



DEPARTMENT OF THE NAVY
OFFICE OF THE SECRETARY
1000 NAVY PENTAGON
WASHINGTON, DC 20350-1000

SECNAVINST 5370.7C
NAVINSGEN
14 Oct 2005

SECNAV INSTRUCTION 5370.7C

From: Secretary of the Navy

Subj: MILITARY WHISTLEBLOWER REPRISAL PROTECTION

Ref: (a) Title 10, United States Code, Section 1034, the Military Whistleblower Protection Act
(b) DoD Directive 7050.6, 23 JUN 2000, Military Whistleblower Protection, as supplemented by DoDIG Policy Memo of 6 December 2004
(c) IGDG 7050.6DI, Guide to Investigating Reprisal and Improper Referrals for Mental Health Evaluations
(d) Downloads and Publications Page of NAVINSGEN Website, www.ig.navy.mil
(e) SECNAVINST 12700.2A, Cooperation with the Office of Special Counsel
(f) Title 5, United States Code, Section 552, the Freedom of Information Act (FOIA), as implemented by SECNAVINST 5720.42E, DON FOIA Program
(g) SECNAVINST 5430.92A, Assignment of Responsibilities to Counteract Fraud, Waste, and Related Improprieties Within the DON
(h) SECNAVINST 5370.5B, DON Hotline Program
(i) US Navy Regulations, 1990
(j) SECNAVINST 5215.1D, Secretary of the Navy Directives Policy

Encl: (1) Rights Acknowledgment/Election Format

1. Purpose. To implement the October 2004 amendments to reference (a) and the December 2004 amendments to reference (b). This instruction makes minor revisions to SECNAVINST 5370.7B, which it replaces. This Instruction has been administratively revised and should be reviewed in its entirety.

2. Cancellation. SECNAVINST 5370.7B and SECNAVINST 5370.8.

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3. Applicability

a. The protections in this instruction apply to: active-duty military personnel, both Regular and Reserve; midshipmen of the Naval Academy and in the Reserve Officer Training Corps; Reserve personnel when performing active or inactive duty for training, or engaging in an activity directly related to the performance of a Department of Defense (DoD) duty or function; and all other members of the Armed Forces (as defined in reference (b)) who, although not in the Navy or Marine Corps, are assigned to a Navy or Marine Corps unit. They also apply to a member of the Coast Guard when the Coast Guard is operating as a service in the Navy, or when an individual member of the Coast Guard is assigned to a Navy or Marine Corps unit.

b. The restrictions set forth in paragraphs 5(b) and 5(c) of this instruction apply to: active-duty military personnel, both Regular and Reserve; all Department of the Navy (DON) civilian personnel, including non-appropriated fund employees; midshipmen of the Naval Academy and in the Reserve Officer Training Corps; Reserve personnel when performing active or inactive duty for training, or engaging in an activity directly related to the performance of a DoD duty or function; and all other members of the Armed Forces (as defined in reference (b)) who, although not in the Navy or Marine Corps, are assigned to a Navy or Marine Corps unit. They also apply to a member of the Coast Guard when the Coast Guard is operating as a service in the Navy, or when an individual member of the Coast Guard is assigned to a Navy or Marine Corps unit.

c. Reference (e) is applicable to DON civilian personnel claiming Whistleblower reprisal. The Office of Special Counsel (OSC) has primary jurisdiction for the investigation of civilian employee complaints of reprisal. The Inspector General, Department of Defense (DoDIG) Civilian Reprisal Investigations Directorate (CRI) also investigates some civilian employee reprisal complaints. Civilian employees should be encouraged to seek the assistance of OSC or CRI. However, if a civilian complainant rejects an investigative role by OSC or CRI, a DON investigator shall be assigned to conduct a reprisal investigation. Non-appropriated fund and Defense Contractor personnel should consult the DoDIG website (www.dodig.mil) for procedures applicable to them.

4. Background

a. Reference (a) provides that no person may restrict a member of the Armed Forces from making a lawful communication to a Member of Congress or an Inspector General (IG). The Act also prohibits reprisal against military members who:

(1) make "lawful" communications to Members of Congress or an IG; or

(2) make, or prepare to make, communications ("lawful" or "unlawful") to a Member of Congress; a statutory or Service IG; a member of a DoD audit, inspection, investigation, or law enforcement organization; any person or organization in the chain of command; or any other person or organization designated pursuant to regulations or other established administrative procedures for such communications, provided the member reasonably believes the information disclosed, or to be disclosed, constitutes evidence of: (1) a violation of law or regulation, including those prohibiting sexual harassment or unlawful discrimination; or (2) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

b. The terms "lawful" and "unlawful" are not defined in references (a) or (b). A communication may be "unlawful" because release of the information is prohibited by statute or regulation, including information: (1) that is classified; (2) that is a trade secret or commercial in nature; or (3) that concerns a personal privacy interest. The communication of information which is exempt from release under reference (f) may be unlawful.

c. The Act does not immunize military members from responsibility for their own wrongdoing associated with the information contained in the protected communication, but their cooperation may serve as a matter in mitigation.

d. References (a) and (b) give specific procedural rights to a military member who alleges reprisal for making a "protected communication" only if the member "submits" the complaint of reprisal to the DoDIG, a Service Inspector General (IG), or to other "Inspectors General within the Military Departments" specified by the Secretaries of the Military Departments. Reference (a) requires the Secretaries of the Military Departments to ensure the "Military Department IGs" establish internal procedures for receiving, reporting, and

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investigating complaints of reprisal. Paragraph 9 of this instruction identifies those who may receive a complaint of reprisal and specifies the procedures they shall follow.

e. Procedural rights afforded by references (a) and (b) include:

(1) completion of the investigation within 180 days;

(2) a report format that includes a thorough review of the facts and circumstances relevant to the allegations, identification of relevant documents acquired during the investigation, and of summaries of interviews conducted;

(3) provision of a redacted copy of the report of investigation to the member;

(4) advice and assistance in filing a request for correction of the member's military record;

(5) provision of a copy of the report of investigation to a Board for Correction of Military Records at the request of the Board, and IG assistance in gathering further evidence the Board may request;

(6) review of the Board's decision by the Secretary of the Military Department; and

(7) review of the Secretary's decision by the Deputy Under Secretary of Defense for Program Integration.

5. Policy. Consistent with paragraph 4 of reference (b), it is DON policy that:

a. Members of the Armed Forces shall be free to make a protected communication to a Member of Congress; an IG; a member of a DoD audit, inspection, investigation, or law enforcement organization; any person or organization in the chain of command; or any other person or organization designated pursuant to command regulations or other established administrative procedures for such communications. A variety of Navy regulations and instructions contain provisions that permit or require DON personnel to report suspected impropriety, or make other communications, to specified superiors. For example:

(1) References (g) and (h) discuss the DON program to combat fraud, waste and related improprieties, and place

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emphasis on reporting suspected violations to proper authority. Reference (i) defines proper authority to include the immediate superior of the person submitting the report, his/her commander or commanding officer, and the immediate superior of his/her commander or commanding officer if either is apparently implicated.

(2) Reference (i) includes numerous articles indicating the chain of command is the preferred method of reporting and resolving the matters they address (e.g., articles 0820, 1024, 1114, 1115, 1137, 1143, 1150, 1151, and 1152).

b. No person shall restrict a member of the Armed Forces from making a protected communication, and members of the Armed Forces shall be free from reprisal and threats of reprisal for making or preparing a protected communication.

c. No person may take, or threaten to take, an unfavorable personnel action (including a referral for mental health evaluation), or withhold, or threaten to withhold, a favorable personnel action in reprisal against any member of the Armed Forces for making or preparing to make a protected communication, including an allegation of sexual harassment or unlawful discrimination, to one authorized to receive the communication. The language in boldface in this paragraph constitutes a regulatory order which is applicable to all DON personnel without further implementation. A violation of these provisions by a person subject to the Uniform Code of Military Justice (UCMJ) (Chapter 47 of title 10, United States Code) is punishable as a violation of Article 92 of the UCMJ. A violation by civilian personnel is punishable under regulations governing disciplinary or adverse action.

6. Protection of Communications Within the Chain of Command or Under Other Established Administrative Procedures

a. Reference (a) protects "lawful" and "unlawful" communications concerning matters described in paragraph 4a(2) when made to any person or organization in the chain of command or to any other person or organization designated under [DON] regulations or other established administrative procedures to receive such communications.

b. The protection afforded by reference (a) against reprisal for communications within the chain of command or pursuant to other established administrative procedures recognizes the long-standing Navy and Marine Corps tradition of encouraging use of the chain of command to address individual

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complaints and of the equally important right (and, in many cases, obligation) of the individual to bring legitimate matters of concern to the attention of his or her superiors without fear of retaliation. In making a communication that includes classified information, the member shall remain responsible for ensuring that the person to whom the information is transmitted has the proper clearance, and for complying with the requirements for the transmission of classified data.

7. Responsibility to Base Allegations Upon Reasonable Belief

a. To receive the protection of references (a), (b), and this instruction, personnel who make communications described in paragraph 4a(2) must reasonably believe the information they disclose constitutes evidence of the type of wrongdoing described in that paragraph.

b. Reference (c), a link to which appears in reference (d), provides that the complainant's motive for reporting the initial wrongdoing is not at issue in a reprisal investigation. It is irrelevant whether the complainant is motivated by a sense of duty or regulatory requirement, or reports the wrongdoing in retaliation against the chain of command or another official. The investigator should consider only the motives of management for taking or withholding a personnel action. However, reference (c) also provides that if an investigator determines that the complainant either intentionally made false statements or misrepresented the truth in a protected communication or a disclosure of wrongdoing, it is appropriate to refer the matter for appropriate command action and close the reprisal investigation. Before taking such action, the investigator shall obtain the concurrence of the Naval Inspector General (NAVINSGEN) or the Deputy Naval Inspector General for Marine Corps Matters/Inspector General of the Marine Corps (DNIGMC/IGMC), as appropriate.

8. Action

a. NAVINSGEN and DNIGMC/IGMC have overall responsibility for assisting the Secretary of the Navy in ensuring full implementation of paragraph 5.3 of reference (b) within the DON. They shall:

(1) Ensure that DON personnel who receive complaints of reprisal from military members advise those members in writing of their rights under references (a), (b), and this instruction; request they execute an acknowledgment and election format

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substantially similar to enclosure (1); offer to forward their complaints to DoDIG via NAVINSGEN or the DNIGMC/IGMC; and offer to assist in preparing complaints that meet the content requirements of reference (b), page 15, paragraph E2.1.3.

(2) Ensure that the person conducting a reprisal investigation under a DoDIG, NAVINSGEN, or DNIGMC tasking requirement is outside the immediate chain of command of both the member submitting the allegation and the person(s) alleged to have taken the retaliatory action.

(3) Ensure the investigator operating under a DoDIG, NAVINSGEN, or DNIGMC tasking requirement submits a draft of the report of investigation to an attorney assigned to the Office of the General Counsel, or a Navy or Marine Corps Judge Advocate, for an appropriate legal sufficiency review. A link to a sample template that will assist in preparing a legal sufficiency review for a reprisal investigation appears in reference (d).

(4) Review and determine the adequacy of investigations tasked by DoDIG, NAVINSGEN, or DNIGMC/IGMC, ensuring that the investigation is conducted in accordance with reference (c) and such other investigative guidance as NAVINSGEN or DNIGMC/IGMC may provide.

(5) Take such other action as may be necessary to implement the policy set forth in paragraph 5 and the requirements of this paragraph, including approval of requests for time extensions for the conduct of investigations, provision of redacted copies of reports of investigation, provision of advice and assistance to members who seek correction of their naval records, and such additional investigative assistance as the Board for Correction of Naval Records or the Secretary of the Navy may request.

b. Commander, Naval Legal Service Command and, within the Marine Corps, the officer exercising General Court-Martial jurisdiction (or delegee) shall:

(1) Make judge advocates available to assist and advise military members of their rights and responsibilities under the Act, enclosure (1), and this instruction, with emphasis on the procedures for making or preparing a communication that qualifies for protection under the Act and for filing complaints of reprisal.

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(2) Make judge advocates available to assist and advise commanders and commanding officers in meeting their responsibilities under this instruction, with emphasis on the provision of training designed to ensure compliance with references (a), (b), and this instruction.

c. Commanders and Commanding Officers shall:

(1) Take specific action to publicize the contents of reference (b). At a minimum, they shall publicize the prohibitions of paragraph 5(d), the definitions contained in reference (b), and the procedures for filing a complaint of reprisal. They shall also prominently display, in command spaces accessible to all military personnel, posters similar to the sample posted on the NAVINSGEN website.

(2) Ensure that military members assigned to their command who make an allegation of reprisal to them are advised in writing of their rights under references (a), (b), and this instruction; request they execute an acknowledgment and election statement substantially similar to enclosure (1); offer to forward the complaint of reprisal to DODIG, via NAVINSGEN (if the member is attached to a Navy activity), or DNIGMC/IGMC (if the member is attached to a Marine Corps activity); and forward the complaint if so requested by the member.

(3) Make personnel available to perform investigations and reviews for legal sufficiency at the request of NAVINSGEN or DNIGMC/IGMC, or investigators tasked by them. These persons should be qualified by temperament and experience to ensure compliance with references (a), (b), and (c).

(4) Ensure independent, fair, impartial, and timely investigation and resolution of complaints of reprisal in those cases where members of their command do not elect to forward their complaints of reprisal to DoDIG, NAVINSGEN, or DNIGMC/IGMC for investigation, in order to encourage trust in the chain of command and promote the policy underlying the Act.

(5) Take such other action, including periodic training, as may be necessary to meet the requirements of, and implement the policy underlying, references (a), (b), and this instruction.

d. Heads of DoD audit, inspection, investigation, or law enforcement organizations shall ensure there are personnel within their organizations who are cleared to receive classified

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information that may be communicated to their organizations under references (a), (b), or this instruction.

9. Procedure

a. Any officer of the Armed Forces or DoD employee who is assigned or detailed to serve as an Inspector General or Command Inspector at any level in the DoD is hereby authorized to receive a complaint of reprisal from personnel identified in paragraph 3a of this instruction for the purpose of satisfying the 60 day filing deadline specified in references (a) and (b). In order to satisfy the notification requirements of references (a) and (b), such officer or employee shall immediately forward the complaint to DoDIG via NAVINSGEN or DNIGMC/IGMC, as appropriate. NAVINSGEN or DNIGMC will endorse and forward the complaint to DoDIG. If the officer or employee is assigned or detailed to serve within the DON, the officer or employee also shall comply with paragraph 8a(1) of this instruction.

b. Upon receipt of a complaint, NAVINSGEN and DNIGMC/IGMC will notify DoDIG as required and shall conduct all necessary inquiries or, at their discretion, assign the complaint to an Inspector General or Command Inspector for action. That Inspector General or Command Inspector shall conduct a preliminary inquiry and report the findings to NAVINSGEN or DNIGMC/DNIGMC, as appropriate, who shall determine whether to direct the command to conduct a full investigation.

c. In selecting Inspectors General or Command Inspectors to conduct specific reprisal investigations, NAVINSGEN and DNIGMC/IGMC may consider factors such as: the chain of command; location of subject, complainants and witnesses; travel costs; work load; operational factors; and conflicts of interest. However, NAVINSGEN and DNIGMC/IGMC tasking decisions are final.

d. Because of the complexity of Whistleblower reprisal investigations, their statutory basis and the visibility often associated with them, only investigators with specialized training or experience should conduct reprisal investigations. NAVINSGEN and DNIGMC/IGMC may establish specific qualification requirements for reprisal investigators and certify investigators. Qualifications and guidance may be posted on NAVINSGEN and DNIGMC/IGMC websites. At a minimum, however, investigators should be qualified by temperament and experience to ensure compliance with references (a), (b), and (c).

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e. NAVINSGEN and DNIGMC/IGMC may establish specific procedures for the conduct of reprisal investigations that are not inconsistent with the requirements of references (a), (b), (c), and this instruction, to include publication of guidance on what does, and does not, constitute a protected communication and an unfavorable personnel action within the meaning of reference (a). To the extent practicable, NAVINSGEN and DNIGMC/IGMC shall coordinate such guidance with DoDIG.

f. Inspectors General and Command Inspectors shall forward completed preliminary and final investigations to NAVINSGEN or DNIGMC/IGMC, as appropriate, for review and transmission to DoDIG. Unless otherwise appropriate, these reports need not be forwarded via the Investigating IG's chain of command. Reports of preliminary and final investigations shall be accompanied by a redacted copy of the report to give the complainant and a memorandum from an attorney (assigned to Navy Office of General Counsel or Judge Advocate General's Corps) indicating a legal review was performed and whether the attorney concurs in the findings, opinions, and conclusions in the report. NAVINSGEN and DNIGMC/IGMC may return preliminary and final investigations to the Inspector General or Command Inspector for additional work when, in their opinion, they are not complete or reach inappropriate conclusions.

10. Reports. The reporting requirements contained in this instruction are exempt from reports control by SECNAVINST 5214.2B, Department of the Navy Information Management (Reports) Requirements Program.

11. Authority. References (i) and (j) authorize the Naval Inspector General to issue this Instruction and publish changes to it.

//s//
R. A. ROUTE
Vice Admiral, U.S. Navy
Naval Inspector General

Distribution:
Electronic only, via Navy Directives Website
<http://neds.daps/dla.mil>

RIGHTS ACKNOWLEDGEMENT/ELECTION FORMAT
MILITARY WHISTLEBLOWER PROTECTION ACT (10 U.S.C. 1034)
ACKNOWLEDGEMENT OF RIGHTS AND ELECTION OF INVESTIGATIVE PROCEDURES

I, _____ (name and rank/grade) spoke to _____ (name and rank/grade), who is the _____ (position and command), concerning my complaint of reprisal for making, or preparing to make, a communication that I believe is protected by 10 U.S.C. 1034. This person informs me that he/she does ____ does not ____ work in the office of an Inspector General within the Department of Defense who is authorized to receive my complaint of reprisal pursuant to applicable DoD and SECNAV instructions.

I understand that in order to obtain all of the procedural rights provided by 10 U.S.C. 1034, I must submit my complaint of reprisal to DoDIG, NAVINSGEN, DNIGMC/IGMC, or an Inspector General within the Department of Defense designated to receive military whistleblower reprisal complaints. I understand these rights include the following

- (1) completion of the investigation within 180 days;
- (2) a report format that requires a thorough review of the facts and circumstances relevant to the allegations, relevant documents acquired during the investigation and summaries of interviews conducted;
- (3) provision of a redacted copy of the report of investigation to the member
- (4) advice and assistance in filing a request for correction of the member's military record when implementation of the recommendations of the report requires action by a board for correction of military records;
- (5) provision of a copy of the report of investigation to a board for correction of military records and Inspector General assistance in gathering further evidence the board may request
- (6) review of the board's decision by the Secretary of the Military Department; and
- (7) review of the Secretary's decision by the Deputy Under Secretary of Defense for Program Integration; and

I also understand that if I choose not to submit my complaint to an Inspector General within the Department of Defense, I may ask my chain of command to investigate my allegation of reprisal, but in that case I will not be entitled to the procedural rights listed above.

I understand that _____ is an Inspector General within the Department of Defense who would may receive my complaint of reprisal, and that I may submit my complaint using the following postal address, electronic address or fax number, or that upon my written request, my complaint will be forwarded for me. _____

I understand that I may send my request directly to DoDIG, NAVINSGEN, or DNIGMC/IGMC, using the information provided below, or that upon my written request, my complaint will be forwarded for me. Based on the foregoing, I have decided (initial one, write "no" in the other two):

_____(initial/no) I will submit my complaint directly to _____ (specify DoDIG, NAVINSGEN, DNIGMC/IGMC, or the Inspector General within the Department of Defense identified above).

_____(initial/no) I request that my complaint be forwarded to _____ (specify DoDIG, NAVINSGEN, DNIGMC/IGMC or the Inspector General within the Department of Defense identified above).

_____(initial/no) I request that my complaint be investigated by my chain of command. I understand that I will not be entitled to the procedural rights listed above

_____(signature) _____(date)

Witnessed by:

_____(signature) _____(date)

Defense Hotline
The Pentagon
Washington, DC 20301
800-424-9098
Fax 703-404-8567
www.dodig.mil/

Naval Inspector General
1254 Ninth Street SE
Washington Navy Yard, DC 20374-5006
800-522-3451
Fax 202-433-2613
www.ig.navy.mil

Deputy Naval Inspector General
for Marine Corps Matters
Washington, DC 20380
703-614-1348/9/1698
Fax 703-697-6690
<http://hqinet001.hqmc.usmc.mil/ig/ig/>

Enclosure (1)