DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
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JAGINST 5814.2A
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JAG INSTRUCTION 5814.2A

From: Judge Advocate General

Subj: NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Ref: (a) Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 806b, 862, 866
(b) SECNAVINST 5430.27 (series)
(c) DoDI 5505.14
(d) American Bar Association Model Code of Judicial Conduct
(e) JAGINST 5400.1 (series)
(f) JAGINST 1150.2 (series)
(g) JAGINST 5817.1 (series)
(h) R.C.M. 1203
(i) JAGINST 5803.1 (series)
(j) JAGINST 5814.1 (series)
(k) DoDD 5500.7 and DoD 5500.7-R (series)

1. Purpose. To specify the mission, organization, and functions, and to provide for the administration and support, of the Navy-Marine Corps Court of Criminal Appeals (NMCCA) in accordance with references (a) and (b). This instruction implements the provisions of references (c) through (j) and establishes regulations to ensure the continued independence of the NMCCA and its assigned judges.

2. Cancellation. JAGINST 5814.2.

3. Background. The Judge Advocate General (JAG) is responsible for providing appellate military judges within the Department of the Navy (DON). The Navy and Marine Corps have a unified appellate judiciary, the NMCCA, to carry out that responsibility. The NMCCA is the intermediate appellate court that reviews United States Navy and Marine Corps courts-martial that fall within its jurisdiction under reference (a).

4. Organization

a. The NMCCA is composed of a Chief Judge, who also serves as the Division Director of Code 51, and one or more panels of three appellate judges, each having a Senior Judge. Generally, eight judges are assigned to the Court, including five Navy and three Marine Corps judges. Each panel will review those cases assigned to it by the Chief Judge, or the Court may sit *en banc* according to the NMCCA Rules of Appellate Procedure, including any internal rules promulgated by the Chief Judge of the NMCCA. The judges of the NMCCA shall include both

Navy and Marine Corps judge advocates and may include properly appointed civilian appellate military judges. Judge advocate members of the Navy Reserve and Marine Corps Forces Reserve who are not serving on extended active duty may be appointed to the Court as reserve appellate judges and may be assigned to special panels to perform judicial duties while in active and inactive duty status.

b. The NMCCA shall sit in Washington, D.C., at the Washington Navy Yard. As directed by the Chief Judge of the NMCCA, either a panel or the Court *en banc* may conduct "outreach" oral arguments at suitable locations to foster greater public understanding of the military justice process and greater visibility of the NMCCA as a component of the military justice system. Additionally, the JAG may establish panels in other geographic locations. Such other panels will be established by JAG notice or through modification of this instruction.

5. Mission and Functions. NMCCA has the following missions and functions:

a. The NMCCA has the statutory responsibility to review all Navy and Marine Corps courts-martial resulting in a sentence of death and, unless appeal is waived or withdrawn, those courts-martial resulting in a sentence that includes a punitive separation or two or more years of confinement. The NMCCA also has the responsibility to review Navy and Marine Corps courts-martial involving discretionary appeals made by an accused in other cases in which the sentence extends to confinement for more than six months but does not otherwise meet the criteria for automatic review. In addition, the NMCCA shall review all other matters over which the Court determines it has jurisdiction pursuant to reference (a), such as an interlocutory appeal filed by the Government or a petition for a writ of mandamus filed by the victim of a UCMJ offense. Upon jurisdiction attaching, appellate review shall be accomplished fairly, impartially, and as expeditiously as possible, consistent with due process and fundamental fairness and according to the law and applicable regulations.

b. Appellate review of courts-martial includes reviewing the record and allied documents in each case, including the appellate pleadings of the parties; conducting legal research necessary to promptly and correctly dispose of any issue; participating in oral arguments; and drafting and promulgating orders or other decisions—including summary dispositions and unpublished and published decisions of the Court, either by a panel or *en banc*—as necessary to complete appellate review. Except as set forth in paragraphs 5.c., 5.d., and 5.e., these duties of judicial office take precedence over all other activities of the NMCCA judges.

c. When so appointed by competent authority, and with the concurrence of the JAG, the judges of the NMCCA may be made available to investigate or review cases of judicial misconduct or other matters that require the specific qualifications, expertise, or experience of a senior officer or an appellate judge.

d. When so appointed by competent authority, the judges of the NMCCA shall also serve as appellate military judges of other Department of Defense (DOD) appellate judiciaries, including the U.S. Court of Military Commission Review. Upon appointment, duty on such a court shall become that judge's primary duty.

e. Those appellate judges who have previously served as trial judges or have been certified by the JAG as qualified to perform the duties of a military trial judge following successful completion of the Military Judges Course sponsored by The Judge Advocate General's Legal Center and School (TJAGLCS), U.S. Army, Charlottesville, Virginia, may be detailed by the Chief Judge of the Navy-Marine Corps Trial Judiciary to preside over a general court-martial only when determined by that Chief Trial Judge to be necessary. Such detail must have the concurrence of the Chief Judge of the NMCCA, who will concur only if such detail does not interfere with the timely appellate review of any pending case. Prior to any such detailing, both chief judges must obtain the concurrence of the Assistant Judge Advocate General, Chief Judge, Department of the Navy (AJAG (CJDON)), after explaining the circumstances necessitating such a detail as well as the impact on the NMCCA, including the potential for recusal of the detailed appellate judge from any future case on appeal.

f. Appellate judges of the NMCCA may participate in public and academic events appropriate for members of the appellate judiciary, as set forth in references (d) and (i), including presiding over moot courts sponsored by the Army, Navy, and Air Force justice schools, civilian law schools, or bar associations; Navy-sponsored recruiting events; and professional teaching, speaking, and writing, consistent with requirements for such activities set forth in reference (k). Participation in such activities by NMCCA judges shall be as authorized by the AJAG (CJDON), and only when consistent with the timely review of courts-martial.

6. Authority and Responsibility. To accomplish the mission and functions of the NMCCA, authority and responsibility are prescribed for specified personnel as follows:

a. AJAG (CJDON)

(1) AJAG (CJDON) is the senior supervisory jurist in the DON. When performing this judicial function, AJAG (CJDON) shall comply with references (d) and (i). When performing other duties, AJAG (CJDON) shall ensure those duties do not compromise judicial independence. AJAG (CJDON) will monitor the timeliness and productivity of the appellate judiciary and adjust, provide, or request resources needed to maintain fair, impartial, and timely disposition of appellate cases by the NMCCA. Additionally, AJAG (CJDON) will take such administrative action consistent with references (d) and (i) and other governing regulations as are necessary to ensure appellate judges perform their duties timely and effectively.

(2) AJAG (CJDON) serves as Rules Counsel for any complaints of misconduct or incompetence of appellate judges, proceeding in accordance with reference (i) and Rule for Courts-Martial (R.C.M.) 109. The AJAG (CJDON) is a designee of the JAG as that term is used in R.C.M. 109.

(3) The AJAG (CJDON) will ensure the provision of professional training and development for appellate military judges.

(4) The AJAG (CJDON) will chair the Judicial Screening Board.

(5) Per reference (e), the AJAG (CJDON) is the reporting senior for the Chief Judge of the NMCCA and all Navy and Marine Corps appellate judges of the NMCCA, both active and reserve components. The JAG serves as the reviewing officer for all Marine Corps appellate judges. AJAG (CJDON) will serve as rating official of any civilian appellate judges assigned to the NMCCA.

(6) AJAG (CJDON) is the higher level reviewer for the Clerk of Court, NMCCA, and any other civilians rated by the Chief Judge of the NMCCA.

(7) In the event the AJAG (CJDON) develops a conflict of interest in the evaluation of any subordinate, the Deputy Judge Advocate General will be the reporting senior. When such a conflict pertains to a reserve component judge, the Deputy Judge Advocate General (Reserve Affairs and Operations) will be the reporting senior.

(8) AJAG (CJDON) is responsible for overseeing a program of continuing legal education and professional development for judges, commissioners, and the staff of the NMCCA.

(9) AJAG (CJDON) shall act on all matters related to the NMCCA requiring the approval of an AJAG.

(10) AJAG (CJDON) will make reports to the JAG as required by references (g), (i), and (j). AJAG (CJDON) shall report at least quarterly to the JAG regarding the status of courts-martial docketed by the NMCCA, with specific comment on any administrative impediment, such as a lack of resources, that might cause any case to fail to be processed within the standards set forth in *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006). In addition, AJAG (CJDON) shall report the status and administrative needs or resource short-falls of any case docketed at NMCCA for longer than one year, in panel for longer than six months, or in which corrective or other action has been directed by NMCCA, when such action has not been completed by the date specified.

(11) AJAG (CJDON) shall discharge such other duties as assigned by the JAG, consistent with references (d) and (i) and the principles of judicial independence. Other duties may include, but are not limited to, serving as a member of the Naval Justice School Board of Advisors, a member of the Office of the Judge Advocate General (OJAG) Awards Board, and as a Performance Award Review Board Manager. When requested by the JAG and consistent with judicial independence, AJAG (CJDON) may provide advice regarding the improvement of military justice training, practice, procedure, rules, and related legislation.

b. Chief Judge of the NMCCA. The Chief Judge of the NMCCA is responsible for the fair, efficient, and effective management of the Court, including ensuring the fair and timely disposition of all matters pending before it. The authority of the Chief Judge extends to all management and administrative functions of the Court. In addition to those duties otherwise assigned in this instruction, the Chief Judge shall:

(1) Dispose promptly of the business of the Court, maintain professional competence, and adhere to the standards set forth in references (d) and (i);

(2) Serve as rating official of the Clerk of Court, and as the second level reviewer for all other civilian personnel of the Court as required by governing civilian personnel regulations;

(3) Serve as reporting senior for active-duty and contract staff attorneys, commissioners, and paralegals assigned to the Court;

(4) Provide for the continuous professional development of NMCCA judges and establish a program for the continuing legal education and professional development of the judges, commissioners, and staff of the NMCCA. An annual training plan shall be provided to the AJAG (CJDON) for his review and concurrence;

(5) Designate one judge of each panel of the Court to serve as Senior Judge;

(6) Diligently discharge administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and Court personnel;

(7) Monitor the timeliness and productivity of the Court and adjust, provide, or request resources needed to maintain fair, impartial, and timely disposition of all matters;

(8) Whenever the simultaneous appointment of an NMCCA judge to a collateral duty occurs, the Chief Judge of the NMCCA shall report to the AJAG (CJDON) the impact on NMCCA's ability to timely discharge its responsibilities, if any, and shall request such additional resources as are required;

(9) Exercise administrative supervisory authority over all cases under review by the judges of the NMCCA, taking reasonable measures consistent with references (d) and (i) to ensure the judges of the Court perform their duties timely and effectively;

(10) Report monthly to the AJAG (CJDON) on the status of the Court's docket, productivity and capability as it relates to the Court's current and anticipated case load; and

(11) Annually prepare such NMCCA information as is required for the Annual Report to the American Bar Association and the UCMJ Article 146a(b) Annual Service Report.

c. Senior Judge. Upon designation by the Chief Judge of the NMCCA, the Senior Judge of a panel shall:

(1) Dispose promptly of the business of the Court, maintain their professional competence, and adhere to the standards set forth in references (d) and (i);

(2) Diligently discharge administrative responsibilities as assigned by the Chief Judge of the NMCCA, maintain professional competence in judicial administration, and facilitate the

performance of the administrative responsibilities of the assigned panel judges and Court personnel;

(3) Exercise administrative supervisory authority over the cases assigned to panel judges, taking reasonable measures consistent with references (d) and (i) to ensure the judges of the panel perform their duties timely and effectively;

(4) Monitor the timeliness and productivity of the panel and periodically, as directed by the Chief Judge of the NMCCA, report the status of the panel's case load and request any additional resources needed to maintain the fair, impartial, and timely disposition of all panel matters.

d. Judges. The judges of the NMCCA shall dispose promptly of the business of the Court, diligently discharge any administrative responsibilities assigned by the Chief Judge of the NMCCA or the Senior Judge of their assigned panel, maintain their professional competence, and adhere to the standards set forth in references (d) and (i).

e. Clerk of Court. The Clerk of Court serves as the Deputy Division Director of Code 51. The Clerk of Court also serves as the Court's principal legal advisor, judicial administrator, supervisory attorney, and senior judicial commissioner. The Clerk of Court shall supervise the day-to-day operations of the Court, implement the policies and procedures of the Court, issue and authenticate all court orders and decisions, manage the Court's case management system, periodically review and draft revisions as appropriate to the NMCCA Rules of Appellate Procedure and the Court's citation and style guides, and perform such other duties as assigned by the Chief Judge of the NMCCA. The Clerk of Court is the custodian of the Seal of the Court, and serves as the immediate supervisor of the Court's civilian staff, excluding any civilian appellate military judges, if appointed. The Clerk of Court shall process requests from former service members to have their Deoxyribonucleic Acid (DNA) samples expunged in accordance with reference (c). The Clerk of Court maintains records related to admission to the Court's Bar and processes applications for such admission.

f. Chief Commissioner. The Chief Commissioner shall ordinarily be an active-duty judge advocate in the pay grade of O-4 who serves as the Court's principal military administrative assistant, providing general supervision and administrative support to the Court and military staff. The Chief Commissioner assists the Clerk of Court, serves as the commissioner for the Chief Judge of the NMCCA, and performs those other duties as assigned by the Chief Judge, to include direct legal research and writing support to one or more of the Court's panels.

g. Staff Attorneys, Commissioners, Paralegals, and Other Support Staff. Active-duty staff shall perform those duties assigned by the Chief Judge of the NMCCA. Civilian support staff, whether DON or contract personnel, shall perform those duties assigned by their individual position description or contract.

7. Selection and Assignment of Appellate Judges

a. Selection. The selection of appellate judges is governed by reference (g). Active and reserve component judge advocate candidates shall apply for appointment to the NMCCA through the Judicial Screening Board (JSB). Manning for the NMCCA will come from current manpower resources as determined by the Chief of Naval Operations, the Commandant of the Marine Corps (CMC), and the JAG, acting in coordination. Marine Corps nominees will first be recommended for appointment by the JSB process, and then submitted to the JAG by the Staff Judge Advocate (SJA) to the CMC. Unless otherwise determined by the JAG, at least one-third of the active-duty judges will be former trial judges or designated as Military Justice Litigation Career Track officers pursuant to reference (f).

b. Assignment. AJAG (CJDON) is the JAG's principal advisor on the assignment of officers to positions within the appellate judiciary, active and reserve components, to best serve the interests of justice within the DON. This includes recommendations to the JAG and the SJA to CMC on billet structure, including the number and geographic location of appellate judiciary billets.

(1) Upon being positively screened by the JSB and approved by the JAG, judicial nominees may be detailed to an active or reserve judicial billet through the routine service assignment process, with the exception that orders to the billet of Chief Judge of the NMCCA must be approved by the JAG. In accordance with references (a) and (h), orders to appellate judiciary billets will be for a minimum of three years, and appellate judges will be reassigned only in accordance with paragraph 7.c. below. Unless waived by the JAG, the JAG's certification of a military appellate judge may not be delivered, and will not be effective, until the selected officer has successfully completed the Military Judge Course sponsored by TJAGLCS.

(2) No judge shall be assigned to the appellate judiciary without having at least three years remaining between the date they are assigned to the appellate judiciary and their statutory mandatory retirement date, absent exceptional circumstances and a waiver granted by the JAG.

(3) AJAG (CJDON) is also the JAG's principal advisor on the officers to be nominated for duty, under the DOD, as military commissions appellate judges. In carrying out these responsibilities, AJAG (CJDON) will coordinate closely with the SJA to CMC regarding the nomination and appointment of Marine Corps judges.

c. Reassignment. Upon certification by the JAG and appointment to the NMCCA, military appellate judges may only be reassigned from the NMCCA as follows:

(1) The detailing authority reassigns the appellate judge in the ordinary course of the assignments process after a minimum three-year tour of duty on the appellate bench, in accordance with references (a) and (h);

(2) The appellate judge voluntarily requests in writing to be reassigned to other duties and the detailing authority receives approval for such reassignment from the JAG;

(3) The appellate judge retires or otherwise separates from military service;

(4) The appellate judge is reassigned to other duties by the JAG or the CMC (after formal coordination with the JAG) to meet exceptional needs of the Service (an example would include, but is not limited to, Marine Corps judges who are selected for command and receive orders from the CMC); or

(5) The officer's certification as an appellate judge is withdrawn by the JAG for good cause.

d. Duty to Disclose Potential Conflicts. The duty to disclose potential conflicts is a crucial and continuing responsibility of a military appellate judge. Military appellate judges should consult both references (d) and (i) regarding conflicts of interest. When weighing whether to disclose a potential conflict, military appellate judges are advised to err on the side of disclosure. " 'Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges,' [so] jurists must avoid even the appearance of partiality." *In re Al-Nashiri*, 921 F.3d 224, 234 (D.C. Cir. 2019) (citing *United States v. Microsoft Corp.*, 253 F.3d 34, 115 (D.C. Cir. 2001) (quoting Code of Conduct for United States Judges, Canon 1 cmt. (2000)). If seeking employment with a federal agency, military appellate judges must disclose the nature and extent of their interaction with any federal agency to the Chief Judge of the NMCCA.

8. Rules of Appellate Procedure. The Chief Judge of the NMCCA shall promulgate such rules of appellate procedure before the NMCCA as are deemed necessary or appropriate, including internal rules which are consistent with the Joint Rules of Appellate Procedure for Courts of Criminal Appeals.

9. Command and Support Relationships. The NMCCA is administratively assigned to OJAG.

10. Funding. Funds allocated by OJAG for the operation of the NMCCA shall be expended at the discretion of the Chief Judge of the NMCCA, or by the AJAG (CJDON) where approval of an AJAG is required, consistent with all regulations pertaining to the commitment and disbursement of such funds. This includes funding for temporary duty travel, training, and per diem expenses for Marine Corps appellate judges related to the NMCCA mission.

11. Records Management. Records created as a result of this instruction, regardless of media and format, must be managed per the current version of Secretary of the Navy Manual 5210.1.

12. Review and Effective Date. Per OPNAVINST 5215.17 A, Code 51 will review this instruction annually on the anniversary of its effective date to ensure applicability, currency, and consistency with Federal, DoD, Secretary of the Navy, and Navy policy and statutory authority using OPNAV 5215/40 Review of Instruction. As the instruction nears its 5-year anniversary and if it is still required, it will be reissued. Otherwise, if the instruction is no longer required, it

will be processed for cancellation as soon as the cancellation is known following the guidance in E.O. 13526.

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