through an after-the-event investigation (e.g., JAGMAN investigation). Describing the manner in which they conducted their investigation and asking them to identify factual conclusions in their report would likewise constitute factual matters to which they might testify. In contrast, asking them to adopt or reaffirm their findings of fact, opinions, and recommendations, or asking them to form or express any other opinion—particularly one based upon matters submitted by counsel or going to the ultimate issue of causation or liability—would clearly constitute precluded testimony under the above policy.

(2) Naval personnel, by virtue of their training, often form opinions because they are required to do so in the course of their duties. If their opinions are formed prior to, or contemporaneously with, the matter in issue, and are routinely required of them in the course of the proper performance of their professional duties, they constitute essentially factual matters (*i.e.*, the opinion they previously held). Opinions formed after the event in question, including responses to hypothetical questions, generally constitute the sort of opinion or expert testimony which this instruction is intended to severely restrict.

(3) Characterization of expected testimony by a requester as fact, opinion, or expert is not binding on the determining authority. When there is doubt as to whether or not expert or opinion (as opposed to factual) testimony is being sought, advice may be obtained informally from, or the request forwarded, to the Deputy Assistant Judge Advocate General (General Litigation) or the Associate General Counsel (Litigation) for resolution.

(d) *Litigation*. All pretrial, trial, and post-trial stages of all existing or reasonably anticipated judicial or administrative actions, hearings, investigations, or similar proceedings before civilian courts, commissions, boards (including the Armed Services Board of Contract Appeals), or other tribunals, foreign and domestic. This term includes responses to discovery requests, depositions, and other pretrial proceedings, as well as responses to formal or informal requests by attorneys or others in situations involving, or reasonably anticipated to involve, civil or criminal litigation.

(e) *Official information*. All information of any kind, however stored, in the custody and control of the DOD and its components including the DON; relating to information in the custody and control of DOD or its components; or acquired by DOD personnel or its component personnel as part of their official duties or because of their official status within DOD or its components, while such personnel were employed by or on behalf of the DOD or on active duty with the United States Armed Forces (determining whether ''official information'' is sought, as opposed to non-DOD information, rests with the determining authority identified in § 725.6, rather than the requester).

(f) *Request or demand (legal process)*. Subpoena, order, or other request by a federal, state, or foreign court of competent jurisdiction, by any administrative agency thereof, or by any party or other person (subject to the exceptions stated in § 725.5) for production, disclosure, or release of official DOD information or for appearance, deposition, or testimony of DON personnel as witnesses.

§ 725.5 Applicability.

(a) This instruction applies to all present and former civilian and military personnel of the DON whether employed by, or assigned to, DON temporarily or permanently. Affected personnel are defined more fully in § 725.4(b).

(b) This instruction applies only to situations involving existing or reasonably anticipated litigation, as defined in § 725.4(d), when DOD information or witnesses are sought, whether or not the United States, the DOD, or its components are parties thereto. It does not apply to formal or informal requests for information in other situations.

(c) This instruction provides guidance only for DON operation and activities of its present and former personnel in responding to litigation requests. It is not intended to, does not, and may not be relied upon to, create any right or benefit, substantive or procedural, enforceable at law or equity against the United States, DOD, or DON.

(d) This instruction is not intended to infringe upon or displace the responsibilities committed to the Department of Justice in conducting litigation on behalf of the United States.

(e) This instruction does not supersede or modify existing laws, DOD or DON regulations, directives, or instructions governing testimony of DON personnel or release of official DOD or DON information during grand jury proceedings.

(f) This instruction does not control release of official information in response to requests unrelated to litigation or under the Freedom of Information Act (FOIA), 5 U.S.C. 552, or the Privacy Act, 5 U.S.C. 552a. This instruction does not preclude treating any written request for DON records as a request under the FOIA or Privacy Acts. Activities are encouraged to treat such requests for documents under the FOIA or the Privacy Act if they are invoked by the requestor either explicitly or by fair implication. See 32 CFR 701.3(a), 701.10(a). Activities are reminded that such treatment does not absolve them of the responsibility to respond in a timely fashion to legal process. In any event, if the official information requested pertains to a litigation matter which the United States is a present or potential party, the release authority should notify the delegate of the General Counsel or the Judge Advocate General, under § 725.6.

(g) This part does not apply to release of official information or testimony by DON personnel in the following situations:

(1) Before courts-martial convened by any DOD component, or in administrative proceedings conducted by, or on behalf of, such component;

(2) Under administrative proceedings conducted by, or on behalf of, the Equal Employment Opportunity Commission (EEOC) or the Merit Systems Protection Board (MSPB), the Federal Labor Relations Authority, the Federal Services Impasse Panel, or under a negotiated grievance procedure under a collective bargaining agreement to which the Government is a party;

(3) In response to requests by Federal Government counsel, or counsel representing the interests of the Federal Government, in litigation conducted, in whole or in part, on behalf of the United States (e.g., Medical Care Recovery Act claims, affirmative claims, or subpoenas issued by, or concurred in by, Government counsel when the United States is a party), but the regulation does apply to an action brought under the qui tam provisions of the False Claims Act in which a private party brings an action in the name of the United States but in which the Department of Justice either has not yet determined to intervene in the litigation or has declined to intervene;

(4) As part of the assistance required by the Defense Industrial Personnel Security Clearance Review Program under DOD Directive 5220.6 [2];

(5) Release of copies of Manual of the Judge Advocate General (JAGMAN) investigations, to the next of kin (or their representatives) of deceased or incompetent naval personnel;

(6) Release of information by DON personnel to counsel retained on their behalf for purposes of litigation, unless that information is classified, privileged, or otherwise protected from disclosure (in the latter event, compliance with 32 CFR part 97 and this part is required);

(7) Cases involving garnishment orders for child support and/or alimony. The release of official information in these cases is governed by 5 CFR 581 and SECNAVINST 7200.16 [3], or;

(8) Release of information to Federal, state, and local prosecuting and law enforcement authorities, in conjunction with an investigation conducted by a DOD component or DON criminal investigative organization.

(h) This part does not preclude official comment on matters in litigation in appropriate cases.

(i) The DOD General Counsel may notify DOD components that DOD will assume primary responsibility for coordinating all litigation requests for demands for official DOD information or testimony of DOD personnel in litigation involving terrorism, espionage, nuclear weapons, and intelligence sources or means. Accordingly, determining officials who receive requests

[2] See footnote 1 to § 725.1.

[3] See footnote 1 to § 725.1.

pertaining to such litigation shall notify the Associate General Counsel (Litigation) or the Deputy Assistant Judge Advocate General (International Law or General Litigation) who shall consult and coordinate with DOD General Counsel prior to any response to such requests.

(j) *Relationship with Federal Rules of Procedure.* The requirements imposed by this instruction are intended, among other things, to provide adequate notice to DON regarding the scope of proposed discovery. This will assure that certain DON information, which properly should be withheld, is not inadvertently released in response to a litigation request or demand, including a subpoena or other request for discovery issued under Federal rules of procedure. When the United States is a party to Federal litigation and the party opponent uses discovery methods (e.g., request for interrogatories and admissions, depositions) set forth in Federal rules of procedure, the Judge Advocate General or General Counsel, in consultation with representatives of the Department of Justice or the cognizant United States Attorney, may determine whether the requirement for a separate written request in accordance with § 725.7 should be waived. Even if this requirement is waived, however, DON personnel who are subpoenaed to testify still will be required to obtain the written permission described in § 725.2.

§ 725.6 Authority to determine and respond.

(a) *Matters proprietary to DON.* If a litigation request or demand is made of DON personnel for official DON or DOD information or for testimony concerning such information, the individual to whom the request or demand is made will immediately notify the cognizant DON official designated in § 725.6(c) and (d), who will determine availability and respond to the request or demand.

(b) *Matters proprietary to another DOD component.* If a DON activity receives a litigation request or demand for official information originated by another DOD component or for non-DON personnel presently or formerly assigned to another DOD component, the DON activity will forward appropriate portions of the request or demand to the DOD component originating the information, to the components where the personnel are assigned, or to the components where the personnel were formerly assigned, for action under 32 CFR part 97. The forwarding DON activity will also notify the requester and court (if appropriate) or other authority of its transfer of the request or demand.

(c) *Litigation matters to which the United States is, or might reasonably become, a party.* Examples of such instances include suits under the Federal Tort Claims Act, Freedom of Information Act, Medical Care Recovery Act, Tucker Act, and suits against Government contractors where the contractor may interplead the United States or seek indemnification from the United States for any judgment paid, e.g., aviation contractors or asbestos matters. Generally, a suit in which the plaintiff is representing the interests of the United States under the Medical Care Recovery Act is not a litigation matter to which the United States is, or might reasonably become, a party. Determining authorities, if in doubt whether the United States is likely to become a party to the litigation, should seek guidance from representatives of the Offices of the Judge Advocate General or General Counsel. The Judge Advocate General and the General Counsel have the authority to determine whether a litigation request should be forwarded to them, or retained by a determining authority, for resolution.

(1) Litigation requests regarding matters assigned to the Judge Advocate General of the Navy under Navy Regulations, article 0331 (1990), shall be referred to the Deputy Assistant Judge Advocate General for General Litigation, Office of the Navy Judge Advocate General (Washington Navy Yard), 1322 Patterson Avenue, SE., Suite 3000, Washington, DC, 20374-5066, who will respond for the Judge Advocate General or transmit the request to the appropriate Deputy Assistant Judge Advocate General for response.

(2) Litigation requests regarding matters assigned to the General Counsel of the Navy under Navy Regs., art.