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8 August 1994

SECNAV INSTRUCTION 5370.8

From: Secretary of the Navy
To: All Ships and Stations

Subj: MILITARY REPRISAL
INVESTIGATIONS

Ref: (a) SECNAVINST 5370.5A
(b) SECNAVINST 5430.57F
(c) SECNAVINST 5430.92A
(d) SECNAVINST 5520.3B
(e) SECNAVINST 5800.12A

Encl: (1) IGDG 7050.6 of 30 Sep 92, Guide to
Military Reprisal Investigations

1. **Purpose.** To implement the policies and procedures for investigating and reporting complaints of reprisal made by Navy and Marine Corps personnel.

2. **Information.** The enclosed edition of the Inspector General, Department of Defense Guide to Military Reprisal Investigations is effective upon receipt. It provides policies and procedures to investigate complaints of reprisal made by Navy and Marine Corps personnel. References (a) through (e) provide policies and procedures for investigating other kinds of improprieties within the Department of the Navy.

3. **Action.** Addressees must follow enclosure (1).

RICHARD DANZIG
Acting

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GUIDE TO MILITARY REPRISAL INVESTIGATIONS

INSPECTOR GENERAL
DEPARTMENT OF DEFENSE

Enclosure (1)

INSPECTOR GENERAL GUIDE 7050.6

INSPECTOR GENERAL, DEPARTMENT OF DEFENSE GUIDE TO MILITARY REPRISAL INVESTIGATIONS

FOREWORD

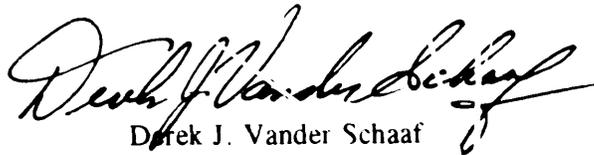
This guide details the procedures for conducting investigations of alleged reprisal and documenting the evidence. Based on the experience of many investigators, the publication is designed to logically guide investigators from the initial allegation, to an analysis of the issues and the conclusion of whether reprisal occurred. The guide incorporates the statutory and regulatory requirements for reprisal investigations.

Following the overview are chapters addressing the three major stages of a reprisal investigation:

Chapter 1.	Overview
Chapter 2.	The Investigation:
Chapter 3.	Review and Analysis
Chapter 4.	Reporting Requirements

During the conduct of a reprisal investigation, questions not covered in this guide may arise. Should that occur, please contact your Department Inspector General or the Military Personnel Inquiries Division, Office of the Assistant Inspector General for Departmental Inquiries, Office of the Inspector General, Department of Defense, (703) 697-6656 or DSN 227-6656.

Paragraph 1.3 delineates procedures for changes to the guide. Recommended changes should be forwarded to the Assistant Inspector General for Departmental Inquiries, Office of the Inspector General, Department of Defense, 400 Army Navy Drive, Arlington, VA 22202-2884.



Derek J. Vander Schaaf
Deputy Inspector General

NOTES

**INSPECTOR GENERAL, DEPARTMENT OF DEFENSE
GUIDE TO MILITARY REPRISAL INVESTIGATIONS**

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DEFINITIONS

The following definitions are taken from DoD Directive 7050.6 and Section 1034, Title 10, United States Code (U.S.C.). For your convenience, copies of both publications are appended to this guide. The definition of a threat does not appear in the Directive or the statute; therefore, a standard dictionary definition is used.

Reprisal

Taking or threatening to take an unfavorable personnel action or withholding or threatening to withhold a favorable personnel action against a military member for making or preparing a protected disclosure. (To threaten means to give signs or warning of, or to announce as intended or possible.)

Protected Disclosure

A lawful communication to a Member of Congress, any Inspector General (IG), or a member of a DoD audit, inspection, investigation or law enforcement organization in which the military member makes a complaint or discloses information that the military member reasonably believes evidences:

- ▶ a violation of law or regulation;
- ▶ mismanagement;
- ▶ a gross waste of funds;
- ▶ an abuse of authority; or
- ▶ a substantial and specific danger to public health or safety.

This also includes circumstances where the military member:

- ▶ was preparing a lawful communication or complaint that was not actually delivered;
- ▶ did not actually communicate or complain, but was believed to have done so; or
- ▶ cooperated with or otherwise assisted an Inspector General, Member of Congress, or a member of a DoD audit, inspection, investigation or law enforcement organization by providing information that the military member reasonably believed evidenced wrongdoing. For example, acted as a witness or responded to a request for information from an IG or a Member of Congress.

Personnel Action

Any action taken regarding a military member that affects or has the potential to affect the military member's current position or career. Such actions include, but are not limited to:

- ▶ promotion;
- ▶ disciplinary or other corrective action;

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- ▶ transfer or reassignment;
- ▶ performance evaluation;
- ▶ decision concerning pay, benefits, awards, or training; or
- ▶ any other significant change in duties or responsibilities inconsistent with the military member's rank.

Member or Member of the Armed Forces

Any Regular and Reserve component officer (commissioned and warrant) or enlisted member of the Army, Navy, Air Force or Marine Corps on active duty, or Reserve component officer (commissioned and warrant) or enlisted member, whether on active duty, full-time National Guard duty, inactive duty for training or not in any duty or training status. DoD Directive 7050.6 also lists certain other military members protected from reprisal.

Inspector General (IG)

The IG, DoD, or an IG at any command level in one of the DoD components. The term IG also refers to any civilian or military member who is assigned to work for an IG.

Audit, Inspection, Investigation and Law Enforcement Organizations

The law enforcement organizations at any command level in any of the DoD components, the Defense Criminal Investigative Service, the U.S. Army Criminal Investigation Command, the Naval Investigative Service, the Air Force Office of Special Investigations, the U.S. Army Audit Agency, the Naval Audit Service, the Air Force Audit Agency and the Defense Contract Audit Agency.

CHAPTER 1 OVERVIEW

1.1 Purpose. This guide is designed to help those assigned to investigate allegations of reprisal against military whistleblowers. It is not intended to create any right, privilege or benefit not otherwise established in law or regulation.

1.2 Background

a. Section 1034, Title 10, United States Code (U.S.C.), requires an expeditious investigation of all allegations of reprisal for whistleblowing submitted by military members. DoD Directive 7050.6, *Military Whistleblower Protection*, implements Section 1034, Title 10, U.S.C.

b. The military whistleblower protection law and regulation prohibit:

▶ restricting a military member from communicating with a Member of Congress, an IG or a member of a DoD audit, inspection, investigation or law enforcement organization; and

▶ taking (or threatening to take) an unfavorable personnel action or withholding (or threatening to withhold) a favorable personnel action as reprisal for making or preparing a lawful communication to a Member of Congress, an IG or a member of a DoD audit, inspection, investigation or law enforcement organization.

1.3 Procedures for Change

a. The Assistant Inspector General for Departmental Inquiries (AIG-DI) is the proponent of this guide and its changes.

b. Recommended changes should be submitted to the AIG-DI with reasons for recommended changes.

1.4 Cancellation. No publications are canceled, rescinded or superseded by this guide.

NOTES

CHAPTER 2 THE INVESTIGATION

2.1 Beginning the Investigation. Prior to initiating the investigation, research the pertinent laws, rules and regulations applying to the personnel actions under review. Also obtain as many of the relevant documents as possible before beginning any interviews so that the interviewee can explain them. Keep a copy of DoD Directive 7050.6 nearby for convenience and accessibility.

2.2 During the Investigation. If possible, interview the complainant first, and plan on reinterviewing him/her after you have interviewed the management officials responsible for the personnel actions. Investigations of allegations of reprisal should answer four questions. The first three questions are relatively straightforward and usually quite simple to resolve. The last question is different from most investigations because investigators must focus on the question, "Why?" In most other investigations, investigators stop investigating if they find that management acted within applicable guidelines and had the authority to act as they did. In reprisal investigations, investigators go one step further and ask "why" management acted as they did. The fourth question, because it incorporates the question of management's motive and justification for the action, makes reprisal investigations very difficult.

The following paragraphs detail the four questions mentioned above and outline the steps investigators should take to answer each one thoroughly:

Question 1. *Did the military member make a disclosure protected by statute?*

Review the definition of a protected disclosure in DoD Directive 7050.6. Obtain appropriate documents and/or witness testimony to show:

Whether the military member lawfully communicated with a Member of Congress, an IG or a member of a DoD audit, inspection, investigation or law enforcement organization.

Remember, investigators are only looking for lawful communications with a Member of Congress, any IG or a member of a DoD audit, inspection, investigation or law enforcement organization. Other communication outside the chain of command would not be investigated under the military whistleblower law and regulation, but could be investigated under the investigator's IG authority.

If the military member communicated with a Member of Congress, any IG or a member of a DoD audit, inspection, investigation, or law enforcement organization, determine:

- ▶ The date the communication occurred.
- ▶ Whether the communication concerned information the military member reasonably believed evidenced a violation of law or regulation; mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety.

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Question 3. *Did the official(s) responsible for taking, withholding or threatening the personnel action know about the protected disclosure?*

The responsible official(s) are the officials who decided to take or withhold the personnel action or who made the threat of such an action and all who made recommendations to the deciding official about the action. You must determine who was responsible for each personnel action and threat and whether the responsible official(s) knew about the military member's protected disclosure at the time of the personnel action or threat.

Interviews

Ask the military member:

- ▶ Who is responsible for the action.
- ▶ Why does he or she believe the responsible official(s) knew of the protected disclosures before they took the action or made the threat.
- ▶ Who can testify (or provide documents) to show the responsible official(s) were aware of the protected disclosure.

Ask each responsible official if he or she knew of the protected disclosure at the time of the personnel action or threat. If the responsible official(s) deny knowledge of the protected disclosure prior to the action or threat, obtain testimony and documents to determine if the denial is, or is not, credible.

If necessary, interview other witnesses such as those suggested by the military member and others who might logically know if and when the responsible official(s) knew of the protected disclosures. Executive officers, chiefs of staff, personnel officers, attorneys and secretaries frequently know about this issue.

What if the responsible officials did not know of the protected disclosure?

If any one of the officials responsible for any personnel action or threat knew about the disclosure at the time of the action or threat, the investigation must continue, even if the deciding official and all others did not know about the disclosure at the time. If none of the responsible officials knew of the protected disclosure at the time of the action or threat, the investigation should end at this point. If the evidence is insufficient to determine who knew what and when, give the benefit of the doubt to the whistleblower and proceed with the investigation.

Question 4. *Does the evidence establish the personnel action would have been taken, withheld or threatened if the protected disclosure had not been made?*

It is not the responsibility of the complainant to demonstrate the impropriety of the personnel action; it is the responsibility of the management officials involved to demonstrate that the action was legitimate and would have been taken if the protected disclosure had not been made.

Before beginning this part of the investigation, it is helpful to develop a chronology of events showing who, what and when, starting with the protected disclosure and management knowledge of the disclosure, and addressing each personnel action taken, withheld or threatened. The chronology will prove to be an excellent reference for investigators as they try to determine why each action occurred.

The task now is to obtain all evidence necessary to decide whether the personnel action would have been taken, withheld or threatened if the military member had not made the protected disclosure. In gathering the evidence, investigators must ensure they have documentation or testimony to determine the following:

- ▶ The responsible official(s)' reason(s) for taking, withholding or threatening the action.
- ▶ Reasonableness of the action(s) taken, withheld or threatened given the military member's performance and/or conduct.
- ▶ Actions of the responsible official(s) in other similar circumstances. When confronted with circumstances similar to those surrounding the personnel actions under investigation, have the responsible official(s) responded in much the same manner or have they treated the whistleblower more leniently or more harshly? (Investigators are looking for a pattern of like reward for like achievement and like penalty for like offenses. If the actions concerning the whistleblower are worse than any pattern found, investigators have a strong presumption of reprisal and need to dig deep to determine the reason for the difference.)
- ▶ Responsible official(s)' motive for retaliation. In the military member's original protected disclosure, did the member allege wrongdoing on the part of any of the responsible officials? Did the inquiry that resulted from the original protected disclosure cause problems for the responsible official(s)?
- ▶ Procedural correctness of the action. Was the action taken in accordance with regulations and policy? Any actions taken outside an individual's authority may be an indication of reprisal.

Once investigators determine that management had the authority to act as it did, the temptation is often to stop the investigation. For a complete investigation of an allegation of reprisal, all the above issues must be addressed. The concept of management prerogative is a strong one in military and business circles. There is nothing in military reprisal law or regulation that attempts to limit management prerogatives. However, if management exercises a legitimate prerogative for unlawful reasons, management is wrong, and the action taken must be corrected. For example, reassignment is a management prerogative. Reassigning a military member because of his or her national origin or race is illegal. Reassigning a military member because he or she made a protected disclosure is also illegal.

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To answer the above questions, investigators must, as a minimum, interview the complainant and the official(s) responsible for each personnel action. They must also review all available documentation of the personnel action(s) and/or threat(s).

When interviewing all witnesses, ask pointed questions that will:

- ▶ confirm or rebut the testimony of the military member and the responsible official(s);
- ▶ expose inconsistencies/contradictions between what the witness is saying in the interview and other evidence you have gathered (e.g., documentation of the personnel action, testimony of others, regulatory requirements, etc.); and
- ▶ reveal if management has been consistent in the handling of similar situations (e.g., like reward for like achievement, like penalties for like offenses).

Interviews

Ask the military member:

- ▶ What is his or her understanding of the reason(s) the personnel action was taken, withheld or threatened?
- ▶ Why does he or she believe the action was reprisal? (If the military member does not offer the information, also ask if the responsible official(s) ever talked about the protected disclosure or the member's going to an IG or Member of Congress. Did they talk to the member himself or to others or both? What was said? Any witnesses?)
- ▶ Why he or she believes the stated reason(s) for the action are untrue or not justified? This is the military member's side of the story regarding the circumstances that caused the personnel action to be taken, withheld or threatened.
- ▶ Who else could provide information to verify the member's testimony or clarify the reasons for the personnel action?
- ▶ Are there any documents pertaining to the action to show/explain why the action was improper or unjustified?
- ▶ Was he or she treated differently from others in similar circumstances? If so, investigators must get all the specifics about the others so that they can investigate to determine if the whistleblower was treated differently.

Ask the deciding official(s) of each personnel action and/or official(s) who made any threats:

- ▶ Why did they take the personnel action or make the threat? This is management's reason for taking, withholding or threatening the personnel action. Get the specific reason(s) and any documents relied on in taking the action. (Cover who, what, where, when, why and how regarding the reason[s].)

- ▶ If you do not already know, ask if he/she had the authority to take the personnel action and what was the regulation, law, rule, etc. that provided the authority.
- ▶ Did anyone recommend whether the personnel action should be taken, withheld, or threatened? Get any documentation of any recommendation(s) made. (Cover who, what, when, why, and how regarding the recommendation[s].)

Ask all individuals who made recommendations about the actions or threats, including members of centralized boards:

- ▶ What recommendation did they make?
- ▶ Why did they make the recommendation? Get the specific reason(s) and any documents relied on in recommending the action. (Cover who, what, where, when, why and how regarding the reason(s) and the recommendation.)

Ask other witnesses such as those suggested by the complainant and witnesses who might logically have such information, such as the executive officer, chief of staff or other person who might advise the responsible official on personnel matters:

- ▶ Have they ever heard any of the responsible officials talk about the protected disclosure or the personnel action(s) or threats? If so, what was said? Did any official show animus against the military member for going to a Member of Congress, an IG or a member of a DoD audit, inspection, investigation or law enforcement organization?
- ▶ Have they any personal knowledge of the events leading to the personnel action(s) or threat(s)? If so, ask them to discuss it.
- ▶ If the military member or responsible official(s) have suggested any topics to the investigators that they believe are relevant to the issue of whether reprisal occurred, ask the witness about the topics and get as specific information from the witness as possible.
- ▶ Investigators should ask about any other information they believe is pertinent.

When interviewing witnesses other than the principals involved in the personnel actions or threats, it is tempting to ask, "Do you believe this happened because the member went to an IG or Congress?" There is nothing wrong with the question as long as it is immediately followed by the question, "WHY?" If the witness then describes behavior relevant to the issue of reprisal, you have valuable evidence. However, if the answer is only a character analysis of either the member or the responsible officials, the answer is not particularly helpful. Even people of questionable character can be reprised against, and managers of very sterling character can, in a moment of anger, reprise against someone. The issue of reprisal is not a character issue. The problem with the question is that it frequently leads the investigator to investigate the complainant and not the complaint. If investigators find themselves doing this, STOP! The issue is reprisal, not the character of the military member who alleged reprisal.

2.3 Completing the Investigation

The investigation is complete when investigators determine the answer to the following questions:

- ▶ *Did the military member make a disclosure protected by statute?*
- ▶ *Was an unfavorable personnel action taken or threatened or was a favorable personnel action withheld or threatened to be withheld following the protected disclosure?*
- ▶ *Did the official(s) responsible for taking, withholding or threatening the personnel action know about the protected disclosure?*
- ▶ *Does the evidence establish the personnel action would have been taken, withheld or threatened if the protected disclosure had not been made?*

The first three questions are answered during the course of the investigation. However, investigators usually will not know if they have fully answered the last question until they have completed the review and analysis of the evidence as discussed in Chapter 3. At that point, they will be well on their way to developing the required report.

CHAPTER 3 REVIEW AND ANALYSIS

3.1 Review of the Evidence. To review the evidence, investigators should develop or revise the chronology of events, prepare written summaries of all witness statements and examine the documentary evidence. If investigators completed the chronology recommended in Chapter 2 before starting investigation of the fourth question, this is the point at which they should make any revisions necessary as a result of the evidence gathered in answering the fourth question. If the chronology has not been developed, do so now. Show who, what and when, starting with the protected disclosure and management knowledge of the disclosure, and addressing each personnel action taken, withheld or threatened.

As addressed later in this guide, there is a legal requirement that the final report include summaries of all testimony taken in the investigation. Completion of the summaries of the testimony by investigators as they revise the chronology or immediately after provides a sound basis for the analysis to follow. The summaries of testimony must include all testimony critical to answering any of the four questions that investigators must address.

3.2 Analysis and Report Writing. The analysis of the evidence is most easily accomplished within the framework of the report writing. Shown below is a suggested report outline that, if followed, will ensure investigators have addressed each question:

I. Background. Give a brief overview of who did what and when. Use the chronology as the basis for the background. Include a brief summary of the facts not in dispute.

II. Did the military member make a disclosure protected by statute?

State the question and answer it briefly. If nothing is in dispute, the background would include the facts and the investigator can simply write, "{Name}'s letter to Congressman X constituted a protected disclosure as defined in DoD Directive 7050.6."

III. Was an unfavorable personnel action taken or threatened or was a favorable personnel action withheld or threatened to be withheld following the protected disclosure?

State the question and answer it briefly. Account for all actions the military member alleged to be reprisal. If any action does not meet the definition of a personnel action in DoD Directive 7050.6, quote the definition and briefly state why the action does not meet the definition.

IV. Did the official(s) responsible for taking, withholding or threatening the personnel action know about the protected disclosure?

State the question. Identify the official(s), both recommending and deciding, for each personnel action. If the answer to the question is undisputed, briefly state that the responsible

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official(s) testified they knew of the protected disclosure at the time of the action. If disputed, summarize or quote the testimony of those official(s) who denied knowledge, summarize supporting and conflicting evidence, briefly analyze the evidence if analysis is necessary to understanding your conclusion, and state your conclusion. Your conclusion must reflect what the preponderance of evidence shows. If you cannot decide the question and do not believe further investigation would be fruitful, state the evidence is inconclusive and go on to the next question.

V. Does the evidence establish the personnel action would have been taken, withheld or threatened if the protected disclosure had not been made?

Address each personnel action or threat separately. Review the five issues on page 2-5 of this guide. Address each of the five issues applicable to the action. Analyze the evidence. Resolve any conflicting evidence. State what you concluded based on the preponderance of the evidence.

Remember you must go beyond the question of whether the action was a management prerogative. Even if the action was warranted given the military member's performance and/or conduct and even if management had the authority to take the action, the action could still have been reprisal if management would not have taken the action if the military member had not made a protected disclosure. The burden of proof is on management to show they would have acted as they did with any military member given similar circumstances without the protected disclosure. The burden is on the investigator to ensure all the necessary evidence has been gathered to objectively decide this question. If, as the investigator addresses any action, some needed evidence is not gathered, the investigator must go back and gather it. Deciding whether reprisal occurred is impossible if the investigator has not gathered the necessary evidence.

VI. Conclusions. Briefly state the conclusions on whether reprisal occurred. If any other action that needs correction is found, the investigator must also state the conclusions regarding the action.

VII. Recommendations. If reprisal occurred, recommend corrective action. If something is found wrong other than reprisal, also recommend corrective action. Do this either with a general recommendation for appropriate corrective action or with a recommendation for specific remedies. The corrective action required when reprisal occurred is the action that will, to the maximum extent possible, put the military member in the position in which he or she would have been if the reprisal had not occurred. Appendices to reports are included as follow:

APPENDIX A: Summaries of Testimony

APPENDIX B: Relevant Documents

3.3 Summary. The analysis and report are much simpler to outline than to complete. However, following the outline as you write the report will ensure all pertinent areas of the investigation are addressed. If a thorough, objective investigation has been conducted, the answer will come.

CHAPTER 4 REPORTING REQUIREMENTS

4.1 Report of Investigation Requirements. Under Section 1034, Title 10, U.S.C. and DoD Directive 7050.6, the following requirements must be met:

- ▶ The investigation must be completed and the report of investigation issued within 90 days of the receipt of the allegation.

- ▶ If the report cannot be issued within 90 days of receipt, the IG, DoD, must notify the Assistant Secretary of Defense (Force Management and Personnel) and the military member. The notification must include the reasons the report will not be submitted within the prescribed time and when the report will be submitted. Keep IG, DoD, apprised of the status.

- ▶ The IG, DoD, must submit a complete copy of the report of investigation to the Assistant Secretary of Defense (Force Management and Personnel) and a copy to the military member not later than 30 days after completion of the investigation. The copy provided to the military member will be redacted in accordance with the provisions of the Freedom of Information Act.

4.2 Report Contents. The report of investigation must include:

- ▶ A thorough review of the facts and circumstances relevant to the allegation(s);
- ▶ The relevant documents acquired during the investigation; and
- ▶ Summaries of interviews conducted.

IMPORTANT: The report must contain all of this material. If any material is lacking, the reporting requirements, as defined by law, have not been satisfied. Two copies of the report of investigation must be returned to the IG, DoD--one unredacted and one redacted--under the provisions of the Freedom of Information Act for the military member. Follow your Service or Agency guidelines for forwarding the report of investigation.

NOTES

APPENDIX A

**DEPARTMENT OF DEFENSE DIRECTIVE 7050.6
MILITARY WHISTLEBLOWER PROTECTION
(SEPTEMBER 3, 1992)**



Department of Defense
DIRECTIVE

SECNAVINST 5370.8
8 AUG 1994

September 3, 1992
NUMBER 7050.6

IG, DoD

SUBJECT: Military Whistleblower Protection

- References:
- (a) DoD Directive 7050.6, subject as above, November 20, 1989 (hereby canceled)
 - (b) Section 843 of Public Law 102-190, "National Defense Authorization Act for Fiscal Years 1992-1993," December 5, 1991
 - (c) Section 846 of Public Law 100-456, "National Defense Authorization Act of 1989," September 29, 1988 (10 U.S.C. 1034)
 - (d) Sections 892, 1552, and 1553 of chapter 47 of title 10, United States Code
 - (e) DoD Directive 5400.7, "DoD Freedom of Information Act Program," May 13, 1988
 - (f) DoD Directive 7050.1, "Defense Hotline Program," March 20, 1987

A. REISSUANCE AND PURPOSE

This Directive:

1. Reissues reference (a) to:
 - a. Update policy, responsibilities, and procedures, in accordance with references (b) and (c).
 - b. Provide protection against reprisal for members of the Armed Forces for making or preparing a lawful communication to a Member of the Congress, an Inspector General (IG), or any member of a DoD audit, inspection, investigation, or law enforcement organization.
 - c. Provide procedures for investigating allegations of reprisal against members of the Armed Forces for making or preparing a protected disclosure, as defined in item 9. of enclosure 1.
2. Updates responsibilities and authorities for such protection and updates operating procedures in section F., below.

B. APPLICABILITY AND SCOPE

This Directive applies to:

1. The Office of the Secretary of Defense, the Military Departments (including their National Guard and Reserve components), the Chairman of the Joint Chiefs of Staff and the

Enclosure (1)
of Appendix A

Joint Staff, the Unified and Specified Commands, the Inspector General of the Department of Defense (IG, DoD), the Defense Agencies, and the DoD Field Activities, including nonappropriated fund activities (hereafter referred to collectively as "the DoD Components"). The term "Military Services," as used herein, refers to the Army, the Navy, the Air Force, and the Marine Corps.

2. All DoD personnel.

C. DEFINITIONS

Terms used in this Directive are defined in enclosure 1.

D. POLICY

It is DoD policy that:

1. No person shall restrict a member of the Armed Forces from lawfully communicating with a Member of the Congress, an IG, or a member of a DoD audit, inspection, investigation, or law enforcement organization.

2. Members of the Armed Forces shall be free from reprisal for making or preparing lawful communications to a Member of the Congress, an IG, or a member of a DoD audit, inspection, investigation, or law enforcement organization.

3. No employee or member of the Armed Forces may take or threaten to take an unfavorable personnel action, or withhold or threaten to withhold a favorable personnel action, in reprisal against any member of the Armed Forces for making or preparing a lawful communication to a Member of the Congress, an IG, or a member of a DoD audit, inspection, investigation, or law enforcement organization.

4. Any violation of subsection D.3., above, by a person subject to Chapter 47 of 10 U.S.C. (the Uniform Code of Military Justice, reference (d)) is punishable in accordance with the provisions of paragraph E.3.a., below. Any violation of subsection D.3., above, by a civilian employee is punishable under regulations governing disciplinary or adverse actions.

5. Allegations of reprisal against members of the Armed Forces for making or preparing a protected disclosure shall be investigated and resolved in accordance with this Directive.

E. RESPONSIBILITIES

1. The Inspector General of the Department of Defense shall:

a. Expeditiously initiate an investigation of any allegation submitted to the IG, DoD, by a member of the Armed Forces that a personnel action has been taken, withheld, or threatened in reprisal for making or preparing a protected disclosure. The IG, DoD, may request the IG of the DoD Component to conduct the investigation. No investigation is required when such allegation is submitted more than 60 days after a member became aware of the personnel action that is the subject of the allegation.

b. Initiate a separate investigation of the allegations contained in the protected disclosure if such an investigation has not already been started. No investigation is required if the information that a member believes evidences wrongdoing relates to actions that took place during combat.

c. Complete an investigation of an allegation of reprisal for making or preparing a protected disclosure and issue a report within 90 days of the receipt of that allegation. If a determination is made that the report cannot be issued within 90 days of receipt of the allegation, notify the Assistant Secretary of Defense (Force Management and Personnel) (ASD(FM&P)) and the member or the former member making an allegation of the reasons why that report will not be submitted within that time, and when that report will be submitted.

d. Prepare a report of the results of an investigation. That report shall include a thorough review of the facts and circumstances about an allegation, the relevant documents acquired during that investigation, and summaries of interviews conducted.

e. Submit a copy of an investigative report to the ASD(FM&P) and to a member or a former member making the allegation not later than 30 days after the completion of the investigation. A copy of that report issued to the member may exclude any information not otherwise available to him or her under DoD Directive 5400.7 (reference (e)).

f. At the request of a Board for Correction of Military Records (BCMR), submit a copy of that investigative report to the BCMR.

g. At the request of a BCMR, gather further evidence and issue a further report to the BCMR.

h. After the final action in any military reprisal complaint filed with the IG, DoD, when possible, interview the person who made the allegation to determine the views of that person on the disposition of the matter.

i. Review and determine the adequacy of DoD Component IG investigations of allegations of reprisal against a member of the Armed Forces for making or preparing a protected disclosure conducted at the request of the IG, DoD. If such investigation

is found inadequate, initiate a followup investigation to correct those inadequacies or ensure that the DoD Component corrects them.

2. The Assistant Secretary of Defense (Force Management and Personnel) shall:

a. Review and process, under the standards and procedures in subsection F.3., below, requests from members or former members of the Armed Forces for review of final decisions of a Secretary of a Military Department on applications for correction of military records decided in accordance with subsection F.3., below.

b. Notify the IG, DoD, of decisions made by the Secretary of Defense on requests for review of a final decision of a Secretary of a Military Department on an application for correction of military records submitted in accordance with paragraph F.3.a., below.

c. Have access to all research, reports, investigations, audits, reviews, documents, papers, or any other material necessary to carry out the responsibilities assigned to the ASD(FM&P) by this Directive.

d. If necessary, obtain for review and request the Secretaries of the Military Departments to comment on, evidence considered by a BCMR in cases in which the Secretary of Defense is requested to reconsider the final decision of the Secretary concerned.

3. The Secretaries of the Military Departments shall:

a. Within 180 days of the date of this Directive, publish an implementing regulation that provides that a violation of the prohibition against taking, withholding, or threatening to take or withhold a personnel action in reprisal for making or preparing a lawful communication by a person subject to Chapter 47 of 10 U.S.C. (the Uniform Code of Military Justice, reference (d)) is punishable as a violation of Section 892 of reference (d) (Article 92 of the Uniform Code of Military Justice). The implementing regulation shall also provide that such a violation by a DoD civilian employee is punishable under regulations governing disciplinary or adverse action.

b. On receipt of a report of investigation from the IG, DoD, that concludes that a member suffered reprisal, and when implementation of the recommendations requires action by a BCMR, advise that member that assistance in preparing an application to the BCMR may be sought from the legal office supporting the member's command.

c. Ensure that the Military Department IG:

(1) On receipt of a member's allegation of reprisal for making or preparing a protected disclosure, expeditiously investigates that allegation. No investigation is required when such allegation is submitted more than 60 days after a member became aware of that personnel action that is the subject of the allegation.

(2) At the request of the IG, DoD, investigates cases arising in the DoD Component.

(3) For those investigations conducted at the request of the IG, DoD, within 90 days of the receipt of an allegation, provides the IG, DoD, with an investigative report containing a thorough review of the facts and the circumstances about the allegation, the relevant documents acquired during the investigation, and summaries of interviews conducted.

(4) For all other investigations of alleged reprisal against a member for making or preparing a protected disclosure, on completion of the investigation, informs the member in writing of the results of the investigation. This may be accomplished by providing the member a thorough summary of the investigative report or a copy of the investigative report, edited as necessary under DoD Directive 5400.7 (reference (e)). The information provided to the member must contain a summary of the material evidence and an analysis of that evidence that supports the determination of whether reprisal occurred. Regardless of the form of communication, the information provided must be in sufficient detail to allow the member to pursue the issue further.

(5) At the request of a BCMR, submits a copy of that investigative report to the BCMR.

(6) At the request of a BCMR, gathers further evidence and issues a further report to the BCMR.

d. Ensure that the BCMR:

(1) In accordance with 10 U.S.C. 1552 (reference (d)), determines whether to resolve an application for the correction of records, made by a member or a former member of the Armed Forces who has filed a timely complaint, alleging a personnel action was taken in reprisal for making or preparing a lawful communication. That may include the receipt of oral argument, examining and cross-examining witnesses, taking depositions, and conducting an evidentiary hearing at the BCMR's discretion. When the BCMR decides to resolve such applications, it shall:

(a) Review the report of any investigation into the member's allegation of reprisal conducted by the IG, DoD, or the IG of a DoD Component.

(b) As deemed necessary, request that the IG, DoD, or the IG of the DoD Component originally investigating the allegation gathers further evidence.

(2) In such cases, if it elects to hold an administrative hearing, allows the member to be represented by a judge advocate (JA) if all of the following conditions exist:

(a) The IG investigation finds there is probable cause to believe that a personnel action was taken, withheld, or threatened in reprisal for a member of the Armed Forces making or preparing a protected disclosure.

(b) The Judge Advocate General concerned determines that the case is unusually complex or otherwise requires JA assistance to ensure proper presentation of the legal issues in the case.

(c) The member is not represented by outside counsel chosen by that member.

(3) If it elects to hold an administrative hearing, ensures that the member may examine witnesses through depositions, serve interrogatories, and request the production of evidence, including evidence in an IG investigatory record not included in the report released to that member.

(4) If it determines that a personnel action was taken in reprisal for a member or a former member of the Armed Forces making or preparing a lawful communication, makes a determination on the appropriateness of administrative or disciplinary action against the individual or individuals who committed the action and, if deemed appropriate by the BCMR, forwards its recommendation in the matter to the Secretary concerned.

e. Within 180 days of its receipt, issue a final decision on an application for the correction of military records from a member or a former member of the Armed Forces alleging reprisal for making or preparing a lawful communication. When the final decision does not grant the full relief requested by the member, advise that member that within 90 days he or she may request the Secretary of Defense to reconsider the decision in accordance with the procedures described in subsection F.3., below.

f. When reprisal is found, take appropriate corrective action, including the correction of the records of the member, in accordance with 10 U.S.C. 1552 and 1553 (reference (d)).

g. Ensure that administrative or disciplinary action, if appropriate, is taken against individuals found to have taken reprisal against a member of the Armed Forces for making or preparing a lawful communication.

h. Notify the IG, DoD, and the Military Department IG of a decision on an application for the correction of military records received from a member or former member of the Armed Forces alleging reprisal for making or preparing a lawful communication and of any disciplinary action taken.

4. The Heads of the DoD Components shall:

a. Based on an IG investigative report, take appropriate corrective action.

b. Publicize the content of this Directive to ensure that military and other DoD personnel fully understand its scope and application.

F. PROCEDURES

1. Any member of the Armed Forces who reasonably believes a personnel action (including the withholding of an action) was taken or threatened in reprisal for making or preparing a lawful communication, may file a complaint with the DoD Hotline under DoD Directive 7050.1 (reference (f)). Such a complaint may be filed by telephone (800) 424-9098 or (202) 693-5080, or by letter addressed to the following:

Department of Defense Hotline
400 Army Navy Drive
Arlington, Virginia 22202-2884

2. Nothing in this Directive precludes a member of the Armed Forces from filing a complaint of reprisal for making or preparing a lawful communication within their Military Department. If the member elects to file the complaint within his or her Department, he or she should contact a local IG or JA for information concerning the procedures for filing such a complaint. Members who file complaints of reprisal for making or preparing a lawful communication within their Military Department should be advised that the provisions of Pub. L. No. 102-190, Section 843, and Pub. L. No. 100-456, Section 846 (references (b) and (c)), only apply to reprisal complaints filed with the IG, DoD.

3. A member or former member of the Armed Forces who has filed an application for the correction of military records under reference (c) alleging reprisal for making or preparing a protected disclosure may request review by the Secretary of Defense of the final decision of the Secretary of a Military Department concerned on such application. The following procedures apply to requests for review by the Secretary of Defense:

a. Content of Request. The request for review must be in writing and include the member's name, address, and telephone number; copies of the application to the BCMR and the final decision of the Secretary of the Military Department concerned on such application; and a statement of the specific reasons why that member is not satisfied with the decision of the Secretary concerned.

(1) Requests based on factual allegations or evidence not previously presented to the cognizant BCMR shall not be considered.

(2) New allegations or evidence must be submitted directly to the BCMR for reconsideration under procedures established by the BCMR.

b. Review by the Secretary of Defense. The Secretary of Defense shall review the allegations submitted by a member or a former member of the Armed Forces requesting review and other records deemed appropriate and necessary by the Secretary of Defense for deciding, in his or her sole discretion, whether to uphold or reverse the decision of the Secretary concerned. The decision of the Secretary of Defense is final.

c. Time Limits. The request for review of the final decision of the Secretary of the Military Department concerned must be filed within 90 days of receipt of the decision by a member or former member of the Armed Forces.

d. Address. Requests for review by the Secretary of Defense must be submitted to the following:

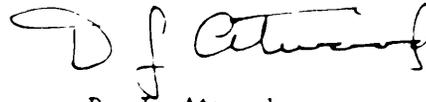
Assistant Secretary of Defense (Force Management
and Personnel)
Attention: Director, Legal Policy
Room 4C763, The Pentagon
Washington, DC 20301-4000

G. EFFECTIVE DATE AND IMPLEMENTATION

1. The ASD(FM&P) may issue such instructions as may be necessary to implement subsections E.2. and F.3. of this Directive. Instructions to the Military Departments shall be issued through the Secretaries of the Military Departments. Instructions to the unified and specified commands shall be communicated through the Chairman of the Joint Chiefs of Staff.

Sep 3, 92
7050.6

2. This Directive is effective immediately.



D. J. Atwood
Deputy Secretary of Defense

Enclosure

Definitions

DEFINITIONS

1. Audit, Inspection, Investigation, and Law Enforcement Organizations. The law enforcement organizations at any command level in any of the DoD Components, the Defense Criminal Investigative Service, the U.S. Army Criminal Investigation Command, the Naval Investigative Service, the Air Force Office of Special Investigations, the U.S. Army Audit Agency, the Naval Audit Service, the Air Force Audit Agency, and the Defense Contract Audit Agency.
2. Board for Correction of Military Records (BCMR). Any board empowered under 10 U.S.C. 1552 (reference (d)) to recommend correction of military records to the Secretary of the Military Department concerned.
3. Corrective Action. Any action deemed necessary to make the complainant whole; changes in Agency regulations or practices; administrative or disciplinary action against offending personnel; or referral to the U.S. Attorney General or court-martial convening authority of any evidence of criminal violation.
4. Inspector General (IG). The IG, DoD, and a military or civilian employee assigned or detailed under DoD Component regulations to serve as an IG at any command level in one of the DoD Components.
5. Member of the Congress. Besides a Representative or Senator, includes any Delegate or Resident Commissioner to the Congress.
6. Member or Member of the Armed Forces. All Regular and Reserve component officers (commissioned and warrant) and enlisted members of the Army, the Navy, the Air Force, the Marine Corps, and the Coast Guard (when operating as part of the Department of the Navy) on active duty (AD), and Reserve component officers (commissioned and warrant) and enlisted members whether on AD, Full-Time National Guard Duty, Inactive Duty for Training, or not in any duty or training status. That definition includes professors and cadets of the Military Service academies and officers and enlisted members of the National Guard.
7. Personnel Action. Any action taken on a member of the Armed Forces that affects or has the potential to affect that military member's current position or career. Such actions include a promotion; a disciplinary or other corrective action; a transfer or reassignment; a performance evaluation; a decision on pay, benefits, awards, or training; and any other significant change in duties or responsibilities inconsistent with the military member's rank.

8. Protected Disclosure. A lawful communication to a Member of Congress, an IG, or any member of a DoD audit, inspection, investigation, or law enforcement organization in which a military member makes a complaint or discloses information that he or she reasonably believes evidences a violation of law or regulation, mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

9. Reprisal. Taking or threatening to take an unfavorable personnel action or withholding or threatening to withhold a favorable personnel action against a military member for making or preparing a protected disclosure.

APPENDIX B

SECTION 1034, TITLE 10 UNITED STATES CODE (U.S.C.) -- EXTRACT

APPENDIX B

SECTION 1034, TITLE 10 UNITED STATES CODE (U.S.C.) -- EXTRACT

10 1034

ARMED FORCES

1034. Communicating with a Member of Congress or Inspector General; prohibition of retaliatory personnel actions.

(a) Restricting communications with Members of Congress and Inspector General prohibited.

(1) No person may restrict a member of the armed forces in communicating with a Member of Congress or an Inspector General.

(2) Paragraph (1) does not apply to a communication that is unlawful.

(b) Prohibition of retaliatory personnel actions.-No person may take (or threaten to take) an unfavorable personnel action, or withhold (or threaten to withhold) a favorable personnel action, as a reprisal against a member of the armed forces for making or preparing a communication to a Member of Congress or an Inspector General that (under subsection [a]) may not be restricted. Any action prohibited by the preceding sentence (including the threat to take any action and the withholding or threat to withhold any favorable action) shall be considered for the purposes of this section to be a personnel action prohibited by this subsection.

(c) Inspector General investigation of certain allegations.

(1) If a member of the armed forces submits to the Inspector General of the Department of Defense (or the Inspector General of Department of Transportation, in the case of a member of the Coast Guard when the Coast Guard is not operating as a service in the Navy) an allegation that a personnel action prohibited by subsection (b) has been taken (or threatened) against the member with respect to a communication described in paragraph (2), the Inspector General shall expeditiously investigate the allegation.

(2) A communication described in this paragraph is a communication to a Member of Congress or an Inspector General that (under subsection [a]) may not be restricted in which the member of the armed forces makes a complaint or discloses information that the member reasonably believes constitutes evidence of--

(A) a violation of a law or regulation; or

(B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(3) The Inspector General is not required to make an investigation under paragraph (1) in the case of an allegation made more than 60 days after the date on which the member becomes aware of the personnel action that is the subject of the allegation.

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(4) If the Inspector General has not already done so, the Inspector General shall commence a separate investigation of the information that the member believes evidences wrongdoing as described in subparagraph (A) or (B) of paragraph (2). The Inspector General is not required to make such an investigation if the information that the member believes evidences wrongdoing relates to actions which took place during combat.

(5) Not later than 30 days after completion of an investigation under this subsection, the Inspector General shall submit a report on the results of the investigation to the Secretary of Defense (or to the Secretary of Transportation in the case of a member of the Coast Guard when the Coast Guard is not operating as a service in the Navy) and the member of the armed forces concerned. In the copy of the report submitted to the member, the Inspector General may exclude any information that would not otherwise be available to the member under section 552 of title 5.

(6) If, in the course of an investigation of an allegation under this section, the Inspector General determines that it is not possible to submit the report required by paragraph (5) within 90 days after the date of receipt of the allegation being investigated, the Inspector General shall provide to the Secretary of Defense (or to the Secretary of Transportation in the case of a member of the Coast Guard when the Coast Guard is not operating as a service in the Navy) and to the member making the allegation a notice--

(A) of the determination (including the reasons why the report may not be submitted within the time); and

(B) of the time when the report will be submitted.

(7) The report of the results of the investigation shall contain a thorough review of the facts and circumstances relevant to the allegation and the complaint or disclosure and shall include documents acquired during the course of the investigation, including summaries of interviews conducted. The report may include a recommendation as to the disposition of the complaint.

(d) Correction of records when prohibited action taken.

(1) A board for the correction of military records acting under section 1552 of this title, in resolving an application for the correction of records made by a member or former member of the armed forces who has alleged a personnel action prohibited by subsection (b), on the request of the member or former member or otherwise, may review the matter.

(2) In resolving an application described in paragraph (1), a correction board--

(A) shall review the report of the Inspector General submitted under subsection (c)(5);

(B) may request the Inspector General to gather further evidence; and

(C) may receive oral argument, examine and cross-examine witnesses, take depositions, and if appropriate, conduct an evidentiary hearing.

(3) If the board elects to hold an administrative hearing, the member or former member who filed the application described in paragraph (1)--

(A) may be provided with representation by a judge advocate if--

(i) the Inspector General, in the report under subsection (c)(5), finds that there is probable cause to believe that a personnel action prohibited by subsection (b) has been taken (or threatened) against the member with respect to a communication described in subsection (c)(2);

(ii) the Judge Advocate General concerned determines that the case is unusually complex or otherwise requires judge advocate assistance to ensure proper presentation of the legal issues in the case; and

(iii) the member is not represented by outside counsel chosen by the member; and

(B) may examine witnesses through deposition, serve interrogatories, and request the production of evidence, including evidence contained in the investigatory record of the Inspector General but not included in the report submitted under subsection (c)(5).

(4) The Secretary concerned shall issue a final decision with respect to an application described in paragraph (1) within 180 days after the application is filed. If the Secretary fails to issue such a final decision within the time, the member or former member shall be deemed to have exhausted the member's or former member's administrative remedies under section 1552 of this title.

(5) The Secretary concerned shall order such action, consistent with the limitations contained in sections 1552 and 1553 of this title, as is necessary to correct the record of a personnel action prohibited by subsection (b).

(6) If the Board determines that a personnel action prohibited by subsection (b) has occurred, the Board may recommend to the Secretary concerned that the Secretary take appropriate disciplinary action against the individual who committed such personnel action.

(e) Review by Secretary of Defense--Upon the completion of all administrative review under subsection (d), the member or former member of the armed forces (except for a member or former member of the Coast Guard when the Coast Guard is not operating as a service in the Navy) who made the allegation referred to in subsection (c)(1), if not satisfied with the disposition of the matter, may submit the matter to the Secretary of Defense. The Secretary shall make a decision to reverse or uphold the decision of the Secretary of the military department concerned in the matter within 90 days after receipt of such a submittal.

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(f) **Post-disposition interviews.**--After disposition of any case under this section, the Inspector General shall, whenever possible, conduct an interview with the person making the allegation to determine the views of the person on the disposition of the matter.

(g) **Regulations.**--The Secretary of Defense, and the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, shall prescribe regulations to carry out this section:

(h) **Definitions.**--In this section:

(1) The term "Member of Congress" includes any Delegate or Resident Commissioner to Congress.

(2) The term "Inspector General" means--

(A) an Inspector appointed under the Inspector General Act of 1978; and

(B) an officer of the armed forces assigned or detailed under regulations of the Secretary concerned to serve as an Inspector General at any command level in one of the armed forces.

(As amended Oct 19, 1984, Pub.L.98-525, Title XIV, 1405(19)(A),(B)(i), 98 Stat. 2622; Sept. 29, 1988, Pub.L. 100-456, Div. A, Title VIII, 846(a)(1), 102 Stat. 2027; Dec. 12, 1989, Pub.L. 101-225, Title II, 202, 103 Stat. 1910.)