



DEPARTMENT OF THE NAVY

OFFICE OF THE JUDGE ADVOCATE GENERAL

200 STOVALL STREET

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IN REPLY REFER TO

JAGINST 5830.1

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JAG INSTRUCTION 5830.1

From: Judge Advocate General

Subj: PROCEDURES APPLICABLE TO COURTS OF INQUIRY AND
ADMINISTRATIVE FACT-FINDING BODIES THAT REQUIRE A HEARING

Ref: (a) 10 U.S.C. § 935
(b) JAGINST 5800.7C (JAGMAN)
(c) Manual for Courts-Martial, United States, 1984

Encl: (1) Rules and Procedures for Courts of Inquiry
(2) Rules and Procedures for Fact-Finding Bodies that
Require a Hearing
(3) Appointing Order for Court of Inquiry
(4) Appointing Order for a Single Member Fact-Finding
Body when a Hearing is Required
(5) Modification to the Appointing Order
(6) Sample Oaths to be Administered
(7) Record of Proceedings of Court of Inquiry
(8) Letter of Transmittal for Record of Proceedings
(9) Endorsement of the Convening Authority

1. **Purpose.** To publish the procedures for courts of inquiry and fact-finding bodies that require a hearing and to detail the rights of individuals designated as parties. A court of inquiry is guided by the references and enclosure (1). An administrative fact-finding body required to conduct a hearing is guided by the references and enclosure (2). Enclosures (3) through (9) are provided as guidance in conducting formal boards. References to various sections of reference (b) in the enclosures are prefaced with the word "JAGMAN" followed by either a section number or appendix page.

2. **Other Directives.** If a conflict arises between this instruction and references, the references control.

3. **Background**

a. Court of inquiry. A court of inquiry is an administrative fact-finding body authorized by reference (a), consisting of three or more officers. It may be convened by a general court-martial convening authority in accordance with references (a) and (b).

(1) The court of inquiry has a long military tradition. Originally adopted from the British Army, it has remained in its present form with only slight modification since the adoption of the Articles of War of 1786. A court of inquiry is not a court in the sense the term is used today. It is rather a board of investigation charged with examining and inquiring into an incident and, when directed by the convening authority, making opinions and recommendations about the incident.

(2) Under circumstances detailed in Rule for Courts-Martial (R.C.M.) 405 of reference (c), a court of inquiry may be substituted for an Article 32, Uniform Code of Military Justice (UCMJ), investigation. Practically, the ability to substitute a court of inquiry for an Article 32 investigation is difficult. Substitution may only be accomplished if the subject matter of the offense was investigated, the accused was present at the investigation and afforded the opportunities for representation, cross-examination and presentation of evidence. Should a court of inquiry be used in place of an Article 32 investigation, a demand for further investigation by an accused entitles the accused to recall witnesses for further cross-examination and to offer any new evidence in his own behalf. Normally, the convening of a separate Article 32 investigation is the most efficient method for bringing an accused to trial.

(3) A court of inquiry has the ability to subpoena civilian witnesses.

(4) A court of inquiry may be used as a preliminary inquiry required by R.C.M. 303 of reference (c).

b. A fact-finding body required to conduct a hearing. A fact-finding body required to conduct a hearing is authorized by reference (b) and will normally consist of a single officer. Such investigations also have a long tradition in the naval service and are intended to be an intermediary step between a fact-finding body without a hearing and a court of inquiry. Such investigations are used, for example, when a hearing with sworn testimony is desired or designation of parties may be required, but only a single investigating officer is necessary to conduct the inquiry. A fact-finding body required to conduct a hearing may be used as the preliminary inquiry required by R.C.M. 303 of reference (c).

4. **Selection.** Before convening an investigation, the convening authority must consider the powers a fact-finding body will require and the desirability of designating parties. If the

subject matter of the inquiry involves disputed issues of fact and a risk of substantial injustice if an individual is not afforded the rights of a party, a court of inquiry or fact-finding body authorized to designate parties should be ordered. Where benefit may be obtained from the deliberative process of several commissioned officers examining an incident, a court of inquiry should be convened. While it is not improper to convene a fact-finding body required to conduct a hearing with more than one commissioned officer, there are rarely any advantages to such a procedure. If the ability to subpoena witnesses is necessary, a court of inquiry should normally be convened. For major incidents, as defined in section 0202a(3) of reference (b), a court of inquiry shall be convened. See also section 0207 of reference (b). In less serious cases, a fact-finding body, with or without a hearing, will be conducted as deemed appropriate by the convening authority. Section 0207c of reference (b) details suggested procedures preliminary to the appointment of a court of inquiry or fact-finding body required to conduct a hearing.

5. **Support Requirements.** Courts of inquiry and fact-finding bodies required to conduct a hearing are only used to investigate the most serious incidents. The report of the proceedings into these serious incidents must be transcribed verbatim, necessitating assignment of court reporters. The assignment of interpreters is also often necessary to obtain a witness statement or to transcribe documents. Further, the incidents being investigated frequently have extraordinary media and congressional interest, and considerable pressure is often exerted to complete the investigation in a limited period of time. Because of the nature of these investigations, convening authorities should provide the following types of support as appropriate:

a. Technical Advisor. If an understanding of the matters under inquiry involves a high degree of technical knowledge, convening authorities are encouraged to appoint an officer who possesses this technical knowledge to assist the court.

b. Court Reporter. A court reporter will normally be provided by the legal office providing court-martial support to the convening authority. Where that legal office is unable to provide court reporter support, the convening authority shall request assistance from the Commander, Naval Legal Service Command or Commandant of the Marine Corps (JA), as appropriate. The reporter appointed to record the proceedings of a court may use longhand, shorthand, or a mechanical or sound recording device. A verbatim record of the proceedings shall be compiled,

subject to exceptions as noted in paragraph 14b of enclosures (1) and (2). If additional expense to the Government is involved in the employing of reporters, the convening authority should follow the procedure set forth in section 0130d(6) of reference (b).

c. Interpreter. In all courts of inquiry where testimony is to be given in other than English, an interpreter shall be appointed. Prior to assuming duties, the interpreter shall satisfy the court of his or her qualifications. If it appears to the court that the interpreter is experiencing difficulty in interpreting, or if there is an objection by a party that the interpreter is not fully and correctly interpreting, the court shall immediately conduct an inquiry into the matter. If it appears that the interpreter is not able to interpret accurately and intelligently, the court shall report this matter to the convening authority and request that a competent person be appointed. Until the appointment of another interpreter, no further examinations of the witnesses whose testimony is to be interpreted shall be undertaken. If additional expense to the Government is involved in the employment of interpreter(s), the convening authority should follow the procedures set forth in section 0130d(d)(6) of reference (b).

d. Evidence Custodian. Appointing an evidence custodian to relieve the hearing officer or court of inquiry members and counsel of the responsibility of cataloging and safeguarding substantial quantities of physical and documentary evidence can greatly expedite the investigation. In appropriate cases, individuals may be assigned to assist the evidence custodian. Evidence custodians will be guided by OPNAVINST 5580.1H (Navy Law Enforcement Manual), Chapter 17.

e. Security. Where classified matters may be involved, a security officer should be assigned. In appropriate cases, the evidence custodian and security officer may be the same individual. Whenever appointed, a security officer will be guided by the Department of the Navy Information and Personnel Security Program Regulation (OPNAVINST 5510.1H).

f. Messages. When the president or hearing officer has a requirement to send or receive information electronically, there may be a necessity to assign a temporary plain language address under the United States Navy Plain Language Address Directory. Hearing officers may desire that information sent or received electronically not be disseminated, especially where a command under investigation controls all message facilities. In such cases, methods to ensure secure transmissions must be provided.

g. Public Affairs. Representatives of the media often attempt to obtain statements from members, hearing officers, counsel, parties, and witnesses. To minimize disruption of the investigation, assignment of a public affairs officer and/or team of public affairs personnel is often advisable. At a minimum, members of a court of inquiry, hearing officers for an investigation required to conduct a hearing, and counsel for the investigation should be advised to not discuss the investigation with anyone who is not officially involved with the investigation, as well as to direct media requests for information to the designated public affairs office.

h. Administrative Support Personnel. Appointing administrative support personnel, such as bailiffs/orderlies, clerks, and other appropriate clerical assistants will relieve court members and assigned counsel of the requirement to perform basic ministerial functions and will greatly expedite the investigative process.

i. Command and control. The investigation is the primary duty of all support personnel. Support personnel are under the command of the president of a court of inquiry, the president of a multiple member fact-finding body, or the investigating officer appointed as a single officer fact-finding body with a hearing.

6. Responsibility for Financial Support

a. Travel, per diem, fees, and mileage

(1) The costs of travel and per diem of military personnel and civilian employees of the Department of the Navy will be charged to the operation and maintenance allotment which supports temporary additional duty travel for the convening authority of the court of inquiry or fact-finding body.

(2) The costs of fees and mileage of civilians other than employees of the Department of the Navy will be charged to the operating budget which supports the temporary additional duty travel funds of the appropriate Navy or Marine Corps convening authority. See the Navy Comptroller Manual, Volume 7, paragraph 075133.

b. Services and supplies

(1) The following costs of services and supplies provided by an activity in support of court of inquiry or fact-

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finding bodies will be charged to the operation and maintenance allotment of the convening authority:

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

(b) Costs which arise under contracts which were entered into in support of courts of inquiry or fact-finding bodies.

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

7. Relationship With Law Enforcement Investigations. To avoid interference with law enforcement investigations, a court of inquiry or fact-finding body required to conduct a hearing should normally not proceed at the same time as a law enforcement investigation by the Federal Bureau of Investigation (FBI), Naval Investigative Service Command (NISC), or local civilian police department. If the convening authority believes it necessary to proceed with an inquiry by an administrative fact-finding body prior to completion of an investigation by the FBI, NISC, or local civilian police, the convening authority shall first discuss the matter with the local NISC Resident Agent in Charge. If the Resident Agent objects, on behalf of NISC or another law enforcement agency, the matter will be referred to the area coordinator for the Navy, or the senior officer in a geographic area exercising general court-martial convening authority for the Marine Corps, as appropriate, for resolution.

8. Executive Summaries. Given the nature of the major incidents investigated, officials of the Department of the Navy, the Department of Defense, other executive agencies, and the legislative branch, as well as the media, often desire copies of the investigation. Where the incident results in death, the next of kin also will normally request a copy of the investigation. The report of investigation, transcript of proceedings, and enclosures can often be thousands of pages in length. For persons unfamiliar with military organizations, terminology, and operations, the task of deciphering an investigation can be impossible. Accordingly, convening authorities should ensure that an executive summary in plain English, which accurately reflects the findings, opinions, and recommendations of the investigation, is prepared prior to forwarding the investigation. The summary may be a part of the convening authority's endorsement or an enclo-

sure thereto. There is nothing improper with requiring counsel to the investigation, the investigating officer of a fact-finding body required to conduct a hearing, or the president of a court of inquiry to prepare the summary. Participation by public affairs personnel in the preparation of the executive summary may also be advisable.

9. **Privacy Act Compliance.** Pursuant to SECNAVINST 5211.5C and the Privacy Act (5 U.S.C. § 552a), the following procedures shall apply to fact-finding bodies.

a. **Advice Required.** When any individual is requested by a person acting on the Government's behalf to supply personal information about himself for a record in a system of records in the course of a fact-finding body investigation, the person making the request shall first provide the individual, in duplicate, a Privacy Act statement containing the information prescribed in SECNAVINST 5211.5C. The original Privacy Act statement should be signed by the individual and appended to the record of the investigation with a copy retained by the individual. If the information is requested in an interview or hearing, the Privacy Act statement should also be orally summarized and explained to ensure full understanding. The requirement for a Privacy Act statement is in addition to other applicable warnings or advice required by the JAG Manual, Article 31, UCMJ, and related court decisions.

b. **"Personal Information" Defined.** Personal information is information about an individual that is intimate or private to the individual, as distinguished from information related solely to the individual's official functions. It ordinarily includes, for example, information pertaining to an individual's financial, family, social, and recreational affairs; medical, education, employment, or criminal history; or information that identifies, describes, or affords a basis for inferring personal characteristics, such as finger or voice prints or photographs. It ordinarily does not include information such as the time, place, and manner of, or reasons or authority for, an individual's conduct directly related to the duties of his or her Federal employment or military assignment.

c. **"Systems of Records" Defined.** A system of records is a group of records under the control of the Department of the Navy or any element of the Navy Department, operating forces, or shore establishments, from which information is retrieved by the name of the individual or by some identifying particular assigned to the individual.

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d. Social Security Numbers. No individual, even a member or employee of the naval service, should be requested to provide his or her social security number in connection with a fact-finding body investigation. This may obviate the need for giving a Privacy Act statement. Social security numbers can generally be obtained from other available records if necessary in a particular investigation.

e. Privacy Act Statement Contents. JAGMAN Appendix A-2-a includes every item of information that would be required for a Privacy Act statement for any administrative investigation. It should be used as a basis for tailoring a specific Privacy Act statement appropriate to the particular purposes and subject matter of the investigation, and the role of the particular party or witness in relation to the matter under investigation.

f. Local Forms. Locally prepared forms utilizing the format in Appendix A-2-a of reference (b) are authorized. Copies of local forms for Privacy Act statements prepared for use in administrative investigations shall be filed on a current basis with the Judge Advocate General.

g. Reviewing Authorities. The officer exercising general court-martial jurisdiction has the responsibility to ensure that remedial action, as appropriate, is taken to rectify any noncompliance with the Privacy Act indicated in the investigative record prior to forwarding the record to the Judge Advocate General.

h. Records of Disclosure. Appendix A-2-b of reference (b) is recommended for use, as required, in recording and accounting for disclosures of information about identifiable individuals from records that are collected, used, or maintained pursuant to directives under the cognizance of the Judge Advocate General. Local reproduction is authorized.


J. E. GORDON

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COURTS OF INQUIRY

This regulation prescribes the rules and procedures concerning courts of inquiry under Article 135, Uniform Code of Military Justice (UCMJ).

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1. **Jurisdiction.** A court of inquiry may be convened to investigate any matter, whether or not the persons involved have requested such an inquiry. The fact that an involved person has requested a court of inquiry does not require that one be convened. Article 135(a), UCMJ.

2. **Authority to Convene.** A court of inquiry may be convened by any person authorized to convene a general court-martial or by any person designated by the Secretary of Navy to convene a court of inquiry. Article 135(a), UCMJ.

3. **Composition**

a. **Members of the Court of Inquiry.** The convening authority will designate three or more commissioned officers to sit as members of the court of inquiry. Article 135(b), UCMJ. When practical, the senior member should be at least a Navy lieutenant commander or a Marine Corps major. The senior member shall be the president. All members should be senior to any person whose conduct is subject to inquiry.

b. **Counsel for the Court of Inquiry.** The convening authority will appoint a counsel certified under Article 27(b), and sworn in accordance with Article 42(a), UCMJ, for the court of inquiry. Counsel is required to act in a fair and impartial manner and will not assume an adversarial role. Counsel duties are to assist the court of inquiry in matters of law, presentation of evidence, and in the keeping and preparation of the record. Assistant counsel for the court may be appointed. (Assistant counsel need not be certified under Article 27(b), UCMJ.)

c. **Parties**

(1) **General.** A "party" before a court of inquiry is a person subject to the UCMJ who has properly been designated as such in connection with a court of inquiry and whose conduct is either the subject of the inquiry or has a direct interest in the inquiry. Upon their request to the court, persons employed by the Department of Defense who have a direct interest in the subject of inquiry must be designated parties. Designation as a party has significant procedural implications.

(2) **Subject to inquiry.** A person's conduct or performance of duty is "subject to inquiry" when the person is involved in the incident or event under investigation such that disciplinary action may follow, that his rights or privileges may be adversely affected, or that his personal reputation or professional standing may be jeopardized.

(3) **Direct interest.** A person has "direct interest" in the subject of inquiry: when the findings, opinions, or recommendations of the court of inquiry may, in view of his relation to the incident or circumstances under investigation, reflect questionable or unsatisfactory conduct or performance of

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duty; or when the findings, opinions, or recommendations may relate to a matter over which the person has a duty or right to exercise official control.

(4) Reserve applicability. Any member of the Naval or Marine Corps Reserve not subject to the UCMJ by virtue of his status whose conduct or performance of duty is subject to inquiry may, upon request to the court of inquiry or its convening authority, be designated a party before the court of inquiry.

(5) Other designations of parties. No other person may be designated as a party unless expressly authorized by the Secretary of the Navy (Judge Advocate General).

(6) Who may designate. Parties are designated by the convening authority of the court of inquiry or by the president of the court of inquiry when expressly authorized to designate parties by the convening authority, subject to the following considerations:

(a) When parties are to be designated, and it is apparent at the time of the issuance of the appointing order that a person or persons must or should be designated, the convening authority should include such designation in the appointing order. The convening authority's power to designate parties continues during the entire proceedings before a court of inquiry.

(b) If at any time during the course of an investigation by a court of inquiry authorized to designate parties it appears to the court that any person not previously designated should be so designated, that person shall be informed of that conclusion, shall be designated a party and shall be informed of and accorded his rights as such.

(c) If at any time during the course of an investigation by a court of inquiry not authorized to designate parties it appears that any person should be so designated the convening authority shall be so advised. The convening authority will decide if such person should be designated.

(7) Effects of designation. Designating an individual a party before a court of inquiry affords that party a hearing on possibly adverse information concerning his conduct or performance of duty, or relating to a matter over which he had a duty or right to exercise official control.

(8) Change in status of a party. If it no longer appears that a person previously designated as a party is involved in a material way in the matter under investigation, his designation as a party may be withdrawn by the president of the court upon application of that party, or upon the president of the court's own initiative. The convening authority will be promptly informed of this action. The convening authority may reverse the president's decision.

Enclosure (1)

d. Counsel for Parties

(1) Entitlement. Only a "party" is entitled to representation by counsel. The convening authority will appoint counsel for military servicemember parties designated in the appointing order and those military servicemembers designated as parties during the course of the proceedings. See 3d(2) for counsel for civilian parties. Appointed counsel must be a person certified by the Judge Advocate General under Article 27(b), UCMJ. Any party may be represented by civilian counsel, at no expense to the Government, or by military counsel of the party's own selection, if reasonably available. The procedures detailed in JAGMAN 0131 will be used in determining availability of requested counsel. If requested military counsel is provided, appointed military counsel will be excused from further representation. Civilian counsel representing a party must be an attorney admitted to practice before the highest court of a State or a Federal District Court. If a party desires to be represented by counsel from a foreign nation, the advice of the Judge Advocate General of the Navy will be sought as to whether such counsel has the requisite qualifications.

(2) Appointed counsel for civilian parties. Appointed military counsel will only be provided for a civilian party under one of the following circumstances:

(a) The civilian party is in a status in which he might be subject to trial by court-martial and the court of inquiry may be used as a pretrial investigation under Article 32, UCMJ. As discussed in the basic instruction the substitution of the court of inquiry in place of an Article 32 investigation is normally not advisable. However, designation of a civilian as a party to the investigation, assignment of military counsel, and allowing the party and counsel to be present and cross-examine witnesses may in some cases expedite a subsequent Article 32 investigation. Failure to designate a civilian as a party before a court of inquiry does not preclude a subsequent Article 32 investigation of the individual.

(b) Doubt exists as to the mental competency of the civilian party, and the civilian party is not represented by counsel capable of adequately protecting the party's interest. See paragraph 3d(3) below.

(c) The convening authority directs such action on the ground that under the particular circumstances of the case, the interests of the Government would be best served by making military counsel available to represent the civilian party.

(3) Incompetent party. When a medical officer states that a person designated a party, whether military or civilian, is incompetent due to injuries or disease and will remain so for at least 30 days, and the party is not represented by counsel, the convening authority will ensure that counsel certified under Article 27(b), UCMJ, is appointed to represent the party during the proceedings of the court. Such counsel is obligated to

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exercise all the rights of the party as though the party were present.

4. Appointing Order

a. **Form.** Courts of inquiry are convened by an appointing order signed by the convening authority. The appointing order shall be in official letter form addressed to the president of the court. When circumstances warrant, a court may be convened on oral or message orders. Written confirmation of oral and message orders will be issued in each case. Message orders and all confirmations of orders shall be included in the record of proceedings of the court.

b. **Contents of Appointing Order.** The appointing order of a court of inquiry shall: (1) name the president, the members, and the counsel; (2) designate known parties to the inquiry; (3) appoint counsel for parties when required and detail support personnel to counsel for a party as appropriate; (4) specify the time and place for initial meeting of counsel; (5) recite the specific purposes of the inquiry and explicit instructions as to the scope of the inquiry; (6) provide any instructions necessary to ensure the accomplishment of the purposes for which the court was convened ensuring that there is ample information developed to be used by authorities remote from the convening authority's command; (7) require that the members of the court of inquiry make findings of fact, but noting that Article 135(g), UCMJ, prohibits the court of inquiry from expressing opinions or making recommendations unless specifically required to do so by the convening authority in the appointing order; if the convening authority desires opinions or recommendations from the members, this will be so stated in the appointing order; (8) require that the president suspend the proceedings of the court and advise the convening authority when it appears that the intentional acts of a deceased servicemember were a contributing cause to the incident under investigation; (9) state whether or not the court of inquiry has authority to designate parties and the scope of that authority; (10) provide for the appointment of reporters, evidence custodians, security officers, public affairs officers and interpreters as appropriate, and (11) contain directions for complying with the Privacy Act of 1974. For an example of an appointing order for a court of inquiry, see enclosure (3).

c. Additional Matters

(1) Junior officer membership. If exigencies of the service require that an officer junior to a party sit as a member, the reason for this will be stated in the appointing order, or will be noted in the convening authority's action on the record.

(2) Amendment of appointing order. The convening authority may amend the appointing order at any time to limit or increase the scope of the inquiry, name additional parties, or provide additional instructions. See enclosure (5) for an example. The counsel to the court may be changed at any time.

Prior to receipt of evidence by the court of inquiry, the convening authority can amend the appointing order at any time to change the president or members. After a court of inquiry has received evidence, changes in the president or members will only be for good cause. Good cause includes physical disability, military exigency, adherence to the seniority principle in membership, and other extraordinary circumstances which render the president or a member unable to proceed within a reasonable time. Good cause does not include temporary inconveniences which are incident to normal conditions of military life. The convening authority in his action on the record of proceedings shall set forth the reasons for any change in the membership of the court after the receipt of evidence. See paragraph 10d(5) and (6) for procedures.

(3) Routing of appointing orders. On occasion, it may be advantageous to forward an advance copy of the appointing order to interested superiors, so that they may be apprised of significant occurrences and actions being taken in connection therewith.

(4) Litigation. If an investigation is convened primarily or as one of its purposes to gather information to adjudicate an administrative claim by or against the United States under the Federal Tort Claims Act, to examine a potential admiralty claim by or against the United States, or for purposes of litigation by or against the United States, the investigation must comply with Chapters VIII and XII of the JAG Manual. See JAGMAN 0211c for special language to be included in the appointing order.

d. Communication with the Convening Authority. If at any time during the course of the proceedings it should appear from the evidence that the convening authority might consider it advisable to enlarge or restrict the scope of the inquiry, alter the composition of the court (whether by augmentation or substitution), cancel or otherwise modify instructions set forth in the appointing order, or provide for additional, appropriate safeguards to ensure a fair hearing regarding a deceased servicemember's action, a report should be made to the convening authority by the president. Recommendations may be included in the report. The convening authority may take such action on this report as deemed appropriate. Copies of all such communications and replies should be appended to the record.

5. Duties and Responsibilities of the President. Attendance at the proceedings of a court of inquiry is the primary duty of the officer appointed as president. The president shall preserve order, decide upon administrative matters relating to the routine business of the court and, where authorized by this enclosure, make rulings. He may recess, grant continuances, or adjourn the court to meet at a time or place that will be most convenient and proper.

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6. Duties and Responsibilities of the Members. Attendance at the proceedings of a court is the primary duty of an officer appointed a member. No member shall fail to attend at the designated time and place unless prevented by illness, ordered away, or excused by competent authority.

7. Duties and Responsibilities of the Counsel for the Court

a. Duties. Counsel for the court is under the direct supervision of the president of the court. Counsel shall call witnesses and conduct the direct examination of all witnesses except those requested or called by a party. He shall arrange for a place for the court to meet and if not provided by the convening authority for the assistance of custodians, security officers, reporters, interpreters, orderlies, and clerical assistants. He shall administer the oath or affirmation to all members, reporters, interpreters, and witnesses, and when appropriate shall advise witnesses and parties under Article 31, UCMJ. He shall arrange for the attendance of all witnesses, military and civilian. He shall also supervise the recording of the proceedings and the preparations of the record. He shall ensure that the Privacy Act is fully complied with prior to requesting an individual to supply personal information. See JAGMAN 0202e, Appendices A-2-a and A-2-b.

b. Responsibility. The primary responsibility of counsel is to exploit all sources of information in order to disclose all facts in an impartial manner without regard to the favorable or unfavorable effect on persons concerned. The counsel is not to assume the role of prosecutor or advocate. The role of counsel is to assist the court of inquiry in its effort to discover the facts associated with the matter under examination.

8. Duty and Responsibilities of Counsel for Party. It is the duty of counsel to represent the party to the best of his ability to protect and safeguard the interests of the party by all ethical and legal means.

9. Party to an Investigation

a. Rights of a Party. A person duly designated a party before a court of inquiry shall be advised of and accorded the following rights:

- (1) To be given due notice of such designation.
- (2) To be present during the proceedings, except in accordance with paragraph 9b and when the investigation is cleared for deliberations.
- (3) To be represented by counsel.
- (4) To be informed of the purpose of the investigation and provided with a copy of the appointing order.

(5) To examine and to object to the introduction of physical evidence and written statements.

(6) To object to the testimony of witnesses and to cross-examine witnesses.

(7) To request that the court of inquiry obtain documents and testimony of witnesses or pursue additional areas of inquiry. See paragraph 11f below.

(8) To introduce evidence.

(9) To not be called as a witness, but to testify at his own request.

(10) To refuse to incriminate himself; if accused or suspected of an offense, to be informed of the nature of the accusation and advised that he does not have to make any statement regarding the offense of which he is accused or suspected; and that any statement made by him may be used as evidence against him in a trial by court-martial. See paragraph 12d below.

(11) To make a voluntary statement, sworn or unsworn, oral or written, to be included in the record of proceedings.

(12) To make an argument at the conclusion of the presentation of evidence.

(13) To be properly advised concerning the Privacy Act of 1974.

(14) To challenge members of the court of inquiry for cause stated to the court, Article 135(d), UCMJ. See paragraph 10f below.

b. Waiver of Rights of a Party. Advice as to the nature of any offense of which accused or suspected, to the right to refrain from making any statement regarding such offense, and the possible adverse use against him of any statement in a trial by court-martial may not be omitted. See Article 31(b), UCMJ, and paragraph 10d below. Any statement regarding the origin, incurrence, or aggravation of a disease or injury is invalid unless warnings in accordance with paragraph 12e are given. Any other right is conclusively waived by the party's failing to exercise it, unless he has made, upon the record, a request to exercise it and such request has been denied. A party to a court of inquiry may waive his right to be present during any portion of the proceedings.

c. Person on Witness Stand when Designated Party. If a person is on the witness stand at the time he is designated a party, testimony may only continue at the request of the party. See paragraph 12c of this enclosure. Prior to continuing, the person designated a party will be fully advised of the rights of a party and given reasonable opportunity to obtain counsel. See paragraph 9a above.

d. Failure to Accord Rights

(1) In cases where nonjudicial punishment is contemplated on the basis of the record of a court of inquiry before which the accused was not designated a party or accorded the rights of a party, the procedures shall be as prescribed in JAGMAN 0110d.

(2) In cases where an adverse determination respecting the contracting or incurrance of a disease or injury in line of duty or as the result of misconduct is contemplated on the basis of the record of a court of inquiry before which the person concerned was not designated a party or accorded the rights of a party, the procedures shall be as prescribed in JAGMAN 0225.

(3) In cases where a general court-martial is contemplated respecting an accused, the record of a court of inquiry before which the accused was not designated a party or accorded the rights of a party may not be used in lieu of a formal pretrial investigation of the offenses charged against the accused. See Article 32(c), UCMJ, and R.C.M. 405(b), MCM, 1984.

(4) In cases where charges have been brought against an accused before a court-martial, military commission, or other tribunal which is required fully to observe the rules of evidence as prescribed in the UCMJ and in Part III, MCM, 1984, sworn testimony contained in the record of proceedings of a court of inquiry before which the accused was not designated a party may not be received in evidence by that court-martial, military commission, or tribunal, unless such testimony is admissible independently of the provisions of Article 50, UCMJ, and Military Rule of Evidence 804.

10. Procedures

a. General. The mission of the court of inquiry shall be given primary consideration in the determination of procedural questions not expressly addressed in this instruction. The procedural rules set out in MCM, 1984, for trials by courts-martial do not apply. However, where no procedure is established by this instruction, the MCM, 1984, may provide a valuable guide and should be followed unless impractical.

b. Presence of Person Designated as a Party. Any person designated as a party will be given reasonable notice as to the time and place of the meeting of the court of inquiry and his right to be present at the court. Article 135(c), UCMJ.

c. Preliminary Procedures. A court of inquiry shall assemble at the place and, as nearly as practicable, at the time designated in the appointing order. Thereafter, the court may convene any particular session at any time and place, when desirable, and convenient to the court. The members shall take their seats in the same order as on courts-martial. Courts of inquiry are usually cleared of all spectators and parties until

the manner of proceeding is decided. Normally, counsel for the court will not withdraw when the court is cleared for preliminary procedures. A record of meetings to establish preliminary procedures is not required.

d. Meeting of the Court

(1) Sessions. The proceedings will be public unless the convening authority or the court, for security reasons or other good cause stated in the record, directs that the entire proceeding or any portion thereof be closed to the public. The closure of the inquiry to the public will not exclude the parties to the inquiry or their counsel from the court. If the matter to be heard requires a security clearance and a party or counsel has not been granted such clearance, the convening authority shall be advised thereof; see paragraph 12-12, Department of the Navy Information and Personnel Security Program Regulation, OPNAVINST 5510.1H. If such a person or civilian counsel is not so cleared, JAGMAN 0144b shall be followed.

(a) Clearing the court. The court may be cleared at any time for deliberation or consultation, whereupon the parties and their counsel and spectators will withdraw. A record of closed sessions is not required. Counsel for the court will also withdraw unless requested to remain. During an open hearing when numerous spectators are present, as a matter of convenience the court may withdraw to another room for deliberation or consultation.

(b) Spectators and publicity. Neither the public nor the news media will make a tape recording, video tape recording, photograph, broadcast, or televise the court proceedings. A party may tape record proceedings only with the prior approval of the convening authority. The president of the court should make clear this requirement by appropriate means. Violation of this rule constitutes grounds for barring violators from subsequent sessions of the investigation.

(2) Recess and adjournment. Courts may recess or adjourn for such period as may be necessary without permission of the convening authority. If, however, the adjournment is for more than three days, the convening authority shall be informed by the president.

(3) Presence of party and counsel. As soon as the court has determined the manner of proceedings and whether the court will be open or closed to the public, each party named in the appointing order and their counsel shall be called before the court. Parties may be called individually, in groups, or all at the same time. Unless waived, the appointing order shall be read to the party or parties before the court. The rights of a party, as set forth in paragraph 9a of this enclosure shall be fully explained by the counsel for the court. The record may state simply that the appointing order was read or the reading thereof waived, but advice as to rights shall be reported verbatim. If any party is not represented by counsel and desires such

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representation, the court shall recess for a reasonable time to allow counsel to be appointed or retained. If it is essential that the court take testimony which might otherwise become unobtainable, then, in lieu of recessing, the court shall arrange for the appointment of counsel (qualified under Article 27(b), UCMJ) to represent the party until he can obtain the attendance of detailed counsel or counsel of choice and proceed with the taking of such testimony.

(4) Absence of counsel from the court. If the counsel for the court is absent and there is an appointed assistant counsel who is certified under Article 27(b), UCMJ, the assistant counsel may, in the discretion of the court, act as counsel and the proceedings may continue. Otherwise, the court shall adjourn, report the absence to the convening authority, and await the return of counsel or the appointment of a new counsel.

(5) Absence of the president or a member. After receiving evidence the court may, in the absence of a member, proceed with the inquiry only if authorized and directed to do so by the convening authority. Convening authorities should only direct the court to proceed when the absence will unreasonably delay the proceedings. The convening authority will state his reasons for so directing in his action on the proceedings. Even if directed to proceed by the convening authority, unless at least three members and a majority of the total membership are present, no business other than an adjournment shall be transacted. If the absence of a member will unreasonably delay a court of inquiry, the convening authority may appoint additional members to ensure that at least three members will be present and direct the court to proceed. Any such action is extreme and convening authorities are cautioned to make substantial efforts to allow the court to go forward with the original members prior to substituting a new member. See paragraph 4c(2). The convening authority will state his reasons for appointing new members and direction for the court to proceed in his action on the proceedings.

(6) Substituted members. Any substituted or additional member appointed after evidence has been received shall examine the record of the proceedings conducted prior to his sitting as a member and such examination shall be noted on the record. Any new member shall be subject to challenge as provided for in paragraph 10f below. After examination, each substituted and additional member shall participate fully in the subsequent proceedings of the court and in its deliberations relative to findings of fact, opinions, and recommendations.

(7) Temporary absence. Temporary absences should be discouraged by the convening authority, however; if a member is absent, the record of that part of the proceedings conducted in a member's absence shall be examined by the member and such examination noted in the record. Such temporary absence does not preclude that member's full participation in the deliberations of the court relative to findings of fact, opinions, and recommendations.

Enclosure (1)

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e. Oaths

(1) General. The members, the reporter, and the interpreter will take an oath or affirmation to faithfully perform their duties. Article 135(e), UCMJ.

(2) Witnesses. All persons who testify before a court of inquiry will be examined under oath or affirmation. Article 135(f), UCMJ.

(3) Administering Oaths. The president and the counsel for the court of inquiry have the authority to administer oaths (enclosure (6)) throughout the court of inquiry proceedings. See Article 136(b), UCMJ.

f. Challenges. A member of a court of inquiry may be challenged by a party only for cause. Article 135(d), UCMJ.

(1) The challenge. Any member of a court including the president may be challenged at any time during the proceedings for good cause stated to the court. The court will not receive a challenge to more than one member at a time. After disclosing his ground for challenge, the party may examine the member concerning that ground. This examination may or may not be under oath, at the discretion of the challenging party, but it shall be recorded verbatim. Counsel for the court may cross-examine the challenged member. After such examination and cross-examination, any other evidence bearing on the basis for challenge will be heard.

(2) Grounds for challenges. The president or a member shall be excused for cause whenever it appears that the individual challenged:

(a) Is not a commissioned officer;

(b) Has not been properly detailed in the appointing order;

(c) Will be a witness;

(d) Has formed a definite opinion as to cause of the incident prior to hearing evidence presented to the court of inquiry; or

(e) Should not sit to ensure a court of inquiry free from substantial doubt as to fairness and impartiality.

(3) Decision on challenge. The burden of establishing the ground for challenge is on the party who made the challenge. The challenged member shall withdraw with all other persons during the court's consideration of the challenge. The remaining members may discuss the challenge in closed session prior to voting. The court decides the challenge according to the preponderance of the evidence. JAGMAN 0213b(1) defines preponderance of evidence. A majority or tie vote disqualifies

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the challenged member. A sustained challenge will be immediately reported to the convening authority. If the challenge reduces the number of members below the statutory minimum of three, the court will adjourn until the convening authority appoints another member. If the membership is not reduced below three, the court may proceed with its inquiry unless otherwise directed by the convening authority. If a challenge to the president is sustained, the next senior officer becomes president.

g. Order of Presentation. Witnesses and evidence are usually presented in the following order: counsel for the court; a party; counsel for the court in rebuttal; and as requested by the court. The order of examining each witness is usually direct examination, cross-examination, redirect examination, recross-examination, and examination by the court. Each witness will then be permitted to make a statement relating to matters pertinent to the inquiry not previously brought out in his testimony. Thereafter, counsel for the court or counsel for the parties will be permitted to examine the witness further concerning these matters as well as any matters touched upon in court.

h. Suspension of Proceedings. If at any time during the course of the investigation it appears that the intentional act or acts of a deceased servicemember were a contributory cause of the incident, the president of the court of inquiry will suspend any further proceedings and immediately notify the convening authority. The convening authority will, in turn, notify the Judge Advocate General of the preliminary findings regarding the deceased. The Judge Advocate General will advise the convening authority of additional measures, if any, that need to be implemented in order to ensure a fair hearing regarding the deceased's actions. The president will proceed with the investigation only when directed to do so by the convening authority.

i. Visiting the Scene of Incident. When practicable, it may be desirable to visit the scene of the incident to acquaint the court with the physical characteristics of the scene. Usually, testimony is not taken at the scene. The court should normally be accompanied by counsel for the court, parties and their counsel, and the reporter, but any party may waive attendance by themselves or their counsel.

j. Examination of Previous Record by Party Designated During Proceedings. The record of proceedings to the point the investigation has progressed will be made available for examination by a newly designated party and his counsel. Such a party may request that specified witnesses who have previously testified be recalled for cross-examination. If circumstances do not permit the recalling of a witness, evidence may be obtained from that witness by a sworn statement. In the absence of compelling justification, investigative proceedings shall not be suspended pending the obtaining of any such statement.

k. Designation of a Party Senior to a Member During Proceedings. Should an officer senior to any member be designated a party during the proceedings, the convening

authority shall be notified so that the membership can be revised in accordance with the seniority principle, if legally permissible. See paragraph 4c(2) above. Whenever it is not possible to adhere to the seniority principle in membership, the convening authority shall set forth the reasons in his action on the record of proceedings. The seniority principle is not applicable to counsel.

1. **Previous Testimony of Witness Thereafter Designated as a Party.** Any testimony given by a person as a witness prior to his designation as a party remains in the record and is considered and used thereafter without regard to his subsequent designation as a party.

m. **Unsworn Statements.** Regardless of whether a party has previously testified as a witness, the party may make an unsworn statement to the court after all the witnesses have testified, all evidence received and before arguments. The party may not be cross-examined upon this unsworn statement. Counsel for the court or any of the other parties to the inquiry may, however, introduce evidence to rebut any statements of fact contained therein. The statement may be oral or written, and may be made by the party or his counsel. The statement should be factual, and not argumentative, in nature.

n. **Arguments.** After the testimony and statements by the parties, if any, counsel for the court and counsel for the parties may present argument if they so desire. The impartial role of the counsel for the court shall not be abandoned. If counsel for the court presents argument, his remarks should be in the nature of a summation of the evidence rather than partisan advocacy. Counsel for the court has the right to make the opening argument and, if any argument is made on behalf of a party, the closing argument in rebuttal. If multiple parties have been designated, their counsel shall present argument in the reverse order of seniority, the most junior party presenting the first argument. The court may set any reasonable limitation on the length of arguments.

11. Evidence

a. **Rules of Evidence.** Proceedings under this instruction are administrative and not judicial. Therefore, the Military Rules of Evidence--other than Military Rules of Evidence 301, 302, 303 and 501-507--will not be followed. See JAGMAN 0213 and paragraph 13 of this enclosure as to the standard of proof required to support findings of fact.

b. **Objections to Evidence.** Any member, the counsel for the court, a designated party, counsel for a party or the president may object to the court of inquiry considering any evidence. The reason for the objection will be stated on the record.

c. **Rulings.** A court of inquiry is an administrative fact-finding body and as such it is inappropriate except as detailed in this paragraph for the president to rule on objections to

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evidence. Rather, the objection should be noted for the record. The president may rule, subject to objection detailed in paragraph 11d below, on the following matters:

(1) Relevancy. Any information relevant to the investigation may be brought before the court of inquiry. Relevant information means information having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. The president may rule that evidence is not relevant and exclude its consideration by the court.

(2) Military Rules of Evidence. The President will make rulings on objections to the court considering evidence when the objection is based upon the following Military Rules of Evidence: 301, compulsory self-incrimination; 302, mental examination; 303, degrading questions; 501-504, dealing with privileges; 505, classified information; 506, government information other than classified information; and 507, informants. In ruling on objections the President will be guided by this instruction and the discussion of the above rules in the Manual for Courts-Martial, 1984, in rendering a ruling.

d. Objections to Rulings. Should counsel to the investigation or for a party object to a ruling, the objections will be noted for the record. Should a member object to the president's ruling on any matter, a vote shall be taken in closed session and the decision of the majority shall govern. The court in closed session may discuss the matter prior to voting. The president and all members will vote on the issue. In the case of a tie vote, the decision of the president shall govern. The objection and the results of the vote will be noted for the record.

e. Obtaining Information. Whenever it appears desirable to members of the court that certain information be elicited or developed in the interest of establishing or clarifying any matter, the president will so advise counsel for the court and may direct counsel to call witnesses, to pursue further lines of questioning, or to adduce other evidence. The president and other members of the court may examine witnesses upon completion of examination by counsel.

f. Request for the Production of Evidence by a Party. Whenever a party desires the court obtain documents or evidence that the party is unable to obtain or desires that information be elicited or developed in the investigation in the interest of establishing or clarifying any matter, a party or the counsel for a party may so request of the president. Such requests are subject to objection, see paragraphs 11b, c and d. If such matters are found to be admissible, the president will direct counsel for the court to obtain the requested documents or witnesses or pursue further lines of inquiry.

g. Depositions. The method of taking and authenticating depositions to be received in evidence before courts of inquiry will be as prescribed in Article 49, UCMJ. If there is any likelihood that the deposition might be required in a subsequent court-martial proceeding, the procedures should comply with R.C.M. 702.

h. Admissibility of Former Testimony. Former testimony admissible under Military Rules of Evidence 804(b)(1) may be received by a court of inquiry.

12. Witnesses

a. General. Witnesses may be summoned to appear and testify before a court of inquiry as provided for in trials by court-martial (R.C.M. 703(e)(2)). Article 135(f), UCMJ. Counsel for the court, any party, and counsel for any party may interview any witness at any time, regardless of whether such witness has previously testified.

b. Refusal To Appear and Testify. Any person not subject to the UCMJ who has been duly subpoenaed to appear as a witness before any court of inquiry, who has been duly paid or tendered the fees and mileage of a witness at the rates allowed to witnesses attending the courts of the United States, and who willfully neglects or refuses to appear, or refuses to qualify as witness, to testify, or to produce any evidence that person may have been legally subpoenaed to produce, is guilty of an offense against the United States and may have a warrant of attachment served upon them to compel their attendance as a witness. Article 47, UCMJ. However, a warrant of attachment (see R.C.M. 703) to compel the witness' attendance before the court shall not be issued by a court of inquiry without prior approval of the Secretary of the Navy (Judge Advocate General). JAGMAN 0138 and 0139 apply. The Judge Advocate General will conduct all liaison with the Justice Department or individual United States Attorney to serve any warrants of attachment.

c. Person Designated as a Party. Any person designated as a party may at his request, but not otherwise, become a witness before the court of inquiry. A party's failure to make such a request will not create any presumption against the party. If a party elects to testify, it will be under oath or affirmation, as with any other witness.

d. Compulsory Self-Incrimination Prohibited

(1) Compelling testimony. No witness shall be compelled to incriminate himself or to answer any question the answer to which may tend to incriminate him; nor shall he be compelled to make any statement or produce evidence if the statement or evidence is not material to any issue under investigation and may tend to degrade him. See Article 31(a) and (c), UCMJ, and Military Rules of Evidence 305.

(2) Warning. If a person called as a witness before a court of inquiry is suspected of or charged with an offense, the person shall be informed of the nature of the offense and the subject matter of the inquiry. Often, particularly in the early stages of an investigation, the specific nature of any suspected offenses is unclear. Care must be taken in such cases to tailor the warning to at least alert an individual in general terms of the nature of any suspected offenses. The person shall also be advised of the right that he does not have to make any statement or give any testimony regarding the offense of which suspected or accused, and that any statement or testimony made may be used as evidence in any subsequent trial. Article 31(b), UCMJ. After being so informed, the right to refrain from testifying regarding the offense of which suspected or charged must be claimed by the witness. Despite his assertion of the right, the witness may be questioned on matters other than the offense of which suspected or charged.

e. Warnings Regarding Disease and Injury. A member of the Armed Forces may not be required to sign a statement relating to the origin, incurrence, or aggravation of a disease or injury that the member has suffered (JAGMAN 0215b). Any such statement without warning against interests, signed by a member, is invalid. (10 U.S.C. § 1219.) Any statement relating to the origin, incurrence or aggravation of any disease or injury that the member has suffered, which is obtained voluntarily after the member has been advised of his right not to sign such a statement, is valid and may be used in connection with the subject matter of the inquiry. JAGMAN Appendix A-2-f is recommended for use, as required, in recording such warning.

f. Examination of Witnesses

(1) Witnesses may be examined by counsel for the court of inquiry and by members of the court.

(2) Any person designated as a party will have the right to cross-examine witnesses. Article 135(c), UCMJ.

(3) The court of inquiry in its discretion may direct witnesses subject to naval authority not to discuss their testimony with other witnesses or persons without an official interest in the matter until the investigation is completed. Other witnesses may be requested, in a similar manner, not to discuss their testimony. This warning may be given to ensure that the matter before the court of inquiry can be fairly heard and to eliminate the possibility that disclosures of the substance of the testimony may influence the testimony of witnesses still to be heard.

g. Exclusion of Witnesses. Witnesses, other than a party, ordinarily should be excluded from hearings except when they are testifying. In some cases, expert witnesses (who did not witness the actual events of an incident but are called upon to testify for their technical expertise) may not be able to testify in an informed manner unless they are fully aware of all the

circumstances of the incident under inquiry. In such instances, it may be necessary to allow such experts to be present during the open sessions of the court in order that they may be sufficiently advised of the facts to give informed testimony as to the technical aspects of the incident. In these instances, the record must affirmatively show that the witness was present during the testimony of other witnesses.

13. Written Report by the Court of Inquiry

a. Report by the Court. After all the evidence, statements, and arguments have been received, the court shall declare the inquiry closed. The president and members of the court will then consider the evidence, statements, and arguments, and the instructions contained in the appointing order shall be carefully reexamined and scrupulously followed. At the request of the court, counsel shall assist in the preparation of the findings of fact, opinions, and recommendations, or any part thereof. In so acting, counsel merely assists the court in the transcription of their report. Counsel is prohibited from taking part in any deliberations. The report of findings of fact, opinions, and recommendations shall become a part of the record. Dissenting views are authorized if the findings of fact, opinion, or recommendations are not unanimous. See enclosure (7).

b. Findings of Fact. The court, after deliberating on the evidence received during the inquiry, shall first record the facts found that constitute a detailed description of the matter investigated. Care shall be taken to include only those findings of fact which the court believes are established by a preponderance of the evidence. JAGMAN 0213b(1) defines preponderance of the evidence as it is to be applied in establishing each finding of fact. If, however, it appears to the court that the actions of a deceased servicemember may have caused a loss of life, including his own, or the loss of property by intentional or criminal acts, such findings of fact must be established by clear and convincing evidence as defined in JAGMAN 0213b(2). The clear and convincing burden pertains to the establishment of those findings of fact which describe the activities or actions of the deceased member. This more demanding burden of proof is required because the deceased servicemember is unavailable to speak in his own behalf.

c. Opinions. If opinions are called for in the appointing order or required by regulations, the court shall list all of its opinions drawn from and supported by the facts. Each opinion will clearly indicate which of the findings of fact supports the opinion. Depending upon the nature of the inquiry and the provisions of the appointing order, opinions include inferences drawn from the facts; opinions as to performance of duty by individuals concerned or as to performance of functions by equipment involved; and opinions required by regulations. No opinion will ever be expressed concerning line of duty or attributing misconduct, as defined in JAGMAN 0218, to a deceased.

d. **Recommendations.** When the appointing order calls for recommendations, the court shall make such recommendations as are specifically directed and any others that, in its view, are appropriate and advisable in view of the nature of the facts found and opinions expressed. If any member of the court recommends trial by court-martial, only the general nature of the charges shall be stated. Under no circumstances will a charge sheet be signed and sworn to by the president or any member who has so recommended. If a punitive letter of reprimand or admonition is recommended, a draft of the recommended letter will be prepared and forwarded with the record of proceedings. If a nonpunitive letter is recommended, a draft may be prepared and separately forwarded to the appropriate commander for issuance, but such a draft will not be included as a part of the record of proceedings. See JAGMAN Appendices A-1-a and A-1-g for examples of punitive and nonpunitive letters.

e. **Disagreement Among Members.** The report of the court shall be based upon the opinion of the majority. If a member does not concur with the findings of fact, opinions, or recommendations of a majority of the court, the nonconcurring member shall append a minority report to the record and state explicitly those parts of the majority report with which he disagrees and the reasons therefor. The minority report may also include additional findings of fact, and where appropriate, opinions, or recommendations. See enclosure (7).

f. **Disclosure of Decision.** No member, the president or counsel for the court, or other person officially connected with the inquiry, shall disclose or publish any findings, opinions, or recommendations of the court or of the individual members without prior approval of the convening authority. With the exception of the convening authority and subsequent reviewers in the convening authority's chain of command, no copies of the report of proceedings may be provided to any person, including parties, without the approval of the Secretary of the Navy (Judge Advocate General).

14. Record of the Court of Inquiry

a. **Authentication.** Each court of inquiry will keep a written record of its proceedings, that will be authenticated by the signatures of the president and counsel for the court. All concurring members, if available, shall sign the record immediately under the findings of fact, opinions, and recommendations. This includes an officer who participated in only part of the proceedings (provided he participated at the time of the findings). Such limited participation shall be disclosed in the record of proceedings. In the case of a minority report, the respective reports must be signed by all the members of the court concurring therein, if available. In case the record cannot be authenticated by the president, it shall be signed by a member in lieu of the president, and in case the record cannot be authenticated by the counsel for the court, it shall be signed by at least one other member. Article 135(h), UCMJ. If members authenticate the record in lieu of the presi-

dent or counsel, the reason will be stated in an addendum to the record.

b. **The Record of Proceedings of a Court.** The record of proceedings of a court shall include the original appointing order and any other communications from the convening authority. It shall contain the verbatim testimony of all witnesses, all exhibits reviewed in evidence by the court, and all proceedings of the court except that, in the discretion of the court, arguments presented on behalf of the Government and any party to the inquiry may be summarized. A copy of the findings of fact, opinions, and recommendations shall be prefixed to the record. See enclosure (7).

c. **Forwarding.** The record of proceedings, together with the number of complete copies required by the circumstances, shall be forwarded to the convening authority by the president using a short letter of transmittal. See enclosure (8).

d. **Privacy Act Compliance.** If at any time during the proceedings an individual is requested by a Government representative to supply personal information, compliance with the Privacy Act is mandatory. The record of proceedings must reflect the foregoing compliance. JAGMAN Appendix A-2-a should be utilized.

e. **Reviewing Authority.** See JAGMAN 0209 and 0210.

f. **Sample Record.** The sample record of proceedings of a court of inquiry in enclosure (7) may be used as a guide in the conduct of the proceedings of a court of inquiry. Nothing in the sample record, however, shall be considered as authority to depart from the provisions of this instruction. Deviations from the sample proceedings, when not inconsistent with the provisions of this instruction, may be made when appropriate and necessary to execute the primary mission of the court of inquiry more effectively. When procedural steps are taken that are not covered in the sample record, the provisions of Appendix 8, MCM, 1984, may be consulted for general guidance.

15. Revision

a. **General.** If not satisfied with the investigation, or with the report of findings, the convening authority may reassemble the court of inquiry, and return the proceedings with direction to:

(1) Have the investigation pursued further, directing that the report of the facts be made more detailed, that opinions be expressed in terms more definite and unequivocal, or that the investigation be more responsive to the original instructions.

(2) Correct some other error or defect, or supply some omission.

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b. Evidence in Revision. A court of inquiry is not a trial but merely an investigation. Therefore, the court may properly be required, upon revision, to reexamine witnesses, take entirely new testimony or obtain other new evidence.

c. Procedures in Revision. The president, members, counsel for the court, parties and counsel for the parties will reassemble. The president shall read the direction from the convening authority. Thereafter the rules regarding procedures, evidence and witnesses detailed in paragraphs 10-12 of this enclosure shall be adhered to.

d. Record in Revision. The court will make a written report and record of the proceedings in revision as detailed in paragraphs 13 and 14 of this enclosure. The record in revision will be attached to the original record. The court may change a finding of fact, opinion or recommendation as part of a hearing in revision. Such a change will be detailed in the report of revision, but the finding of fact, opinion or recommendation as originally determined will remain a part of the record. Dissenting opinions may be made to any change or new finding of fact, opinion or recommendation in the manner detailed in paragraph 13e of this enclosure.

**FACT-FINDING BODIES REQUIRED
TO CONDUCT A HEARING**

This instruction prescribes the rules and procedures concerning fact-finding bodies requiring a hearing before multiple officers or a single officer.

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1. Jurisdiction. Fact-finding bodies that require a hearing may be convened to investigate any matter, whether or not the persons involved have requested such an inquiry. In most cases, a one-officer, fact-finding body without a hearing requirement will ensure adequate and timely inquiry. Additional guidance concerning selection of the appropriate fact-finding body is provided in Chapter II of JAGMAN.

2. Authority to Convene. Any person authorized to convene general or special courts-martial may appoint a fact-finding body required to conduct a hearing. See JAGMAN 0204c.

3. Composition. Membership should normally consist of a single commissioned officer. If multiple members are considered to be desirable the need for a court of inquiry should be evaluated. The membership shall be constituted as follows:

a. One Officer Fact-Finding Body. A one officer fact-finding body required to conduct a hearing should normally consist of one commissioned officer, but may consist of a civilian employee when the convening authority considers it appropriate. Whenever practical, an investigating officer should be at least a Navy lieutenant commander, Marine Corps major, or GS-13 and senior in rank to any designated party.

b. Multiple Membership of a Fact-Finding Body. A fact-finding body required to conduct a hearing may consist of two or more commissioned officers. When practical, the senior member should be at least a Navy lieutenant commander or a Marine Corps major. When the convening authority considers it appropriate, warrant officers, senior enlisted persons, or civilian employees of the Department of the Navy may be assigned as members, in addition to at least one commissioned officer. The senior commissioned officer shall be the president. Whenever practical, no member of a fact-finding body should be junior in rank to any person whose conduct or performance of duty will be subject to inquiry.

c. Counsel for the Fact-Finding Body. The convening authority should appoint a counsel certified under Article 27(b), and sworn in accordance with Article 42(a), UCMJ, for the fact-finding body. Counsel is required to act in a fair and impartial manner and will not assume an adversarial role. Counsel duties are to assist the fact-finding body in matters of law, presentation of evidence, and in the keeping and preparation of the record. Assistant counsel may also be appointed. Assistant counsel need not be certified under Article 27(b), UCMJ.

d. Parties

(1) General. A "party" before a fact-finding body required to conduct a hearing is a person subject to the UCMJ who has properly been designated as such in connection with an investigation and whose conduct is either the subject of the investigation or has a direct interest in the investigation. Upon their request to the fact-finding body, persons employed by

the Department of Defense who have a direct interest in the subject of the investigation must be designated parties. Designation as a party has significant procedural implications.

(2) Subject to investigation. A person's conduct or performance of duty is "subject to investigation" when the person is involved in the incident or event under investigation such that disciplinary action may follow, that his rights or privileges may be adversely affected, or that his personal reputation or professional standing may be jeopardized.

(3) Direct interest. A person has "direct interest" in the subject of investigation: when the findings, opinions, or recommendations of the fact-finding body may, in view of his relation to the incident or circumstances under investigation, reflect questionable or unsatisfactory conduct or performance of duty; or when the findings, opinions, or recommendations may relate to a matter over which the person has a duty or right to exercise official control.

(4) Reserve applicability. Any member of the Naval or Marine Corps Reserve not subject to the UCMJ by virtue of his status whose conduct or performance of duty is subject to inquiry may, upon request to the convening authority, be designated a party before the fact-finding body.

(5) Other designations of parties. No other person may be designated as a party unless expressly authorized by the Secretary of the Navy (Judge Advocate General).

(6) Who may designate. Parties are designated by the convening authority of the fact-finding body or by the fact-finding body when expressly authorized by the convening authority, subject to the following considerations:

(a) When parties are to be designated, and it is apparent at the time of the issuance of the appointing order that a person or persons must or should be designated, the convening authority should include such designation in the appointing order. The power to designate parties continues during the entire proceedings before a fact-finding body.

(b) If at any time during the course of an investigation by a fact-finding body authorized to designate parties it appears to the fact-finding body that any person not previously designated should be so designated, that person shall be informed of that determination, and shall be designated a party and shall be informed of and accorded his rights as such.

(c) If at any time during the course of an investigation by a fact-finding body not authorized to designate parties it appears that any person should be so designated the convening authority shall be so advised. The convening authority will decide if such person should be designated.

(7) Effects of designation. Designating an individual a party before a fact-finding body affords that party a hearing respecting possibly adverse information concerning his conduct or performance of duty, or relating to a matter over which he has a duty or right to exercise official control.

(8) Change in status of a party. If it no longer appears that a person previously designated as a party is involved to a material degree in the matter under investigation, his designation as a party may be withdrawn by the convening authority upon application of that party or upon the convening authority's own initiative.

e. Counsel for Parties

(1) Entitlement. Only a "party" is entitled to be represented by counsel. The convening authority will appoint counsel for military parties designated in the convening order and those military parties designated during the course of the proceedings. See paragraph 3(e)(2) for when military counsel may be appointed for civilian parties. Appointed counsel must be a person certified by the Judge Advocate General under Article 27(b), UCMJ. Any party may be represented by civilian counsel, at no expense to the Government; or by military counsel of the party's own selection, if reasonably available. The procedures detailed in JAGMAN 0131 will be used in determining availability of requested counsel. If requested military counsel is provided, appointed military counsel will be excused from further representation. Civilian counsel representing a party must be an attorney admitted to practice before the highest court of a State or a Federal District Court. If a party desires to be represented by counsel from a foreign nation, the advice of the Judge Advocate General of the Navy will be sought as to whether such counsel has the requisite qualifications.

(2) Appointed counsel for civilian party. Appointed military counsel will be provided for a civilian party only under one of the following circumstances:

(a) Doubt exists as to the mental or physical competency of the civilian party, and the civilian party is not represented by counsel capable of adequately protecting the party's interest. See paragraph e(3) below.

(b) The convening authority directs such action on the ground that under the peculiar circumstances of the case, the interests of the Government would be best served by making military counsel available to represent the civilian party.

(3) Incompetent party. When a medical officer states that an individual who is to be designated a party, whether military or civilian, is incompetent due to injuries or disease and will remain so for at least 30 days, the convening authority will ensure that counsel certified under Article 27(b), UCMJ, is appointed to represent the party during the proceeding of the

fact-finding body. Such counsel is obligated to exercise all the rights of the party as though the party were present.

4. Appointing Order

a. **Form.** Investigations under this instruction are convened by an appointing order signed by a convening authority. An appointing order must be in official letter form addressed to the senior member of a multiple member fact-finding body or to the investigating officer of a one-officer investigation. When circumstances warrant, an investigation may be convened on oral or message orders. Signed, written confirmation of oral or message orders must be issued in each case and must be included in the investigative report.

b. **Contents of Appointing Order.** An appointing order must name, as appropriate, the member(s), counsel for the fact-finding body, the parties, counsel for the parties, and support personnel. It shall specify the time and place for initial meeting. It shall recite specific purposes of the inquiry and contain explicit instructions about the scope of the inquiry. Inasmuch as the information developed by a fact-finding body is used not only by the convening authority, but also by authorities remote from the command, an appointing order should contain sufficient instructions to ensure accomplishment of the purposes for which the fact-finding body was convened. It must direct the fact-finding body to report findings of fact, and at the convening authority's discretion, opinions and recommendations. It must require that the president suspend the proceedings of the court and advise the convening authority when it appears that the intentional acts of a deceased servicemember were a contributing cause to the incident under investigation. It must state whether or not the fact-finding body has authority to designate parties, and the scope of that authority. The appointing order may in appropriate cases provide for the appointment of interpreters. An appointing order must contain directions for complying with the Privacy Act. A convening authority may require a verbatim record of all or only specific parts of the proceedings by a fact-finding body. For an example of an appointing order for a fact-finding body required to conduct a hearing, see enclosures (4) and (5)).

c. Additional Matters

(1) If exigencies of the service require that an officer junior to a party sit as a member, the reason for this will be stated in the appointing order, or in the convening authority's action on the record.

(2) The convening authority may amend the appointing order at any time to limit or increase the scope of the inquiry, to name additional parties, or to provide additional instructions. See enclosure (5) for an example. The counsel to the investigation may be changed at any time. Prior to the receiving of evidence by the investigation the convening authority can amend the appointing order at any time to change the investigat-

ing officer, president, or members. After an investigation has received evidence, changes in membership should normally only be made because of physical disability, military exigency, to adhere to the seniority principle in membership and other extraordinary circumstances which render the investigating officer, president, or a member unable to proceed within a reasonable time. Replacement should not occur to correct temporary inconveniences which are incident to normal conditions of military life. The convening authority in his action on the record of proceedings shall set forth the reasons for any change in the membership after the receipt of evidence. See paragraph 10d(5) and (8) for procedures.

(3) On occasion, it may be advantageous to forward an advance copy of the appointing order to interested superiors so that they may be apprised of significant occurrences and actions being taken.

(4) If an investigation is convened primarily or as one of its purposes to gather information to adjudicate an administrative claim by or against the United States under the Federal Tort Claims Act, to examine a potential admiralty claim by or against the United States, or for purposes of litigation by or against the United States, the investigation must comply with Chapters VIII and XII of the JAG Manual. See JAGMAN 0211c for special language to be included in the appointing order.

d. Communication with the Convening Authority. If at any time during the course of the proceedings it should appear from the evidence that the convening authority might consider it advisable to enlarge or restrict the scope of the inquiry, alter the composition of the court (whether by augmentation or substitution), cancel or otherwise modify instructions set forth in the appointing order, or provide for additional, appropriate safeguards to ensure a fair hearing regarding a deceased servicemember's action a report should be made to the convening authority by the president or investigating officer. Recommendations may be included in the report. The convening authority may take such action on this report as deemed appropriate. Copies of all such communications and replies should be appended to the record.

5. Duties and Responsibilities of the Investigating Officer or President. Attendance at the proceedings of a fact-finding body is the primary duty of the officer appointed as single investigating officer or president of a multiple member fact-finding body. The investigating officer or president shall preserve order, decide upon administrative matters relating to the routine business of the fact-finding body, and, where authorized by this enclosure, make rulings. He may recess, grant continuances, or adjourn the fact-finding body to meet at a time or place that will be most convenient and proper.

6. Duties and Responsibilities of the Members. Attendance at the proceedings of a fact-finding body is the primary duty of an officer appointed a member. No member shall fail to attend at

the designated time and place unless prevented by illness, ordered away, or excused by competent authority.

7. Duties and Responsibilities of the Counsel for the Investigation

a. Duties. Counsel for the investigation is under the direct supervision of the investigating officer or the president of the multiple fact-finding body. Counsel shall call witnesses and conduct the direct examination of all witnesses except those requested or called by a party. He shall arrange for a place for the fact-finding body to meet and if not provided by the convening authority for the assistance of custodians, security officers, reporters, interpreters, orderlies, and clerical assistants. He shall administer the oath or affirmation to all members, reporters, interpreters, and witnesses, and when appropriate shall advise witnesses and parties under Article 31, UCMJ. He shall arrange for the attendance of all witnesses, both military and civilian. He shall also supervise the recording of the proceedings and the preparations of the record. He shall ensure that the Privacy Act is fully complied with prior to requesting an individual to supply personal information. See JAGMAN 0202e, Appendices A-2-a, and A-2-b.

b. Responsibility. The primary responsibility of counsel is to exploit all sources of information in order to disclose all facts in an impartial manner without regard to the favorable or unfavorable effect on persons concerned. The counsel is not to assume the role of prosecutor or advocate. The role of counsel is to assist the investigation in its effort to discover the facts associated with the matter under examination.

8. Duty and Responsibilities of Counsel for Party. It is the duty of counsel to represent the party to the best of his ability, to protect and safeguard the interests of the party by all ethical and legal means.

9. Party to an Investigation

a. Rights of a Party. A person duly designated a party before a fact-finding body shall be advised of and accorded the following rights:

- (1) To be given due notice of such designation.
- (2) To be present during the proceedings, except in accordance with paragraph 9d and when the investigation is cleared for deliberations.
- (3) To be represented by counsel.
- (4) To be informed of the purpose of the investigation and provided with a copy of the appointing order.
- (5) To examine and to object to the introduction of physical evidence and written statements.

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(6) To object to the testimony of witnesses and to cross-examine witnesses.

(7) To request that the investigation obtain documents and testimony of witnesses, or pursue additional areas of inquiry. See paragraph 11f below.

(8) To introduce evidence.

(9) To not be called as a witness, but to testify at his own request.

(10) To refuse to incriminate himself; if accused or suspected of an offense, to be informed of the nature of the accusation and advised that he does not have to make any statement regarding the offense of which he is accused or suspected; and that any statement made by him may be used as evidence against him in a trial by court-martial. See paragraph 12d below.

(11) To make a voluntary statement, sworn or unsworn, oral or written, to be included in the record of proceedings.

(12) To make an argument at the conclusion of the presentation of evidence.

(13) To be properly advised concerning the Privacy Act of 1974.

(14) To challenge the investigating officer or, when assigned, the president and any member of the fact-finding body for cause stated to the fact-finding body. See paragraph 10f below.

b. Waiver of Rights of a Party. Advice as to the nature of any offense of which accused or suspected, to the right to refrain from making any statement regarding such offense, and the possible adverse use against him of any statement in a trial by court-martial may not be omitted. See Article 31(b), UCMJ and paragraph 12d below. Any statement regarding the origin, incurrence, or aggravation of a disease or injury is invalid unless warnings in accordance with paragraph 12e are given. Any other right is conclusively waived by the party's failure to exercise it, unless he has made, upon the record, a request to exercise it and such request has been denied. A party to an investigation may waive his right to be present during any portion of the proceedings.

c. Person on Witness Stand when Designated Party. If a person is on the witness stand at the time he is designated a party, testimony may only continue at the request of the party. See paragraph 12c of this enclosure. Prior to continuing, the person designated a party will be fully advised of the rights of a party and given reasonable opportunity to obtain counsel. See paragraph 9a above.

d. Failure to Accord Rights

(1) In cases where nonjudicial punishment is contemplated on the basis of the record of an investigation before which the accused was not designated a party or accorded the rights of a party, the procedures shall be as prescribed in JAGMAN 0110d.

(2) In cases where an adverse determination respecting the contracting or incurrance of a disease or injury in line of duty or as the result of misconduct is contemplated on the basis of the record of an investigation before which the person concerned was not designated a party or accorded the rights of a party, the procedures shall be as prescribed in JAGMAN 0225.

(3) In cases where charges have been brought against an accused before a court-martial, military commission, or other tribunal which is required fully to observe the rules of evidence as prescribed in the UCMJ and in Part III, MCM, 1984, sworn testimony contained in the record of proceedings of a fact-finding body required to conduct a hearing before which the accused was not designated a party may not be received in evidence by that court-martial, military commission, or tribunal, unless such testimony is admissible independently of the provisions of Article 50, UCMJ, and Military Rule of Evidence 804.

10. Procedures

a. General. The mission of the fact-finding body required to conduct a hearing shall be given primary consideration in the determination of procedural questions not expressly addressed in this instruction. The procedural rules set out in enclosure (1) for courts of inquiry and in the MCM, 1984, for trials by courts-martial do not apply. However, where no procedure is established by this instruction, enclosure (1) and the MCM, 1984, may provide valuable guidance and should be followed unless impractical.

b. Presence of Person Designated as a Party. Any person designated as a party will be given reasonable notice as to the time and place of the meeting of the fact-finding body and their right to be present at the meeting.

c. Preliminary Procedures. The fact-finding body and counsel to the investigation shall assemble at the place, and as nearly as practicable, at the time designated in the appointing order. Thereafter the investigation may convene any particular session at any time and place, when desirable, and convenient to the fact-finding body. If multiple members are assigned, the members shall take their seats in the same order as on courts-martial. The investigation is usually cleared of all spectators and parties until the manner of proceeding is decided. Normally, counsel for the investigation will not withdraw when the hearing is cleared for preliminary procedures. A record of meetings to establish preliminary procedures is not required.

d. Meeting of the Fact-Finding Body

(1) Sessions. The proceedings will be public unless the convening authority or the fact-finding body, for security reasons or other good cause stated in the record, directs that the entire proceeding or any portion thereof be closed to the public. The closure of the inquiry to the public will not exclude the parties to the inquiry or their counsel from the investigation. If the matter to be heard requires a security clearance and a party or counsel has not been granted such clearance, the convening authority shall be advised thereof; see paragraph 12-12, Department of the Navy Information and Personnel Security Program Regulation, OPNAVIST 5510.1H. If such a person or civilian counsel is not so cleared, JAGMAN 0144b shall be followed.

(a) Clearing the investigation hearing. The investigation may be cleared at any time for deliberation or consultation, whereupon the parties and their counsel and spectators will withdraw. A record of closed sessions is not required. Counsel for the investigation will also withdraw unless requested to remain. During an open hearing when numerous spectators are present, as a matter of convenience the fact-finding body may withdraw to another room for deliberation or consultation.

(b) Spectators and publicity. Neither the public nor the news media will make a tape recording, video tape recording, photograph, broadcast, or televise the investigative hearing. A party may tape record proceedings only with the prior approval of the convening authority. The investigating officer or president should make clear this requirement by appropriate means. Violation of this rule constitutes grounds for barring violators from subsequent sessions of the investigation.

(2) Recess and adjournment. Investigations may recess or adjourn for such period as may be necessary without permission of the convening authority. If, however, the adjournment is for more than three days, the convening authority shall be informed.

(3) Presence of party and counsel. As soon as the fact-finding body has determined the manner of proceedings and whether the proceedings will be open or closed to the public, each party named in the appointing order and their counsel shall be called before the fact-finding body. Parties may be called individually, in groups, or all at the same time. Unless waived, the appointing order shall be read to the party or parties before the fact-finding body. The rights of a party, as set forth in paragraph 9a of this enclosure shall be fully explained by the counsel for the fact-finding body. The record may state simply that the appointing order was read or the reading thereof waived, but advice as to rights shall be reported verbatim. If any party is not represented by counsel and desires such representation, the hearing shall recess for a reasonable time to allow counsel to be appointed or retained. If it is essential that the fact-finding body take testimony which might otherwise become

unobtainable, then, in lieu of recessing, the fact-finding body shall arrange for appointment of counsel (qualified under Article 27(b), UCMJ) to represent the party until he can obtain the attendance of detailed counsel or counsel of choice and proceed with the taking of such testimony.

(4) Absence of counsel from the investigation. If the counsel for the investigation is absent and there is an appointed assistant counsel who is certified under Article 27(b), UCMJ, the assistant counsel may in the discretion of the investigating officer or president, act as counsel and the proceedings may continue. Otherwise, the hearing shall adjourn, report the absence to the convening authority, and await the return of counsel or the appointment of a new counsel.

(5) Absence of the president or a member. After receiving evidence a multiple member fact-finding body may, in the absence of a member, proceed with the inquiry only if authorized and directed to do so by the convening authority. Convening authorities should only direct the investigation to proceed when the absence will unreasonably delay the proceedings. The convening authority will state his reasons for so directing in his action on the proceedings. If the absence of a member will unreasonably delay an investigation the convening authority may appoint additional members or direct the investigation to proceed. Any such action is extreme and convening authorities are cautioned to make substantial efforts to allow the investigation to go forward with the original members prior to substituting a new member. See paragraph 4c(2). The convening authority will state his reasons for appointing new members and direction for the investigation to proceed in his action on the proceedings.

(6) Substituted members. In a multiple member fact-finding body any substituted or additional member appointed after evidence has been received shall examine the record of the proceedings conducted prior to his sitting as a member and such examination shall be noted on the record. Any new member shall be subject to challenge as provided for in paragraph 10f below. After examination, each substituted and additional member shall participate fully in the subsequent proceedings of the fact-finding body and in its deliberations relative to findings of fact, opinions, and recommendations.

(7) Temporary absence. Temporary absences of a member of a multiple member fact-finding body should be discouraged by the convening authority; however, if absent, the record of that part of the proceedings conducted in the member's absence shall be examined by the member and such examination noted in the record. Such temporary absence does not preclude that member's full participation in the deliberations of the investigation relative to findings of fact, opinions, and recommendations.

(8) Substitution of investigating officer. If it becomes necessary to replace the investigating officer of a single officer fact-finding body required to conduct a hearing

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after evidence has been received, the new investigating officer shall examine the record of the proceedings conducted prior to his sitting as investigating officer and such examination will be noted on the record. A new investigating officer is subject to challenge in accordance with paragraph 10f below. The investigating officer may recall any witness who has previously testified and will be liberal in granting a party's request that a witness be recalled.

e. Oaths

(1) General. The investigating officer, president, members, assistant counsel (if not Article 27(b), UCMJ certified and sworn in accordance with Article 42(a), UCMJ), the reporter, and the interpreter will take an oath or affirmation to faithfully perform their duties.

(2) Witnesses. All persons who testify before a fact-finding body required to conduct a hearing will be examined under oath or affirmation.

(3) Administering Oaths. The president and the counsel for the investigation have the authority to administer oaths (enclosure (6)) throughout the fact-finding proceedings. See Article 136(b), UCMJ.

f. Challenges. An investigating officer, president, or member of a fact-finding body required to conduct a hearing may be challenged by a party only for cause.

(1) Members of the Fact-Finding Body. If any party to an investigation believes the president or a member should not sit, he may present evidence to show such reason. A party may examine a member about his fitness as a member and such examination may be under oath at the discretion of the party. Following this examination, counsel for the investigation may also question the member. If requested, counsel for the fact-finding body will administer the appropriate oath from enclosure (6) prior to examination. The basis for the challenge and any testimony will be transcribed and forwarded to the convening authority.

(2) One Officer Fact-Finding Body. If a party has reason to believe that an investigating officer cannot be a disinterested investigator, he shall present any evidence or facts to support such a belief to the investigating officer. A party may examine the investigating officer about his fitness and such examination may be under oath at the discretion of the party. Following this examination, counsel for the investigation may also question the investigating officer. If requested, counsel for the fact-finding body will administer the appropriate oath from enclosure (6) prior to examination. The basis for the challenge and any testimony will be transcribed and forwarded to the convening authority.

(3) Convening Authority. The convening authority will in his discretion determine whether relief of a challenged

member, president or investigating officer is appropriate. In reaching his decision, the convening authority should consider whether the challenged member's or investigating officer's continued presence will subject the proceedings to substantial doubt as to fairness and impartiality. Copies of the communication to and the reply from the convening authority must be appended to the record.

g. Order of Presentation. Witnesses and evidence are usually presented in the following order: counsel for the investigation; a party; counsel for the investigation in rebuttal; and as requested by the fact-finding body. The order of examining each witness is usually direct examination, cross-examination, redirect examination, recross-examination, and examination by the fact-finding body. Each witness will then be permitted to make a statement relating to matters pertinent to the inquiry not previously brought out in his testimony. Thereafter, counsel for the investigation or counsel for the parties will be permitted to examine the witness further concerning these matters as well as any matters touched upon during his testimony before the fact-finding body.

h. Suspension of Proceedings. If at any time during the course of the investigation it appears that the intentional act or acts of a deceased servicemember or employee were a contributory cause of the incident, the senior member of the fact-finding body will suspend any further proceedings and immediately notify the convening authority. The convening authority will, in turn, notify the Judge Advocate General of the preliminary findings regarding the deceased. The Judge Advocate General will advise the convening authority of any additional measures which need be implemented in order to ensure a fair hearing regarding the deceased's actions. The senior member will proceed with the investigation only when directed to do so by the convening authority.

i. Visiting the Scene of Incident. When practicable, it may be desirable to visit the scene of the incident to acquaint the fact-finding body with the physical characteristics of the scene. Usually, testimony is not taken at the scene. The fact-finding body should normally be accompanied by counsel for the investigation, parties and their counsel, and the reporter, but any party may waive attendance by themselves or their counsel.

j. Examination of Previous Record by Party Designated During Proceedings. The record of proceedings to the point the investigation has progressed will be made available for examination by a newly designated party and his counsel. Such a party may request that specified witnesses who have previously testified be recalled for cross-examination. If circumstances do not permit the recalling of a witness, evidence may be obtained from that witness by a sworn statement. In the absence of compelling justification, investigative proceedings shall not be suspended pending the obtaining of any such statement.

k. Designation of a Party Senior to a Member During Proceedings. Should an officer senior to any member be designated a party during the proceedings, the convening authority shall be notified so that the membership can be revised in accordance with the seniority principle, if practicable. Whenever it is not practicable to adhere to the seniority principle in membership, the convening authority shall set forth the reasons therefor in his action on the record of proceedings. The seniority principle is not applicable to counsel.

l. Previous Testimony of Witness Thereafter Designated as a Party. Any testimony given by a person as a witness prior to his designation as a party remains in the record and is considered and used thereafter without regard to his subsequent designation as a party.

m. Unsworn Statements. Regardless of whether a party has previously testified as a witness, the party may make an unsworn statement to the fact-finding body after all the witnesses have testified, all evidence received, and before arguments. The party may not be cross-examined upon this unsworn statement. Counsel for the investigation or any of the other parties to the inquiry may, however, introduce evidence to rebut any statements of fact contained therein. The statement may be oral or written and may be made by the party or his counsel. The statement should be factual, not argumentative, in nature.

n. Arguments. After the testimony and statements by the parties, if any, counsel for the investigation and counsel for the parties may present argument if they so desire. The impartial role of the counsel for the investigation shall not be abandoned. If counsel for the investigation presents argument, his remarks should be in the nature of a summation of the evidence rather than partisan advocacy. Counsel for the investigation has the right to make the opening argument and, if any argument is made on behalf of a party, the closing argument in rebuttal. If multiple parties have been designated their counsel shall present argument in reverse order of seniority, the most junior party presenting the first argument. The fact-finding body may set any reasonable limitation on the length of arguments.

11. Evidence

a. Rules of Evidence. Proceedings under this instruction are administrative and not judicial. Therefore, the Military Rules of Evidence--other than Military Rules of Evidence 301, 302, 303 and 501-507--will not be followed. See JAGMAN 0213 and paragraph 13 of this enclosure as to the standard of proof required to support findings of fact.

b. Objections to evidence. The president, or member of a multiple member fact-finding body, the counsel for the investigation, a designated party, or counsel for a party may object to the fact-finding body's consideration of any particular evidence. The reason for the objection will be stated on the record.

c. Rulings. An investigation is an administrative fact-finding body and as such it is inappropriate except as detailed in this paragraph for the investigating officer or president to rule on objections to evidence. Rather, the objection should be noted for the record. The investigating officer or president may rule, subject to objection detailed in paragraph 11d below, on the following matters:

(1) Relevancy. Any information relevant to the investigation may be brought before the investigation. Relevant information means information having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. The investigating officer or president may rule that evidence is not relevant and exclude its consideration by the fact-finding body.

(2) Military Rules of Evidence. The investigating officer or president will make rulings on objections to the fact-finding body considering evidence when the objection is based upon the following Military Rules of Evidence: 301, self-incrimination; 302, mental examination; 303, degrading questions; 501-504, dealing with privileges; 505, classified information; 506, government information other than classified information; and 507, informants. In ruling on objections the investigating officer or president will be guided by this instruction and the discussion of the above Rules in the Manual for Courts-Martial, 1984, in rendering a ruling.

d. Objections to Rulings. Should counsel to the investigation or for a party object to a ruling, the objections will be noted for the record. In a multiple member fact-finding body, should a member object to the president's ruling on any matter, a vote shall be taken in closed session and the decision of the majority shall govern. The fact-finding body in closed session may discuss the matter prior to voting. The president and all members will vote on the issue. In the case of a tie vote, the decision of the president shall govern. The objection and the results of the vote will be noted for the record.

e. Obtaining Information. Whenever it appears desirable to the fact-finding body that certain information be elicited or developed in the interest of establishing or clarifying any matter, the investigating officer or president will so advise counsel for the investigation and may direct counsel to call witnesses, to pursue further lines of questioning, or to adduce other evidence. The investigating officer or president and other members of the fact-finding body may examine witnesses upon completion of examination by counsel.

f. Request for the Production of Evidence by a Party. Whenever a party desires the fact-finding body obtain documents or evidence that the party is unable to obtain or desires that information be elicited or developed in the investigation in the interest of establishing or clarifying any matter, a party or the counsel for a party may so request of the president. Such

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requests are subject to objection, see paragraphs 11b, c and d. If such matters are found to be admissible, the president will direct counsel for the fact-finding body to obtain the requested documents, witnesses or pursue further lines of inquiry.

g. Depositions. The method of taking and authenticating depositions to be received in evidence before fact-finding bodies will be as prescribed in Article 49, UCMJ. If there is any likelihood that the deposition might be required in a subsequent court-martial proceeding, the procedures should comply with R.C.M. 702.

h. Admissibility of Former Testimony. Former testimony admissible under Military Rule of Evidence 804(b)(1) may be received by a fact-finding body.

12. Witnesses

a. General. Military witnesses may be ordered to appear and testify before a fact-finding body. Civilian witnesses may not be summoned to appear and testify before a fact-finding body, but may be invited to do so. Counsel for the court, any party, and counsel for any party may interview any witness at any time, regardless of whether such witness has previously testified.

b. Refusal To Appear and Testify. No civilian witness may be forced to testify.

c. Person Designated as a Party. Any person designated as a party may at his request, but not otherwise, become a witness before the court of inquiry. A party's failure to make such a request will not create any presumption against the party. If a party elects to testify, it will be under oath or affirmation, as with any other witness.

d. Compulsory Self-Incrimination Prohibited

(1) Compelling testimony. No witness shall be compelled to incriminate himself or to answer any question the answer to which may tend to incriminate him; nor shall he be compelled to make any statement or produce evidence if the statement or evidence is not material to any issue under investigation and may tend to degrade him. Article 31(a) and (c), UCMJ, and Military Rule of Evidence 305.

(2) Warning. If a person called as a witness before a fact-finding body is suspected of or charged with an offense, the person shall be informed of the nature of the offense and the subject matter of the inquiry. Often, particularly in the early stages of an investigation, the specific nature of any suspected offenses is unclear. Care must be taken in such cases to tailor the warning to at least alert an individual in general terms of the nature of any suspected offenses. The person shall also be advised of the right that he does not have to make any statement or give any testimony regarding the offense of which suspected or accused, and that any statement or testimony made may be used as

evidence in any subsequent trial. Article 31(b), UCMJ. After being so informed, the right to refrain from testifying regarding the offense of which suspected or charged must be claimed by the witness. Despite his assertion of the right, the witness may be questioned on matters other than the offense of which suspected or charged.

e. **Warnings Regarding Disease and Injury.** A member of the Armed Forces may not be required to sign a statement relating to the origin, incurrence, or aggravation of a disease or injury that the member has suffered (JAGMAN 0215b). Any such statement without warning against interests, signed by a member, is invalid. (10 U.S.C. § 1219.) Any statement relating to the origin, incurrence or aggravation of any disease or injury that the member has suffered, which is obtained voluntarily after the member has been advised of his right not to sign such a statement, is valid and may be used in connection with the subject matter of the inquiry. JAGMAN Appendix A-2-f is recommended for use, as required, in recording such warning.

f. Examination of Witnesses

(1) Witnesses may be examined by counsel for the investigation and by members of the fact-finding body.

(2) Any person designated as a party will have the right to cross-examine witnesses.

(3) The investigating officer or president in his discretion may direct witnesses subject to naval authority not to discuss their testimony with other witnesses or persons without an official interest in the matter until the investigation is completed. Other witnesses may be requested, in a similar manner, not to discuss their testimony. This warning may be given to ensure that the matter before the fact-finding body can be fairly heard and to eliminate the possibility that disclosures of the substance of the testimony may influence the testimony of witnesses still to be heard.

g. Exclusion of Witnesses. Witnesses, other than a party, ordinarily should be excluded from hearings except when they are testifying. In some cases, expert witnesses (who did not witness the actual events of an incident but are called to testify for their technical expertise) may not be able to testify in an informed manner unless they are fully aware of all the circumstances surrounding the incident under inquiry. In such instances, it may be necessary to allow such experts to be present during the open sessions of the investigation in order that they may be sufficiently advised of the facts to give informed testimony as to the technical aspects of the incident. In these instances, the record must affirmatively show that the witness was present during the testimony of other witnesses.

13. Written Report by the Fact-Finding Body

a. **Report of Investigation.** After all the evidence, statements, and arguments have been received, the fact-finding body shall declare the investigation closed. The fact-finding body will then consider the evidence, statements, and arguments, and the instructions contained in the appointing order shall be carefully reexamined and scrupulously followed. At the request of the fact-finding body, counsel shall assist in the preparation of the findings of fact, opinions, and recommendations, or any part thereof. In so acting, counsel merely assists the fact-finding body in the transcription of its report. Counsel is prohibited from taking part in any deliberations in a multiple member investigation or discussing the findings with the investigating officer. The report of findings of fact, opinions, and recommendations shall become a part of the record. In multiple member fact-finding bodies, dissenting views are authorized. See enclosure (7).

b. **Findings of Fact.** The fact-finding body, after considering the evidence received during the hearing, shall first record the facts found that constitute a detailed description of the matter investigated. Care shall be taken to include only those findings of fact which the fact-finding body believes are established by a preponderance of the evidence. JAGMAN 0213b(1) defines preponderance of the evidence as it is to be applied in establishing each finding of fact. If, however, it appears to the fact-finding body that the actions of a deceased servicemember may have caused a loss of life, including his own, or the loss of property by intentional or criminal acts, such findings of fact must be established by clear and convincing evidence as defined in JAGMAN 0213b(2). The clear and convincing burden pertains to the establishment of those findings of fact which describe the activities or actions of the deceased member. This more demanding burden of proof is required because the deceased servicemember is unavailable to speak in his own behalf.

c. **Opinions.** If opinions are called for in the appointing order or required by regulations, the fact-finding body shall list all of its opinions drawn from and supported by the facts. Each opinion will clearly indicate which of the findings of fact support the opinion. Depending upon the nature of the inquiry and the provisions of the appointing order, opinions include inferences drawn from the facts; opinions as to performance of duty by individuals concerned or as to performance of functions by equipment involved; and opinions required by regulations. No opinion will ever be expressed concerning line of duty or attributing misconduct, as defined in JAGMAN 0218, to a deceased.

d. **Recommendations.** When the appointing order calls for recommendations, the fact-finding body shall make such recommendations as are specifically directed and any others that, in its view, are appropriate and advisable in view of the nature of the facts found and opinions expressed. If there is a recommendation for trial by court-martial, only the general nature of the charges shall be stated. Under no circumstances

will a charge sheet be signed and sworn to by the investigating officer or any member who has so recommended. If a punitive letter of reprimand or admonition is recommended, a draft of the recommended letter will be prepared and forwarded with the record of proceedings. If a nonpunitive letter is recommended, a draft may be prepared and separately forwarded to the appropriate commander for issuance, but such a draft will not be included as a part of the record of proceedings. See JAGMAN Appendices A-1-a and A-1-g for examples of punitive and nonpunitive letters.

e. **Disagreement Among Members.** The report of a fact-finding body with multiple members shall be based upon the opinion of the majority. If a member does not concur with the findings of fact, opinions, or recommendations of a majority of the fact-finding body, the nonconcurring member shall append a minority report to the record and state explicitly those parts of the majority report with which he disagrees and the reasons therefor. The minority report may also include additional findings of fact, and where appropriate, opinions, or recommendations. See enclosure (7).

f. **Disclosure of Decision.** No member, the president or counsel for the fact-finding body, or other person officially connected with the investigation, shall disclose or publish any findings, opinions, or recommendations of the fact-finding body or of the individual members without prior approval of the convening authority. With the exception of the convening authority and subsequent reviewers in the convening authority's chain of command, no copies of the report of proceedings may be provided to any person, including parties, without the approval of the Secretary of the Navy (Judge Advocate General).

14. Record of the Fact-Finding Body

a. **Authentication.** Each fact-finding body will keep a written record of its proceedings that will be authenticated by the signature of the investigating officer or president. In the case of a minority report, the respective report must be signed by the members, if available, of the fact-finding body concurring therein. In case the record cannot be authenticated by the investigating officer or president, it shall be signed by counsel to the investigation.

b. **The Record of Proceedings of the Fact-Finding Body.** The record of proceedings of a fact-finding body shall include the original appointing order and any other communications from the convening authority. It shall contain the verbatim testimony of all witnesses, all exhibits received in evidence by the fact-finding body, and all proceedings of the investigation except that, in the discretion of the fact-finding body, arguments presented on behalf of the Government and any party to the inquiry may be summarized. A copy of the findings of fact, opinions, and recommendations shall be prefixed to the record. See enclosure (7).

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c. Forwarding. The record of proceedings, together with the number of complete copies required by the circumstances, shall be forwarded to the convening authority. See enclosure (8).

d. Privacy Act Compliance. If at any time during the proceedings an individual is requested by a Government representative to supply personal information, compliance with the Privacy Act is mandatory. The record of proceedings must reflect the foregoing compliance. JAGMAN Appendix A-2-a should be utilized.

e. Reviewing Authority. See JAGMAN 0209 and 0210.

f. Sample Record. The sample record of proceedings of a court of inquiry in enclosure (7) may be used as a guide in the conduct of the proceedings of a fact-finding body. Nothing in the sample record, however, shall be considered as authority to depart from the provisions of this enclosure. Deviations from the sample proceedings, when not inconsistent with the provisions of this enclosure, may be made when appropriate and necessary to execute the primary mission of the investigation more effectively. When procedural steps are taken that are not covered in the sample record, the provisions of Appendix 8, MCM, 1984, may be consulted for general guidance.

15. Revision

a. General. If not satisfied with the investigation, or with the report of findings, the convening authority may reassemble the fact-finding body, and return the proceedings with direction to:

(1) Have the investigation pursued further, directing that the report of the facts be made more detailed, that opinions be expressed in terms more definite and unequivocal, or that the investigation be more responsive to the original instructions.

(2) Correct some other error or defect, or supply some omission.

b. Evidence in Revision. A fact-finding body is not a trial but merely an investigation. Therefore, the investigation may properly be required, upon revision, to reexamine witnesses, take entirely new testimony, or obtain other new evidence.

c. Procedures in Revision. The investigating officer, president, members, counsel for the investigation, parties and counsel for the parties will reassemble. The investigating officer or president shall read the direction from the convening authority. Thereafter, the rules regarding procedures, evidence, and witnesses detailed in paragraphs 10-12 of this enclosure shall be adhered to.

d. Record in Revision. The fact-finding body will make a written report and record of the proceedings in revision as detailed in paragraphs 13 and 14 of this enclosure. The record

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in revision will be attached to the original record. The fact-finding body may change a finding of fact, opinion or recommendation as part of a hearing in revision. Such a change will be detailed in the report of revision but the finding of fact, opinion, or recommendation as originally determined will remain a part of the record. Dissenting opinions may be made to any change or new finding of fact, opinion, or recommendation in the manner detailed in paragraph 13e of this enclosure.

Appointing Order for Court of Inquiry

(File information)
Date: _____

From: Commander Amphibious Force, U.S. Atlantic Fleet
To: Rear Admiral J _____ B. T _____, USN,
000-00-0000/1100

Subj: COURT OF INQUIRY TO INQUIRE INTO THE CIRCUMSTANCES
SURROUNDING AN EXPLOSION WHICH OCCURRED ON BOARD USS
_____ (_____), ON __ February 19__

Ref: (a) JAG INSTRUCTION 5830.1

1. In accordance with reference (a), a court of inquiry is appointed to inquire into the circumstances surrounding an explosion which occurred on board USS _____ (_____), on __ February 19__. The court will convene on board USS _____ (_____), at 1000 on __ February 19__, or as soon thereafter as practicable.

2. The court shall consist of you as president, Capt D _____ E. F _____, USN, 000-00-0000/1100, and Captain G _____ H. I _____, USNR, 000-00-0000/1100, as members. Commander J _____ K. L _____, JAGC, USN, 000-00-0000/2500, a lawyer qualified in accordance with Article 27(b) of the Uniform Code of Military Justice, is designated counsel for the Court.

3. The court is directed to inquire into all the facts and circumstances connected with the explosion, the damage resulting therefrom, and deaths of and injuries to naval personnel; as appropriate, to perform the duties of an inquest; and to fix individual responsibility for the incident. After deliberation the court shall submit its findings of fact, opinions and recommendations. The court will express its opinion as to the line of duty and misconduct status of any injured personnel and will recommend administrative or disciplinary action, as appropriate.

4. The court is directed to suspend the proceedings and notify the convening authority at any time during the course of the investigation that it appears that the intentional act or acts of a deceased servicemember were a contributory cause of the explosion.

Enclosure (3)

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5. The court is directed to notify Commander M _____ N. O _____, USN, 000-00-0000/1100, of the time and place of the meeting of the court and that he is a party to the inquiry and to accord him the rights of a party pursuant to the provisions of JAGINST 5830.1. The court is (not) authorized to designate additional parties to the inquiry during the proceedings (as may be appropriate).

6. Lieutenant Commander D _____ M. M _____, JAGC, USN, 000-00-0000/2500, a lawyer qualified in accordance with Article 27(b) Uniform Code of Military Justice has been designated counsel for Commander M _____ N. O _____, USN.

7. The court is directed to take the testimony of witnesses under oath and to submit a verbatim record of the proceedings. Compliance with the Privacy Act of 1974 is mandatory during the proceedings.

8. By signed copy of this appointing order, Commanding Officer, USS _____ (_____), is directed to furnish the necessary reporters and other clerical assistance to the court for the purpose of recording and preparing the record of this court of inquiry.

A _____ J. L. _____
Vice Admiral, U. S. Navy

Copy to:
CINCLANTFLT
CO USS _____ (_____)
Members
Counsel
Party

Enclosure (3)

2

APPOINTING ORDER FOR A SINGLE MEMBER FACT-FINDING BODY
WHEN A HEARING IS REQUIRED

Date: _____

From: Commander Naval Surface Force, U. S. Atlantic Fleet
To: Captain _____, USN, 000-00-0000/1110

Subj: INVESTIGATION OF AN EXPLOSION THAT OCCURRED ON BOARD USS
_____ (____), ON __ AUGUST 19__¹

Ref: (a) JAGINST 5830.1

1. Under JAGINST 5830.1, you are appointed to inquire, as soon as practical into the circumstances surrounding an explosion that occurred on board USS _____ on __ August 19__.

2. You are to investigate all facts and circumstances surrounding the explosion. You must investigate the cause of the explosion, resulting injuries, and damages, and any fault, neglect or responsibility therefor. You must express your opinion of the line of duty and misconduct status of any injured naval member, but no opinion may be expressed concerning the line of duty and misconduct status of deceased members. You should recommend appropriate administrative or disciplinary action. Report your findings of fact, opinions and recommendations by __ September 19__, unless an extension of time is granted.

3. (When counsel for the investigation is appointed, add the following language:

"Commander _____, JAGC, USN, 000-00-0000/2500, a lawyer qualified under Article 27(b) of the Uniform Code of Military Justice, is counsel for the investigation.")

4. You are directed to suspend proceedings and notify the convening authority at any time during the course of the investigation that it appears that the intentional act or acts of a deceased servicemember were a contributory cause of the explosion.

5. (If parties are designated by a convening authority, add the following language:

¹ When known, the date or approximate date of the event must be shown.

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"You are to notify Commander _____, USN 000-00-0000/1110, of the time and place of the hearing and that he is a party to the inquiry, and accord him the rights of a party under JAGINST 5830.1.")

(If a convening authority authorizes designating parties during the proceedings, add the following language:

"You may designate parties to the investigation during the proceedings. If you designate, comply with JAGINST 5830.1."

6. Compliance with the Privacy Act of 1974 is mandatory during the proceedings.

(If testimony under oath and a verbatim record are required, add the following language:

"You are directed to take testimony of witnesses under oath and submit a verbatim record of proceedings.")

7. By copy of this appointing order, Commanding Officer, USS _____, is directed to furnish necessary reporters and other clerical assistance to the fact-finding body for recording the proceeding and preparing the record.

Vice Admiral, U. S. Navy

Copy to:
CINCLANTFLT
CO USS _____
Counsel
Party
Party

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MODIFICATION TO THE APPOINTING ORDER

**COMMANDER AMPHIBIOUS FORCE
UNITED STATES ATLANTIC FLEET**

(File information)
__ Feb 19__

From: Commander Amphibious Force, U.S. Atlantic Fleet
To: Rear Admiral J_____ B. T_____, USN, 000-00-0000/
1100

Subj: CHANGE IN MEMBERSHIP OF COURT OF INQUIRY

1. Captain S_____ T. U_____, USN, 000-00-0000/1100, is appointed a member of the court of inquiry of which you are president convened by my appointing order of __ February 19__, vice Captain D_____ R. F_____, U. S. Navy, relieved.

A_____ J. L_____
Vice Admiral, U.S. Navy

Enclosure (5)

SAMPLE OATHS TO BE ADMINISTERED

1. **Reporter.** Every reporter shall, before entering upon his duties, make an oath or affirmation, administered by counsel for the court, in the following form:

"You swear (or affirm) that you will faithfully perform the duties of reporter to this court. So help you God."

2. **Court Members.** Before the court begins the inquiry prescribed by the appointing order, counsel for the court shall administer to the members the following oath or affirmation:

"You, AB, CD, and EF, do swear (or affirm) that you will faithfully perform all the duties incumbent upon you as members of this court, and that you will examine and inquire, according to the evidence, into the matter now before you, without partiality. So help you God."

3. **Counsel.** When the oath or affirmation has been administered to the members, the president of the court shall administer the following oath or affirmation to the counsel for the court, and assistant counsel, if any (counsel for the parties are not sworn):

"You swear (or affirm) that you will faithfully perform the duties of counsel (assistant counsel) for this court. So help you God."

4. **Interpreter.** Every interpreter shall, before entering upon his duties, make oath or affirmation, administered by counsel for the court, in the following form:

"You swear (or affirm) that you will faithfully perform the duties of interpreter to this court. So help you God."

5. **Challenged Member.** If challenged member is to be examined under oath as to his fitness to serve, counsel for the court shall administer the following oath or affirmation:

"You swear (or affirm) that you will answer truthfully to the questions touching your competency as a member of the court in this case. So help you God."

6. **Witnesses.** All persons who testify before the court shall be examined on oath or affirmation, administered by counsel for the court before they first testify, in the following form:

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"You swear (or affirm) that the evidence you shall give in the matter now under investigation shall be the truth, the whole truth, and nothing but the truth. So help you God."

NOTE: In the administration of an affirmation, the word "affirm" is used in lieu of "swear." The words "so help you God." should be omitted in administering an affirmation to one whose individual religious belief forbids both his use of the word "swear" and a reference to the Supreme Deity in a secular proceeding.

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RECORD OF PROCEEDINGS OF COURT OF INQUIRY

RECORD OF PROCEEDINGS

of a

COURT OF INQUIRY

convened on board

USS _____ (____)

by order of

Commander Amphibious Force

United States Atlantic Fleet

To inquire into an explosion in

Enclosure (7)

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Investigation into _____

which occurred on board

USS _____ (_____) on

___ February 19 ___

Ordered on _____ February 19___ 1/-5/

Note:

- 1/ Ordered on is the date of the appointing order.
- 2/ A copy of the findings of fact, opinions and recommendations will be prefixed to the record as the first page following the title page.
- 3/ The record of proceedings shall be prepared on standard-size paper.
- 4/ Index in lengthy cases: An index is required whenever a record exceeds 20 pages. The index shall list the witnesses, a descriptive title of their duties in relation to the incident (e.g., Officer-of-the-Day, Engineer Officer, Navigator), whether called by the "Court" or "Party", and the page numbers on which their testimony appears. Exhibits, briefly described, offered or admitted in evidence, shall be listed in chronological order showing the page at which each was admitted in evidence. The index shall follow the findings of fact, opinions and recommendations.
- 5/ Appointing Order: The original appointing order follows the cover page and is lettered "A." Amendments or modifications thereto are lettered "B," "C," etc. When an index is required, it precedes the appointing order. Written communications with the convening authority will follow the appointing order as amendments or modifications thereto.

Court meets

-FIRST DAY -

On board
USS _____ (_____)
U.S. Naval Base
Norfolk, Virginia
Wednesday ___Feb 19__

Preliminary Matters

The court met at _____ (Insert time, e.g., 0830 for preliminary matters.)

Present:

Rear Admiral J _____ B. T _____, U. S. Navy;
Captain S _____ T. U _____, U. S. Navy; and
Captain G _____ H. I _____, U.S. Naval Reserve
members.

Commander J _____ K. L _____, JAGC, U.S. Navy,
certified in accordance with Article 27b and sworn in
accordance with Article 42a of the Uniform Code of Military
Justice, Counsel for the court.

All matters preliminary to the inquiry having been
determined, and the court having decided to sit with open doors,
the court was opened.

Advice to parties

Party and counsel enter

Commander M _____ N. O _____, U. S. Navy, entered as a
party to the inquiry was represented by Lieutenant P _____
A. R _____, JAGC, U. S. Naval Reserve, as his counsel, who is
qualified in accordance with Article 27(b) of the Uniform Code of
Military Justice. (If civilian counsel represents a party his or
her qualifications should be stated.)

Note: If a party enters and waives his right to be present
or to be represented by counsel, this shall be
reported verbatim. If any designated party or his
counsel is absent the record shall indicate the
absence, the reason therefor if known, and whether
or not the party had been notified that he was a
party and of the time and place of the meeting of the
court.

Swearing the reporter, members and counsel for the court

The appointed reporter, W _____ E. D _____, Yeoman
First Class, U. S. Navy, and the members of the court, were sworn
by counsel.

Note: Interpreters and assistant counsel, if any, also
shall be sworn at this time.

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Reading of appointing order

The counsel for the court read the appointing order, original prefixed, marked "A," (and an amendment thereto, original prefixed, marked "B").

Advising parties of their rights

Note: Informing the party or parties of their rights is accomplished at this time. The counsel informs the interested party or parties of their rights in accordance with paragraph 9a of enclosure (1) and paragraph 9a of enclosure (2) of this instruction; and this is reported verbatim. The record will clearly show that each has been designated as a party. Several parties may be informed of their rights at the same time. See paragraph 12e of enclosure (1) and paragraph 12e of enclosure (2) of this instruction for additional rights of a person who has been injured.

Challenges

Note: The president may permit counsel for a party to ask brief general questions of the court members to determine if there is a ground for challenge. He may also permit questioning of individual members. If requested by a party, he may require any questioning be done under oath.

Upon request of the party, the member took the stand, was duly sworn and was examined as follows:

Questions by counsel for Commander O_____, party:

Q. _____?

A. _____.

Questions by counsel for the court:

Q. _____ ?

A. _____ .

Neither counsel for the court, the court, nor the party desired to examine the witness further. The witness resumed his seat as a member of the court (evidence may be presented regarding the possible challenge).

Ensign A _____ I. K _____, U. S. Navy, was called as a witness by counsel for the court, was duly sworn, and examined as follows:

DIRECT EXAMINATION

Questions by counsel for the court:

Q. State your name, grade, organization and present duty station.

A. _____.

Q. _____?

A. _____.

CROSS-EXAMINATION

Questions by Commander O _____, party:

Q. _____?

A. _____.

Neither counsel for the court, the court, nor the party desired to examine the witness further. The witness was duly warned and withdrew.

Right to challenge accorded

The president asks if any party has a challenge for cause against any member.

_____ objected to Captain G _____ H. I _____, U.S. Naval Reserve, as a member because Captain I _____ had formed an opinion that the party was guilty of culpable conduct with regard to the question of the responsibility for the explosion. (The member if not called by a party to testify under oath regarding the challenge may make a brief statement regarding the challenge). The president may permit brief arguments by counsel for a party or counsel to the court on the challenge.

The challenged member replied as follows:

The court closed at (Indicate time), ____ February 19___. The challenged member withdrew from the courtroom along with all other persons. Only the members remained.

Challenge sustained

The court opened at _____, ____ February 19 ____.

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All persons connected with the inquiry who were present when the inquiry closed were again present. The president announced that the challenge of the party was sustained and that Captain I_____ was relieved as a member and excused.

Captain I_____ withdrew from his seat as a member.

Note:

- 1/ If the challenge reduced the number of members to less than three, the court would proceed as follows:

The number of members being reduced to less than three, the court directed the counsel for the court to inform the convening authority of this fact.

- 2/ If the court, after the challenge had three or more members remaining, it could proceed; however, the convening authority should be informed of the excusing by the court of the challenged member and the court would then proceed as follows:

The number of members remaining after excusing the challenged member being not less than three, the court determined to proceed. Counsel for the court was instructed to inform the convening authority that Captain I_____, U.S. Naval Reserve was challenged by an interested party and excused by the court.

- 3/ All communications with the convening authority will be in writing and will be made part of the record.

Adjournment

The court adjourned at _____, ____ February 19__ (to await the appointment of a new member).

-SECOND DAY-

On board
USS _____ (____)
U. S. Naval Base
Norfolk, Virginia
Thursday, __ Feb 19__

The court met at _____.

All persons connected with the court who were present when the court adjourned were present again.

Counsel for the party absent

Continue the above entry by stating "except Lieutenant R _____, counsel for the party who was called as a witness in a general court-martial." Commander O _____, the party stated: "I waive my right to have counsel present during this session of the court."

Note: When the party is represented by counsel and the counsel is not present, the record shall show verbatim accused's waiver of his right to have counsel present, if such be the case.

Communication from the convening authority read

Counsel for the court read a communication from the convening authority, original prefixed, marked "C," appointing Captain V _____ W. Z _____, U. S. Navy, a member of the court. A copy of the amendatory order was given to the party.

The party stated that he did not object to the new member or to any member.

New member sworn

The new member of the court was duly sworn and was afforded an opportunity to examine the record of proceedings of the court as far as it had progressed.

Note: If deemed advisable, the court will be recessed or adjourned for this purpose.

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Witness separated

No witness not otherwise connected with the inquiry was present.

Presentation of Evidence

Commander _____, U. S. Navy, took the stand as a witness, was duly sworn, and examined as follows:

DIRECT EXAMINATION

Questions by counsel for the court:

Q. State your name, grade, organization, and present duty station.

A. _____.

Witness introduces documentary evidence

Q. Are you the custodian of the official log of USS _____ (____)?

A. I am.

Q. Can you produce the log?

A. Here it is.

Exhibits

Note: Introducing documentary evidence and other material things, the following procedure should be followed by counsel:

Counsel: Request that the reporter mark this exhibit.

Note: The reporter is responsible for keeping a list of exhibits marked and also as finally accepted into evidence. The reporter will mark on the exhibit (or tag affixed thereto) the appropriate number and state:

Reporter: This will be Exhibit 1.

The log (Exhibit 1) was submitted to the party and to the court, and was offered in evidence by counsel for the court for the purpose of reading into the record such extracts therefrom as pertained to the explosion which occurred on board USS _____ (____) on ___ February 19__.

There being no objection, it was received in evidence.

If there is an objection see paragraph 11b of enclosure (1) and paragraph 11b of enclosure (2) for procedures.

Q. Refer to the log and read such portions thereof as pertain to _____.

The witness read from the said log extracts, copy appended, marked "Exhibit 1."

Neither the counsel for the court, the court, nor the party desired further to examine this witness. The witness was duly warned concerning his testimony and withdrew from the courtroom.

Examination of a witness called by counsel for the court

P _____ S. L. _____, Fireman, U. S. Navy, was called as a witness for the court, was duly sworn, informed of the subject matter of the inquiry and examined as follows:

Note: To the extent feasible, the procedures for preparing verbatim records of courts-martial shall be followed in courts of inquiry. All questions and answers (except statements or extracts from documents subsequently admitted as exhibits) as well as all objections, arguments and discussions thereto and rulings thereon shall be recorded verbatim. In all other instances entries may be summarized as outlined below unless verbatim proceedings are required for clarity.

Note: The examination of witnesses shall be captioned as below. Whenever possible, the side interrogating a witness shall be given the opportunity to complete such interrogation of that witness before further questions are propounded by anyone else.

DIRECT EXAMINATION

Questions by counsel for the court:

Q. State your name, rate, organization, and present duty station.

A. _____.
Q. _____?
A. _____.

CROSS-EXAMINATION

Questions by counsel for CDR _____, party:

Q. _____?
A. _____.

REDIRECT EXAMINATION

Q. _____?
A. _____.

RE-CROSS-EXAMINATION

Questions by counsel for CDR _____, party:

Q. _____?
A. _____.

EXAMINATION BY THE COURT

Questions by a court member (president/CAPT _____):

Q. _____?
A. _____.

Neither counsel for the court, the court, nor the party desired to examine this witness further.

The president of the court informed the witness that he could make any further statement covering anything related to the subject matter of the inquiry that he thought should be a matter of record in connection therewith, which had not been fully brought out by the previous questioning.

The witness made the following statement:

Witness: _____.

Note: If a witness brings up any new matter, each counsel and member will be afforded the opportunity of further examination before the witness is excused.

Warning the witness

Note: A witness who by assignment or otherwise is subject to naval authority is cautioned by the president in the following tenor: "You are instructed not to discuss your testimony in this case with anyone other than a member of

the court, parties thereto, or counsel. You will not allow any witness in this case to talk to you about the testimony he has given or which he intends to give. If anyone, other than counsel or the parties thereto attempts to talk to you about your testimony in this case, you should make the circumstances known to the counsel originally calling you as a witness."

Note: A witness who is not subject to naval authority by assignment or otherwise is cautioned by the president in the following tenor:

"You are requested not to discuss your testimony in this case with anyone other than a member of the court, parties thereto, or counsel. You should not allow any witness in this case to talk to you about the testimony he has given or which he intends to give. If anyone, other than counsel or the parties, attempts to talk to you about your testimony in this case, you should make the circumstances known to the counsel originally calling you as a witness. Your cooperation is requested so that the evidence to be received is not influenced by any discussion of that nature."

The witness was duly cautioned concerning his testimony and withdrew from the courtroom.

At this stage of the proceedings it appeared to the court that the conduct of Lieutenant D _____ F _____, U. S. Navy, was subject to inquiry, and that he should properly be designated a party to the inquiry. Accordingly, the president of the court instructed counsel for the court (to so advise the convening authority and if the convening authority designated him a party to summon Lieutenant F _____ before the court) or (to summon Lieutenant F _____ to appear if the court has been given the authority to designate parties).

Time of session

The court (adjourned) (recessed) at _____, ____ February 19 ____.

The court (closed) (opened) at _____, ____ February 19 ____.

All persons connected with the inquiry who were present when the court (adjourned) (recessed) are again present in court (except _____).

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J _____ A. H _____, Chief Yeoman, U. S. Navy,
was introduced as reporter and was duly sworn.

No witness not otherwise connected with the inquiry was
present.

Designation of a party

Lieutenant D _____ F _____, U. S. Navy, entered.
The president of the court informed him of its conclusion that
his conduct appeared to be subject to inquiry and the reasons
therefor, and advised him that (either the convening authority or
the court of inquiry if so empowered) had designated him a party
to the inquiry. (See Note first day as to informing of rights.)

Lieutenant F _____ requested and was granted a delay
in the proceedings until he could obtain counsel.

Adjournment

The court adjourned at _____, ____ February 19____.

-THIRD DAY-

On board
USS _____ (____)
U. S. Naval Base
Norfolk, Virginia
Friday, ____ Feb 19__

The court met at _____.

All persons connected with the court who were present when the court adjourned were again present in court.

Lieutenant F _____ was present and represented by Captain B _____ O. J _____, U. S. Marine Corps, qualified in accordance with Article 27(b) of the Uniform Code of Military Justice, as his counsel.

According rights to new party

Lieutenant F _____ examined the appointing order and modification(s) and stated that he did not object to any member of the court. Note: If a new party desires he or she must be allowed the opportunity to voir dire the members and afforded the opportunity to challenge for cause.

Note: An opportunity to examine the record of proceedings thus far conducted will be afforded Lieutenant F _____ and his counsel. If deemed advisable the court will be recessed (or adjourned) for this purpose.

Lieutenant F _____ stated that he did not desire to recall any of the previous witnesses for further examination.

Note: If further examination of any of the witnesses is requested by a newly named party, such witnesses will be recalled, if practicable.

No witnesses not otherwise connected with the inquiry were present.

View by the court

The president announced that the court would adjourn to the scene of the explosion on board USS _____ (____).

The court adjourned at _____, ____ February 19__.

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The court met at _____, ____ February 19____, in compartment A-106 USS _____ (_____) to inspect the damaged area. All members, counsel for the court, parties and their counsel were present.

Note: If any party or their counsel is absent a specific verbatim waiver by the party on the record is required.

After completing inspection of the scene of the explosion, all personnel present returned to the regular place of meeting where the court was reassembled.

The court opened at _____, ____ February 19____.

All the members, counsel for the court, the parties and their respective counsel and the reporter were present.

No witnesses not otherwise connected with the inquiry were present.

Person requests designation as a party

Ensign J _____ D _____, U. S. Navy, entered, informed the court that he had a direct interest in the subject matter of the inquiry and requested that he be designated a party and be accorded the rights of a party.

Ensign D _____ was directed to state the nature of his interest and replied as follows (Report the reply verbatim):

Designation as party and according of rights

The court, having decided that Ensign D _____ had a direct interest in the subject of the inquiry, (the convening authority was advised of his interest) (he was designated a party). (See Note first day as to informing party of his rights).

Ensign D _____ stated: "I waive my right to be represented by counsel and to examine the record of proceedings thus far conducted." He read the appointing order and modification(s) and stated that he did not object to any member of the court; or

The court recessed at _____, ____ February 19____, to provide Ensign D _____ with an opportunity to examine all the evidence of record.

The court opened at _____, ____ February 19____.

Enclosure (7)

All persons connected with the inquiry who were present when the inquiry recessed were again present in court.

No witnesses not otherwise connected with the inquiry were present.

Ensign D _____ stated: "I have examined all the evidence of record and do not desire to recall any of the previous witnesses for further cross-examination."

Court overrules president's ruling

A member objected to the ruling of the president.

The court closed at _____, _____ February 19____.

The court opened at _____, _____ February 19____.

All persons connected with the inquiry who were present when the inquiry closed were again present in court.

The president announced that his previous ruling was withdrawn and that the motion to strike was denied.

Counsel for the court has no further evidence to present

Counsel for the court stated that he had completed the presentation of his evidence.

Parties informed of right to call witnesses

The president of the court informed the parties that they could now call witnesses and present any evidence in their own behalf.

Examination of witness called by party

O _____ P. J _____, Machinist's Mate, Third Class, U. S. Navy, was called as a witness by Commander O _____, party, was duly sworn, informed of the subject matter of the inquiry, and examined as follows:

DIRECT EXAMINATION

Questions by counsel for the court:

Q. State your name, rate, organization and present duty station.

A. _____.

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Questions by counsel for Commander O _____, party:

Q. _____?
A. _____.

Neither the counsel for the court, the court, nor the parties desired to examine this witness further.

The president of the court informed the witness that he could make any additional statement covering anything relating to the subject matter of record in connection therewith, which had not been fully brought out by the previous questioning.

The witness stated that he had nothing further to say.

The witness was duly warned concerning his testimony and withdrew from the courtroom.

Party calls self as witness

Ensign D _____, a party, called himself as a witness. He was informed by the court that he was suspected of an offense, to wit: *****, was advised of his right not to testify or make any statement regarding the offense of which he was suspected, was informed that any testimony or statement made by him might be used as evidence against him in any subsequent trial, and was reminded of his rights as a party. (Advice of rights, waiver if any and testimony of a party is always recorded verbatim).

Ensign D _____ stated that he understood his rights and that he chose to testify relative to the offense of which he was suspected.

(Ensign D _____, a party, stated that he withdrew his request to testify.)

Ensign D _____, a party, took the stand to testify in his own behalf, was duly sworn, and examined as follows:

DIRECT EXAMINATION

Questions by counsel for the court:

Q. State your name, grade, organization and present duty station.

A. _____.

Q. Are you a party to this proceeding?

A. I am.

Enclosure (7)

Questions by Ensign D _____, party:

Q. _____?
A. _____.

Questions by counsel for Commander O _____, party:

Q. _____?
A. _____.

CROSS-EXAMINATION

Questions by counsel for the court:

Q. _____?
A. _____.

Neither the counsel for the court, the court nor the parties desired to examine this witness further. He resumed his seat as a party.

Parties rest

None of the parties desired to present additional evidence.

Witness for the court

The court announced that it desired further testimony and directed that R _____ O. J _____, Chief Gunner's Mate, U. S. Navy, be called as a witness for the court.

R _____ O. J _____, Chief Gunner's Mate, U.S. Navy, was called as a witness for the court, was duly sworn, informed of the subject matter of the inquiry, and was examined as follows:

EXAMINATION BY THE COURT

Questions by counsel for the court:

Q. State your name, rate, organization and present duty station.
A. _____.

Questions by the (president) (CAPT _____):

Q. _____?
A. _____.

Neither the counsel for the court, the court, nor the parties desired to examine this witness further.

The president of the court informed the witness that he could make any additional statement covering anything relating to the subject matter of the inquiry that he thought should be a matter of record in connection therewith, which had not been fully brought out by the previous questioning.

The witness stated that he had nothing further to say.

The witness was duly warned concerning his testimony and withdrew from the courtroom.

Statements of Parties

Commander O _____ and Ensign D _____, parties, each submitted a signed written statement, which statements were read and are appended as exhibits (numbered _____ and _____, respectively).

Lieutenant F _____, party, made an oral statement as follows:

* * * * *

Arguments

Counsel for the court presented opening argument.

Note: Counsel may waive opening argument.

Commander O _____, party, presented argument.

Lieutenant F _____, party, made the following oral argument:

* * * * *

Note: Argument may be made by either the party or his counsel.

Ensign D _____, party, desired to make no argument.

The counsel for the court made the following closing argument:
_____.

Inquiry completed

President: Counsel for the court and the party (parties) having no further evidence or argument to present to this court of inquiry, the court is now adjourned to consider all the evidence and to submit to the convening authority its findings of fact, opinions, and recommendations. The court will be closed.

The court closed at _____, _____ February 19__.

Findings of fact, opinions, and recommendations

The court, after inquiring into all the facts and circumstances connected with the incident which occasioned the inquiry, and having considered the evidence, finds as follows (and submits the following opinions and recommendation(s) if requested by the convening authority). The findings of facts, opinions and recommendation(s) are attached to the front of the record. See page one of this enclosure.

FINDINGS OF FACT

1. That a violent explosion occurred at 0939, _____ February 19__ on board USS _____ (_____).
2. *****

OPINIONS

1. That the cause of the explosion was *****.
2. That Commander O _____ was derelict in his duties in that he *****.
3. That the injuries to ***** which were caused by the explosion occurred in the line of duty and were not the result of their misconduct.
4. *****

RECOMMENDATIONS

1. That Commander M _____ N. O _____, U. S. Navy, be brought to trial by general court-martial on the charge of violation of Article *****, Uniform Code of Military Justice.

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2. That Lieutenant D _____ F _____, U. S. Navy, be addressed a letter of reprimand for his failure to *****. A draft of such letter is forwarded herewith.

3. That, in order to prevent a recurrence of this type of explosion, the following action be taken: *****.

J _____ B. T _____
Rear Admiral, U. S. Navy
President

D _____ E. F _____
Captain, U. S. Navy
Member

Note: If there is no minority report, each member signs as shown above. If there is a minority report, the member who disagrees with the majority does not sign. Instead he submits a minority report and signs as follows:

Minority report. I concur with the majority report except as follows:

I disagree with the court's finding number 3 for the reason that _____.

I disagree with the court's opinion number 2 for the reason that _____.

I disagree with the court's recommendation number 1 for the reason that _____.

The following additional (findings of fact) (opinions) (and recommendations) are submitted: _____.

S _____ T _____
Captain, U. S. Navy
Member

Authentication

J _____ B. T _____
Rear Admiral, U. S. Navy
President

J _____ K. L _____
Commander, JAGC, U. S. Navy
Counsel for the court

Note: If either the president or the counsel for the court cannot authenticate the record, a member shall sign in lieu thereof. Members authenticating the record sign as follows:

Captain, U. S. Navy, a member in lieu of the (president) (counsel) because of his (death) (disability) (absence)

Documents appended

Note: All exhibits received in evidence are appended in the order in which they were marked during the inquiry. A description, photograph, or copy of any exhibit may be substituted. When a letter of censure is recommended, a draft of the letter will be prepared and forwarded with the record. See enclosures 7, 8, and 9.

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LETTER OF TRANSMITTAL
FOR
RECORD OF PROCEEDINGS

From: Rear Admiral J_____ B. T_____, USN, 000-00-0000/1100
To: Commander Amphibious Force, U.S. Atlantic Fleet

Subj: COURT OF INQUIRY INTO THE EXPLOSION WHICH OCCURRED ON
BOARD USS _____ (_____) ON __ MARCH 19__

Ref: (a) COMPHIBLANT ltr 5830 Ser _____ of __ Mar 19__

Encl: (1) Subject Record of Proceedings

1. As directed by reference (a), a court of inquiry was convened on __ March and was completed on __ April 19__. The original record of proceedings and _____ complete copies are forwarded herewith as enclosure (1).

J_____ B. T_____

Enclosure (8)

ENDORSEMENT OF THE CONVENING AUTHORITY

FIRST ENDORSEMENT on RADM J_____ B. T_____ 's ltr of _____

From: Commander Amphibious Force, U. S. Atlantic Fleet
To: Judge Advocate General
Via: Commander in Chief, U. S. Atlantic Fleet

Subj: (SAME)

1. Readdressed and forwarded.

2. The court failed to accord the rights of a party to _____;
or

Opinion 6 of the investigative record is not substantiated by the findings of fact as _____; or

The evidence of record is clear and convincing that the (injuries) (disability) of Lieutenant _____ (were) (was) the direct result of his intemperate and excessive use of _____; or

Opinion 6 and recommendation 2 of the court's report are (disapproved) (disapproved in part) (approved in part) _____; or

A letter of (reprimand) (admonition) has been issued to Lieutenant _____ as a result of this inquiry; or

Subject to the foregoing remarks, the proceedings, findings of fact, opinions and recommendations of the court of inquiry in this case are approved; or

The record is returned for further inquiry into _____; or _____.

A_____ J. L. _____
Vice Admiral, U.S. Navy