

§ 40.7 Cross-reference to Post-Employment Conflict of Interest Restrictions.

DoD employees and former DoD employees should refer to OGE regulation, Post-Employment Conflict of Interest Restrictions, 5 CFR part 2641, for provisions on post-employment applicable to those who left DoD employment on or after January 1, 1991.

PART 41—ENLISTED ADMINISTRATIVE SEPARATIONS

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APPENDIX A TO PART 41—STANDARDS AND PROCEDURES

AUTHORITY: 10 U.S.C. 1162, 1163, 1169, 1170, 1172, and 1173.

SOURCE: 47 FR 10174, Mar. 9, 1982, unless otherwise noted.

§ 41.1 Purpose.

This part establishes policies, standards, and procedures governing the administrative separation of enlisted members from the Military Services.

§ 41.2 Applicability and scope.

The provisions of this part apply to Office of the Secretary of Defense and the Military Departments (including their reserve components). The term “Military Services,” as used herein, refers to the Army, Navy, Air Force and Marine Corps.

§ 41.3 Policy.

(a) It is the policy of the Department of Defense to promote the readiness of the Military Services by maintaining high standards of conduct and performance. Separation policy promotes the readiness of the Military Services by providing an orderly means to:

(1) Ensure that the Military Services are served by individuals capable of meeting required standards of duty performance and discipline;

(2) Maintain standards of performance and conduct through characterization of service in a system that em-

phasizes the importance of honorable service;

(3) Achieve authorized force levels and grade distributions; and

(4) Provide for the orderly administrative separation of enlisted personnel in a variety of circumstances.

(b) DoD separation policy is designed to strengthen the concept that military service is a calling different from any civilian occupation.

(1) The acquisition of military status, whether through enlistment or induction, involves a commitment to the United States, the service, and one’s fellow citizens and servicemembers to complete successfully a period of obligated service. Early separation for failure to meet required standards of performance or discipline represents a failure to fulfill that commitment.

(2) Millions of Americans from diverse backgrounds and with a wide variety of aptitudes and attitudes upon entering military service have served successfully in the armed forces. It is the policy of the Department of Defense to provide servicemembers with the training, motivation, and professional leadership that inspires the dedicated enlisted member to emulate his or her predecessors and peers in meeting required standards of performance and discipline.

(3) The Military Services make a substantial investment in training, time, equipment, and related expenses when persons are enlisted or inducted into military service. Separation prior to completion of an obligated period of service is wasteful because it results in loss of this investment and generates a requirement for increased accession. Consequently, attrition is an issue of significant concern at all levels of responsibility within the armed forces. Reasonable efforts should be made to identify enlisted members who exhibit a likelihood for early separation, and to improve their chances for retention through counseling, retraining, and rehabilitation prior to initiation of separation proceedings. Enlisted members who do not demonstrate potential for further military service should be separated in order to avoid the high costs in terms of pay, administrative efforts, degradation of morale, and substandard

mission performance that are associated with retention of enlisted members who do not conform to required standards of discipline and performance despite efforts at counseling, retraining, or rehabilitation.

(c) Standards and procedures for implementation of these policies are set forth in appendix A to this part.

§ 41.4 Responsibilities.

(a) The *Secretaries of the Military Departments* shall prescribe implementing documents to ensure that the policies, standards, and procedures set forth in this part are administered in a manner that provides consistency in separation policy to the extent practicable in a system that is based on command discretion. The implementing documents also shall address the following matters:

(1) *Processing goals.* The Secretary concerned shall establish processing time goals for the types of administrative separations authorized by this part. Such goals shall be designed to further the efficient administration of the armed forces and shall be measured from the date of notification to the date of separation. Normally such goals should not exceed 15 working days for the Notification Procedure (part 3, section B., appendix A) and 50 working days for the Administrative Board Procedure (part 3, section C., appendix A) Goals for shorter processing times are encouraged, particularly for cases in which expeditious action is likely. Variations may be established for complex cases or cases in which the Separation Authority is not located on the same facility as the respondent. The goals, and a program for monitoring effectiveness, shall be set forth in the implementing document of the Military Department. Failure to process an administrative separation within the prescribed goal for processing times shall not create a bar to separation or characterization.

(2) *Periodic explanations.* The Secretary concerned shall prescribe appropriate internal procedures for periodic explanation to enlisted members of the types of separations, the basis for their issuance, the possible effects of various actions upon reenlistment, civilian employment, veterans' benefits, and relat-

ed matters, and the effects of 10 U.S.C. 977 and Pub. L. 97-66, concerning denial of certain benefits to members who fail to complete at least 2 years of an original enlistment. Such explanation may be provided in the form of a written fact sheet or similar document. The periodic explanation shall take place at least each time the provisions of the Uniform Code of Military Justice (UCMJ) are explained pursuant to Article 137 of the UCMJ. The requirement that the effects of the various types of separations be explained to enlisted members is a command responsibility, not a procedural entitlement. Failure on the part of the member to receive or to understand such explanation does not create a bar to separation or characterization.

(3) *Provision of information during separation processing.* The Secretary concerned shall ensure that information concerning the purpose and authority of the Discharge Review Board and the Board for Correction of Military/Naval Records, established under 10 U.S.C. 1552 and 1553 and 32 CFR part 70 (DoD Directive 1332.28) is provided during the separation processing of all members, except when the separation is for the purpose of an immediate reenlistment. Specific counseling is required under 38 U.S.C. 3103(a) which states that a discharge under other than honorable conditions, resulting from a period of continuous, unauthorized absence of 180 days or more, is a conditional bar to benefits administered by the Veterans Administration, notwithstanding any action by a Discharge Review Board. The information required by this paragraph should be provided in the form of a written fact sheet or similar document. Failure on the part of the member to receive or to understand such explanation does not create a bar to separation or characterization.

(b) The *Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics)* may modify or supplement the enclosures to this Directive, and may delegate the authority to establish reporting requirements for the reasons for separation (part 1, appendix A) to a Deputy Assistant Secretary.

§ 41.5 Effective date and implementation.

(a) This part applies only to administrative separation proceedings initiated on or after October 1, 1982.

(b) Part 41, effective December 29, 1976 shall continue to be used for administrative separation proceedings initiated on or before September 30, 1982.

§ 41.6 Definitions.

(a) *Member.* An enlisted member of a Military Service.

(b) *Discharge.* Complete severance from all military status gained by the enlistment or induction concerned.

(c) *Release from active duty.* Termination of active duty status and transfer or reversion to a reserve component not on active duty, including transfer to the Individual Ready Reserve (IRR).

(d) *Separation.* A general term which includes discharge, release from active duty, release from custody and control of the armed forces, transfer to the IRR, and similar changes in active or reserve status.

(e) *Military record.* An individual's overall performance while a member of a Military Service, including personal conduct and performance of duty.

(f) *Separation Authority.* An official authorized by the Secretary concerned to take final action with respect to a specified type of separation.

(g) *Convening Authority.* (1) The Separation Authority or (2) a commanding officer who has been authorized by the Secretary concerned to process the case except for final action and who otherwise has the qualifications to act as a Separation Authority.

(h) *Respondent.* A member of a Military Service who has been notified that action has been initiated to separate the member.

(i) *Entry level status.* The first 180 days of continuous active military service. For members of a reserve component who have not completed 180 days of continuous active military service and who are not on active duty, entry level status begins upon enlistment in a reserve component (including a period of assignment to a delayed entry program) and terminates 180 days after beginning an initial period of entry level active duty training. For

purposes of characterization of service or description of separation, the member's status is determined by the date of notification as to the initiation of separation proceedings.

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PART 1—REASONS FOR SEPARATION

- A. *Expiration of Service Obligation.* 1. *Basis.* A member may be separated upon expiration of enlistment or fulfillment of service obligation. This includes separation authorized by the Secretary concerned when the member is within 30 days of the date of expiration of term of service under the following circumstances:
 - a. The member is serving outside the continental United States (CONUS); or
 - b. The member is a resident of a State, territory, or possession outside CONUS and is serving outside the member's State, territory, or possession of residence.
2. *Characterization or description.* Honorable, unless:
 - a. An Entry Level Separation is required under subsection C.3. of part 2;
 - b. Characterization of service as General (under honorable conditions) is warranted under section C. of part 2 on the basis of numerical scores accumulated in a formal, Service-wide rating system that evaluates conduct and performance on a regular basis; or

c. Another characterization is warranted upon discharge from the IRR under section E. of part 3.

B. Selected Changes in Service Obligations. 1. *Basis.* A member may be separated for the following reasons:

a. General demobilization or reduction in authorized strength.

b. Early separation of personnel under a program established by the Secretary concerned. A copy of the document authorizing such program shall be forwarded to the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics (ASD(MRA&L))) on or before the date of implementation.

c. Acceptance of an active duty commission or appointment, or acceptance into a program leading to such a commission or appointment in any branch of the Military Services.

d. Immediate enlistment or reenlistment.

e. Interservice transfer of inactive reserves in accordance with DoD Directive 1205.5.

2. *Characterization or description.* Honorable, unless:

a. An Entry Level Separation is required under section C. of part 2;

b. Characterization of service as General (under honorable conditions) is warranted under section C. of part 2 on the basis of numerical scores accumulated in a formal, service-wide rating system that evaluates conduct and performance on a regular basis; or

c. Another characterization is warranted upon discharge from the IRR under section E. of part 3.

C. Convenience of the Government. 1. *Basis.* A member may be separated for convenience of the government for the reasons set forth in subsection C.4., below.

2. *Characterization or description.* Honorable, unless:

a. An Entry Level Separation is required under section C. of part 2; or

b. Characterization of service as General (under honorable conditions) is warranted under section C. of part 2.

3. *Procedures.* Procedural requirements may be established by the Secretary concerned, subject to procedures established in subsection C.4., below. Prior to characterization of service as General (under honorable conditions), the member shall be notified of the specific factors in the service record that warrant such a characterization, and the Notification Procedure (section B. of part 3) shall be used. Such notice and procedure is not required, however, when characterization of service as General (under honorable conditions) is based upon numerical scores accumulated in a formal, service-wide rating system that evaluates conduct and performance on a regular basis.

4. *Reasons.* a. *Early release to further education.* A member may be separated under DoD Directive 1332.15 to attend a college,

university, vocational school, or technical school.

b. *Early release to accept public office.* A member may be separated to accept public office only under circumstances authorized by the Military Department concerned and consistent with DoD Directive 1344.10.

c. *Dependency or hardship.* (1) Upon request of the member and concurrence of the government, separation may be directed when genuine dependency or undue hardship exists under the following circumstances:

(a) The hardship or dependency is not temporary;

(b) Conditions have arisen or have been aggravated to an excessive degree since entry into the Service, and the member has made every reasonable effort to remedy the situation;

(c) The administrative separation will eliminate or materially alleviate the condition; and

(d) There are no other means of alleviation reasonably available.

(2) Undue hardship does not necessarily exist solely because of altered present or expected income, family separation, or other inconveniences normally incident to Military Service.

d. *Pregnancy or childbirth.* A female member may be separated on the basis of pregnancy or childbirth upon her request, unless retention is determined to be in the best interests of the service under section A. of part 2 and guidance established by the Military Department concerned.

e. *Parenthood.* A member may be separated by reason of parenthood if as a result thereof it is determined under the guidance set forth in section A. of part 2 that the member is unable satisfactorily to perform his or her duties or is unavailable for worldwide assignment or deployment. Prior to involuntary separation under this provision, the Notification Procedure (section B. of part 3) shall be used. Separation processing may not be initiated until the member has been counseled formally concerning deficiencies and has been afforded an opportunity to overcome those deficiencies as reflected in appropriate counseling or personnel records.

f. *Conscientious objection.* A member may be separated if authorized under 32 CFR part 75 (DoD Directive 1300.6).

g. *Surviving family member.* A member may be separated if authorized under 32 CFR part 52 (DoD Directive 1315.14).

h. *Other designated physical or mental conditions.* (1) The Secretary concerned may authorize separation on the basis of other designated physical or mental conditions, not amounting to Disability (section D., below), that potentially interfere with assignment to or performance of duty under the guidance set forth in section A. of part 2. Such conditions may include but are not limited

to chronic seasickness or airsickness, enuresis, and personality disorder.¹

(2) Separation processing may not be initiated until the member has been counseled formally concerning deficiencies and has been afforded an opportunity to overcome those deficiencies as reflected in appropriate counseling or personnel records.

(3) Separation on the basis of personality disorder is authorized only if a diagnosis by a psychiatrist or psychologist, completed in accordance with procedures established by the Military Department concerned, concludes, that the disorder is so severe that the member's ability to function effectively in the military environment is significantly impaired.

(4) Separation for personality disorder is not appropriate when separation is warranted under sections A. through N. or section P. of this part. For example, if separation is warranted on the basis of unsatisfactory performance (section G.) or misconduct (section K.), the member should not be separated under this section regardless of the existence of a personality disorder.

(5) Nothing in this provision precludes separation of a member who has such a condition under any other basis set forth under this section (Convenience of the Government) or for any other reason authorized by this part.

(6) Prior to involuntary separation under this provision, the Notification Procedure (section B. of part 3) shall be used.

(7) The reasons designated by the Secretary concerned shall be separately reported.

i. *Additional grounds.* The Secretary concerned may provide additional grounds for separation for the convenience of the government. A copy of the document authorizing such grounds shall be forwarded to the ASD(MRA&L) on or before the date of implementation.

D. *Disability.* 1. *Basis.* A member may be separated for disability under the provisions of 10 U.S.C. chapter 61.

2. *Characterization or description.* Honorable, unless:

a. An Entry Level Separation is required under section C. of part 2; or

b. Characterization of service as General (under honorable conditions) is warranted under section C. of part 2.

3. *Procedures.* Procedural requirements for separation may be established by the Military Departments consistent with 10 U.S.C. chapter 61. If separation is recommended, the

following requirements apply prior to characterization of service as General (under honorable conditions): the member shall be notified of the specific factors in the service record that warrant such a characterization, and the Notification Procedure (section B. of part 3) shall be used. Such notice and procedure is not required, however, when characterization of service as General (under honorable conditions) is based upon numerical scores accumulated in a formal, service-wide rating system that evaluates conduct and performance on a regular basis.

E. *Defective Enlistments and Inductions.* 1. *Minority.* a. *Basis.* (1) *Under age 17.* If a member is under the age of 17, the enlistment of the member is void, and the member shall be separated.

(2) *Age 17.* A member shall be separated under 10 U.S.C. 1170 in the following circumstances except when the member is retained for the purpose of trial by court-martial:

(a) There is evidence satisfactory to the Secretary concerned that the member is under 18 years of age;

(b) The member enlisted without the written consent of the member's parent or guardian; and

(c) An application for the member's separation is submitted to the Secretary concerned by the parent or guardian within 90 days of the member's enlistment.

b. *Description of separation.* A member separated under subparagraph E.1.a.(1), above, shall receive an order of release from the custody and control of the armed forces (by reason of void enlistment or induction). The separation of a member under subparagraph E.1.a.(2), above, shall be described as an Entry Level Separation.

c. *Procedure.* The Notification Procedure (section B. of part 3) shall be used.

2. *Erroneous.* a. *Basis.* A member may be separated on the basis of an erroneous enlistment, induction, or extension of enlistment under the guidance set forth in section A. of part 2. An enlistment, induction, or extension of enlistment is erroneous in the following circumstances, if:

(1) It would not have occurred had the relevant facts been known by the government or had appropriate directives been followed;

(2) It was not the result of fraudulent conduct on the part of the member; and

(3) The defect is unchanged in material respects.

b. *Characterization or description.* Honorable, unless an Entry Level Separation or an order of release from the custody and control of the Military Services (by reason of void enlistment or induction) is required under section C. of part 2.

c. *Procedure.* (1) If the command recommends that the individual be retained in military service, the initiation of separation

¹Personality disorders are described in the Diagnostic and Statistical Manual (DSM-III) of Mental Disorders, 3d Edition, Committee on Nomenclature & Statistics, American Psychiatric Association, Washington, DC, 1978.

processing is not required in the following circumstances:

- (a) The defect is no longer present; or
- (b) The defect is waivable and a waiver is obtained from appropriate authority.

(2) If separation processing is initiated, the Notification Procedure (section B. of part 3) shall be used.

3. *Defective enlistment agreements. a. Basis.* A defective enlistment agreement exists in the following circumstances:

(1) As a result of a material misrepresentation by recruiting personnel, upon which the member reasonably relied, the member was induced to enlist with a commitment for which the member was not qualified;

(2) The member received a written enlistment commitment from recruiting personnel for which the member was qualified, but which cannot be fulfilled by the Military Service; or

(3) The enlistment was involuntary. See 10 U.S.C. 802.

b. *Characterization or description.* Honorable, unless an Entry Level Separation or an order of release from the custody and control of the Military Services (by reason of void enlistment) is required under section C. of part 2.

c. *Procedures.* This provision does not bar appropriate disciplinary action or other administrative separation proceedings regardless of when the defect is raised. Separation is appropriate under this provision only in the following circumstances:

(1) The member did not knowingly participate in creation of the defective enlistment;

(2) The member brings the defect to the attention of appropriate authorities within 30 days after the defect is discovered or reasonably should have been discovered by the member;

(3) The member requests separation instead of other authorized corrective action; and

(4) The request otherwise meets such criteria as may be established by the Secretary concerned.

4. *Fraudulent entry into military service. a. Basis.* A member may be separated under guidance set forth in section A. of part 2 on the basis of procurement of a fraudulent enlistment, induction, or period of military service through any deliberate material misrepresentation, omission, or concealment which, if known at the time of enlistment, induction, or entry onto a period of military service, might have resulted in rejection.

b. *Characterization or description.* Characterization of service or description of separation shall be in accordance with section C. of part 2. If the fraud involves concealment of a prior separation in which service was not characterized as Honorable, characterization normally shall be Under Other Than Honorable Conditions.

c. *Procedures.* The Notification Procedure (section B. of part 3) shall be used except as follows:

(1) Characterization of service Under Other Than Honorable Conditions may not be issued unless the Administrative Board Procedure (section C. of part 3) is used.

(2) When the sole reason for separation is fraudulent entry, suspension of separation (section B. of part 2) is not authorized. When there are approved reasons for separation in addition to fraudulent entry, suspension of separation is authorized only in the following circumstances:

(a) A waiver of the fraudulent entry is approved; and

(b) The suspension pertains to reasons for separation other than the fraudulent entry.

(3) If the command recommends that the member be retained in military service, the initiation of separation processing is unnecessary in the following circumstances:

(a) The defect is no longer present; or

(b) The defect is waivable and a waiver is obtained from appropriate authority.

(4) If the material misrepresentation includes preservice homosexuality (subsection H.1.), the standards of paragraph H.1.c. and procedures of subsection H.3. shall be applied in processing a separation under this section. In such a case the characterization or description of the separation shall be determined under paragraph E.4.b., above.

F. *Entry Level Performance and Conduct. 1. Basis. a.* A member may be separated while in entry level status (§41.6(i)) when it is determined under the guidance set forth in section A. of part 2 that the member is unqualified for further military service by reason of unsatisfactory performance or conduct (or both), as evidenced by inability, lack of reasonable effort, failure to adapt to the military environment or minor disciplinary infractions.

b. When separation of a member in entry level status is warranted by unsatisfactory performance or minor disciplinary infractions (or both), the member normally should be separated under this section. Nothing in this provision precludes separation under another provision of this Directive when such separation is authorized and warranted by the circumstances of the case.

2. *Counseling and rehabilitation.* Separation processing may not be initiated until the member has been counseled formally concerning deficiencies and has been afforded an opportunity to overcome those deficiencies as reflected in appropriate counseling or personnel records. Counseling and rehabilitation requirements are important with respect to this reason for separation. Because military service is a calling different from any civilian occupation, a member should not be separated when this is the sole reason

unless there have been efforts at rehabilitation under standards prescribed by the Secretary concerned.

3. *Description of separation.* Entry Level Separation.

4. *Procedures.* The Notification Procedure (section B. of part 3) shall be used.

G. *Unsatisfactory Performance.* 1. *Basis.* A member may be separated when it is determined under the guidance set forth in section A. of part 2 that the member is unqualified for further military service by reason of unsatisfactory performance. This reason shall not be used if the member is in entry level status (§41.6(i)).

2. *Counseling and Rehabilitation.* Separation processing may not be initiated until the member has been counseled formally concerning deficiencies and has been afforded an opportunity to overcome those deficiencies as reflected in appropriate counseling or personnel records. Counseling and rehabilitation requirements are of particular importance with respect to this reason for separation. Because military service is a calling different from any civilian occupation, a member should not be separated when unsatisfactory performance is the sole reason unless there have been efforts at rehabilitation under standards prescribed by the Secretary concerned.

3. *Characterization or description.* The service shall be characterized as Honorable or General (under honorable conditions) in accordance with section C. of part 2.

4. *Procedures.* The Notification Procedure (section B. of part 3) shall be used.

H. *Homosexuality.* 1. *Basis.* a. Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission. The presence of such members adversely affects the ability of the Military Services to maintain discipline, good order, and morale; to foster mutual trust and confidence among servicemembers; to ensure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of servicemembers who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the Military Services; to maintain the public acceptability of military service; and to prevent breaches of security.

b. As used in this section:

(1) Homosexual means a person, regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts;

(2) Bisexual means a person who engages in, desires to engage in, or intends to engage in homosexual and heterosexual acts; and

(3) A homosexual act means bodily contact, actively undertaken or passively per-

mitted, between members of the same sex for the purpose of satisfying sexual desires.

c. The basis for separation may include preservice, prior service, or current service conduct or statements. A member shall be separated under this section if one or more of the following approved findings is made:

(1) The member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are approved further findings that:

(a) Such conduct is a departure from the member's usual and customary behavior;

(b) Such conduct under all the circumstances is unlikely to recur;

(c) Such conduct was not accomplished by use of force, coercion, or intimidation by the member during a period of military service;

(d) Under the particular circumstances of the case, the member's continued presence in the Service is consistent with the interest of the Service in proper discipline, good order, and morale; and

(e) The member does not desire to engage in or intend to engage in homosexual acts.

(2) The member has stated that he or she is a homosexual or bisexual unless there is a further finding that the member is not a homosexual or bisexual.

(3) The member has married or attempted to marry a person known to be of the same biological sex (as evidenced by the external anatomy of the persons involved) unless there are further findings that the member is not a homosexual or bisexual and that the purpose of the marriage or attempt was the avoidance or termination of military service.

2. *Characterization or description.* Characterization of service or description of separation shall be in accordance with the guidance in section C. of part 2. When the sole basis for separation is homosexuality, a characterization Under Other Than Honorable Conditions may be issued only if such a characterization is warranted under section C. of part 2 and there is a finding that during the current term of service the member attempted, solicited, or committed a homosexual act in the following circumstances:

a. By using force, coercion, or intimidation;

b. With a person under 16 years of age;

c. With a subordinate in circumstances that violate customary military superior-subordinate relationships;

d. Openly in public view;

e. For compensation;

f. Aboard a military vessel or aircraft; or

g. In another location subject to military control under aggravating circumstances noted in the finding that have an adverse impact on discipline, good order, or morale comparable to the impact of such activity aboard a vessel or aircraft.

3. *Procedures.* The Administrative Board Procedure (section C. of part 3) shall be used, subject to the following guidance:

a. Separation processing shall be initiated if there is probable cause to believe separation is warranted under paragraph H.1.c., above.

b. The Administrative Board shall follow the procedures set forth in subsection C.5. of part 3, except with respect to the following matters:

(1) If the Board finds that one or more of the circumstances authorizing separation under paragraph H.1.c., above, is supported by the evidence, the Board shall recommend separation unless the Board finds that retention is warranted under the limited circumstances described in that paragraph.

(2) If the Board does not find that there is sufficient evidence that one or more of the circumstances authorizing separation under paragraph H.1.c. has occurred, the Board shall recommend retention unless the case involves another basis for separation of which the member has been duly notified.

c. In any case in which characterization of service Under Other Than Honorable Conditions is not authorized, the Separation Authority may be exercised by an officer designated under paragraph B.4.a. of part 3.

d. The Separation Authority shall dispose of the case according to the following provisions:

(1) If the Board recommends retention, the Separation Authority shall take one of the following actions:

(a) Approve the finding and direct retention; or

(b) Forward the case to the Secretary concerned with a recommendation that the Secretary separate the member under the Secretary's Authority (section O. of this part 1).

(2) If the Board recommends separation, the Separation Authority shall take one of the following actions:

(a) Approve the finding and direct separation; or

(b) Disapprove the finding on the basis of the following considerations:

1. There is insufficient evidence to support the finding; or

2. Retention is warranted under the limited circumstances described in paragraph H.1.c., above.

(3) If there has been a waiver of Board proceedings, the Separation Authority shall dispose of the case in accordance with the following provisions:

(a) If the Separation Authority determines that there is not sufficient evidence to support separation under paragraph H.1.c., the Separation Authority shall direct retention unless there is another basis for separation of which the member has been duly notified.

(b) If the Separation Authority determines that one or more of the circumstances authorizing separation under paragraph H.1.c. has occurred, the member shall be separated unless retention is warranted under the limited

circumstances described in that paragraph.

e. The burden of proving that retention is warranted under the limited circumstances described in paragraph H.1.c. rests with the member, except in cases where the member's conduct was solely the result of a desire to avoid or terminate military service.

f. Findings regarding the existence of the limited circumstances warranting a member's retention under paragraph H.1.c. are required only if:

(1) The member clearly and specifically raises such limited circumstances; or

(2) The Board or Separation Authority relies upon such circumstances to justify the member's retention.

g. Nothing in these procedures:

(1) Limits the authority of the Secretary concerned to take appropriate action in a case to ensure that there has been compliance with the provisions of this part;

(2) Precludes retention of a member for a limited period of time in the interests of national security as authorized by the Secretary concerned;

(3) Authorizes a member to seek Secretarial review unless authorized in procedures promulgated by the Secretary concerned;

(4) Precludes separation in appropriate circumstances for another reason set forth in this part; or

(5) Precludes trial by court-martial in appropriate cases.

I. Drug Abuse Rehabilitation Failure. 1. *Basis.* a. A member who has been referred to a program of rehabilitation for personal drug and alcohol abuse may be separated for failure through inability or refusal to participate in, cooperate in, or successfully complete such a program in the following circumstances:

(1) There is a lack of potential for continued military service; or

(2) Long-term rehabilitation is determined necessary and the member is transferred to a civilian medical facility for rehabilitation.

b. Nothing in this provision precludes separation of a member who has been referred to such a program under any other provision of this part in appropriate cases.

c. Drug abuse rehabilitation failures shall be reported separately from alcohol abuse rehabilitation failures. If separation is based on both, the primary basis shall be used for reporting requirements.

2. *Characterization or description.* When a member is separated under this provision, characterization of service as Honorable or General (under honorable conditions) is authorized except when an Entry Level Separation is required under section C. of part 2. The relationship between voluntary submission for treatment and the evidence that may be considered on the issue of characterization is set forth in subparagraph C.2.c.(6)

of part 2. The relationship between mandatory urinalysis and the evidence that may be considered on the issue of characterization is set forth in subparagraph C.2.c.(7) of part 2.

3. *Procedures.* The Notification Procedure (section B. of part 3) shall be used.

J. *Alcohol Abuse Rehabilitation Failure.* 1. *Basis.* a. A member who has been referred to a program of rehabilitation for drug and alcohol abuse may be separated for failure through inability or refusal to participate in, cooperate in, or successfully complete such a program in the following circumstances:

(1) There is a lack of potential for continued military service; or

(2) Long-term rehabilitation is determined necessary and the member is transferred to a civilian medical facility for rehabilitation.

b. Nothing in this provision precludes separation of a member who has been referred to such a program under any other provision of this part in appropriate cases.

c. Alcohol abuse rehabilitation failures shall be reported separately from drug abuse rehabilitation failures. If separation is based on both, the primary basis shall be used for reporting purposes.

2. *Characterization or description.* When a member is separated under this provision, characterization of service as Honorable or General (under honorable conditions) is authorized except when an Entry Level Separation is required under section C. of part 2.

3. *Procedures.* The Notification Procedure (section B. of part 3) shall be used.

K. *Misconduct.* 1. *Basis.* a. *Reasons.* A member may be separated for misconduct when it is determined under the guidance set forth in section A. of part 2 that the member is unqualified for further military service by reason of one or more of the following circumstances:

(1) *Minor disciplinary infractions.* A pattern of misconduct consisting solely of minor disciplinary infractions. If separation of a member in entry level status is warranted solely by reason of minor disciplinary infractions, the action should be processed under Entry Level Performance and Conduct (section F., above).

(2) *A pattern of misconduct.* A pattern of misconduct consisting of (a) despicable involvement with civil or military authorities or (b) conduct prejudicial to good order and discipline.

(3) *Commission of a serious offense.* Commission of a serious military or civilian offense if in the following circumstances:

(a) The specific circumstances of the offense warrant separation; and

(b) A punitive discharge would be authorized for the same or a closely related offense under the Manual for Courts-Martial, 1969 (Revised Edition), as amended.

(4) *Civilian conviction.* (a) Conviction by civilian authorities or action taken which is tantamount to a finding of guilty, including

similar adjudications in juvenile proceedings, when the specific circumstances of the offense warrant separation, and the following conditions are present:

1 A punitive discharge would be authorized for the same or a closely related offense under the Manual for Courts-Martial; or

2 The sentence by civilian authorities includes confinement for six months or more without regard to suspension or probation.

(b) Separation processing may be initiated whether or not a member has filed an appeal of a civilian conviction or has stated an intention to do so. Execution of an approved separation should be withheld pending outcome of the appeal or until the time for appeal has passed, but the member may be separated prior to final action on the appeal upon request of the member or upon direction of the Secretary concerned.

b. *Reporting.* The Deputy Assistant Secretary (Military Personnel and Force Management), Office of the ASD (MRA&L), shall require separate reports under each subparagraph in paragraph K.1.a. for misconduct by reason of drug abuse, unauthorized absence, and such other categories as may be appropriate.

c. *Related separations.* Misconduct involving homosexuality shall be processed under section H. Misconduct involving a fraudulent enlistment is considered under subsection E.4., above.

2. *Counseling and rehabilitation.* Separation processing for a pattern of misconduct (subparagraphs K.1.a. (1) and (2)) may not be initiated until the member has been counseled formally concerning deficiencies and has been afforded an opportunity to overcome those deficiencies as reflected in appropriate counseling or personnel records. If the sole basis of separation is a single offense (subparagraph K.1.a.(3)) or a civilian conviction or a similar juvenile adjudication (subparagraph K.1.a.(4)), the counseling and rehabilitation requirements are not applicable.

3. *Characterization or description.* Characterization of service normally shall be Under Other Than Honorable Conditions, but characterization as General (under honorable conditions) may be warranted under the guidelines in section C. of part 2. For respondents who have completed entry level status, characterization of service as Honorable is not authorized unless the respondent's record is otherwise so meritorious that any other characterization clearly would be inappropriate and the separation is approved by a commander exercising general court-martial jurisdiction or higher authority as specified by the Secretary concerned. When characterization of service Under Other Than Honorable Conditions is not warranted for a member in entry level status under section C. of part 2, the separation shall be described as an Entry Level Separation.

4. *Procedures.* The Administrative Board Procedure (section C. of part 3) shall be used, except that use of the Notification Procedure (section B. of part 3) is authorized if separation is based upon subparagraphs K.1.a.(1) and K.1.a.(2) and characterization of service Under Other Than Honorable Conditions is not warranted under section C. of part 2.

L. *Separation in Lieu of Trial by Court-Martial.* 1. *Basis.* A member may be separated upon request of trial by court-martial if charges have been preferred with respect to an offense for which a punitive discharge is authorized and it is determined that the member is unqualified for further military service under the guidance set forth in section A. of part 2. This provision may not be used when section B. of paragraph 127c of the Manual for Courts-Martial provides the sole basis for a punitive discharge unless the charges have been referred to a court-martial empowered to adjudge a punitive discharge.

2. *Characterization or description.* Characterization of service normally shall be Under Other Than Honorable Conditions, but characterization as General (under honorable conditions) may be warranted under the guidelines in section C. of part 2. For respondents who have completed entry level status, characterization of service as Honorable is not authorized unless the respondent's record is otherwise so meritorious that any other characterization clearly would be inappropriate. When characterization of service Under Other Than Honorable Conditions is not warranted for a member in entry level status under section C. of part 2, the separation shall be described as an Entry Level Separation.

3. *Procedures.* a. The request for discharge must be submitted in writing and signed by the member.

b. The member shall be afforded opportunity to consult with counsel qualified under Article 27(b)(1) of the UCMJ. If the member refuses to do so, counsel shall prepare a statement to this effect, which shall be attached to the file, and the member shall state that he or she has waived the right to consult with counsel.

c. Except when the member has waived the right to counsel, the request shall be signed by counsel.

d. In the written request, the member shall state that he or she understands the following:

(1) The elements of the offense or offenses charged;

(2) That characterization of service Under Other Than Honorable Conditions is authorized; and

(3) The adverse nature of such a characterization and possible consequences thereof.

e. The Secretary concerned shall also require that one or both of the following matters be included in the request:

(1) An acknowledgment of guilt of one or more of the offenses or any lesser included offenses for which a punitive discharge is authorized; or

(2) A summary of the evidence or list of documents (or copies thereof) provided to the member pertaining to the offenses for which a punitive discharge is authorized.

f. The Separation Authority shall be a commander exercising general court-martial jurisdiction or higher authority as specified by the Secretary concerned.

g. Statements by the member or the member's counsel submitted in connection with a request under this subsection are not admissible against the member in a court-martial except as authorized under Military Rule of Evidence 410, Manual for Courts-Martial.

M. *Security.* 1. *Basis.* When retention is clearly inconsistent with the interest of national security, a member may be separated by reason of security and under conditions and procedures established by the Secretary of Defense in DoD 5200.2-R.

2. *Characterization or description.* Characterization of service or description of a separation shall be in accordance with section C. of part 2.

N. *Unsatisfactory Participation in the Ready Reserve.* 1. *Basis.* A member may be separated for unsatisfactory participation in the Ready Reserve under criteria established by the Secretary concerned under 32 CFR part 100 (DoD Directive 1215.13).

2. *Characterization or description.* Characterization of service or description of a separation shall be in accordance with section C. of part 2 and 32 CFR part 100 (DoD Directive 1215.13).

3. *Procedures.* The Administrative Board Procedure (section C. of part 3) shall be used, except that the Notification Procedure (section B. of part 3) may be used if characterization of service Under Other Than Honorable Conditions is not warranted under section C. of part 2.

O. *Secretarial Plenary Authority.*

1. *Basis.* Notwithstanding any limitation on separations provided in this part the Secretary concerned may direct the separation of any member prior to expiration of term of service after determining it to be in the best interests of the Service.

2. *Characterization or description.* Honorable or General (under honorable conditions) as warranted under section C. of part 2 unless an Entry Level Separation is required under section C. of part 2.

3. *Procedures.* Prior to involuntary separation, the Notification Procedure (section B. of part 3) shall be used, except the procedure for requesting an Administrative Board (paragraph B.1.g. of part 3) is not applicable.

P. *Reasons Established by the Military Departments.* 1. *Basis.* The Military Departments may establish additional reasons for separation for circumstances not otherwise

provided for in this part to meet specific requirements, subject to approval by the ASD (MRA&L).

2. *Counseling and rehabilitation.* Separation processing may not be initiated until the member has been counseled formally concerning deficiencies and has been afforded an opportunity to overcome those deficiencies as reflected in appropriate counseling or personnel records except when the Military Department concerned provides in its implementing document that counseling and rehabilitation requirements are not applicable for the specific reason for separation.

3. *Characterization or description.* Characterization of service or description of a separation shall be in accordance with section C. of part 2.

4. *Procedures.* The procedures established by the Military Departments shall be consistent with the procedures contained in this part insofar as practicable.

PART 2—GUIDELINES ON SEPARATION AND CHARACTERIZATION

A. *Separation.* 1. *Scope.* This general guidance applies when referenced in part 1. Further guidance is set forth under the specific reasons for separation in part 1.

2. *Guidance.* a. There is a substantial investment in the training of persons enlisted or inducted into the Military Services. As a general matter, reasonable efforts at rehabilitation should be made prior to initiation of separation proceedings.

b. Unless separation is mandatory, the potential for rehabilitation and further useful military service shall be considered by the Separation Authority and, where applicable, the Administrative Board. If separation is warranted despite the potential for rehabilitation, consideration should be given to suspension of the separation, if authorized.

c. Counseling and rehabilitation efforts are a prerequisite to initiation of separation proceedings only insofar as expressly set forth under specific requirements for separation in part 1. An alleged or established inadequacy in previous rehabilitative efforts does not provide a legal bar to separation.

d. The following factors may be considered on the issue of retention or separation, depending on the circumstances of the case:

(1) The seriousness of the circumstances forming the basis for initiation of separation proceedings, and the effect of the member's continued retention on military discipline, good order, and morale.

(2) The likelihood of continuation or recurrence of the circumstances forming the basis for initiation of separation proceedings.

(3) The likelihood that the member will be a disruptive or undesirable influence in present or future duty assignments.

(4) The ability of the member to perform duties effectively in the present and in the

future, including potential for advancement or leadership.

(5) The member's rehabilitative potential.

(6) The member's entire military record.

(a) This may include:

1 Past contributions to the Service, assignments, awards and decorations, evaluation ratings, and letters of commendation;

2 Letters of reprimand or admonition, counseling records, records of nonjudicial punishment, records of conviction by court-martial and records of involvement with civilian authorities; and

3 Any other matter deemed relevant by the Board, if any, or the Separation Authority, based upon the specialized training, duties, and experience of persons entrusted by this part with recommendations and decisions on the issue of separation or retention.

(b) The following guidance applies to consideration of matter under subparagraph A.2.d.(6)(a):

1 Adverse matter from a prior enlistment or period of military service, such as records of nonjudicial punishment and convictions by courts-martial, may be considered only when such records would have a direct and strong probative value in determining whether separation is appropriate. The use of such records ordinarily shall be limited to those cases involving patterns of conduct manifested over an extended period of time.

2 Isolated incidents and events that are remote in time normally have little probative value in determining whether administrative separation should be effected.

3. *Limitations on separation actions.* A member may not be separated on the basis of the following:

a. Conduct that has been the subject of judicial proceedings resulting in an acquittal or action having the effect thereof except in the following circumstances:

(1) When such action is based upon a judicial determination not going to the guilt or innocence of the respondent; or

(2) When the judicial proceeding was conducted in a State or foreign court and the separation is approved by the Secretary concerned.

b. Conduct that has been the subject of a prior Administrative Board in which the Board entered an approved finding that the evidence did not sustain the factual allegations concerning the conduct except when the conduct is the subject of a rehearing ordered on the basis of fraud or collusion; or

c. Conduct that has been the subject of an administrative separation proceeding resulting in a final determination by a Separation Authority that the member should be retained, except in the following circumstances:

(1) When there is subsequent conduct or performance forming the basis, in whole or in part, for a new proceeding;

(2) When there is new or newly discovered evidence that was not reasonably available at the time of the prior proceeding; or

(3) When the conduct is the subject of a rehearing ordered on the basis of fraud or collusion.

B. Suspension of Separation. 1. *Suspension.* a. Unless prohibited by this part a separation may be suspended for a specified period of not more than 12 months by the Separation Authority or higher authority if the circumstances of the case indicate a reasonable likelihood of rehabilitation.

b. During the period of suspension, the member shall be afforded an opportunity to meet appropriate standards of conduct and duty performance.

c. Unless sooner vacated or remitted, execution of the approved separation shall be remitted upon completion of the probationary period, upon termination of the member's enlistment or period of obligated service, or upon decision of the Separation Authority that the goal of rehabilitation has been achieved.

2. *Action during the period of suspension.* a. During the period of suspension, if there are further grounds for separation under part 1, one or more of the following actions may be taken:

(1) Disciplinary action;

(2) New administrative action; or

(3) Vacation of the suspension accompanied by execution of the separation if the member engages in conduct similar to that for which separation was approved (but suspended) or otherwise fails to meet appropriate standards of conduct and duty performance.

b. Prior to vacation of a suspension, the member shall be notified in writing of the basis for the action and shall be afforded the opportunity to consult with counsel (as provided in paragraph B.1.f. of part 3) and to submit a statement in writing to the Separation Authority. The respondent shall be provided a reasonable period of time, but not less than 2 working days, to act on the notice. If the respondent identifies specific legal issues for consideration by the Separation Authority, the matter shall be reviewed by a judge advocate or civilian lawyer employed by the government prior to final action by the Separation Authority.

C. Characterization of Service or Description of Separation. 1. *Types of characterization or description.* a. At separation, the following types of characterization of service or description of separation are authorized under this part:

(1) Separation with characterization of service as Honorable, General (under honorable conditions), or Under Other Than Honorable Conditions.

(2) Entry Level Separation.

(3) Order of release from the custody and control of the Military Services by reason of void enlistment or induction.

(4) Separation by being dropped from the rolls of the Service.

b. Any of the types of separation listed in this section may be used in appropriate circumstances unless a limitation set forth in this section or in part 1 (Reasons for Separation).

2. *Characterization of service.* a. *General considerations.* (1) Characterization at separation shall be based upon the quality of the member's service, including the reason for separation and guidance in paragraph C.2.b., below, subject to the limitations set forth under various reasons for separation in part 1. The quality of service will be determined in accordance with standards of acceptable personal conduct and performance of duty for military personnel. These standards are found in the 10 U.S.C., sections 801-940, UCMJ, directives and regulations issued by the Department of Defense and the Military Departments, and the time-honored customs and traditions of military service.

(2) The quality of service of a member on active duty or active duty for training is affected adversely by conduct that is of a nature to bring discredit on the Military Services or is prejudicial to good order and discipline, regardless of whether the conduct is subject to UCMJ jurisdiction. Characterization may be based on conduct in the civilian community, and the burden is on the respondent to demonstrate that such conduct did not adversely affect the respondent's service.

(3) The reasons for separation, including the specific circumstances that form the basis for the separation, shall be considered on the issue of characterization. As a general matter, characterization will be based upon a pattern of behavior rather than an isolated incident. There are circumstances, however, in which the conduct or performance of duty reflected by a single incident provides the basis for characterization.

(4) Due consideration shall be given to the member's age, length of service, grade, aptitude, physical and mental condition, and the standards of acceptable conduct and performance of duty.

b. *Types of characterization.* (1) *Honorable.* The Honorable characterization is appropriate when the quality of the member's service generally has met the standards of acceptable conduct and performance of duty for military personnel, or is otherwise so meritorious that any other characterization would be clearly inappropriate. In the case of an Honorable Discharge, an Honorable Discharge Certificate (DD Form 256) will be awarded and a notation will be made on the appropriate copies of the DD Form 214/5 in accordance with 32 CFR part 45 (DoD Directive 1336.1).

(2) *General (under honorable conditions).* If a member's service has been honest and faithful, it is appropriate to characterize that

service under honorable conditions. Characterization of service as General (under honorable conditions) is warranted when significant negative aspects of the member's conduct or performance of duty outweigh positive aspects of the member's military record.

(3) *Under Other Than Honorable Conditions.* (a) This characterization may be issued in the following circumstances:

1 When the reason for separation is based upon a pattern of behavior that constitutes a significant departure from the conduct expected of members of the Military Services.

2 When the reason for separation is based upon one or more acts or omissions that constitute a significant departure from the conduct expected of members of the Military Services. Examples of factors that may be considered include the use of force or violence to produce serious bodily injury or death, abuse of a special position of trust, disregard by a superior of customary superior-subordinate relationships, acts or omissions that endanger the security of the United States or the health and welfare of other members of the Military Services, and deliberate acts or omissions that seriously endanger the health and safety of other persons.

(b) This characterization is authorized only if the member has been afforded the opportunity to request an Administrative Board, except as provided in section L. of part 1 (Separation in Lieu of Trial by Courts-Martial).

c. *Limitations on characterization.* Except as otherwise provided in this paragraph, characterization will be determined solely by the member's military record during the current enlistment or period of service to which the separation pertains, plus any extensions thereof prescribed by law or regulation or effected with the consent of the member.

(1) Prior service activities, including records of conviction by courts-martial, records of absence without leave, or commission of other offenses for which punishment was not imposed shall not be considered on the issue of characterization. To the extent that such matters are considered on the issue of retention or separation (subsection A.2. of this part 2), the record of proceedings may reflect express direction that such information shall not be considered on the issue of characterization.

(2) Preservice activities may not be considered on the issue of characterization except as follows: in a proceeding concerning fraudulent entry into military service (subsection E.4. of part 1), evidence of preservice misrepresentations about matters that would have precluded, postponed, or otherwise affected the member's eligibility for enlistment or induction may be considered on the issue of characterization.

(3) The limitations in subsection A.3., above, as to matters that may be considered

on the issue of separation are applicable to matters that may be considered on the issue of characterization.

(4) When the sole basis for separation is a serious offense which resulted in a conviction by a court-martial that did not impose a punitive discharge, the member's service may not be characterized Under Other Than Honorable Conditions unless such characterization is approved by the Secretary concerned.

(5) Conduct in the civilian community of a member of a reserve component who is not on active duty or active duty for training may form the basis for characterization Under Other Than Honorable Conditions only if such conduct affects directly the performance of military duties. Such conduct may form the basis of characterization as General (under honorable conditions) only if such conduct has an adverse impact on the overall effectiveness of the service, including military morale and efficiency.

(6) A member's voluntary submission to a DoD treatment and rehabilitation program (for personal use of drugs) and evidence provided voluntarily by the member concerning personal use of drugs as part of initial entry into such a program may not be used against the member on the issue of characterization. This limitation does not preclude the following actions:

(a) The introduction of evidence for impeachment or rebuttal purposes in any proceeding in which the evidence of drug abuse (or lack thereof) has been first introduced by the member; and

(b) Taking action based on independently derived evidence, including evidence of drug abuse after initial entry into the treatment and rehabilitation program.

(7) The results of mandatory urinalysis may be used on the issue of characterization except as provided in the Deputy Secretary of Defense Memorandum, "Alcohol and Drug Abuse," December 28, 1981, and rules promulgated thereunder.

3. *Uncharacterized separations.* a. *Entry Level Separation.* (1) A separation shall be described as an Entry Level Separation if separation processing is initiated while a member is in entry level status, except in the following circumstances:

(a) When characterization Under Other Than Honorable Conditions is authorized under the reason for separation (part 1) and is warranted by the circumstances of the case; or

(b) The Secretary concerned, on a case-by-case basis, determines that characterization of service as Honorable is clearly warranted by the presence of unusual circumstances involving personal conduct and performance of military duty. This characterization is authorized when the member is separated under part 1 by reason of selected changes in service obligation (section B.), Convenience

of the Government (section C.), Disability (section D.), Secretarial Plenary Authority (section O.), or an approved reason established by the Military Department (section P.).

(2) In time of mobilization or in other appropriate circumstances, the ASD (MRA&L) may authorize the Secretary concerned to delegate the authority in subparagraph (1)(b), above, (concerning the Honorable characterization) to a general court-martial convening authority with respect to members serving in operational units.

(3) With respect to administrative matters outside this part that require a characterization as Honorable or General, an Entry Level Separation shall be treated as the required characterization. This provision does not apply to administrative matters that expressly require different treatment of an Entry Level Separation except as provided in subparagraph (4), below.

(4) In accordance with 10 U.S.C. 1163, an Entry Level Separation for a member of a Reserve Component separated from the Delayed Entry Program is "under honorable conditions."

b. *Void enlistments or inductions.* A member shall not receive a discharge, characterization of service at separation, or an Entry Level Separation if the enlistment or induction is void except when a constructive enlistment arises and such action is required under subparagraph (3), below. If characterization or an Entry Level Separation is not required, the separation shall be described as an order of release from custody or control of the Military Services.

(1) An enlistment is void in the following circumstances:

(a) If it was effected without the voluntary consent of a person who has the capacity to understand the significance of enlisting in the Military Services, including enlistment of a person who is intoxicated or insane at the time of enlistment. 10 U.S.C. 504; Article 2(b), UCMJ.

(b) If the person is under 17 years of age. 10 U.S.C. 505.

(c) If the person is a deserter from another Military Service. 10 U.S.C. 504.

(2) Although an enlistment may be void at its inception, a constructive enlistment shall arise in the case of a person serving with a Military Service who:

(a) Submitted voluntarily to military authority;

(b) Met the mental competency and minimum 10 U.S.C. age qualifications of sections 504 and 505 of, at the time of voluntary submission to military authority;

(c) Received military pay or allowances; and

(d) Performed military duties.

(3) If an enlistment that is void at its inception is followed by a constructive enlistment within the same term of service, char-

acterization of service or description of separation shall be in accordance with subsection C.2. or paragraph C.3.a. of this part 2, as appropriate; however, if the enlistment was void by reason of desertion from another Military Service, the member shall be separated by an order of release from the custody and control of the Service regardless of any subsequent constructive enlistment. The occurrence of such a constructive enlistment does not preclude the Military Departments, in appropriate cases, from either retaining the member or separating the member under section E. of part 1 on the basis of the circumstances that occasioned the original void enlistment or upon any other basis for separation provided in this part.

c. *Dropping from the rolls.* A member may be dropped from the rolls of the Service when such action is authorized by the Military Department concerned and a characterization of service or other description of separation is not authorized or warranted.

PART 3—PROCEDURES FOR SEPARATION

A. *Scope.* 1. The supplementary procedures in this part are applicable only when required under a specific reason for separation (part 1). These procedures are subject to the requirements set forth in part 1 with respect to specific reasons for separation.

2. When a member is processed on the basis of multiple reasons for separation, the following guidelines apply to procedural requirements (including procedural limitations on characterization of service or description of separation):

a. The requirements for each reason will be applied to the extent practicable.

b. If a reason for separation set forth in the notice of proposed action requires processing under the Administrative Board Procedure (section C., below), the entire matter shall be processed under section C.

c. If more than one reason for separation is approved, the guidance on characterization that provides the greatest latitude may be applied.

d. When there is any other clear conflict between a specific requirement applicable to one reason and a general requirement applicable to another reason, the specific requirement shall be applied.

e. If a conflict in procedures cannot be resolved on the basis of the foregoing principles, the procedure most favorable to the respondent shall be used.

B. *Notification Procedure.* 1. *Notice.* If the Notification Procedure is initiated under part 1, the respondent shall be notified in writing of the matter set forth in this section.

a. The basis of the proposed separation, including the circumstances upon which the action is based and a reference to the applicable provisions of the Military Department's implementing regulation.

b. Whether the proposed separation could result in discharge, release from active duty to a reserve component, transfer from the Selected Reserve to the IRR, release from custody or control of the Military Services, or other form of separation.

c. The least favorable characterization of service or description of separation authorized for the proposed separation.

d. The right to obtain copies of documents that will be forwarded to the Separation Authority supporting the basis of the proposed separation. Classified documents may be summarized.

e. The respondent's right to submit statements.

f. The respondent's right to consult with counsel qualified under Article 27(b)(1) of the UCMJ. Nonlawyer counsel may be appointed when the respondent is deployed aboard a vessel or in similar circumstances of separation from sufficient judge advocate resources as determined under standards and procedures specified by the Secretary concerned. The respondent also may consult with civilian counsel retained at the member's own expense.

g. If the respondent has 6 or more years of total active and reserve military service, the right to request an Administrative Board (section C.).

h. The right to waive paragraphs d., e., f. or g., above, after being afforded a reasonable opportunity to consult with counsel, and that failure to respond shall constitute a waiver of the right.

2. *Additional notice requirements.* a. If separation processing is initiated on the basis of more than one reason under part 1, the requirements of paragraph B.1.a. apply to all proposed reasons for separation.

b. If the respondent is in civil confinement, absent without leave, or in a reserve component not on active duty or upon transfer to the IRR, the relevant notification procedures in sections D., E., or F. of this part 3 apply.

c. Additional notification requirements are set forth in part 1, sections C. and D., when characterization of service as General (under honorable conditions) is authorized and the member is processed for separation by reason of Convenience of the Government or Disability.

3. *Response.* The respondent shall be provided a reasonable period of time, but not less than 2 working days, to act on the notice. An extension may be granted upon a timely showing of good cause by the respondent. The decision of the respondent on each of the rights set forth in paragraphs 1.d. through g., above, and applicable provisions referenced in subsection 2. shall be recorded and signed by the respondent and counsel, subject to the following limitation:

a. If notice by mail is authorized under sections D., E., or F. of this part 3 and the respondent fails to acknowledge receipt or sub-

mit a timely reply, that fact shall constitute a waiver of rights and an appropriate notation shall be recorded on a retained copy of the appropriate form.

b. If the respondent declines to respond as to the selection of rights, such declination shall constitute a waiver of rights and an appropriate notation will be made on the form provided for respondent's reply. If the respondent indicates that one or more of the rights will be exercised, but declines to sign the appropriate form, the selection of rights will be noted and an appropriate notation as to the failure to sign will be made.

4. *Separation Authority.* a. The Separation Authority for actions initiated under the Notification Procedure shall be a special court-martial convening authority or higher authority. The Secretary concerned also may authorize a commanding officer in grade O-5 or above with a judge advocate or legal advisor available to the command to act as a Separation Authority for a specified reason for separation, subject to approval by the ASD(MRA&L). When the case has been initiated under the Administrative Board Procedure and the member has waived the right to a hearing under section C.4., the Separation Authority shall be an official designated under subsection C.6., below.

b. The action of the Separation Authority shall be recorded.

c. The Separation Authority shall determine whether there is sufficient evidence to verify the allegations set forth in the notification of the basis for separation. If an allegation is not supported by a preponderance of the evidence, it may not be used as a basis for separation.

d. If there is a sufficient factual basis for separation, the Separation Authority shall determine whether separation is warranted under the guidance in sections A. and B. of part 2. On the basis of that guidance, the Separation Authority shall direct one of the following actions:

- (1) Retention;
- (2) Separation for a specific reason under part 1; or
- (3) Suspended separation in accordance with the guidance in section B. part 2.

e. If the Separation Authority directs separation or suspended separation on the basis of more than one reason under part 1, the Separation Authority shall designate the most appropriate basis as the primary reason for reporting purposes.

f. If separation or a suspended separation is directed, the Separation Authority shall assign a characterization or description in accordance with section C. of part 2.

g. Except when characterization Under Other Than Honorable Conditions is directed or the member is separated on the basis of homosexuality or a void enlistment or induction, the Secretary concerned may authorize

the Separation Authority or higher authority to make a recommendation or determination as to whether the respondent should be retained in the Ready Reserve as a mobilization asset to fulfill the respondent's total military obligation. This option applies in cases involving separation from active duty or from the Selected Reserve. Section E. of this part 3 is applicable if such action is approved.

C. Administrative Board Procedure. 1. *Notice.* If an Administrative Board is required, the respondent shall be notified in writing of the matters set forth in this section.

a. The basis of the proposed separation, including the circumstances upon which the action is based and reference to the applicable provisions of the Military Department's implementing regulation.

b. Whether the proposed separation could result in discharge, release from active duty to a reserve component, transfer from the Selected Reserve to the IRR, release from the custody or control of the Military Services, or other form of separation.

c. The least favorable characterization of service or description of separation authorized for the proposed separation.

d. The respondent's right to consult with counsel as prescribed in paragraph B.1.f. of this part 3. However, nonlawyer counsel may not represent a respondent before an Administrative Board unless (1) the respondent expressly declines appointment of counsel qualified under Article 27(b) (1) of the UCMJ (10 U.S.C.) and requests a specific nonlawyer counsel; or (2) the Separation Authority assigns nonlawyer counsel as assistant counsel.

e. The right to obtain copies of documents that will be forwarded to the Separation Authority supporting the basis of the proposed separation. Classified documents may be summarized.

f. The respondent's right to request a hearing before an Administrative Board.

g. The respondent's right to present written statements instead of board proceedings.

h. The respondent's right to representation at the Administrative Board either by military counsel appointed by the Convening Authority or by military counsel of the respondent's own choice (if counsel of choice is determined to be reasonably available under regulations of the Secretary concerned) but not both.

i. The right to representation at the Administrative Board by civilian counsel at the respondent's own expense.

j. The right to waive the rights in paragraphs d. through i., above.

k. That failure to respond after being afforded a reasonable opportunity to consult with counsel constitutes a waiver of the rights in paragraphs d. through i., above.

1. Failure to appear without good cause at a hearing constitutes waiver of the right to be present at the hearing.

2. *Additional notice requirements.* a. If separation processing is initiated on the basis of more than one reason under part 1, the requirements of paragraph C.1.a. apply to all proposed reasons for separation.

b. If the respondent is in civil confinement, absent without leave, or in a reserve component not on active duty or upon transfer to the IRR, the relevant notification procedures in sections D., E., or F. of this part 3 apply.

c. Additional notification requirements are set forth in sections C. and D., part 1, when characterization of service as General (under honorable conditions) is authorized and the member is processed for separation by reason of Convenience of the Government or Disability.

3. *Response.* The respondent shall be provided a reasonable period of time, but not less than 2 working days, to act on the notice. An extension may be granted upon a timely showing of good cause by the respondent. The decision of the respondent on each of the rights set forth in paragraphs 1.d. through 1.i., above, and applicable provisions referenced in subsection 2., above, shall be recorded and signed by the respondent and counsel, subject to the following limitations:

a. If notice by mail is authorized under sections D., E., or F. of this part 3 and the respondent fails to acknowledge receipt or submit a timely reply, that fact shall constitute a waiver of rights and an appropriate notation shall be recorded on a retained copy of the appropriate form.

b. If the respondent declines to respond as to the selection of rights, such declination shall constitute a waiver of rights and an appropriate notation will be made on the form provided for respondent's reply. If the respondent indicates that one or more of the rights will be exercised, but declines to sign the appropriate form, the selection of rights will be noted and an appropriate notation as to the failure to sign will be made.

4. *Waiver.* a. If the right to a hearing before an Administrative Board is waived, the case will be processed under subsection B.4. of this part 3 (Notification Procedure), but the Separation Authority in such cases shall be an official designated under subsection C.6.

b. When authorized by the Secretary concerned, a respondent entitled to an Administrative Board may exercise a conditional waiver after a reasonable opportunity to consult with counsel under paragraph C.1.d. A conditional waiver is a statement initiated by a respondent waiving the right to a board proceeding contingent upon receiving a characterization of service or description of separation higher than the least favorable characterization or description authorized for the basis of separation set forth in the notice to the respondent.

5. *Hearing procedure.* If a respondent requests a hearing before an Administrative Board, the following procedures are applicable:

a. *Composition.* (1) The Convening Authority shall appoint to the Administrative Board at least three experienced commissioned, warrant, or noncommissioned officers. Enlisted personnel appointed to the Board shall be in grade E-7 or above, and shall be senior to the respondent. At least one member of the Board shall be serving in the grade of 0-4 or higher, and a majority shall be commissioned or warrant officers. The senior member shall be the president of the Board. The Convening Authority also may appoint to the Board a nonvoting recorder. A nonvoting legal advisor may be appointed to assist the Board if authorized by the Secretary concerned.

(2) If the respondent is an enlisted member of a reserve component or holds an appointment as a reserve commissioned or warrant officer, the Board shall include at least one Reserve officer as a voting member. Voting members shall be senior to the respondent's reserve grade. See 10 U.S.C. 266.

(3) The Convening Authority shall insure that the opportunity to serve on Administrative Boards is given to women and minorities. The mere appointment or failure to appoint a member of such a group to the Board, however, does not provide a basis for challenging the proceeding.

(4) The respondent may challenge a voting member of the Board or the legal advisor, if any, for cause only.

b. *Presiding officer.* The president shall preside and rule finally on all matters of procedure and evidence, but the rulings of the president may be overruled by a majority of the Board. If appointed, the legal advisor shall rule finally on all matters of evidence and challenges except challenges to himself.

c. *Witnesses.* (1) The respondent may request the attendance of witnesses in accordance with the implementing instruction of the Military Department concerned.

(2) In accordance with such instructions, the respondent may submit a written request for TDY or invitational travel orders for witnesses. Such a request shall contain the following matter:

(a) A synopsis of the testimony that the witness is expected to give.

(b) An explanation of the relevance of such testimony to the issues of separation or characterization.

(c) An explanation as to why written or recorded testimony would not be sufficient to provide for a fair determination.

(3) The Convening Authority may authorize expenditure of funds for production of witnesses only if the presiding officer (after consultation with a judge advocate) or the legal advisor (if appointed) determines that:

(a) The testimony of a witness is not cumulative;

(b) The personal appearance of the witness is essential to a fair determination on the issues of separation or characterization;

(c) Written or recorded testimony will not accomplish adequately the same objective;

(d) The need for live testimony is substantial, material, and necessary for a proper disposition of the case; and

(e) The significance of the personal appearance of the witness, when balanced against the practical difficulties in producing the witness, favors production of the witness. Factors to be considered in relation to the balancing test include, but are not limited to, the cost of producing the witness, the timing of the request for production of the witness, the potential delay in the proceeding that may be caused by producing the witness, or the likelihood of significant interference with military operational deployment, mission accomplishment, or essential training.

(4) If the Convening Authority determines that the personal testimony of a witness is required, the hearing will be postponed or continued if necessary to permit the attendance of the witness.

(5) The hearing shall be continued or postponed to provide the respondent with a reasonable opportunity to obtain a written statement from the witness if a witness requested by the respondent is unavailable in the following circumstances:

(a) When the presiding officer determines that the personal testimony of the witness is not required;

(b) When the commanding officer of a military witness determines that military necessity precludes the witness' attendance at the hearing; or

(c) When a civilian witness declines to attend the hearing.

(6) Paragraph (5)(c), above, does not authorize a Federal employee to decline to appear as a witness if directed to do so in accordance with applicable procedures of the employing agency.

d. *Record of proceedings.* In cases where the Board recommends separation, the record of the proceedings shall be kept in summarized form unless a verbatim record is required by the Secretary concerned. In cases where the Board recommends retention, a record of the proceedings is optional unless required by the Secretary concerned. However, a summarized or verbatim record shall be prepared in any cases where the board recommends retention and the Separation Authority elects to forward the matter to the Secretary concerned under subparagraph C.6.d.(2)(6). The Board reporter shall retain all materials necessary to prepare a transcript should the Separation Authority elect to forward the

case to the Secretary. In all cases, the findings and recommendations of the Board shall be in verbatim form.

e. *Presentation of evidence.* The rules of evidence for courts-martial and other judicial proceedings are not applicable before an Administrative Board. Reasonable restrictions shall be observed, however, concerning relevancy and competency of evidence.

f. *Rights of the respondent.* (1) The respondent may testify in his or her own behalf, subject to the provisions of Article 31(a), UCMJ (10 U.S.C.).

(2) At any time during the proceedings, the respondent or counsel may submit written or recorded matter for consideration by the Board.

(3) The respondent or counsel may call witnesses in his or her behalf.

(4) The respondent or counsel may question any witness who appears before the Board.

(5) The respondent or counsel may present argument prior to when the Board closes the case for deliberation on findings and recommendations.

g. *Findings and recommendations.* (1) The Board shall determine its findings and recommendations in closed session. Only voting members of the Board shall be present.

(2) The Board shall determine whether each allegation set forth in the notice of proposed separation is supported by a preponderance of the evidence.

(3) The Board shall then determine under the guidance in section A. of part 2 whether the findings warrant separation with respect to the reason for separation set forth in the Notice. If more than one reason was contained in the Notice, there shall be a separate determination for each reason.

(4) The Board shall make recommendations on the following:

(a) *Retention or separation.* The Board shall recommend retention or separation.

(b) *Suspension of separation.* If the Board recommends separation, it may recommend that the separation be suspended in accordance with section B. of part 2, but the recommendation of the Board as to suspension is not binding on the Separation Authority.

(c) *Characterization of service or description of separation.* If separation or suspended separation is recommended, the Board shall recommend a characterization of service or description of separation as authorized in part 1 (Reasons for Separation) in accordance with the guidance in section C. of part 2.

(d) *Transfer to the Ready Reserve.* Except when the Board has recommended separation on the basis of homosexuality or has recommended characterization of service Under Other Than Honorable Conditions, the Secretary Concerned may authorize the Board to make a recommendation as to whether the respondent should be retained in the Ready Reserve as a mobilization asset to fulfill the respondent's total military obliga-

tion. This option applies to cases involving separation from active duty or from the Selected Reserve. Section E. of this part 3 is applicable if the action is approved.

6. *Separation Authority.* A. The separation Authority for actions initiated under the Administrative Board Procedure shall be a general court-martial convening authority or higher authority. The Secretary concerned also may authorize a commanding officer in grade 0-7 or above with a judge advocate or legal advisor available to his command to act as a separation authority in specified circumstances. When an Administrative Board recommends characterization of service as Honorable or General (under honorable conditions), the Separation Authority may be exercised by an officer designated under subsection B.4. When the case has been initiated under the Notification Procedure and the hearing is a result of a request under paragraph B.1.g., the Separation Authority shall be as designated in subsection B.4.

b. In every case in which characterization of service Under Other Than Honorable Conditions is recommended, the record of the Board's proceedings will be reviewed by a judge advocate or civilian attorney employed by the Military Department prior to action by the Separation Authority. Such review is not required when another characterization is recommended unless the respondent identifies specific legal issues for consideration by the Separation Authority.

c. The respondent will be provided with a copy of the Board's statement of facts and recommendations.

d. The Separation Authority shall take action in accordance with this subparagraph, the requirements of part 1 with respect to the reason for separation, and the guidance in part 2 on separation and characterization.

(1) If the Separation Authority approves the recommendations of the Board on the issue of separation or characterization (or both) this constitutes approval of the Board's findings and recommendations under paragraph C.5.g. unless the Separation Authority expressly modifies such findings or recommendations.

(2) If the Board recommends retention, the Separation Authority may take one of the following actions:

(a) Approve the recommendation.

(b) Forward the matter to the Secretary concerned with a recommendation for separation based upon the circumstances of the case. In such a case, the Secretary may direct retention or separation. If the Secretary approves separation, the characterization of service or description of separation will be Honorable, General (under honorable conditions) or an Entry Level Separation under the guidance in section C. of part 2.

(3) If the Board recommends separation, the Separation Authority may:

(a) Approve the Board's recommendation;

(b) Approve the Board's recommendation, but modify the recommendations by one or more of the following actions when appropriate:

1 Approve the separation but suspend execution as provided in section B. of part 2.

2 Change the character of service or description of separation to a more favorable characterization or description.

3 Change the Board's recommendation, if any, concerning transfer to the IRR.

(c) Disapprove the Board's recommendation and retain the respondent.

(4) If the Separation Authority approves the Board's findings and recommendations in whole or in part with respect to more than one reason under part 1, the Separation Authority shall designate the most appropriate basis as the primary reason for reporting purposes.

(5) If the Separation Authority finds legal prejudice to a substantial right of the respondent or determines that the findings of the Board have been obtained by fraud or collusion, the case may be referred to a new board. No member of the new board shall have served on a prior board that considered the case. The Separation Authority may not approve findings and recommendations less favorable to the respondent than those rendered by the previous board unless the Separation Authority finds that fraud or collusion in the previous board is attributable to the respondent or an individual acting on the respondent's behalf.

D. Additional Provisions Concerning Members Confined by Civil Authorities. 1. If proceedings under this part have been initiated against a respondent confined by civil authorities, the case may be processed in the absence of the respondent. Paragraph C.5.e. of this part 3 is not applicable except insofar as such rights can be exercised by counsel on behalf of the respondent.

2. The following requirements apply:

a. The notice shall contain the matter set forth in subsection B.1. of this part or subsection C.1. (Notice in the Administrative Board Procedure), as appropriate. The notice shall be delivered personally to the respondent or sent by registered mail or certified mail, return receipt requested (or by an equivalent form of notice if such service is not available for delivery by U.S. mail at an address outside the United States). If the member refuses to acknowledge receipt of notice, the individual who mails the notification shall prepare a Sworn Affidavit of Service by Mail (see 32 CFR part 100) [DoD Directive 1215.13], which will be inserted in the member's personnel file together with PS Form 3800.

b. If delivered personally, receipt shall be acknowledged in writing by the respondent. If the respondent does not acknowledge receipt, the notice shall be sent by mail as provided in paragraph 2.a., above.

c. The notice shall state that the action has been suspended until a specific date (not less than 30 days from the date of delivery) in order to give the respondent the opportunity to exercise the rights set forth in the notice. If respondent does not reply by such date, the separation authority shall take appropriate action under subsection B.4. of this part 3.

d. The name and address of the military counsel for appointed consultation shall be specified in the notice.

e. If the case involves entitlement to an Administrative Board, the respondent shall be notified that the board will proceed in the respondent's absence and that the case may be presented on respondent's behalf by counsel for the respondent.

E. Additional Requirements for Certain Members of Reserve Components. 1. *Members of reserve components not on active duty.* a. If proceedings under this chapter have been initiated against a member of a reserve component not on active duty, the case may be processed in the absence of the member in the following circumstances:

(1) At the request of the member;

(2) If the member does not respond to the notice of proceedings on or before the suspension date provided therein; or

(3) If the member fails to appear at a hearing as provided in paragraph C.1.1.

b. The notice shall contain the matter set forth in subsections B.1. or C.1. of this part 3, as appropriate.

c. If the action involves a transfer to the IRR under circumstances in which the procedures in this Appendix A are applicable, the member will be notified that the character of service upon transfer to the IRR also will constitute the character of service upon discharge at the completion of the military service obligation unless specified conditions established by the Secretary concerned are met.

2. *Transfer to the IRR.* Upon transfer to the IRR, the member will be notified of the following:

a. The character of service upon transfer from active duty or the Selected Reserve to the IRR, and that the character of service upon completion of the military service obligation will be the same unless specified conditions established by the Secretary concerned are met.

b. The date upon which the military service obligation will expire.

c. The date by which the member must submit evidence of satisfactory completion of the specified conditions.

3. If the member submits evidence of completion of the specified conditions but the Military Department proposes to issue a discharge other than an Honorable Discharge, the Notification Procedure shall be used. An Administrative Board is not required at this

point notwithstanding the member's years of service.

4. If the member does not submit such information on or before the date specified in the notice, no further proceedings are required. The character of discharge at the completion of the military service obligation shall be the same as the character of service upon transfer from the Selected Reserve to the IRR.

5. The following requirements apply to the notices required by subsections E.1. and E.2. of this part 3.

a. Reasonable effort should be made to furnish copies of the notice to the member through personal contact by a representative of the command. In such a case, a written acknowledgment of the notice shall be obtained.

b. If the member cannot be contacted or refuses to acknowledge receipt of the notice, the notice shall be sent by registered or certified mail, return receipt requested (or by an equivalent form of notice if such service by U.S. Mail is not available for delivery at an address outside the United States) to the most recent address furnished by the member as an address for receipt or forwarding of official mail. The individual who mails the notification shall prepare a Sworn Affidavit of Service by Mail (see 32 CFR part 100 (DoD Directive 1215.13)), which will be inserted in the member's personnel file together with PS Form 3800.

F. *Additional Requirements for Members Beyond Military Control by Reason of Unauthorized Absence.* 1. *Determination of applicability.* If the general court-martial convening authority or higher authority determines that separation is otherwise appropriate under this part, a member may be separated without return to military control in one or more of the following circumstances:

a. Absence without authority after receiving notice of initiation of separation processing.

b. When prosecution of a member who is absent without authority appears to be barred by the statute of limitations, Article 43, UCMJ.

c. When a member who is an alien is absent without leave and appears to have gone to a foreign country where the United States has no authority to apprehend the member under a treaty or other agreement.

2. *Notice.* Prior to execution of the separation under paragraphs 1.b. or 1.c., the member will be notified of the imminent action by registered mail or certified mail, return receipt requested (or by an equivalent form of Notice if such service by U.S. Mail is not available for delivery at an address outside the United States) to the member's last known address or the next of kin under regulations prescribed by the Military Department concerned. The notice shall contain the matter set forth in subsections B.1. or C.1.,

as appropriate, and shall specify that the action has been suspended until a specific date (not less than 30 days from the date of mailing) in order to give the respondent the opportunity to return to military control. If the respondent does not return to military control by such date, the separation authority shall take appropriate action under subsection B.4. of this part 3.

3. *Members of reserve components.* See 10 U.S.C 1163 with respect to limitations on separation of members of reserve components.

[47 FR 10174, Mar. 9, 1982, as amended at 52 FR 46997, Dec. 11, 1987]

PART 42—INTERCEPTION OF WIRE AND ORAL COMMUNICATIONS FOR LAW ENFORCEMENT PURPOSES

Sec.

42.1 Reissuance and purpose.

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42.8 Information to be included in reports of interceptions and pen register operations.

AUTHORITY: 5 U.S.C. 301.

SOURCE: 43 FR 39988, Sept. 8, 1978, unless otherwise noted.

§ 42.1 Reissuance and purpose.

This part reissues part 42 to update established policies, procedures, and restrictions governing interception of wire and oral communications and the use of pen registers and related devices for law enforcement purposes, both in the United States and abroad, in accordance with 47 U.S.C. 605 and 18 U.S.C. 2510-2520.

§ 42.2 Applicability and scope.

(a) The provisions of this part apply to the Office of the Secretary of Defense, the military departments, the Organization of the Joint Chiefs of Staff, the defense agencies, and the unified and specified commands (hereafter referred to collectively as "DoD components").

(b) This part does not affect status of forces or other specific agreements