

MIDLANT Legal Compass

Guiding Warfighters through Legal and Ethical Waters

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Note: The *MIDLANT Legal Compass* is the new name for the previously-titled *MIDLANT Quarterly Legal Advisor*

“Chief, I got arrested...”: Revised Self-reporting Requirements

- LT Rob Singer, SJA NAS Oceana / Dam Neck Annex

On December 8, 2011, CNO released NAVADMIN 373/11 revising self-reporting requirements for service members.

Is there still a self-reporting requirement for criminal activity? YES. Under NAVADMIN 373/11, all Sailors now have a duty to report any *arrest or charge* by a civil authority. This duty was created by amending paragraph 510.6 of OPNAVINST 3120.32C, the Standard Organization Regulations of the U.S. Navy (SORM). Under paragraph 510.6 of the SORM, Sailors must now report any *arrest or charge* by a civil authority (i.e., a civilian or foreign law enforcement organization).

If a Sailor does not self-report a civilian arrest/charge, can I bring him/her to NJP for failing to self-report? YES. Since the SORM is a punitive order, a failure to follow paragraph 510.6 may be punishable at court-martial/NJP as a violation of Article 92, UCMJ. However, the duty to self-report offenses did not go into effect until December 8, 2011. As such, commanders may NOT hold personnel accountable for failing to report civilian arrests/charges that originated prior to December 8, 2011.

If a Sailor does not self-report a civilian conviction, can I bring him/her to NJP for failing to self-report? YES. Paragraph (2) of Article 1137, U.S. Navy Regulations, as amended by ALNAV 49/10, requires that all Sailors report to superior authority any domestic or foreign civilian convictions other than motor vehicle violations that do not require a court appearance. The term “conviction” includes any plea or finding of guilty, plea of nolo contendere, and any action tantamount to a finding of guilty (adjudication withheld, deferred finding, deferred prosecution, or entry into a pretrial intervention/diversion program). Since Article 1137 is a punitive order, a failure to follow it may be punishable at court-martial/NJP as a violation of Article 92, UCMJ.

What must a Sailor who self-reports actually report to the command?

Under paragraph 510.6 of the SORM, as amended by NAVADMIN 373/11, a Sailor must report the following information regarding an *arrest or charge* by a civil authority:

- 1) Date of Arrest/Criminal Charge
- 2) Name of the Arresting/Charging authority
- 3) The nature of the offense (e.g., DUI)



Under Article 1137, as amended by ALNAV 49/10, there is no specific guidance as to what a Sailor must report about a *conviction*. However, it is safe to assume that the report should include no more than the general information required in NAVADMIN 373/11.

NOTE: This is the only information required to be disclosed. The Sailor is under *no obligation to provide any additional facts or paperwork of the arrest/charge or conviction*. This is because those additional facts are immaterial to the administrative purpose of the self-reporting requirement – namely, to provide the command information about the arrest/charge or conviction so that leadership may evaluate the Sailor’s continued operational availability and security clearance eligibility. Further, if the command inquires into those additional facts, but does not do so properly, the command may foreclose the possibility of any future disciplinary action (more to follow on this below).

If a Sailor properly self-reports, can I take him/her to NJP for the underlying offense? YES, but not with information derived from the self-report. When a Sailor self-reports to the command, that report cannot be used to discipline the Sailor at NJP for the underlying offense reported. In addition, evidence obtained as a result of the self-report (i.e., any investigation into or further questioning of the Sailor about the facts of the underlying offense) may not be used to discipline the Sailor at NJP for the underlying offense reported. **To legally discipline a Sailor at NJP for the underlying offense reported, the command must receive evidence of the underlying offense that is *independent of the self-report*.**

What is independent evidence? Most frequently, evidence is received by the command independent of a self-report when 1) the arresting agency or another person/entity independently makes contact with the command and provides information about the arrest/charge or conviction and/or 2) the Sailor makes an incriminating statement about the civilian arrest/charge or conviction and the admission or confession is not a self-report (i.e., the Sailor is read his Article 31b rights, waives those rights, and makes incriminating statements). Such evidence is “independent” because it is not received as a result of the command’s actions (i.e., the command did not ask for it); it is received as a result of regular business practices, routine information sharing, or independent and voluntary action of another person, entity, or the accused.

The self-reporting restriction prevents my command from disciplining my Sailor at NJP. Does it also prevent my command from investigating the matter and using any evidence obtained during the investigation for only administrative purposes? NO. The restrictions in using self-reported misconduct against a service member only apply to *discipline, not administrative* matters. This is because administrative proceedings are not disciplinary in nature. As such, if a self-report prevents your command from proceeding at NJP or the commander does not intend to discipline the Sailor at NJP, there is no issue with using information derived directly from that self-report to initiate an investigation. Moreover, there is no issue with using information obtained from a self-report or a subsequent investigation for an administrative purpose.

Evidence obtained as a result of a self-report may not be used to discipline a sailor at NJP for the underlying offense reported.

Examples of a use for administrative purposes

- Evidence at ADSEP/BOI
- Evidence at DRB/XOI (pre-mast proceedings are not NJP)
- Detachment for Cause/Relief of Command
- Adverse Eval /FITREP comment
- Page 13 entries
- Suspension/Revocation of installation driving privileges
- Withdrawal of endorsement for Warrant/Commissioning packages
- Alcohol / drug abuse screening

PII Breaches: Identifying, Reporting, and Recovering from the loss of PII

- LT Griffin Farris, SJA SUBASE Groton

The loss of personally identifiable information (PII) can affect all of us, both personally and professionally. While efforts should be taken to prevent such losses, commands must also be prepared to respond to PII breaches. Understanding the guidance from DON CIO and developing a preplanned response can help ensure a command is ready to respond to a breach in a timely and effective manner.

Is the information at issue PII? PII is any information that can be used to distinguish or trace an individual's identity. PII includes information such as name, social security number, and birthday and less obvious types of information such as rank, marital status, race, salary, phone number (including office phone number), and other demographic information that can be used to distinguish or trace an individual's identity.

Has there been a breach? A breach includes the loss of control, compromise, unauthorized disclosure, unauthorized acquisition, unauthorized access, or any other situation where a non-authorized user has access or potential access to PII, whether physical or electronic, for a non-authorized purpose. Any loss or suspected loss of PII triggers reporting requirements.

A loss or suspected loss of PII has been identified. How do I report it? Your command's designated official, such as the Privacy Act Coordinator, must notify the United States Computer Emergency Readiness Team, DON CIO Privacy Team, DOD Privacy Office, and CHINFO within one hour of the breach. Reports may be made on a fillable OPNAV 5211/13 found [here](#). Reports should contain as much information as possible regarding parties involved, date of incident, and number of individuals impacted, but reports should not be delayed due to lack of information. Follow-up reports should be made as more information becomes available.

Does anyone else need to be notified? Servicing Judge Advocates or General Counsel should be notified of all PII breaches. NCIS should be contacted if a crime is suspected. If the breach involves the loss or suspected loss of a Government Credit Card or associated information, the issuing bank and command credit card manager should be notified. An OPREP 3 special incident report should also be issued when warranted. Consult OPNAVINST F3100.6J for SITREP reporting requirements.

I have notified all necessary parties. Now what? Within 24-hours of the initial report, the DON CIO Privacy Office will determine the potential risk of harm to impacted personnel. Based on this review, the DON CIO Privacy Office will notify the command of any required action. If necessary, written notification must be provided to impacted individuals within ten days of the breach discovery. If impacted personnel cannot be reached, the command must use any means that will likely succeed in reaching impacted individuals, such as establishing a call center.

PII is any information that can be used to distinguish or trace an individual's identity.

Any loss or suspected loss of PII triggers reporting requirements.

All incidents requiring notification also require a command investigation into whether DON policy was followed and disciplinary action as appropriate.

All impacted parties have been notified. Anything else? Within thirty days of the breach discovery, the command's designated official must submit an after action report detailing corrective action taken, notification status, and lessons learned. Commands should review their Privacy Act programs to prevent the recurrence of a similar incident. Reports can be made via a fillable OPNAV 5211/14.



MWR Poker Tournaments

- LT Medardo Martin, RLSO Tenant Command Services, Norfolk

My command would like to run an MWR-sponsored poker tournament on board USS NEVERSAIL. Is gambling permitted on board a naval vessel or installation? Not really.

Not really? So sometimes it might be permitted? Well, no... not gambling *per se*...

Enough with this lawyer talk, JAG. Give me a straight answer! Gambling is not allowed. However, following certain rules you may do something that looks like gambling, for instance a Texas Hold 'Em poker tournament.

DODI 1015.10 paragraph 14.a.(4) states:

"In the United States, Monte Carlo games and recreational poker tournaments shall conform to State and local requirements unless these events are played at installations under exclusive Federal jurisdiction. International agreements apply overseas. Although no monetary gain is awarded participants, non-monetary prizes may be awarded. Once a patron purchases the necessary instrument for participation in the available games and activities (i.e., tickets or chips), no reimbursement may be made for unused or accumulated instruments."

What about a Texas Hold 'Em poker tournament? Do not worry. The instruction was amended in May 2011 to include Texas Hold 'Em reflecting the game's growing popularity.

Translation: An MWR-sponsored Hold 'Em tournament is appropriate if it is (1) onboard the ship, (2) you do not give out a cash prize, and (3) you do not allow people to cash in whatever chips they have remaining. In other words: use 'em or lose 'em.

What kinds of prizes can I give out? Can I give the winner an iTunes gift card?

The glossary in DODI 1015.10 defines Monte Carlo, Texas Hold 'Em, and/or recreational card tournaments as "[s]cheduled events that provide games and activities played exclusively for entertainment and that do not provide any monetary gain *in the form of legal tender* to the participant." (Emphasis added). This means that a merchant gift card (i.e. iTunes, Amazon) will likely be okay, though a pre-paid credit card or debit card will not be. Be sure to check that the gift card cannot be exchanged for cash.

An MWR-sponsored Hold 'Em tournament is appropriate if it is (1) onboard the ship, (2) you do not give out a cash prize, and (3) you do not allow people to cash in whatever chips they have remaining.

Is there a potential fraternization issue? I mean, officers and enlisted gambling on board together seems wrong...

Navy Fraternization Policy, OPNAVINST 5370.2C paragraph 6.b. provides guidance:

“Officer and enlisted participation on command sports teams and other command-sponsored events intended to build unit morale and camaraderie are healthy and clearly appropriate. Dating, shared living accommodations, intimate or sexual relations, commercial solicitations, private business partnerships, gambling and borrowing money between officers and enlisted members, regardless of service, are unduly familiar and are prohibited.”

There is some tension here between the prohibition on gambling and encouragement of participation in command-sponsored events. Note that the concern articulated in OPNAVINST 5370.2C deals with money changing hands between officers and enlisted Sailors. Therefore, there should not be a fraternization issue with a Monte Carlo night conducted in accordance with DODI 1015.10 due to the very nature of this type of event. According to DODI 1015.10, the event is not actually gambling but a MWR fundraising game played for entertainment with a non-monetary prize. As such, the Ensign that wins a hand of Hold ‘Em in the event is not taking money out of a Seaman’s pocket, as the Seaman paid MWR directly to participate in the event.

Provided that the event is (1) MWR-sponsored and (2) follows the specific DODI 1015.10 rules surrounding a Monte Carlo, you should encounter no problems related to Article 133 (Conduct Unbecoming an Officer and a Gentleman), Article 134 (Gambling with subordinates), or the fraternization instruction.

Political Activities by Service Members

– LT Natasha Bode, SJA NAVSTA Newport

As the 2012 election season shifts into high gear, a number of questions may arise from service members at your command regarding political activities they may participate in during upcoming campaigns.

The importance of training your Sailors on this issue was highlighted by an incident on January 3, 2012 after the Iowa caucuses. That evening, an Army National Guard Soldier potentially violated DoD regulations when he stepped onto stage, in uniform, at a Ron Paul campaign event and enthusiastically offered his endorsement on national television for the candidate.

Department of Defense Directive (DoDD) 1344.10 provides guidance regarding political activities in which service members may and may not participate. In short, the directive is designed to prevent service member participation in political activities that implies, or appears to imply, official sponsorship, approval, or endorsement of a particular partisan party or candidate. The concern is that actual or perceived partisanship could undermine the legitimacy of the military profession and the Department of Defense.

However, while the Directive does limit some political activities by service members, military members are still free to participate in a wide range of political events. The following table is a useful reference for permissible and impermissible political activities:

	Members of the Armed Forces on Active Duty	Members of the Armed Forces NOT on Active Duty
Promote and encourage voting	Yes	Yes
Attend partisan political club meetings	Yes (when not in uniform)	Yes (when not in uniform)
Serve in an official capacity of a partisan political club	No	Yes (when not in uniform and no appearance of DoD endorsement)
Speak before a partisan political gathering	No	Yes (when not in uniform and no appearance of DoD endorsement)
Perform any duties for a partisan political committee or candidate	No	Yes (when not in uniform and no appearance of DoD endorsement)
Write a letter to the editor	Yes (may need disclaimer)	Yes (may need disclaimer)
Publish partisan political writings soliciting votes	No	Yes (when no appearance of DoD endorsement)
Attend partisan fundraisers and events (merely as a spectator)	Yes (when not in uniform and no appearance of DoD endorsement)	Yes (when not in uniform and no appearance of DoD endorsement)
Participate in partisan fundraisers and events (more than mere spectator)	No	Yes (when not in uniform and no appearance of DoD endorsement)
Contribute money to a political party or candidate	Yes	Yes
March in a partisan political parade	No	Yes (when not in uniform and no appearance of DoD endorsement)

DoDD 1344.10 prohibits service member participation in political activity that implies, or appears to imply, official sponsorship, approval, or endorsement of a particular partisan party or candidate.

If commands train to the guidelines set forth in DoDD 1344.10, service members can avoid placing the Navy in a negative light. When faced with an uncertain situation, always keep in mind that we want to avoid any inference that the DoD or the Navy sponsors, approves, or endorses a certain partisan political cause or candidate. As always, when in doubt, consult your local command services attorney.

High Year Tenure Changes Highlight Importance of Legal Hold

- LT Griffin Farris, SJA SUBASE Groton

Recently announced changes to the Navy's High Year Tenure (HYT) Program provide a reminder of the importance of maintaining awareness of pending separation dates for members under criminal investigation and of placing those members on legal hold when necessary.

NAVADMIN 030/12 announced changes to MILPERSMAN 1160-120. Effective 1 July 2012, HYT length of service (LOS) gates for E2 and E3 personnel are reduced to four years and five years respectively. Passing a Navy-wide advancement exam will no longer extend an E3 Sailor beyond the LOS gate. Beginning 1 July 2012, E2 and E3 personnel with active service in excess of revised LOS gates will be required to separate by 31 March 2013 unless advanced or in receipt of a waiver.

Also effective 1 July 2012, Sailors previously reduced in rate who exceed the HYT gate for the lower paygrade must be separated at the sooner of soft expiration of active obligated service (SEAOS) or 31 December 2012 unless granted a waiver, reinstated, or subsequently advanced. Sailors reduced in rate on or after 1 July 2012 who have not reached 18 years of service and with a SEAOS exceeding the HYT LOS gate of the reduced paygrade must separate at SEAOS or within 180 days from the date of reduction in rate, whichever is sooner, unless granted a waiver, reinstated, or subsequently advanced.

HYT changes will result in an increased number of Sailors separating prior to EAOS, heightening the importance of timely legal hold action taken under MILPERSMAN 1160-150. When initiating criminal investigations, commands should verify not only the suspects' projected rotation dates and EAOS dates, but also determine how suspects may be affected by HYT LOS gates. Contact should be made with administrative personnel, the command career counselor, and the servicing PSD to ensure that any upcoming orders or separation dates are identified as soon as possible and are canceled when necessary. Failure to identify these dates may lead to transfer or separation of suspects before investigations and judicial processes are complete.

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