Officers promoted to the grade of brigadier general must file this report within 30 days of promotion.

d. **Annual Ethics Training.** All DoD employees who file an SF 278 or OGE Form 450 must receive ethics training annually. Annual ethics training must be accomplished in person by a qualified instructor or by telecommunications, computer-based training, or video that is prepared by a qualified instructor.

e. **Honoraria.** Ethical rules prohibit DoD members (regardless of grade) from accepting compensation for teaching, speaking, or writing that relates to official duties. Military

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personnel and civilian employees may accept payment or anything of value for a speech, appearance, or article on any matter that does not relate to their official duties. Consultation with your ethics counselor is key.

f. **Solicited Sales.** Service members cannot solicit sales to personnel who are junior in grade or under their supervision. In the absence of coercion or intimidation, this rule does not prohibit the occasional and non-commercial sale or lease of real or personal property, or off-duty employment of naval personnel in retail stores.

g. **Misuse of Government Property and Manpower.** Use Government facilities, property, and manpower only for official Government business.

h. **Misuse of Military Titles.** Commanding officers often receive requests from non-Federal entities for their time and support for fundraising projects. Although most of these projects are worthy causes, DoD members may not use or allow the use of their official titles, positions, or organization names in any way that tends to suggest official endorsement or preferential treatment by DoD. Military grade and military department as part of an individual's name (e.g., Colonel Smith, U.S. Marine Corps) may be used, however, in the same way as other conventional titles such as Mr., Ms., or Honorable.

i. **Gifts From Outside Sources.** DoD members cannot accept gifts because of their official position or from a prohibited source. This rule also applies to the member's spouse and minor children. Regardless of the above rule, you may accept:

(1) unsolicited gifts valued at \$20.00 or less from any source, but no more than \$50.00 from any one source in a given year;

(2) gifts based on a personal relationship (from family or friends; gift unrelated to official duties);

(3) commercial discounts available to the public or to a class consisting of all employees (e.g., "military discounts.");

(4) bona fide awards, prizes, or honorary degrees;

(5) gifts based on outside business relationships;

(6) free attendance and meals at widely-attended gatherings;

(7) social invitations from non-prohibited sources;

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(8) gifts of nominal value (\$260.00 or less) from a foreign Government;

(9) meals, refreshment, and entertainment in foreign areas; and

(10) gifts of travel from non-Federal sources.

Note: These exceptions are complex and contain many preconditions before acceptance. Consult your ethics counselor first.

j. **Acceptable Items.** The following items are not considered gifts and may be accepted:

(1) greeting cards, plaques, and trophies that have little intrinsic value;

(2) modest refreshments not part of a meal (coffee and donuts);

(3) benefits available to the public (discounts, bank loans, reduced airfare); and

(4) anything paid for or accepted by the Government.

Note: More restrictive rules apply if you are a "procurement official."

k. **Gifts From a Group that Includes a Subordinate (includes military and DoD civilians).**

(1) General rule: we cannot--

(a) give a gift or solicit another to give a gift to an "official superior" (someone who directs or evaluates your performance);

(b) accept a gift from an employee who receives "less pay" unless the two are not in a senior-subordinate relationship AND there is a personal relationship between the two employees that would justify the gift.

(2) Exceptions: we may accept or give--

(a) items of \$10.00 or less on an occasional basis when gifts are traditionally given (birthday, Christmas, etc.);

(b) food and refreshments shared at the office;

(c) personal hospitality at a residence/hostess gifts;

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(d) As a narrow exception, reference (b) permits groups of employees to give gifts exceeding \$300 in value to superiors on special infrequent occasions that terminate the superior-subordinate relationship, if the gifts are appropriate to the occasion and are uniquely linked to the departing employee's position or tour of duty and commemorate the same.

6. **Advice**. Standards of Conduct advice may be obtained from your local staff judge advocate, CMC (JAR) at DSN 224-1513/2510 or (703) 614-1513/2510, or Counsel for the Commandant (CL) at DSN 224-2150 or (703) 614-2150.

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Subj: FUNDRAISING

Ref: (a) DoD Directive 5500.7-R, Joint Ethics Regulation, of
30 Aug 93
(b) MCO P1700.27, MCCS Policy Manual
(c) DoD Instruction 1015.10, Programs for Military
Morale, Welfare, and Recreation, of 3 Nov 95
(d) SECNAVINST 4001.2G
(e) MCO P5800.16

1. General Policy

a. **Official Support of Fundraising Limited.** Pursuant to reference (a), DoD components shall **not** officially support and DoD employees may **not** officially endorse or participate in membership drives or fundraising for any non-Federal entity, **except:** the Combined Federal Campaign, emergency and disaster appeals approved by the Office of Personnel Management, the Navy-Marine Corps Relief Society, and other organizations composed of DoD employees or dependents when fundraising among their own members and as approved by the head of the command or organization. For these purposes, fundraising means raising funds for a nonprofit organization through solicitation of funds, sale of items, or participation in a fundraising event.

b. **Fundraising for Commercial Interests.** DoD policy prohibits Government participation in events clearly sponsored by, or conducted for the benefit of, commercial interests.

c. **Voluntariness.** Where solicitation is authorized, the request must be made in an environment and manner that ensures that contributions are in fact voluntarily made. Any actions that do not allow free choices or create the appearance that Marine Corps personnel do not have a free choice to give any amount, or not to give at all, are prohibited.

2. On-the-Job Solicitations. Marine Corps personnel shall be given the opportunity through on-the-job solicitations to make truly voluntary contributions to such charitable health and welfare agencies within the local Combined Federal Campaign, Navy-Marine Corps Relief Society, and other specifically approved groups, as they desire to support. Such solicitations shall be conducted in strict conformity with guidelines published annually.

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3. **Other Solicitations.** Subject to other restrictions, DoD employees may voluntarily participate in non-Federal activities in their **personal** capacities, provided they act exclusively outside their official position. Purely personal, unofficial, volunteer efforts to support fundraising are not prohibited where the efforts do not imply DoD endorsement. The head of the command or organization, usually the installation commander, may authorize such activities outside the workplace, such as at quarters or community support centers.

a. **Family Quarters on Military Installations.** Local installation commanders may permit voluntary agencies to solicit at private residences or at family quarters in unrestricted areas of military installations at their discretion.

b. **Public Entrances of Federal Buildings and Installations.** The above restrictions do **not** operate to prevent local DoD employees' efforts to aid the unfortunate. This may include, but is not limited to, the sale of token items, such as veterans group "poppies," and the placement of collection boxes, which may be permitted at public entrances or in public concourses of Federal buildings or installations that are normally open to the general public. The decision to authorize such collections rests with the commanders or heads of field installations or activities.

c. **Duty Status.** Solicitations shall not be conducted by military or civilian personnel in their official capacities, whether during duty or non-duty hours. Marine Corps personnel shall not use or allow the use of their titles, grades, or positions in connection with fundraising for private organizations. Unless authorized by CMC (PA), Marines shall not wear the uniform while engaged in off-the-job solicitations for any purpose from the public.

4. **Money Raising Conducted by Marine Corps Community Services (MCCS) Activities.** Per reference (b), money-raising events of short duration may be held in support of MCCS activities provided:

a. all members or patrons of the sponsoring MCCS activity must be authorized patrons;

b. such money-raising activities must be conducted entirely on Federal property;

c. requests for funds or participation are restricted to authorized patrons; and

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d. all proceeds from the fundraising event must be used by the sponsoring MCCS activity solely for the benefit of authorized patrons.

5. Solicitation for Commercial Sponsorship of MCCS Events.

Pursuant to reference (c), DoD authorized MCCS activities to solicit commercial sponsorship from U.S. firms for some MCCS events. Guidelines are provided by DoD and CMC (letter of 11 Oct 88) and prohibit solicitation of tobacco or alcoholic beverage sponsorship.

6. Birthday Ball

a. **Money-Raising Generally Permitted.** Money-raising events of short duration for the purpose of generating money for that sponsoring group may be permitted. See paragraph 4 of this paper for additional qualifications.

b. **Solicitations Prohibited.** No member of the Marine Corps, may, in his official capacity, solicit donations from private entities or individuals for funds to be applied to the birthday ball.

c. **Gifts Accepted in Accordance with MCO P5800.16.** Outright gifts, unconditional and unsolicited, must be handled in compliance with references (d) and (e).

7. **Advice.** Standards of Conduct advice may be obtained from your local staff judge advocate, CMC (JAR) at DSN 224-1513/2510 or (703) 614-1513/2510, or Counsel for the Commandant (CL) at DSN 224-2150 or (703) 614-2150.

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Subj: GIFTS TO THE MARINE CORPS

Ref: (a) MCO P5800.16
(b) DoD Directive 5500.7-R, Joint Ethics Regulation, of
30 Aug 93

1. **General Rule**. Pursuant to reference (a), no gift will be accepted by the Marine Corps or by an individual Marine, regardless of value, if either presently or in the future, it has the potential to embarrass the Marine Corps. Consider:

(a) Will the public believe the gift is given for ulterior motives, i.e., will the donor expect future favors in return?

(b) Does it create an actual or perceived conflict of interest between donor and USMC?

(c) Is the donor a defense contractor (does business or is seeking to do business with any DoD component)?

(d) Does the gift come from a donor (individual, group, or association) with whom we would not like the Marine Corps linked?

(e) Is acceptance of the gift otherwise restricted by reference (b)?

(f) Does the gift have unduly burdensome conditions associated with it (will the expenditure of funds or administrative efforts outweigh the value of the gift)?

2. **Solicitation of Gifts**. Unless authorized by the Secretary of the Navy, requests for gifts or contributions for Marine Corps institutions, organizations, or personnel shall not be initiated by persons in the Marine Corps.

3. **Acceptance of Unsolicited Gifts**. Unsolicited gifts of personal property to the Marine Corps may be accepted by the appropriate acceptance authority. Pursuant to reference (a):

a. Officers exercising special court-martial jurisdiction may accept gifts of a value not exceeding \$1500.00.

b. General officers in command, district directors, SJA to CMC, and Counsel for CMC may accept gifts of a value not to exceed \$10,000.00.

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c. CMC may accept gifts of personal property to the Marine Corps of a value less than \$50,000.00.

d. In addition, any commander may accept unsolicited gifts of perishables or consumables such as food, nonalcoholic beverages, flowers, regardless of donor or value, and subject only to the "General Rule" above. This acceptance is of items that will be consumed at one specific event; i.e., unit picnic, command event, or the like.

e. Gifts of real property can be accepted only by the Secretary of the Navy.

4. **Gifts from Foreign Governments.** No Marine Corps personnel shall request or otherwise encourage the offer of a gift from a foreign government, and such gifts, whenever possible without embarrassment, shall be declined. Special handling and processing may be required. Refer to references (a) and (b).

5. **Procedure for Handling Gifts**

a. Gifts that clearly violate the "General Rule" above shall be immediately refused by the commander to whom the gift is offered.

b. All other offers must be forwarded to the cognizant acceptance authority per reference (a). Gifts of money can be accepted locally, but the money must be forwarded to CMC (P&R) for deposit in the Navy Gift Account. Gifts of money tendered in the form of negotiable instruments must be made payable to the Department of the Navy. P&R then provides the command with appropriation data to draw the money. The money must not be spent or obligated until this action is accomplished.

c. In cases where the gift is intended to reward superior performance, the Marine Corps will determine the recipient, rather than the donor (i.e., Marine of the Quarter, Recruiter of the Year, and the like).

d. Commanders may take temporary possession of property while making a determination concerning acceptance, or while awaiting the acceptance decision of higher authority. No gift will be taken up on command property accounts until formally accepted by appropriate authority.

6. **Gifts for Marine Corps Balls or Other Official Functions.**

Unsolicited gifts offered to help support Marine Corps birthday balls or other official functions will be treated the same as other gifts. Soliciting funds is prohibited.

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7. **HQMC Advice**. CMC (JAR), at DSN 224-1513, or (703) 614-1513 has responsibility for advising on all gift acceptance matters, except those dealing with real estate and commercial interests (patents, copyrights, trademarks), which are the responsibility of Counsel for the Commandant (CL) at DSN 224-2150 or (703) 614-2150.

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Subj: GIFTS OF TRAVEL

Ref: (a) 41 C.F.R. §§ 301, 304 (1998)
(b) 31 U.S.C. § 1353 (1993)
(c) MCO P5800.16

1. **Issue.** By what legal and regulatory mechanism may Marine Corps officers, enlisted personnel, civilian employees and spouses accept gifts of travel from non-Federal sources?

2. **Answer.** The framework set forth below allows for the acceptance, on behalf of the Government, of certain expenses associated with travel if specified conditions are met.

3. **Analysis**

a. **Government Service Administration (GSA) Regulations Control.** The GSA regulations published at reference (a) are the controlling regulations in this area and should be consulted directly. The GSA regulations are issued under a specific grant of authority for this purpose under reference (b).

b. **Acceptance Criteria.** The gift of travel must be made to the Government, and the individual may not accept the gift directly. The legal distinction is that the individual is not accepting the gift of travel on his own behalf, but, rather on behalf of the Government.

(1) A gift of travel may be accepted where the authorizing official determines the payment is: (a) for travel relating to an official's duties under official travel authorizations; (b) for attendance at a meeting or similar function; and (c) from a non-Federal source that is not disqualified.

(2) A "meeting or similar function" is a conference, seminar, speaking engagement, symposium, training course, or similar event that takes place away from the employee's official station.

(3) To accept such a gift of travel, the donating organization or entity must not be conflicted. This analysis is conducted with a view of all the circumstances, such that a "reasonable person with knowledge of all the facts" would not question the integrity of the agency or its programs. The analysis is guided by, but not limited to, the identity of the

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non-Federal source, the purpose of the meeting or function, the identity of other expected participants, the nature and sensitivity of any matter pending before the agency affecting that source, and the monetary amount and character of the travel benefits. The authorizing official may find that acceptance in part, or to attend only part of the function, is appropriate. Of course, a gift of travel may fit these criteria and still be refused by the acceptance authority as being contrary to the interests of the Marine Corps. The individual has no right to the gift of travel.

c. **Acceptance Authority is Keyed to Gift Acceptance Authorities.** Gift of travel acceptance is keyed to gift acceptance, per reference (c). Gift acceptance authorities have certain limited monetary authority, which should cover most gift of travel acceptance situations. All gifts of travel and related expenses must be reported to CMC (JAR) twice annually by the acceptance authorities. This report should include the name of employee, dates of travel, description of meeting, and identification of the non-Federal entity. CMC (JAR) will solicit reports from commands, consolidate the information, and forward it to the Office of Government Ethics for final disposition.

4. **Advice.** Standards of Conduct advice may be obtained from your local staff judge advocate, CMC (JAR) at DSN 224-1513/2510 or (703) 614-1513/2510, or Counsel for the Commandant (CL) at DSN 224-2150 or (703) 614-2150.

POINT PAPER

Subj: POLITICAL ACTIVITIES

Ref: (a) DoD Directive 1344.10, Political Activities by Members of the Armed Forces on Active Duty, of 15 Jun 90
(b) DoD Directive 5500.7-R, Joint Ethics Regulation, of 30 Aug 93
(c) Office of Personnel Management Political Activity of Federal Employees, 5 C.F.R. § 734 (2003)
(d) SECDEF WASHINGTON DC 052112Z DEC 03

1. **Purpose.** With each political season, commanders and their judge advocates will find it useful to review applicable guidance on political activities by Federal employees. Different sets of rules apply depending on what position the employee holds within the Federal government. This paper discusses the rules governing actions of military personnel and civilian employees, and the use of DoD facilities and equipment, in support of political activities.

2. **Key Points**

a. **Members of the Armed Forces.** Principal guidance on permissible political activities for military personnel is in reference (a), and is incorporated in Chapter 6 of reference (b). The range of political activities permitted for service members is significantly narrower than for civilian employees.

(1) **Acceptable Activities.** A member on active duty may vote, express his or her personal opinion on political issues and candidates, contribute to political organizations, and attend political rallies when not in uniform.

(2) **Unacceptable Activities.** Members on active duty, whether or not in uniform, may not:

- be a candidate for civil office (with some narrow exceptions);

- participate in partisan political management of campaigns or make speeches in the course thereof;

- participate in any radio, TV, or other program or group discussion as an advocate of a partisan political party or candidate;

- display large political signs on a privately-owned vehicle (bumper stickers that support a party or candidate are permissible);

- solicit or receive a campaign contribution from another service member or from a civilian employee of the United States for promoting a political objective or cause;

- allow or cause to be published partisan political articles signed or written by the service member that solicit votes for or against a partisan political party or candidate;

- speak before a partisan political gathering of any kind promoting a partisan political party or candidate;

- perform clerical or other duties for a partisan political committee during a campaign or on an election day;

- march or ride in a partisan political parade; or

- serve in any official capacity or be listed as a sponsor of a partisan political club.

c. **Further Analysis.** Enclosure (3) to reference (a) provides more examples of permissible and impermissible political activities. Note that reference (a) does not preclude participation in local nonpartisan political campaigns (e.g., school boards, or city and county posts in some jurisdictions), initiatives, or referendums when not in uniform and when such participation does not imply any official DoD position or interfere with the member's official duties.

3. **Civilian Employees.** Reference (c) contains guidance for civilian employees, and is incorporated in Chapter 6 of reference (b).

a. **Acceptable Activities.** In general, civilian employees may participate in political organizations, campaigns, and elections, in their personal capacities. This means they may:

- Be candidates for public office in nonpartisan elections

- Register, vote, or assist in voter registration drives

- Attend political fundraising functions and contribute money to political organizations

- Join and actively participate in political parties, including attending political rallies and meetings or holding office

- Campaign for or against candidates in partisan elections, including distributing literature or making speeches

b. **Unacceptable Activities.** Civilian employees generally may not:

- use their official authority or influence to interfere with or affect the result of an election

- solicit, accept, or receive political contributions (with some very narrow exceptions); solicit, accept, or receive uncompensated volunteer services from an individual who is a subordinate; or allow their official titles to be used in connection with fundraising activities

- run for nomination or election to public office in a partisan election, meaning one with party primaries or party affiliation for candidates (with some narrow exceptions)

- solicit or discourage the political activity of any person who has business with DoD

- engage in political activities (to include wearing a political buttons) while on duty, while in a Government-occupied office or building, while wearing an official uniform, badge, insignia, or other similar item, or while using a Government vehicle

- contribute to the political campaign of another Federal employee in their chain of command or supervision

c. **Prohibitions Applicable to Senior Civilian Employees and Employees in Particularly Sensitive Positions.** Additional prohibitions apply to more senior civilian employees, including all career Senior Executive Service (SES) employees, administrative law judges, and certain employees in sensitive positions, such as members of Contract Appeal Boards, and employees (except Presidential appointees confirmed by the Senate) of DIA and NSA. Additional prohibitions also apply to all Presidential appointees confirmed by the Senate and all non-career SES members.

4. **Logistical Support for Political Activities.** In general, commanders may not permit the use of DoD facilities to support political activities.

a. **DoD Guidance.** The Secretary of Defense provided guidance on logistical support for political activities in reference (d). Key provisions include:

- Installation commanders shall not permit the use of installation facilities by any candidate for political assemblies, media events (including speeches), fundraisers, press conferences, or any other activity that could be construed as political in nature.

- Candidates may receive the same access to installations as any other visitor. Commanders will inform candidates, however, that all political activities and media events are prohibited while on the military installation.

- All requests for community relations support to political meetings, ceremonies, and like events, including bands, color guards, personnel, and speakers, whether on the installation or in the civilian community, will be denied.

- Commanders will deny requests from politicians to tape or film campaign commercials in front of military equipment on military property owned or leased by the Government.

- DoD newspapers will not carry campaign news, partisan discussions, cartoons, editorials, or commentaries dealing with political campaigns, candidates, or issues.

b. **Further Analysis**. The text of reference (d) provides additional guidance, OSD points of contact, and references. A copy of the message is available on the SJA to CMC website at [http://sja.hqmc.usmc.mil/jar/Just in archive/Files/Campaign Elections.pdf](http://sja.hqmc.usmc.mil/jar/Just%20in%20archive/Files/Campaign%20Elections.pdf).

5. **Advice**. You may obtain standards of conduct advice, including evaluating political activities, from your local staff judge advocate, CMC (JAR) at DSN 224-1513/2510 or (703) 614-1513/2510, or Counsel for the Commandant (CL) at DSN 224-2150 or (703) 614-2150.

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Subj: PARTICIPATION AND SERVICE WITH NON-FEDERAL ENTITIES

Ref: (a) DoD Directive 5500.7-R, Joint Ethics Regulation, of
30 Aug 93

1. **Participation**. There are two ways in which a DON employee may participate in or serve with a non-Federal entity (NFE): (1) in his or her official capacity; or (2) in his or her private or personal capacity.

2. **Official Capacity Service**

a. **Liaison Role Permitted**. Subject to the limited exception in paragraph 2.d. below, the only way for DON employees to serve within the scope of their official position in an NFE is to serve in a liaison role. This status is specifically recognized in section 3-201 of reference (a). DON employees may serve as liaisons when appointed by the head of the DoD component command or organization. A determination must be made that a significant and continuing DoD interest will be served by the representation.

(1) Liaisons serve the interests of the DON. They owe loyalty to the DON and not to the NFE.

(2) Liaisons function only in an advisory position to the NFE. They may not be directors or board members of the NFE. In fact, liaisons may not participate in the management of the organization at all.

(3) Since liaisons are serving as official representatives of the DON, it is permissible to send liaisons TAD to perform liaison duties.

b. **Liaison Role and Advisory Boards**. Some defense contractors invite senior DoD officials to sit on their "advisory boards." According to a DoD General Counsel Memo of 7 May 99, such service in an official capacity is unlikely to ever be proper because of conflict of interest laws, except in cases where it is pursuant to a contract or part of a Cooperative Research and Development Agreement. Service in a personal capacity may be authorized in limited circumstances, for example, advisory boards for colleges or professional organizations.

c. **Management Role Prohibited**. Again, subject to paragraph 2d below, DON employees may not participate in the management of NFEs *in their official capacity*. This determination is based on

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the rationale that DoD officials cannot serve both the interests of DoD and the private organization. If the individual employee seeks to serve with an NFE as a board member, he may do so only if such service can be classified as personal capacity service.

d. **Management Exception.** With prior written approval from DoD General Counsel, employees may serve in limited management roles for specifically designated organizations, such as the Navy-Marine Corps Relief Society and organizations supporting the service academies. Refer to section 3-202 of reference (a), Change 4.

3. **Personal Capacity Service**

a. **Personal Relationships with Non-Federal Entities Permitted.** Marines are permitted, and even encouraged, to join, participate in, or hold office (as board members, trustees, or officers) in NFEs in their private capacities. Service with NFEs is desired because it often promotes professional or personal development and helps the Marine become an active part of the local military or civilian community. When personally participating in an NFE, however, a Marine needs to be aware of the ethical rules that govern participation in these organizations.

b. **Determining Personal Capacity Service.** You may not accept an office or serve on the board of directors or similar position in an NFE if the position is offered to you because of your official assignment or position, for example because you are the Commanding General, Marine Corps Base, Camp Pendleton. Nor may you accept an ex officio position (i.e., one traditionally offered to the officer in your billet) in your personal capacity. Military grade, however, is not considered an official position. Accordingly, you may accept a position offered to you because of your grade, background, or experience. General officers must obtain approval in writing from their supervisor before beginning such personal service.

c. **General/Flag Officer Compensation Prohibited.** Pursuant to DEPSECDEF Memo of 23 Jul 96, 0-7 - 0-10 officers may not accept compensation for personal service with NFEs. They may however, accept in-kind services (lodging, transportation, meals) from the NFE in connection with their personal service or reimbursement for such expenses, provided these benefits are not enhanced because of their official position or military grade (in other words, the same benefits all members of the board receive.)

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e. **The Don'ts of Private Capacity Service.** If you are serving in your private capacity with an NFE:

(1) You may not use your office, title, or position in connection with your personal participation, but you may be identified by grade and service;

(2) You may not personally solicit subordinates or any other prohibited sources (usually DoD contractors), or permit the use of your name in a solicitation that targets subordinates or prohibited sources in NFE membership drives or fundraising campaigns;

(3) You may not participate in and must disqualify yourself from acting on official DoD matters that affect the financial interests of that organization. This is true even though someone else might make the final decision. You must remain impartial in your official duties;

(4) You may not represent your organization before the Government;¹

(5) You may not use Government resources, personnel, or official time for unauthorized purposes. Certain agency designees (supervisors and ethics counselors), however, may permit limited use of official resources (but not personnel) if the use:

- (a) does not adversely affect mission;
- (b) is reasonable in duration and frequency;
- (c) serves a legitimate public interest;
- (d) does not reflect adversely on DoD; and
- (e) creates no significant additional costs.

(6) You may not divulge nonpublic information; and

(7) You may not give your organization preferential treatment.

¹ Although Pub. L. 104-177 (110 Stat. 1563), signed August 6, 1996, permits Federal personnel to represent professional, recreational, or similar groups if the majority of the organization's members are Federal employees or family members thereof, this exception does not apply to obtaining a grant or contract from the Federal Government for the NFE.

Subj: PARTICIPATION AND SERVICE WITH NON-FEDERAL ENTITIES

4. Consult Your Local Staff Judge Advocate When Questions Arise.

If you have questions or would like more details concerning personal capacity service, contact your staff judge advocate, CMC (JAR), at DSN 224-1513/2510 or (703) 614-2510, or Counsel for the Commandant (CL) at DSN 224-2150 or (703) 614-2150.

POINT PAPER

Subj: **USE OF MOTOR VEHICLES, EQUIPMENT, AND PERSONNEL**

1. **Purpose.** To address basic rules for use of government transportation, equipment.
2. **General Rule.** Government vehicles, equipment, and personnel may only be used in connection with official business and duties. (Personnel, equipment, vehicles, etc., may not be used for personal use or purely social events.)
3. **Motor vehicles:** The use of DoD motor vehicles shall be for official purposes only. 31 U.S.C. 1344 authorizes the Commandant of the Marine Corps and other Service Chiefs transportation between home and work. In the absence of highly unusual circumstances, (e.g., a clear and present danger, an emergency, or other compelling operational considerations), no other Marine Corps personnel are authorized home-to-work transportation. Very limited exceptions are contained in DoD Directive 4500.36R, and require approval by the Secretary of the Navy or Unified Combatant Commander, and notification to Congress.
4. **Enlisted Aides:** The use of enlisted aides must be for duties which relate to military and official responsibilities of the officers to whom assigned. The propriety of the duties is governed by the official purpose rather than the nature of the duty itself. Responsibility for the supervision, direction, and performance of duty by enlisted aides lies solely with the officer to whom assigned. Only duties may that have a reasonable connection with official duties should be assigned. Duties contributing solely to the personal benefit of the individual officer or members of his family should not be assigned.
5. **Mess men:** Marine Mess men may be used in support of "official functions," which means those activities relating exclusively to the business of the United States government. Under limited circumstances, Marine Messmen may also be used for "unofficial functions," subject to the following restrictions: a) participation is voluntary; b) the services are provided during an off-duty status; and c) they are compensated for their time.
6. Consult with your local SJA, Counsel for the Commandant or CMC (JAR) in any circumstance where the use of government assets or personnel is in question or may present appearance problems.

Prepared by: J.D. Groharing, Captain USMC
Special Assistant to Counsel
Office of Counsel for the Commandant

POINT PAPER

Subj: PERSONAL LIABILITY OF COMMANDERS

1. **Background**. Military command includes potential personal liability for violations of Federal or State laws. In most instances, commanders are immunized from suit as long as their actions were within the scope of their official duties.
2. **Personal vs. Official Liability**. The Government assumes **all** responsibility for suits brought against commanders in their "official capacities." When sued in a "personal" capacity, the commander is personally at risk--and may feel that risk when, for example, trying to qualify for a mortgage or a loan. Two types of personal liability confront commanders: criminal and civil.
3. **Personal Criminal Liability**
 - a. Knowing, intentional acts that violate Federal or State law, e.g., not reporting an oil spill.
 - b. Negligent act contrary to Federal or State law, e.g., auto fatality due to alcohol.
 - c. Knowing, intentional act of subordinate, where commander knew (or should have known) of the action and had ability to control the action, e.g., storage of hazardous waste.
4. **Department of Justice (DoJ) Representation for Criminal Charges**. DoJ will represent a commander if the action giving rise to charges was:
 - a. Within "scope of employment" ("in scope").
 - b. Representation is in best interest of U.S. (highly unlikely if Federal prosecution).
5. **Personal Civil Liability** can arise on the same basis as personal criminal liability; consequences do not include imprisonment.
6. **DoJ Representation for Civil Suits**
 - a. Same as for criminal cases.
 - b. If defendant "in scope", case may be removed to Federal court if originally filed in State court, and U.S. will be "substituted" as defendant.

Subj: PERSONAL LIABILITY OF COMMANDERS

7. **Immunity**

a. Commanders acting "in scope" are protected from civil common law tort actions. Federal Tort Claims Act requires U.S. to be substituted as the defendant and is **exclusive** remedy for plaintiff.

b. Limited immunity for "constitutional torts." (If commander violates a clearly-established constitutional right of an individual that a reasonable person would have cognizance of, then the commander is not immune from suit.)

c. Intramilitary immunity: "Feres doctrine" bars servicemembers from suing each other when injury is "incident to service."

8. **Indemnification.** Pending DoD directive would indemnify individuals for civil penalties, fines, and damages--if DoD (as opposed to DoJ) views actions giving rise to suit as "in scope." Until approved, there is no indemnification and individual commanders will be personally responsible for any judgment.

9. **Insurance.** No coverage available for criminal prosecutions. The few policies only cover actions that arise "within the scope of employment," which are the same cases where immunities are strongest.

10. **"Immediate action" if sued.** Contact your staff judge advocate immediately. He or she will coordinate representation, removal, and substitution issues with DoJ via the Office of the Judge Advocate General of the Navy.

11. **Summary.** No **commander** has been successfully sued or convicted (yet) in either State or Federal court for tortious or criminal conduct, although a few subordinate officers have. While the law offers commanders significant protections from liability, they are not, however, immune from successful prosecution or suit. Consult your staff judge advocate immediately on issues relating to litigation.

POINT PAPER

Subj: **FINANCIAL DISCLOSURE REQUIREMENTS**

Ref: (a) Ethics in Government Act of 1978, 5 U.S.C. App 4 (Pub. L. 95-521)
(b) Ethics Reform Act of 1989, 5 U.S.C. App 4 (Pub. L. 101-194)
(c) DoD Directive 5500.7-R (Joint Ethics Regulation)

1. **Required Filers** - Section 7-200 of reference (c) identifies certain covered positions required to file an SF 278 Public Financial Disclosure Report. Included in the covered positions are: Regular military officers serving in the pay grade of 0-7 and above; Reserve officers whose pay grade is 0-7, or above, and who have served on active duty more than 60 days during a calendar year; and members of the Senior Executive Service. "Frosted" General Officers need not file until they begin receiving pay and benefits of the 0-7 grade.

2. **Types of Reports**

- (A) **New Entrant Reports** - The report should cover the 12-month period prior to signature and must be filed within 30 days of assuming a new position. However, a General Officer that transfers into a "covered position" within 30 days of leaving another "covered position" for which he/she already filed an SF 278 does not have to file a new entrant report.
- (B) **Annual Reports** - SF 278 forms are required to be completed and returned to the DAEO no earlier than 1 January and no later than 15 May for any individual who served in a "covered position" for more than 60 days during the preceding year. HQMC (CL) and HQMC (JA) send notifications to filers including filing instructions.
- (C) **Termination Reports** - No earlier than 15 days and no later than 30 days after termination from a "covered position," unless he/she assumes another "covered position" within 30 days. Fines and penalties in addition to the late filing fee have often been imposed on termination filers who have failed to file a report. (In 2003, a former Department of Commerce employee was assessed a penalty of \$11,000 for failure to file a termination report.)

3. A 45- day extension may be granted for good cause. There is also a 180-day combat zone extension if the individual is serving in a combat zone on applicable date.

4. Late filing (more than 30 days) carries with it a \$200.00 late filing fee. (Note - fee expected to be raised by the Office of Government Ethics to \$500.00 for Calendar Year 2003 filing)

5. Local Staff Judge Advocates, CMC (JAR), and Counsel for the Commandant are available to assist in the required filing of the SF 278 and all questions pertaining thereto.

6. The SF 278 is an official public report, the contents of which must be current, complete and accurate.

Prepared by: J.D. Groharing, Captain, USMC
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Office of Counsel for the Commandant

POINT PAPER

Subj: USE OF GOVERNMENT FUNDS FOR PRINTING AND POSTAGE

Ref: (a) SECNAVINST 5603.2D
(b) MCO 5600.31G

1. There are a number of responsibilities and privileges associated with the assumption of the flag or general level which involve ceremonial and social obligations of not only the general but also his/her spouse. While we cannot address each of those obligations in depth, this point paper highlights the most significant "rules of the road" for obligating and expending appropriated funds in connection with printing, postage, and/or business cards, as they are used for business, ceremonies and social events.

2. PRINTING

a. Rule No. 1: Public funds may be used to defray printing costs only if those costs are associated with official ceremonies, which are defined as events that have been "approved as official and necessary for conducting public business".

Included in this definition are cornerstone and building dedications, memorial services, military reviews, commissionings and decommissionings of air squadrons, military school graduations, changes of command and retirement BUT ONLY if the retirement is coincident with a change of command.

b. Corollary to Rule 1: Appropriated funds may not be used to defray printing associated with purely "social" functions.

Both of the references specifically state, "Unless otherwise specifically sanctioned by the Secretary of the Navy or the Commandant, Marine Corps Balls, dining-ins and mess nights are social--not official--functions."

Generally, lunches, dinners, teas, and receptions, even when held in conjunction with official ceremonies, are social events that do not qualify for use of appropriated funds to defray printing.

c. Exception-Official Representation Funds (ORF): The only exception to the rules that appropriated funds may not be used to pay for social functions are those social functions authorized and funded with ORF per SECNAVINST 7042.7J. In particular, where heads of activities are required to entertain

officially to further the interests of Navy and the Marine Corps, the matter is "official business" ORFs may be used to support the event subject to availability. ORF events may be of three categories: 1) to foster good relations with foreign nations; 2) to promote community relations through public affair approved functions, or 3) to honor dignitaries.

d. **Rule No. 2**: Only the following types of printed materials may be purchased with appropriated funds for official ceremonies: invitations, admission cards, place cards, and programs for memorial services, changes of command and military reviews. For "official retirement ceremonies" (i.e., in conjunction with change of command), invitations may be used only if the retiree is a colonel or above.

e. **Rule No. 3**: Even though for official use, appropriated funds may not be used to print, engrave, or emboss calling or greeting cards.

3. **POSTAGE** - The rules for postage and use of official mails parallel the rules set forth above regarding printing, with one notable exception:

a. **Rule No. 1**: Official announcements of official change-of-command and retirement ceremonies in conjunction with a change of command may be mailed using appropriated funds.

Such official announcements may include an invitation to a related reception immediately following the change-of-command ceremonies IF this invitation does not increase the cost of postage to the government.

b. **Corollary to Rule 1**: The inclusion of information regarding an unofficial social function in any other invitation or announcement of an official ceremony renders that official announcement ineligible for official mailing.

4. **BUSINESS CARDS** - Department of the Navy policy, issued in March 1999, permits the printing of business cards for organizations or positions that require business cards in the performance of official duties. However, the expenditure of funds for this purpose must be authorized by either a Flag or General Officer, or member of the Senior Executive Service. Additionally, when the exchange of business cards would facilitate mission-related business communications, government employees may use existing software and agency-purchased card stock to print their own business cards on Government computers/printers. The card stock may be purchased with appropriations used to finance daily operating expenses.

5. **Advice**. Advice on use of government funds for printing and postage or any other matter may be obtained from your local staff judge advocate, CMC (JAR), or Counsel for the Commandant (CL).

POINT PAPER

Subj: **SUMMARY OF POST GOVERNMENT EMPLOYMENT RESTRICTIONS**

1. **Purpose.** To provide an overview of post government employment restrictions applicable to general officers and SES employees.

2. **General.** The Procurement Integrity Act, 41 U.S.C. 423, is the statute that prohibits working for a contractor upon leaving government service. It applies to a group of persons directly involved in awarding a contract over \$10 million. The following representational restrictions apply to all general officers and SES employees upon leaving government services.

- Lifetime restriction: Under 18 U.S.C. 207, **CAN NEVER** communicate or appear before the government with the intent to influence, on behalf of any other person on a **particular matter** in which the employee participated **personally and substantially** while a government employee.

- Two-year ban: Under 18 U.S.C 207(a) (2), **CANNOT FOR TWO YEARS**, communicate or appear **before the government** with intent to influence, on behalf of any other person on any **particular matter** which was actually pending under their **official responsibility**. "Official responsibility" is defined as authority to approve or disapprove, or otherwise direct, government action.

- One-year ban: Under 18 U.S.C. 207(c), **CANNOT FOR ONE YEAR** communicate or appear **before the Department** in which the person served while on active duty, in connection with any matter in which official action is sought.

3. **Recusal requirement** - Under 18 U.S.C. 208, officials must **disqualify** themselves from **personal and substantial participation** in any particular matter in which there is a direct financial interest for that individual, spouse, child, or partner. **Matters concerning a prospective employer are considered a "financial interest" which requires disqualification.**

4. **Summary.** This Information Paper is intended to highlight the significant restrictions pertaining to post-government employment. Please consult your local staff judge advocate, Counsel's Office, CMC (JAR), or CMC (CL) for a detailed opinion before you begin seeking employment.

Tab I

POINT PAPER

Subj: **PURCHASING COMMANDER COINS WITH GOVERNMENT FUNDS**

1. **Purpose.** To provide general guidance on "commander's coins" and detail restrictions applicable to the expenditure of government appropriated and non-appropriated funds to purchase coins.

2. Government funds may be used for the limited purpose of purchasing official coins to award outstanding performance or extend official courtesies. Coins may be officially purchased using three different funding sources and the type of funds used to purchase a coin dictates when, and to whom, it can be awarded. Coins can be purchased using 1) appropriated funds (APF), 2) official representation funds (ORF, a subset of APF), and 3) nonappropriated funds (NAF).

- **Appropriated Funds (APF)**. A soon to be released revised Marine Corps Order will authorize the use of APFs to purchase commander coins as long as they are used as a legitimate award for Marine Corps personnel and not as a memento or personal gift. Coins may be given to an individual or unit whose achievements **make a significant contribution to the effectiveness and efficiency of the Marine Corps**. Coins purchased with APF may not be used to provide personal or commemorative gifts, souvenirs, tokens of exchange or as "morale-builders" (i.e. reasons unrelated to special achievements). Also, coins purchased with APF should not be given as tokens of appreciation to government officials, foreign officials or non-Federal personnel in recognition of general support or improved community relations; however, in this situation coins may be purchased using ORF funds, as discussed below.

- **Official Representation Funds (ORF)**. ORF may be used to purchase coins when they are presented as **official courtesies** to authorized guests. Authorized guests include certain foreign citizens, national and local government officials, national or regional "dignitaries," and similar officials that are hosted consistent with the regulation governing ORF expenditures (SECNAVINST 7042.7J). Commander coins should not be given to unaffiliated individuals or nonfederal government agencies simply to create goodwill, recognize positive contributions, or to encourage or reward cooperation with the Marine Corps.

- **Nonappropriated Funds (NAF)**. NAFs may be used to purchase coins used to honor NAF employees. The commander should award these coins to NAF employees only **for acts, which contribute to the Morale, Welfare, and Recreation (MWR)**

programs. NAF employees may be recognized individually or in groups for their superior performance.

3. Of course, personal funds may always be used to purchase coins. Similarly, while all employees are prohibited from soliciting a private organization, if a gift of coins is offered and properly accepted pursuant to SECNAVINST 4001.2G and LEGADMINMAN Chapter 12, a commander can distribute coins acquired under such circumstances. The restrictions covered in paragraph two above would not apply to these two situations.

4. Finally, whatever funding source is used to purchase the coins, a method of tracking each coin's funding source should be in place. While this requirement may present a minor administrative inconvenience, appropriate tracking will ensure records are maintained in the event Marine Corps personnel are later questioned regarding use of appropriated funds for commander's coins.

5. **Advice.** Advice regarding purchase of coins may be obtained from your local staff judge advocate, CMC (JAR), or Counsel for the Commandant (CL).

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POINT PAPER

Subj: **MCCS NAF FUNDING AND OFFICIAL REPRESENTATION FUNDS
(ORF)**

1. **Purpose**. MARADMIN 583/99 canceled the Nonappropriated Fund (NAF) Official Entertainment Fund (OEF). OEF provided Commanders with a discretionary monetary source for miscellaneous command expenses. MCCS NAF replaced the canceled OEF policy with a single policy linking authorized NAF expenditures to the MCCS mission of supporting the greatest number of Marines possible. Though certain command expenses may qualify for MCCS support, MCCS NAF is separate and distinct from Official Representation Funds (ORF), and the two funds should not be intermingled. This paper is provided to help clear up the differences between the two accounts, and provide a few examples to help illustrate appropriate expenditures.

2. **MCCS NAF** policy is controlled by MCO P1700.27A. NAF can be spent when it supports MCCS MWR activities of the command, and is equally available (or supports) all members of the military community. MCCS NAF may not be used for command representational or protocol obligations covered by ORF, or to supplement appropriations for public affairs. The key to approval is linking the spending to an MCCS purpose. Examples of permissible expenditures include:

- a. Cost of lunch for visiting mayor or member of the Chamber of Commerce in which MWR related issues will be discussed.
- b. Provision of light refreshments to incoming command personnel as part of an orientation program, provided that personnel of all ranks have an equal opportunity to participate in the event, or in a *similar* program.
- c. Holidays and special parties such as a Christmas party, Independence day celebration, etc., that benefits overall military community.
- d. Refreshments at an officers tea to include spouses (as long as equal or similar opportunity is provided to enlisted Marines).

3. **ORF**: Policy controlled by SECNAVINST 7042J. Funds are to extend official courtesies on behalf of the U.S. Government.

Tab MC

Subj: **MCCS NAF FUNDING AND OFFICIAL REPRESENTATION FUNDS
(ORF)**

They are to be used to maintain the standing and prestige of the United States. Official courtesies may be extended to individuals such as prominent federal (non-DoD), state and local government officials; foreign dignitaries and specific high-level DoD officials specifically enumerated in the SECNAV. Examples of authorized expenditures:

- a. Reception for ACMC when on an official visit to a command.
- b. Memento to present to the Venezuelan Commandant upon official visit to the U.S.
- c. Commander's coins that will be presented as official courtesies to dignitaries.
- d. Memento and parade expenses to honor Secretary of Education at parade ceremony.
- e. Reception expenses related to hosting the visit of the Crown Prince of Qatar.

4. This is brief overview of funding sources. Any specific questions on appropriate expenditures should be referred to legal counsel.

Prepared by: J.D. Groharing, Captain, USMC
Special Assistant to Counsel,
Office of Counsel for the Commandant

[Note: Anticipate CMC Green Letter guidance in early 2004 which will significantly affect spousal travel determinations described in this paper. Check here for latest update or consult CL or JAR at the contact numbers listed at the end of this paper.]

CL

Jan 02

POINT PAPER

Subj: **SPOUSAL TRAVEL**

1. **Purpose**. To provide current status and guidance on accompanying spousal travel.
2. **Background**. A initiative regarding spousal travel was sent through the immediate office of the Secretary of Defense. This initiative requests a change to the DoD Directive in order to permit a more liberal rule. Final approval of this initiative has not yet been achieved. **Until the change becomes official, DoD Directive 4500.56 continues to govern spousal travel.**
3. **Discussion**. The general rule is that spouse may not accompany when traveling on official business. Exceptions:
 - Spousal travel may be approved when there is an **unquestionably official function** and the spouse is actually to **participate in an official capacity**.
 - Spousal travel also permissible when spouse's presence serves a diplomatic or public relations benefit to the United States. Participation is representational in nature.
 - ACMC remains approval authority for spousal travel requests.
 - Spousal travel requests must include itinerary detailing spouse's role. The more thorough and detailed, the easier spousal travel is to justify and approve.
 - Examples of official functions include Key Volunteer networking, participation in family service activities, official tours of family service facilities, participation in working groups, etc.
 - Normally, when spousal travel is approved, only transportation costs will be covered, not per diem nor other expenses.
4. It is necessary to abide by DoD Directives by insuring that the role of a spouse participating in official events is clearly spelled out and an official itinerary is included in all requests.

Subj: **SPOUSAL TRAVEL**

5. **Advice.** Advice may be obtained from your local staff judge advocate, CMC (JAR) or Counsel for the Commandant (CL) at DSN 224-2150 or (703) 614-2150.

POINT PAPER

Subj: **FREQUENT-FLYER MILEAGE RULES**

1. **Personal Use of Official Miles Is Authorized**

a. The FY 2002 National Defense Authorization Act (P.L. 107-107) was signed on December 28, 2001. Section 1116 (Retention of Travel Promotional Items) allows employees (military and civilian) to retain for personal use promotional items (including frequent flyer miles, upgrades, or access to carrier clubs or facilities) earned as a result of travel or transportation services obtained at Federal expense or accepted under 31 U.S.C. § 1353, provided the promotional item was obtained (1) under the same terms as those offered to the general public and (2) at no additional cost to the Government.

b. The DOD Per Diem Committee issued changes to the JTR/JFTR to implement section 1116 on December 31, 2001, effective that date. The Joint Ethics Regulation, reference (a) has also been changed to reflect section 1116.

2. **Frequently Asked Questions**

a. May an employee use these frequent flyer miles to upgrade to business or first class on official travel?

Answer: Yes, an employee has always had the ability to use their personal frequent flyer miles or funds to upgrade to business or first class on official travel. OMB Memorandum, Subj: Travel Upgrades, 19 Sep 94. Frequent Flyer Miles earned from official travel under the conditions set forth in Section 1116 belong to the employee and he may use them however he sees fit, to include using them for upgrades on official travel.

b. If uniformed DON personnel use frequent flyer miles to upgrade to business or first class for official travel, may they travel in uniform?

Answer: There is no DoD or DON policy prohibiting a uniformed member from wearing his uniform while traveling in business or first class on official travel. While this practice has been discouraged in the past because of appearance concerns, that concern may be lessened with the Government-wide authorization for employees to retain and personally use frequent flyer miles obtained for official travel.

c. Is Section 1116 retroactive?

Answer: Yes. Section 1116 applies to promotional items received before, on or after the effective date of the Act. Section 1116(f).

d. Do the restrictions in the JER concerning retention of promotional items preclude employees from personally retaining and using promotional items earned under section 1116?

Answer: No. DoD issued a revision to the JER on 10 Jan 02. It provides as follows: "As a result of section 1116, paragraphs 4-200, 4-201, 4-302(b), and 2-100 (incorporating 5 C.F.R. section 2635.203(b)(7) "note") of the Joint Ethics Regulation are rescinded and superseded by the per Diem, Travel and transportation Allowance Committee's Memorandum dated December 31, 2001 (copy attached). Paragraph 4-202(a)(2) is modified by deleting the phrase "(Other Than Those Obtained for Frequent Flyer Miles)" so as to read as follows: "Use of Upgrade Certificates." See DOD SOCO Advisory 02-02, dated January 11, 2002. Available on-line at www.ethics.navy.mil.

e. Does section 1116 change the rules for retention of benefits in an involuntary bumping situation?

Answer: No. The rules concerning voluntary bumping and involuntary bumping have not changed. A traveler may keep payments from a carrier for voluntarily vacating a seat. However, no additional expense (per diem or miscellaneous reimbursable) may be paid as a result of the traveler's delay. Additional travel expenses incurred as a result of voluntarily giving up a seat are the traveler's financial responsibility. If a traveler is involuntarily bumped, the traveler enters an "awaiting transportation" travel status and is entitled to per diem and miscellaneous expense reimbursement. Any monetary compensation (including meal and/or lodging vouchers) for the involuntary bump belong to the Government. See JTR C1200.B and JFTR U1200.B.

3. **Advice.** Standards of Conduct advice may be obtained from your local staff judge advocate, CMC (JAR), or Counsel for the Commandant (CL).

Prepared by: J.D. Groharing, Captain USMC
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Office of Counsel for the Commandant

INFORMATION PAPER

Subj: UNLAWFUL COMMAND INFLUENCE

1. This paper presents basic information about unlawful command influence.
2. **Background.** You and your commanders may not attempt to influence the outcome of any military justice proceeding. Doing so is called "unlawful command influence." You must also avoid saying or doing anything that gives the appearance of trying to influence the outcome of a particular case or class of cases. The military justice system is designed to promote good order and discipline in the armed forces while providing justice to those who stand accused of misconduct. Unlawful command influence is prohibited because it undermines public confidence that dispositions are based on the courts' application of the law to facts properly proven at trial, and not on predetermined edicts by interested commanders.
3. **Commanders' Role.** Commanders play an expansive, appropriate, and lawful role in the military justice system to include determining initial disposition of alleged offenses; selecting court-martial members; negotiating appropriate pretrial agreements; acting on the findings and sentence of courts-martial; and reviewing initial allegations of legal errors and requests for clemency. Commanders may not, however, seek to influence decisions of subordinate commanders with respect to actions regarding military justice proceedings; inhibit testimony or appearance of witnesses; punish or reward court members on the basis of their votes on court-martial findings or sentences; or punish or reward witnesses, counsel, or military judges for their conduct in military justice proceedings. Commanders should also avoid making detailed policy statements to subordinates about specific offenses -
- "every drug user in my battalion is going to get a BCD" -
- or commenting on the outcome of judicial proceedings --
"I can't believe members from my command only gave Bnotz seven months."
4. **Consequences.** Unlawful command influence in military justice proceedings can result in dismissal of charges

against an accused, appellate reversal of otherwise properly determined findings and sentences, relief for cause of the offending commander, and adverse media coverage.

5. **Summary**. Unlawful command influence is unnecessary and easy to avoid. I encourage you and your commanders to seek out the advice of your staff judge advocate before publicly commenting upon any military justice matters.

Prepared by: Maj Doug Cody, USMC
HQMC (JAM) 614-4250

INFORMATION PAPER

Subj: GENERAL OFFICER PRIMER ON PROCESSING ALLEGATIONS OF MISCONDUCT IN THE MILITARY

1. **Purpose.** This paper summarizes how allegations of misconduct are disposed of in the United States Armed Forces and your role as a General Court-Martial Convening Authority. Consult your local staff judge advocate for advice regarding a particular case.
2. **Commander's Role.** The central role the commanding officer plays in the disciplinary and administrative processes cannot be overemphasized. Commanders make critical decisions at every stage, to include determining the initial disposition of alleged offenses, negotiating appropriate pretrial agreements, acting on the findings and sentence of courts-martial, and reviewing initial allegations of legal errors and requests for clemency. Commanders may not, however, seek to influence decisions of subordinate commanders with respect to actions regarding military justice proceedings, punish or reward court members based on their performance on courts-martial, or inhibit prospective testimony or the appearance of witnesses.
3. **Preliminary Inquiry.** The Uniform Code of Military Justice (UCMJ) and the Manual for Courts-Martial, United States, (2002 Edition), establish military disciplinary procedures. On receipt of information that a member of the command is suspected of committing an offense triable by court-martial, the accused's commander must make, or direct, a preliminary inquiry into the charges or suspected offenses. The commander determines the extent and form of the preliminary inquiry based on the circumstances of the case and the needs of the command. In some instances, it is no more formal than having a member of the command informally "check into" the allegations and giving a verbal report back to the commander. In other instances, full criminal investigations by the Naval Criminal Investigative Service or other agencies may be necessary.
4. **Disposition Decision.** After receipt of the preliminary inquiry report, commanders decide how to dispose of

allegations of offenses by members of their commands. Depending on the seriousness of the allegations, the state of the evidence, and a variety of other factors, commanders have several options:

a. **Article 32 Pretrial Investigations.** In cases involving allegations of serious misconduct, the commander may convene a formal investigation of the charges pursuant to Article 32 of the Uniform Code of Military Justice (UCMJ) as a necessary prerequisite to trial by general court-martial.

(1) An Article 32 investigation provides an initial hearing of the evidence relating to the charges alleged against a servicemember. The investigating officer must inquire into the truth of the matters contained in the charges, consider their form, determine whether they are supported by sufficient evidence to conclude the accused committed an offense, and ultimately recommend appropriate disposition of the charges to the commander.

(2) The accused may be represented by counsel, may call witnesses in his or her own behalf, and may testify or remain silent. Judge advocates, who are lawyers admitted to practice by a State bar and certified by the judge advocate general of their service, are appointed to represent an accused servicemember during Article 32 proceedings. Additionally, accused servicemembers may request a specific judge advocate, if reasonably available, or retain civilian counsel, at their own expense, to represent them in conjunction with, or in lieu of, appointed military counsel.

(3) After reviewing the Article 32 investigating officer's report, the officer who convened the investigation may dismiss the charges, initiate administrative action, impose nonjudicial punishment (NJP), convene a summary or special court-martial if empowered to do so, or forward the case, with a recommendation for appropriate disposition, to an officer exercising general court-martial jurisdiction (if the original convening authority is not so empowered).

b. **Summary Courts-Martial.** Summary courts-martial are not authorized to resolve charges against officers. A summary court-martial is a judicial forum which provides a simple procedure for adjudicating relatively minor offenses.

(1) The single commissioned officer who is appointed as the summary court-martial officer acts as judge, prosecutor, and defense counsel, and in so doing decides questions of fact. If he or she finds the accused guilty, he or she also determines the sentence.

(2) The summary court-martial officer (normally a captain or above) must thoroughly and impartially investigate both sides of the matter before the court and ensure that the interests of both the accused and the Government are represented. A Marine may refuse trial by summary court-martial, in which case the officer who convened the summary court may dismiss the charges, initiate administrative action, conduct a NJP hearing, refer the charges to a special court-martial, or convene an investigation pursuant to Article 32, UCMJ, to determine if trial by general court-martial is warranted.

(3) The United States Supreme Court has held that the Sixth Amendment's guarantee of assistance to counsel does not apply to a summary court-martial. Thus, an accused has no right to have a military defense counsel appointed to represent him at a summary court-martial. He may, however, retain a civilian counsel at his own expense. As in any criminal trial, the accused at a summary court-martial is presumed innocent, and the Government has the burden of proving guilt beyond a reasonable doubt. The rules of evidence which apply during a summary court-martial are similar to those applied in the U.S. district courts. The accused has the right to confront and cross-examine the witnesses against him or her, to present relevant evidence in his own defense, and to testify or remain silent. If convicted, he or she may present evidence in extenuation and mitigation before any sentence is adjudged.

(4) The maximum punishment that may be adjudged at a summary court-martial is confinement for 30 days, reduction to the grade of private, and forfeiture of two-thirds pay per month for 1 month.

c. **Special Courts-Martial.** A special court-martial is a judicial proceeding conducted in accordance with the Constitution of the United States and the UCMJ. As in any Federal criminal trial, the accused is presumed innocent, and the Government has the burden of proving guilt beyond a reasonable doubt. The rules of evidence are similar to those applied in the U.S. district courts. The accused has the right to confront and cross-examine witnesses, to

present relevant evidence in his defense, and to testify or remain silent. The accused also has the right to choose trial by a military judge alone or trial by a military jury. If convicted, the accused may present evidence in extenuation and mitigation before any sentence is adjudged. The maximum punishment that may be adjudged at a special court-martial is confinement for 12 months, reduction to the grade of private, forfeitures of not more than two-thirds pay per month for 6 months, and a bad conduct discharge.

d. **General Courts-Martial**. A general court-martial is a judicial proceeding similar to a special court-martial except the maximum punishment that may be adjudged at a general court-martial is based on limits established for the charged offenses by the President in the Manual for Courts-Martial. Depending on the severity of the offense, authorized general courts-martial punishments range from punitive censure, to punitive separation from the service (bad conduct or dishonorable discharge for enlisted; dismissal for officers). The sentence may also include death, confinement for life, or other punishment as the court-martial may adjudge. A punitive separation adjudged at a court-martial divests the recipient of virtually all veterans' benefits to include any entitlement to retirement pay. Only a general court-martial may sentence an officer to confinement or punitive separation from the service by dismissal. Further, an officer may not be reduced in grade by any court-martial. Accordingly, given the limited punishment available at special courts-martial, commanders generally refer charges against officers to general courts-martial if a judicial resolution is necessary.

e. **Nonjudicial Punishment (NJP)**. If a commander determines disciplinary proceedings less severe than a court-martial are appropriate, he or she may consider the charges and evidence under Article 15 of the UCMJ. Article 15 authorizes commanding officers and officers in charge to impose punishment, known as NJP, for relatively minor offenses without referring the case to a court-martial. Unless the accused is attached to or embarked in a vessel, the accused may refuse NJP and request a trial by court-martial.

(1) If an accused agrees to accept NJP, the NJP authority will conduct the hearing to determine whether NJP should be imposed and, if so, the type and amount of punishment. This hearing is not a trial, and the rules of evidence that apply at a court-martial do not apply.

Before the hearing, the accused will be informed of the alleged offenses and be provided an opportunity to examine available evidence and statements. During the hearing the accused may present evidence on the merits of the case or the punishment, testify or remain silent, be accompanied by a personal representative or spokesman, and have present witnesses, including those adverse to the accused if they are reasonably available. What punishment is imposed is within the commanding officer's discretion, but the punishment must be within the limits imposed by Article 15 and the Manual for Courts-Martial.

(2) The maximum punishment that a commanding officer in the grade of major or above can impose at NJP upon enlisted personnel includes punitive censure, extra duties for not more than 45 days, restriction for 60 days,² correctional custody (CC) for 30 days, reduction one pay grade for sergeants and below, and forfeiture of one-half of 1 month's pay per month for 2 months.

(3) The maximum punishment an officer exercising general court-martial jurisdiction can impose upon commissioned or warrant officers is punitive censure, restriction for 60 days, arrest in quarters for not more than 30 days, and forfeiture of one-half of 1 month's pay per month for 2 months.

(4) A Marine who believes his NJP to be unjust or disproportionate to the offense may appeal it within five days to the commanding officer of the officer imposing the punishment. If the Marine submits the appeal more than five days after receiving the punishment, the appeal may be denied as untimely unless the Marine shows good cause for the delay.

f. **No Action**. Finally, a commander may decide to take no action on an alleged offense. An initial decision to take no action does not bar later disposition of an offense in a different manner, or independent action, by a superior commander.

5. **Pretrial Restraint**. Under the UCMJ, four types of pretrial restraint may be imposed on a Marine facing trial by court-martial.

a. **Pretrial Confinement**

² If combined, restriction and extra-duties may be imposed for no more than 45 days. CC may not be combined with either restriction or extra-duties.

(1) A commanding officer may order a servicemember into pretrial confinement if he reasonably believes that the individual accused has committed an offense triable by special or general court-martial; that lesser forms of restraint are inadequate; and that the accused, if not confined, will flee before trial or engage in serious criminal misconduct.

(2) Within 48 hours after the beginning of the confinement, the commanding officer must prepare a memorandum stating the reasons for continued confinement. If the commanding officer does not prepare the memorandum, a neutral and detached officer must review the propriety of continued confinement within 48 hours. If the commanding officer does prepare the memorandum, a neutral officer will review whether continued confinement is appropriate within 7 days. The accused can request representation by a military counsel during this review proceeding. The accused and his counsel, if any, will be allowed to appear before the reviewing officer to make a statement. The reviewing officer may order continued confinement or order the release of the accused. This officer may later reconsider his initial decision to continue the accused's confinement if the accused provides significant information not previously considered.

(3) If the charges are referred to trial, the accused may request that the military judge assigned to his case review the propriety of the pretrial confinement. If the accused is convicted by the court-martial, the pretrial confinement served will be credited against any confinement adjudged by the sentencing authority.

b. **Arrest.** Arrest is the restraint of a person by oral or written orders directing the person to remain within specified limits. A person under arrest does not normally perform military duties.

c. **Pretrial Restriction in Lieu of Arrest.** Restriction in lieu of arrest is the restraint of a person by oral or written orders directing the person to remain within specified limits. A restricted person normally continues to perform military duties.

d. **Conditions on Liberty.**³ Conditions on liberty are imposed by orders directing a person to refrain from doing certain acts. Such conditions may be imposed in conjunction with the other forms of restraint discussed above.

6. **Pretrial Negotiations.** In court-martial cases, commanders will often find themselves involved in pretrial negotiations. Accused servicemembers, through counsel, often seek pretrial agreements wherein they will plead guilty to some or all offenses, in exchange for the convening authority agreeing to suspend, or even set aside imposed punishments. Agreements may also allow the accused, in return for his guilty plea, to appear in a less serious forum, such as special court-martial, summary court-martial or NJP, than would otherwise be the case. Usually the command SJA facilitates the negotiation process or will actually be the commander's negotiator. It is the commander's responsibility, however, to make all final pretrial decisions. Pretrial agreements are useful because they guarantee convictions, increase sentence predictability, protect witnesses from the rigors of the trial process, save command man-hours/money that would be spent on a trial, and provide the commander with a tool (such as suspended punishments) to further exercise control over a convicted member.

7. **Post-Trial Matters.** After each general court-martial, or each special court-martial imposing a bad conduct discharge, a verbatim record of trial will be prepared and forwarded to the convening authority, who must act on the sentence and may act on the findings of guilty. Before acting, the convening authority must consider the results of trial, any written matters submitted by the accused or his counsel, the staff judge advocate's recommendation concerning the sentence, and the defense counsel's response to that recommendation. The convening authority may then approve, modify, or disapprove any finding of guilty; approve, disapprove, mitigate, or suspend all or part of the sentence; or order a rehearing.

8. **Courts-Martial Appeals.** The convicted servicemember may appeal his conviction by any court-martial. In fact, in most instances, his case will be reviewed automatically. For instance, those cases resulting in a bad conduct

³ Although not technically a form of pretrial restraint, overseas commanders also have authority to place members of the command on "liberty risk," denying them off-base liberty, when previous misconduct indicates that the member poses a risk to U.S. foreign relations with the host country.

discharge or 1 year of confinement are automatically reviewed by the Navy-Marine Corps Court of Criminal Appeals. If the member is dissatisfied with the decision of that court, he may petition the U.S. Court of Appeals for the Armed Forces and, in limited circumstances, the U.S. Supreme Court for further review of his case. The servicemember is represented without charge by a military appellate defense counsel during these appeals. For general courts-martial where no punitive separation is imposed or the confinement imposed is less than 1 year, the Judge Advocate General of the Navy will automatically review the case. For special courts-martial not imposing a punitive discharge, the convicted servicemember may petition the Judge Advocate General of the Navy to review his case.

9. **Separation in Lieu of Trial by Court-Martial.** An enlisted Marine facing a trial by special or general court-martial may submit a written request for an administrative separation in lieu of trial by court-martial (also known as a "SILT request"). Marine Corps regulations require that a Marine who submits such a request be afforded the opportunity to discuss this decision with a lawyer. In the request, the Marine must acknowledge that he understands the elements of the offense or offenses charged, that the discharge may be characterized as under other than honorable conditions, and that he recognizes the adverse nature and possible consequences of an other than honorable discharge. In addition, the Marine must admit that he committed one or more of the offenses charged for which a punitive discharge could be adjudged if the case were tried by a court-martial. The request, which must originate with the accused and his defense counsel, is forwarded via the chain of command to the officer exercising general court-martial jurisdiction. That officer decides whether to grant or to deny the request. This decision is within his discretion and is based on the nature of the case, his review of the Marine's service record, and the recommendations of the chain of command. Accused officers may also request a separation in lieu of trial by court-martial; the approval authority, however, is the Secretary of the Navy.

10. **Administrative Measures**

a. **General.** As an alternative to, or in conjunction with disciplinary proceedings, a commander may initiate administrative action based on a report of misconduct. Administrative actions include administrative separation

from the service and corrective measures such as counseling, admonition, reprimand, extra military instruction, administrative withholding of privileges, and negative performance evaluations.

b. **Administrative Separation.** Marines may be administratively separated based on a documented record of misconduct. In such cases, the Marine will be notified of the commanding officer's recommendation for separation, the recommended character of the discharge, and his rights during the separation proceedings. Those rights include the right to discuss the case with a military lawyer and may include the right to present the case before an administrative discharge board with the assistance of that lawyer. If the Marine elects to present his or her case before a board, the board will recommend either that he be retained or that he be separated; if it recommends separation, the board must also recommend an appropriate characterization of service. A record of the separation proceedings will then be forwarded to the commanding general. For enlisted Marines, the commanding general acts as the separation authority. Before making the final determination in the case, the commanding general will review the Marine's service record, the recommendations of the officers in his chain of command, and the recommendations of the administrative discharge board (if the Marine presented his or her case before a board). For officers, the record of separation proceedings is forwarded, via the chain of command, to the Secretary of the Navy, who acts as the separation authority.

11. **Conclusion.** The disciplinary and administrative measures described above have survived extensive administrative and judicial review. They are designed to provide the servicemember and his accusers with a forum where the truth may be discovered and justice may be served. The procedures strike a careful balance between maintaining the good order and discipline of our armed forces and protecting the rights of the accused. Commanders are the key decision makers in this system.

12. **Summary.** This point paper provides an overview of the disciplinary and administrative options available to a commander to dispose of allegations of misconduct. This overview, however, is not intended as a substitute for the staff judge advocate's advice on a particular case. We recommend commanders consult with their local staff judge advocate on all military justice matters.

INFORMATION PAPER

Subj: SETTING ASIDE NONJUDICIAL PUNISHMENT (NJP)

1. **Purpose.** Officers in command have authority to "set aside" NJP that was imposed upon a member of their command. You may be asked by someone in your command to reverse the punishment imposed by a previous commander. This paper provides information about this power.

2. **Authority to Set Aside NJP.** Paragraph 6.d of Part V, Manual for Courts-Martial, United States (2002 Edition) (Part V, MCM), authorizes an NJP authority to set aside all or part of an NJP previously imposed upon a Marine in his unit. Section 0118b of JAGINST 5800.7C (JAGMAN), provides that an NJP authority may only set aside punishments that he has the power to impose. Additionally, under paragraph 7f(1) of Part V, MCM, the appellate authority (or his successor in command) may set aside NJP.

3. **Effect of Setting Aside NJP.** Setting aside NJP has the effect of voiding the punishment and restoring the rights, privileges, and property the service member was deprived of. Pursuant to paragraph 3005 of MCO P5800.16A (LEGADMINMAN), all entries pertaining to the set-aside punishment must be removed from the Marine's service record.

4. **Basis for Setting Aside NJP.** The power to set aside NJP is a matter within the sole discretion of the appropriate authority (as described above). Paragraph 6d of Part V, MCM provides general guidance for exercising such discretion. Setting aside NJP is an action that should be reserved for compelling circumstances where the commander determines that punishment has resulted in a clear injustice. Whether an NJP resulted in a "clear injustice" is a decision within the appropriate authority's discretion. Note, however, that setting aside NJP is an extraordinary remedy and should not be used as a substitute for suspended punishment or any other form of clemency. Further, commendable service following an NJP is not an appropriate basis for setting aside an NJP that was fair at the time it was imposed.

5. **Time limits.** The power to set aside an NJP should ordinarily be exercised within a reasonable time after the punishment has been executed. Absent unusual circumstances, 4 months is considered a reasonable time. Whether "unusual circumstances" justify setting aside punishment later than 4 months after execution is a matter of command discretion. Paragraph 3005.3c of the LEGADMINMAN allows suspension--as opposed to set aside--of an executed punishment of reduction

or forfeiture only within 4 months of the date it is executed.

6. **Summary.** The commander who initially imposed NJP, his successor in command, the commander of a Marine's new unit, or the NJP appellate authority have the power to set aside NJP. Setting aside NJP voids the NJP outright. NJP should only be set aside, however, when the appropriate authority determines that an NJP resulted in a clear injustice. You should keep in mind, however -- particularly with respect to older NJP's from a previous commander -- that the commander who sets aside an NJP is basically second-guessing a decision that was based on first-hand evidence, presented by both sides of the case, when the incident was probably much more recent.

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INFORMATION PAPER

Subj: FROCKING OFFICERS

Ref: (a) U.S. Const. art. II, § 2, cl. 2
(b) DoD Directive 1334.2 of 13 Mar 87
(c) MCO P1400.13 (MARCORPROMAN)

1. **Purpose.** This paper explains the legal authority to frock officers.
2. **Background.** Reference (a) enumerates three steps necessary to promotion to the grades of O-4 through O-10: (1) nomination by the President; (2) consent of the Senate; and (3) appointment by the President. An officer is not legally promoted until all three steps have occurred. An appointment cannot properly be issued until a vacancy occurs in the grade to which the officer selected for promotion is being promoted. The first two steps often occur months before the third step. Frocking is intended to ameliorate the effects of this delay.
3. **DoD Directive.** Reference (b) establishes policy, standards, and procedures governing the frocking of commissioned officers to the grades O-4 through O-10 within DoD. This directive contains the following provisions:
 - a. A frocked officer is entitled to "wear the insignia" and to "assume the title" of the next higher grade.
 - b. Before an officer can be frocked, the officer must have cleared the first two hurdles for promotion: (1) nomination by the President; and (2) consent of the Senate.
 - c. The directive added two other requirements for frocking: (1) frocking must be essential to the officer's maximum effectiveness in the assigned billet; and (2) the officer being considered for frocking must be serving in an authorized billet designated for the higher grade, or must be in the process of being ordered to such a billet.
 - d. Finally, the directive requires the officer to be informed that frocking is not a promotion, and that until actual promotion the officer does NOT:

- (1) Accrue monetary entitlements;
- (2) Gain seniority on the active duty list or for any other purpose;
- (3) Accumulate time in grade;
- (4) Assume the legal authority of the higher grade.

4. **National Defense Authorization Act for FY 2004.** Title 10, U.S. Code, section 777, as amended, designates the Secretary of Defense as the approval authority for frocking above the grade of colonel.

5. **Officer Promotions Manual (MARCORPROMAN, Vol. 1, OFFPROM).** Paragraph 6007 of the MARCORPROMAN, Vol 1, OFFPROM, requires that requests for frocking be forwarded to CMC (MMPR-1). The Director, Personnel Management Division, is the approval authority for frocking field grade officers. Commanding Generals are authorized to frock first lieutenants to captain based on criteria specified in paragraph 6007. Frocking a second lieutenant to first lieutenant is not authorized. In addition to the limitations provided above, frocked officers:

- (1) Are not authorized increased disciplinary powers under Article 15, UCMJ.

- (2) Must complete a grade change (GC) fitness report per MCO P16510.7_.

6. **Defrocking.** Paragraph 6007.6 of MARCORPROMAN, Vol. 1, OFFPROM, provides that an officer's frocking may be rescinded prior to the time of actual promotion is effected if it is determined that potential adverse information exists. In such instances, MMPR and CMC (JA) must be notified for further guidance.

7. **Summary.** A frocked officer can assume the title and wear the insignia of the higher grade, but pursuant to reference (c), frocking in and of itself will not increase the disciplinary authority a commanding officer possesses under Article 15, Uniform Code of Military Justice. For instance, a captain frocked to major may not impose the greater punishments listed in Article 15(b)(2)(H).

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INFORMATION PAPER

Subj: SETTING ASIDE NONJUDICIAL PUNISHMENT (NJP)

1. **Purpose.** Officers in command have authority to "set aside" NJP that was imposed upon a member of their command. You may be asked by someone in your command to reverse the punishment imposed by a previous commander. This paper provides information about this power.

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3. **Effect of Setting Aside NJP.** Setting aside NJP has the effect of voiding the punishment and restoring the rights, privileges, and property the service member was deprived of. Pursuant to paragraph 3005 of MCO P5800.16A (LEGADMINMAN), all entries pertaining to the set-aside punishment must be removed from the Marine's service record.

4. **Basis for Setting Aside NJP.** The power to set aside NJP is a matter within the sole discretion of the appropriate authority (as described above). Paragraph 6d of Part V, MCM provides general guidance for exercising such discretion. Setting aside NJP is an action that should be reserved for compelling circumstances where the commander determines that punishment has resulted in a clear injustice. Whether an NJP resulted in a "clear injustice" is a decision within the appropriate authority's discretion. Note, however, that setting aside NJP is an extraordinary remedy and should not be used as a substitute for suspended punishment or any other form of clemency. Further, commendable service following an NJP is not an appropriate basis for setting aside an NJP that was fair at the time it was imposed.

5. **Time limits.** The power to set aside an NJP should ordinarily be exercised within a reasonable time after the punishment has been executed. Absent unusual circumstances, 4 months is considered a reasonable time. Whether "unusual circumstances" justify setting aside punishment later than 4 months after execution is a matter of command discretion. Paragraph 3005.3c of the LEGADMINMAN allows suspension--as

opposed to set aside--of an executed punishment of reduction or forfeiture only within 4 months of the date it is executed.

6. **Summary.** The commander who initially imposed NJP, his successor in command, the commander of a Marine's new unit, or the NJP appellate authority have the power to set aside NJP. Setting aside NJP voids the NJP outright. NJP should only be set aside, however, when the appropriate authority determines that an NJP resulted in a clear injustice. You should keep in mind, however -- particularly with respect to older NJP's from a previous commander -- that the commander who sets aside an NJP is basically second-guessing a decision that was based on first-hand evidence, presented by both sides of the case, when the incident was probably much more recent.

Prepared by: Maj Doug Cody, USMC
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INFORMATION PAPER

Subj: OFFICER MISCONDUCT CASES

1. Purpose. To provide an overview of the unique processing requirements for officer misconduct cases.

2. Statutory/Regulatory Foundation for Officer Misconduct Processing in the Marine Corps.

a. SECNAVINST 1920.6B is the controlling regulation for separation/retirement of USN/USMC officers for misconduct or substandard performance. This instruction contains nine enclosures, each of which addresses a different aspect of the separation or retirement of USN/USMC officers (including an extensive definition section).

b. MCO P1900.16 (MARCORSEPMAN). Chapter 4 provides useful, Marine Corps specific information for the separation of officers.

c. MCO P5800.16A (LEGADMINMAN). Chapter 4 provides helpful information regarding the reporting and processing of officer misconduct cases. Sample documents are also provided.

3. Show Cause Authority Overview

a. Paragraph 13d of SECNAVINST 1920.6B delegates show cause authority to the Commandant for all Marine Corps officer cases, as well as military officers assigned to Marine Corps commands. CMC has further delegated this authority to DC M&RA. In this capacity, DC M&RA acts as the show cause authority for the Marine Corps. Specifically, he has been granted the authority to deny resignation requests, direct Boards of Inquiry, and terminate administrative proceedings. By the same reference, SecNav has authorized generals and lieutenant generals in command to be designated as alternate show cause authorities. Accordingly, these general officers have been granted the ability to direct officers to show cause for retention at Boards of Inquiry at the force level. However, these general officers have not been granted the authority to deny resignation requests or terminate administrative proceedings.

4. Reportable Misconduct

a. Paragraph 4002 (1) of the LEGADMINMAN, requires that "Upon receipt of information which indicates an officer may have

committed an act proscribed by a military or civilian criminal statute, a report thereof will be made to CMC (JAM) " Accordingly, the Officer Disciplinary Notebook (ODN) provides a compilation of all cases meeting these criteria. The current procedures demand that all misconduct, no matter how insignificant, be reported to CMC (JAM). This regulation fulfills a three-fold purpose: (1) ensure prompt disposal of allegations of officer misconduct; (2) to provide the documentation necessary to facilitate the promotion process; and, (3) to provide CMC with visibility on all cases involving officer misconduct. There is no discretion permitted at the command level regarding an initial report of officer misconduct.

5. The Significance of Minimizing Processing Times for Officer Misconduct.

a. Timely Processing. Paragraph 10 of SECNAVINST 1920.6B establishes processing time goals for officer misconduct cases within the Department of the Navy. Specifically, the Secretary states that separation processing "should" be completed: 1) by the date of fulfillment of service obligation for separations upon fulfillment of service obligation; 2) 30 days from the date a command notifies an officer of the commencement of separation proceedings in cases where no BOI; 3) 90 days from the date a command notifies an officer of the commencement of separation proceedings in cases where a BOI is required. The importance of prompt disposition of officer misconduct cases is further amplified by CMC in paragraph 4000 of the LEGADMINMAN by providing that SJAs "must . . . generate an internal sense of urgency in officer misconduct cases" (underscore in original). Paragraph 4001 of the LEGADMINMAN clarifies this requirement by adding that "[w]hat is desired is not a 'rush to judgment,' but rather all deliberate speed in handling officer discipline cases" (underscore in original). When officer misconduct cases are delayed the cost to the Marine Corps is significant. The cost of keeping a retirement-eligible lieutenant colonel on active duty pending separation is in excess of \$4,252.67 per month.⁴ In contrast, the cost of keeping a second lieutenant on active duty pending separation is in excess of \$2,846.50 per month.⁵ Enclosure (2) provides a complete overview of the costs of keeping an officer on active duty pending administrative separation.

b. Types of Delay. Many of the reasons for delay can be grouped into the five broad categories. Each category is set forth below.

⁴ Basic pay, BAH (with dependents), and BAS for a lieutenant colonel and over 20 years of service less the applicable retirement pay of \$3039.90.

⁵ Basic pay, BAH (with dependents), and BAS for a second lieutenant with under 2 years of service.

1. Alternate Disposition. Frequently cases of officer misconduct begin headed to a GCM, only to be disposed of at a lesser forum, often by written agreement.

2. Preparation of a Record of Trial, Report of BOI, or Report of Civilian Conviction.

3. Pending Civilian Court Action. In many jurisdictions the civilian courts are clogged and there is little that can be done to speed these cases along. However, commands may impose NJP prior to civilian court action. After a civilian conviction, approval from the local General Court-Martial Convening Authority (and notice to Navy JAG (Code 20)) is required to impose NJP.

4. Military or Civilian Investigation. A thorough and complete investigation is the cornerstone of a successful prosecution or administrative action.

5. Cases delayed by a commander's decision. Commanders have a myriad of options for disposing of officer misconduct cases. Evaluation of these options, consultation with your SJA, and a reasoned decision should be made with all deliberate speed, without a "rush to judgment." In short, the need for speedy disposition must be balanced against the need for a commander to thoroughly understand and evaluate of all available disposition options. The importance of expeditious processing must always be balanced with the need to protect the rights of the subject officer.

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SUMMARY

Subj: **OFFICER MISCONDUCT CASES**

The Staff Judge Advocate to the Commandant of the Marine Corps monitors all cases of reported Marine Corps officer misconduct in which formal disciplinary or adverse administrative action may result. Cases involving Navy officers assigned to the Marine Corps are also monitored.

1. At this time last year there were 133 officer misconduct cases pending (open). Currently, there are 154 cases pending (145 active duty and 9 Reserve officers). A breakdown by grade and duty status is as follows:

	<u>Active Duty</u>	<u>Reserve</u>
Col	3	1
CAPT (USN)	1	0
LtCol	8	3
CDR (USN)	1	1
Maj	16	1
LCDR (USN)	4	0
Capt	42	1
LT (USN)	5	0
1stLt	17	0
LTJG (USN)	2	0
2ndLt*	21	0
ENS	2	0
CWO/WO	23	2

Total

145

9

2. During the past month, 17 cases (17 active duty and 0 Reserve) were closed, while 21 new cases were added to our list (21 active duty and 0 Reserve).

***14 2ndLt's currently at TBS**

INFORMATION PAPER

1. **Purpose.** This paper provides statistical information regarding the Marine Corps drug testing program and the subsequent criminal and administrative disposition of cases for those Marines who do test positive for illegal drug use.

2. **Background**

a. According to urinalysis test results, illegal drug use increased slightly from FY01 to FY02, but then a decrease from FY02 to FY03.

	FY00	FY01	FY02	FY03
Total samples tested	646,673	663,847	733,562	579,219
Total positive samples⁶	4,681	4,598	5,305	2,603
Percentage of positive samples	0.0072	0.0065	0.0072	0.0045
THC positives	3,305	2,906	2,890	1,589
Cocaine positives	672	785	962	703
Methamphetamine positives	538	544	879	416
Ecstasy⁷	275	281	413	142
Other drug positives	161	82	11	2

⁶ Total positive samples may be less than the sum of the positive tests because some samples tested positive for more than one drug.

⁷Ecstasy, a type of methamphetamine, is listed separately due to the recent increased usage of that specific drug.

b. Disciplinary statistics reflect an increase in all categories except summary courts-martial. The reasons for these changes are unclear, however, they may reflect changes in military law with respect to the prosecution of criminal cases involving positive urinalysis results.

	FY00	FY01	FY02	FY03
Nonjudicial punishment	1,111	1,683	1,482	
General Courts-Martial	50	70	72	
Special Courts-Martial	536	572	631	
Summary Court-Martial	310	292	336	
Total	2,007	2,617	2,521	

3. Administrative Separations

a. Administrative separations related to drugs also decreased from 1,561 in FY02 to 1,290 in FY03.⁸

b. Administrative separation processing⁹ is mandatory for possession, use, or distribution of illegal drugs under paragraphs 6210.5 and 4103.1 of MCO P1900.16E, the Marine Corps Separation and Retirement Manual. Separation, however, is not mandatory. Although a separation board may substantiate a Marine's involvement with illegal drugs, the board may vote to retain the Marine. Even if a board votes to separate a Marine, the Commanding General may elect to retain the Marine by disapproving or suspending the separation.

4. Deterring Illegal Drug Use

a. Training and Education. An effective deterrent against drug use is a continuous education and training program about the dangers of illegal drug use and the Marine Corps policy towards it. For this purpose,

⁸Administrative separation numbers reflect Marines administratively separated under codes GKK1 and HKK1.

⁹A general term used to ensure the commander initiates the involuntary separation process to the separation authority.

commanders should ensure that PME regarding dangers of drug abuse are provided to Marines as well as utilize the resources of the Substance Abuse Counseling Centers at every major command.

b. **Inspections.** A commander may direct inspections, without notice, to locate and confiscate contraband, to assess readiness, or to ensure cleanliness and sanitation. See Mil. R. Evid. 313, Manual for Courts-Martial, United States (2002 ed.). These inspections may use any reasonable natural or technological aids, such as drug dogs. The most effective inspections are frequent, random, and highly visible.

c. **Urinalysis.** One of the best tools commanders have to deter and detect drug use is an aggressive urinalysis program. The most effective programs frequently test small numbers in random, unpredictable patterns. The higher the visibility testing has within the command, the more effective a deterrent it will be.

5. **Summary.** Illegal drug use in the Marine Corps, as indicated by positive urinalysis results, increased slightly from FY01 to FY02, but decreased from FY02 to FY03. This decrease has not been matched by a corresponding decrease in the number of NJP's, administrative separations, and courts-martial for drug related offenses. Instead, disciplinary and administrative actions have increased markedly. This disparity may be the result of recent changes in the law regarding prosecutions for wrongful use of a controlled substance, where the only evidence is a urinalysis test. Also, because it often takes many weeks or months to process a given case, the statistical disparity may simply be the result of FY00 positive samples being adjudicated in FY01. Aggressive urinalysis testing, frequent inspections, and continuous training and education remain essential tools for commanders to reduce illegal drug use in their commands.

INFORMATION PAPER

Subj: ADMINISTRATIVE SEPARATION FOR HOMOSEXUAL CONDUCT

1. **Purpose**. This paper provides information on investigating and processing Marines for administrative separation based upon homosexual conduct. As noted in paragraph 5c below, the provisions on administrative separation for homosexual conduct do not preclude disciplinary action under the UCMJ, in appropriate cases.

2. **Policy**

a. Homosexual conduct⁹ is grounds for separation from the Marine Corps under paragraph 6207 of MCO P1900.16 (MARCORSEPMAN). Homosexual status, i.e. "sexual orientation" alone, is considered a personal and private matter. It is not a bar to continued service unless manifested by homosexual conduct.

b. The Congressional Findings that support the policy concerning homosexual conduct in the armed forces are incorporated in Marine Corps policy at MARCORSEPMAN 6207.1(b). These findings establish the "rational basis" for separation of Marines who engage in homosexual conduct. Administrative discharge boards (enlisted personnel) and boards of inquiry (officers) are required to be informed of these findings. These findings include the following:

(1) There is no constitutional right to serve in the armed forces.

(2) Success in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion.

(3) The armed forces must maintain personnel policies that exclude certain individuals whose presence in

⁹ Homosexual conduct includes homosexual acts, a statement that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. A statement that demonstrates a propensity or intent to engage in homosexual acts is grounds for separation not because it reflects sexual orientation, but because the statement indicates a likelihood that the Marine engages in or intends to engage homosexual acts.

the armed forces would create an unacceptable risk to the armed forces high standards of morale, good order and discipline, and unit cohesion.

(4) The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion, which are the essence of military capability.

3. **Bases for Administrative Separation.** A Marine shall be separated if one or more of the following approved findings is made:

a. The Marine has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts¹⁰; unless there are further approved findings that: (1) such acts are a departure from the member's usual and customary behavior; (2) such acts, under all the circumstances, are unlikely to recur; (3) such acts were not accomplished by use of force, coercion, or intimidation; (4) under the particular circumstances of the case, the member's continued presence in the Marine Corps is consistent with the interests of the Marine Corps in proper discipline, good order, and morale; and (5) the member does not have a propensity or intent to engage in homosexual acts.

b. The Marine has made a statement that he or she is a homosexual or bisexual, or words to that effect¹¹ unless there is a further approved finding that the Marine has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

c. The Marine has "married"¹² or attempted to marry a person known to be of the same sex, as determined by the external anatomy of the persons involved.

¹⁰ "Homosexual act" means any bodily contact actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires, and any bodily contact that a reasonable person would understand to demonstrate a propensity or intent to engage in such an act (for example, hand-holding or kissing, in most circumstances).

¹¹ Statement by a Marine that "he or she is a homosexual or bisexual, or words to that effect" means language or behavior that a reasonable person would believe intends to convey the statement that a person engages in or has a propensity to engage in homosexual acts. This includes statements such as "I am a homosexual," "I am gay," "I am a lesbian," "I have a homosexual orientation," "I engage in homosexual acts," and similar statements.

¹² As of this writing, no State recognizes homosexual "marriages" as such. Vermont recognizes homosexual "civil unions," however, and entry into such a union would constitute homosexual conduct.

4. Inquiry

a. Responsibility. Only the Marine's commander is authorized to initiate fact finding inquiries involving homosexual conduct. Commanders are responsible for ensuring that inquiries are conducted properly and that no abuse of authority occurs.

b. Inquiries must be limited to the factual circumstances directly relevant to the specific allegation.

c. At any point of the inquiry, the commander or appointed inquiry official must be able to clearly and specifically explain, which basis for separation he or she is attempting to verify and how the information being collected relates to this specific separation basis.

d. A commander may initiate an inquiry only if he or she has credible information that a basis for discharge exists. Credible information exists when the information, considering its source and the surrounding circumstances, supports a reasonable belief that a Marine has engaged in homosexual conduct. It requires a determination based on articulable facts, not just a belief or suspicion.

5. Disposition

a. Based on the inquiry described above, the commander must determine whether there is probable cause (a reasonable belief) to believe a basis for administrative separation exists. If the commander determines probable cause exists, the commander shall initiate administrative separation processing.

b. If the commander determines probable cause does not exist, the commander shall terminate the inquiry and any administrative action already initiated.

c. Certain homosexual conduct may constitute both a basis for administrative separation processing and a violation of the UCMJ. The UCMJ requires all allegations of misconduct to be thoroughly investigated. Upon review of the results of the investigation, the cognizant commander has discretion to determine what, if any, disciplinary action is appropriate. The provisions for administrative discharge for homosexual conduct do not preclude disciplinary action under the UCMJ when such action is deemed appropriate by the cognizant commander. In this regard, there is no right on the part

of any individual to demand trial by court-martial in lieu of administrative separation processing.

d. Lawrence v. Texas. On 26 June 2003, the U.S. Supreme Court decided Lawrence v. Texas, 539 U.S. ___ (2003). The Court reversed the judgment of the Court of Appeals for the Texas Fourteenth District, which had upheld Petitioner's conviction upon a Texas statute¹⁰ criminalizing homosexual sodomy. The Court held that the Texas statute criminalizing homosexual sodomy, as applied to Petitioners, violates the Due Process Clause of the Fourteenth Amendment.¹¹ The Court concluded, "[T]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." Lawrence at 18. Note that in deciding that Texas had no legitimate interest in proscribing homosexual sodomy, the Court specifically rejected Texas' rationale: that a governing majority viewed the practice as immoral.

(1) Lawrence v. Texas is unlikely to change, in the near term, the administrative separation policy for homosexual conduct. The Congressional findings supporting the policy focus on the armed forces' legitimate interests high morale, good order and discipline, and unit cohesion. The traditional criminal prohibition against homosexual conduct (sodomy) in the military was only 1 of 15 Congressional findings, and, fairly read, was not central to the purpose of the legislation or the other 14 findings.

(2) The Lawrence decision may affect the ability to successfully prosecute violations of Article 125 of the Uniform Code of Military Justice (UCMJ), which proscribes "unnatural carnal copulation" (sodomy) with another person of the same or opposite sex, or with an animal. Inasmuch as the Court did not strike down the statute as facially invalid, there is no reason to believe that Article 125, UCMJ, is now unconstitutional on its face. Applications of the statute in cases of forcible sodomy, sodomy with a child under the age of 16 years, sodomy with an animal, or public acts of sodomy would suffer no Constitutional infirmity under the principles and logic announced in the case. However, application of Article 125 to instances of private, consensual sodomy between two adult service members may be declared unconstitutional.

¹⁰ Tex. Penal Code Ann. §21.06(a)(2003).

¹¹ For purposes of this paper, there is no relevant distinction between the Due Process Clause of Fourteenth Amendment and that of the Fifth Amendment.

6. **Separation Authority**

a. For an enlisted Marine, the officer exercising general courts-martial convening authority over the Marine (his or her commanding general) is the separation authority.

b. CMC is the separation authority if the Marine is an enlisted active duty Marine with 18 years or more of service.

c. SecNav is the separation authority if the Marine is an enlisted member of the USMCR with 18 years or more of service.

d. SecNav is the separation authority for all officers.

7. **Problem Areas**

a. Ambiguous/Unsupported "homosexual" statements.

b. "Credible information" - Inquiries must be based on "credible information" that a basis for separation exists. The following, *standing alone*, do not constitute "credible information" of homosexual conduct: mere rumor, suspicion, or opinion that a Marine is a homosexual or has engaged in homosexual conduct; information that a Marine patronized a "gay bar" or associated with known homosexuals; possession of homosexually oriented publications; or proof that a Marine marched in a homosexual-rights parade. Additionally, the fact that a servicemember reports being threatened because he or she is perceived to be a homosexual does not by itself constitute credible information justifying the initiation of an investigation of the threatened servicemember. Inquiries must be limited to the specific facts (date, time, place, participants, witnesses) that form the basis for separation.

c. On 24 Mar 97, the Under Secretary of Defense for Personnel and Readiness (USD(P&R)) created a new "credible information" exclusion. Specifically, the mere fact that a servicemember reports that he or she has been threatened, harassed, or harmed because others *believe* he or she is homosexual does not, by itself, constitute credible information upon which an inquiry can be initiated.

Commanders are expected to investigate the threatening behavior without delving into the sexual orientation of the victim.

8. DoD Policy Memoranda

a. On 12 Aug 99, USD(P&R) sent two memoranda to the Secretaries of the Military Departments entitled "Guidelines for Investigating Threats Against or Harassment of Service Members based on Alleged Homosexuality" and "Implementation of Recommendations Concerning Homosexual Conduct Policy." These memoranda direct the Secretaries to take certain actions with respect to the DoD Homosexual Conduct Policy.

b. "Guidelines for Investigating Threats Against or Harassment of Service Members based on Alleged Homosexuality" reiterates the existing policy requiring commanders to hold servicemembers who threaten or harass others based on alleged homosexuality fully accountable. This same policy prohibits using a servicemember's report of such harassment as a basis for initiating investigation of that servicemember for homosexual conduct. The memorandum directs that the policy be disseminated to all levels of command and be incorporated in existing training programs for law enforcement personnel, commanders, and supervisors. Additionally, the policy must be included in training required under section 654(d) of title 10 (mandatory briefing that enlisted members receive upon entry into service, and periodically thereafter, concerning the UCMJ).

c. "Implementation of Recommendations Concerning Homosexual Policy Conduct " discusses recommendations contained in the 1998 *Review of Effectiveness of the Application and Enforcement of the Department's Policy on Homosexual Conduct in the Military*. The memorandum directed Service Secretaries to issue guidance recommending that "installation level" staff judge advocates consult with senior level officers at higher headquarters prior to investigation into alleged homosexual conduct; to ensure that initiation of any "substantial investigation"¹³ of homosexual statements is approved at the Military Department secretarial level; and to ensure that

¹³ In accordance with similar guidance issued by the other services, ASN(M&RA) subsequently defined a "substantial investigation" as one that is conducted to test the sincerity of a statement and that goes beyond questioning 1) the servicemember who made the statement; 2) witnesses who heard the statement; 3) the servicemember's immediate chain of command; and, 4) persons suggested by the servicemember.

Service Inspectors General include the training of personnel charged with application and enforcement of the homosexual policy as an inspection item.

d. MARADMIN 014/00 was issued in response to SecNav direction that followed the SecDef memoranda.

e. On 13 Dec 99, while the Services were still developing implementation of the August 1999 direction, SecDef ordered DoDIG to survey the environment with respect to the homosexual conduct policy. The survey's charter included direction to measure tolerance of disparaging speech about homosexuality in general, in addition to actual harassment. The DODIG survey report of 16 March 2000 noted 80 percent of the survey population reported hearing jokes, "offensive speech," etc. about homosexuality in general, and that 37 percent of the survey population reported observing what they considered "harassment." On 24 March 2000, SecDef tasked the working group with developing measures to address harassment based on perceived sexual orientation and "other issues" raised by the DODIG survey report of 16 March. In context, "other issues" referred to jokes etc. about homosexuality in the abstract.

f. On 21 July, SecDef approved the working group's draft action plan. The main recommendations of the plan included: adoption of an "overarching principle" regarding harassment in general, including that based on sexual orientation; Service review of training to ensure incorporation of overarching principle; Service review of means for members to report mistreatment, harassment, or "inappropriate comments or gestures," and to ensure that application of "don't ask, don't tell" in reporting context is understood; Service action to ensure appropriate command response in cases of mistreatment, or tolerance of same; and Service action to ensure that inspection programs measure command compliance with plan and effectiveness of plan.

g. Significant Distinctions. The action plan is a general "anti-harassment" plan, it is not an anti homosexual-harassment plan. Whether untargeted derogatory jokes or comments about homosexuality in the abstract are, in context, "inappropriate" is left to commander's discretion, as is the decision of whether corrective action is necessary. Finally, the statutory homosexual conduct policy is still that homosexual conduct, in the form of homosexual acts, statements, or marriages, is incompatible with military service and will result in separation.

9. Summary. Cases involving homosexual conduct will continue to draw the closest scrutiny. We must ensure careful compliance with all relevant regulations.

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INFORMATION PAPER

Subj: THE POSSE COMITATUS ACT (PCA), 18 U.S.C. § 1385

Application to Navy and Marine Corps

- The PCA statute applies only to the Army & USAF
- Congress, apparently attempting to provide broader application, enacted 10 U.S.C. § 375
- That law directs SecDef to prescribe regulations to ensure that any support to civilian law enforcement does not permit direct participation by members of any of the Services in a search, seizure, arrest, or other similar activity unless otherwise authorized by law. SecDef did so through DoDD 5525.5

Prohibited activity. Under applicable law & regulations, Marines may not:

- Act in a law enforcement role
- Search, seize, arrest, or detain
- Serve as undercover agents, investigators, or interrogators
- Interdict vehicles, vessels, aircraft

Permissible Activity. Under applicable law & regulations, Marines may *Support Civil Authorities with:*

- Engineering support
- Logistics movement support
- Medical support
- A base of operations
- Operation of equipment
- Maintenance of equipment

With POTUS/SecDef approval, Marines may:

- Employ force in response to acts or threats of domestic terrorism

Tab X

Subj: THE POSSE COMITATUS ACT (PCA), 18 U.S.C. § 1385

- Provide military security to critical sites, infrastructure, & facilities, in coordination with law enforcement authorities
- Secure Federal facilities
- Protect DoD personnel

Conclusion: Marines can provide tremendous support to civilian law enforcement, but are generally prohibited from acting in a law enforcement role. Per POTUS & SecDef authorization, Marines may also play an anti-terrorism & security role. In the event a larger or a law enforcement role is necessary, a legislative change is required.

POINT PAPER

Subj: LEGAL ISSUES CONCERNING DETAINEE OPERATIONS

Purpose of this Point Paper: To discuss various legal issues surrounding the current detainee operations at GTMO.

Status Issues:

- U.S. policy is to treat all detainees at GTMO humanely, and consistent with Geneva Convention relative to POWs (GPW), taking into account security concerns and temporary nature of facilities.
- Detainees will be *treated* consistently with GPW, however, Al Qaida/Taliban detainees will not be given POW *status* per GPW (major reason: they did not conduct their operations consistent with the Law of War).
- Significance of not having POW status:
 - Unlike POWs, can be prosecuted for their warlike acts
 - Can be tried by military commissions instead of courts-martial, which would be required by GPW
 - No requirement to repatriate at cessation of hostilities
 - No pay advance, access to a canteen, to have personal financial accounts, to receive scientific equipment, musical instruments, or sports outfits
- Detainees are being provided 3 meals/day that meet Muslim dietary laws, medical care, opportunity to worship, clothing and shoes, shelter, showers, soap and toiletries, sleeping pads, blankets, towels, mailing privileges and supplies.

Military Commissions:

- POTUS Military Order of 13 Nov 01, authorized military commissions. Procedures and evidentiary rules being formulated.
- SecArmy EA for investigations in CENTCOM AOR and GTMO.
- Anticipate joint effort, to include USMC judge advocates in carrying out both investigative and trial phases of military commissions.

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Tab Y

POINT PAPER

Subj: CITIZENSHIP APPLICATIONS BY MARINES

Ref: (a) MARADMIN 040/99

1. **Issue.** What assistance is available to active-duty Marines who desire to apply for citizenship ?
2. **Background.** DoD has entered into an agreement with INS to expedite the processing of certain naturalization applications for military members. There is generally a large backlog in INS processing of naturalization applications - the wait has been up to 3 years. This problem is especially burdensome for military members since certain clearances and overseas assignments are related to citizenship status.
3. **Description of Program.** The local legal assistance office is now the primary point of aid for active duty Marines who apply for citizenship. The legal assistance office stocks all INS forms necessary for citizenship applications based upon qualifying military service, and has staff experienced in the Marine Corps / INS program. Where previously an applicant had to forward various forms to different agencies for completion and processing, and wait for consolidation at one of many INS processing centers around the country, the new program allows complete application assembly at the local legal assistance office, and creates a single INS processing center for processing of such applications.
4. The program has reduced processing times for citizenship applications from active-duty Marines to about six months. Both the Marine Corps and INS have dedicated single points of contact to track the progress of applications. Specific guidance regarding the details of the program is available in the reference.
5. **Advice.** Assistance and advice may obtained from your local staff judge advocate or CMC (JAL) at DSN 224-3886/0 or (703)614-3886/0.

Tab Z