

therefor when the record indicates such action would be appropriate, except that he shall not designate unfitness or misconduct as the basis when the board has recommended discharge for unsuitability.

(4) Approve the discharge but suspend its execution for a specified period of probation.

(5) Disapprove the recommendation for discharge and retain the member in the service.

(6) Disapprove the recommendation for retention and direct discharge under honorable conditions with an Honorable or General Discharge certificate, as warranted.

(7) He may set aside the findings and recommendations and refer the case to a new board if he finds legal prejudice to the substantial rights of the respondent. No member of the new board shall have served on a prior board which considered the same matter. The record of the proceedings of the earlier board, minus the findings, recommendations, and prejudicial matter, may be furnished the successor board. The discharge authority may not approve findings or recommendations less favorable to the respondent than those rendered by the previous board.

§ 41.9 Suspension of execution of approved discharge.

The Discharge Authority or higher authority may, prior to the expiration of the member's enlistment or period of obligated service, suspend execution of an approved discharge for a specified period if the circumstances in a case indicate a reasonable prospect for rehabilitation. During the period of suspension, the member will be afforded an opportunity to demonstrate that he is capable of behaving properly for an extended period under varying conditions and that he can perform assigned duties efficiently.

(a) Upon satisfactory completion of the probationary period, execution of the approved discharge will be cancelled automatically.

(b) Additional misconduct on the part of the member during the probationary period or actions which constitute substandard performance of duty or demonstrate characteristics of unsuitability may establish the basis for one of the following actions:

(1) Punitive or new administrative action may be initiated notwithstanding the suspension of execution of the approved discharge.

(2) Suspension of the approved discharge may be vacated, and the approved discharge executed, to include discharge in absentia when the member has been beyond military control for 15 or more days.

§ 41.10 Retroactive application of the general discharge.

It is the policy of the Department of Defense that the Boards of Review convened pursuant to section 301 of the Servicemen's Readjustment Act of 1944 (Public Law 346, 78th Congress, second session), as amended, be authorized to grant the General Discharge in a uniform manner without regard to the date of separation or discharge of the individual in those cases where such Boards deem the General Discharge to be the proper remedy.

(Sec. 13(v) (2), 72 Stat. 1287; 10 U.S.C. 1553) [33 F.R. 13009, Sept. 14, 1968]

PART 42—TELEPHONE INTERCEPTION AND EAVESDROPPING

Sec.

42.1 Purpose and scope.

42.2 Applicability.

42.3 Definitions.

42.4 Wiretapping.

42.5 Eavesdropping.

42.6 Procedures and reports.

42.7 Information to be included in a request for approval of proposed wiretapping or eavesdropping.

42.8 Information to be included in wiretapping and eavesdropping reports.

AUTHORITY: The provisions of this Part 42 issued under 5 U.S.C. 301.

SOURCE: The provisions of this Part 42 appear at 32 F.R. 13380, Sept. 22, 1967, unless otherwise noted.

§ 42.1 Purpose and scope.

This part implements section 605 of the Communications Act of 1934, as amended (47 U.S.C. 605), Presidential Memorandum for the Heads of Executive Departments and Agencies, June 30, 1965, and Memorandum to the Heads of Executive Departments and Agencies From the Attorney General, June 16, 1967, and sets forth the policies and restrictions governing telephone interception and eavesdropping by DoD personnel engaged in the conduct of investigations for law enforcement purposes in the United States. It also establishes certain worldwide reporting requirements regarding storage, inventory, and use of interception and eavesdropping devices by

DoD Components in the conduct of such activities.

§ 42.2 Applicability.

This part is applicable to all DoD Components. It does not apply to activities which are related directly to the protection of the national security.

§ 42.3 Definitions.

For the purpose of this part, the following definitions apply:

(a) "Wiretapping" means the act of listening to or recording of any telephonic conversation by the use of any electronic, mechanical, or other device without the advance consent of all of the parties to the conversation; sometimes referred to in this part as interception.

(b) "Eavesdropping" means the act of listening to or recording of any conversation other than telephonic by the use of any electronic, mechanical, or other device without the advance consent of all the parties to the conversation.

(c) "Heads of DoD Components" means the Secretaries of the Military Departments (or if they so designate, the Under Secretary, Assistant Secretary, the principal staff officer responsible for the investigative activity concerned, or the head of the investigative agency concerned), the Directors of the Defense Agencies, the Chairman of the Joint Chiefs of Staff, and the Assistant Secretary of Defense (Administration) for the Office of the Secretary of Defense and other activities assigned for administrative support.

§ 42.4 Wiretapping.

(a) To insure the privacy of telephone conversations to the maximum practical extent, the interception of telephone conversations is prohibited unless there are reasonable grounds to believe that:

(1) A criminal offense concerning the national security is involved; or,

(2) A felony has been or is about to be committed; or,

(3) Telephone calls involving obscenity, harassment, extortion, bribery, or threat of bodily harm have been made to a subscriber-user on a military base under the jurisdiction of the Department of Defense.

(b) National security investigations: The following requirements must be met:

(1) One of the parties has freely and voluntarily consented in advance to the interception. If none of the parties has

consented in advance, the interception must be approved by the Attorney General in advance, see paragraph (f) (3) of this section; and

(2) The interception has been approved in advance by the Secretary of the Military Department concerned (or his specific designee), or the Assistant Secretary of Defense (Administration) for all other DoD Components.

(c) Felony investigations: The following requirements must be met:

(1) One of the parties has freely and voluntarily consented in advance to the interception; and,

(2) The interception has been approved in advance by the Secretary of the Military Department concerned (or his specific designee), or the Assistant Secretary of Defense (Administration) for all other DoD Components.

(d) Investigations involving on-base telephone: The following requirements must be met:

(1) The subscriber-user of the telephone has requested the investigation of telephone calls involving obscenity, harassment, extortion, bribery, or threat of bodily harm and, in writing, freely and voluntarily consents in advance to the wiretap; and,

(2) The telephone and wiretap are located on an installation under the jurisdiction of the Department of Defense; and

(3) The head of the investigative unit has approved the interception in advance in accordance with the rules prescribed by the Head of the DoD Component concerned.

(e) The prohibitions and restrictions of this § 42.4 apply whether or not the information which may be acquired through interception is intended to be used in any way or to be subsequently divulged outside the Department of Defense. Any question as to whether the use of a particular device can be said to involve a prohibited interception of a telephone conversation shall be submitted to the General Counsel of the Department of Defense for consideration.

(f) A request for approval under paragraphs (b) and (c) of this section shall include the information outlined in § 42.7.

(1) Approval will not be granted for more than 30 days, and the wiretap will be terminated as soon as the desired information is obtained.

(2) Renewal requests for specified periods of not more than 30 days may be submitted to the appropriate approval authority for consideration.

(3) If the approval of the Attorney General is required, the request shall be sent to the Assistant Secretary of Defense (Administration) who, if he considers it justified, will forward it, and subsequent renewals thereof, to the Attorney General.

§ 42.5 Eavesdropping.

(a) To protect the rights of privacy, eavesdropping is prohibited if the listening to or recording of a conversation involves a violation of the Constitution or a statute. This prohibition includes eavesdropping in any form which is accomplished by means of physical trespass or entry. It also may include eavesdropping practices which intrude upon the conversations between persons whose relationship is traditionally considered privileged (such as lawyer-client and doctor-patient). Further, even though it may be accomplished without physical trespass or entry, it may also be unlawful if it invades the sanctity of a man's home, private office, hotel room, automobile, or other physical areas deserving protection of the right of privacy.

(b) In order to limit eavesdropping not otherwise prohibited by paragraph (a) of this section, eavesdropping is authorized without the consent of all the parties only under the following conditions:

(1) There are reasonable grounds to believe that a criminal offense concerning the national security is involved, or that a felony has been or is about to be committed; and,

(2) Advance written approval has been obtained from the Attorney General, see subparagraph (3) of this paragraph. A request for approval under this paragraph must include the information outlined in § 42.7. Approval will not be granted for more than 30 days, and the eavesdrop will be terminated as soon as the desired information is obtained; and,

(3) The request shall be sent to the Assistant Secretary of Defense (Administration) who, if he considers it justified, will forward it, and subsequent renewals thereof for not more than 30 days, to the Attorney General.

(c) If, in the judgment of the Head of the DoD Component concerned, or his specific designee, the emergency needs of an investigation preclude ob-

taining the advance approval of the Attorney General as required by paragraph (b) (2) of this section, he may, without that approval authorize the eavesdropping required by the investigation. He shall, within 24 hours after authorizing the eavesdropping, provide the Attorney General with a copy to the Assistant Secretary of Defense (Administration), with the information outlined in § 42.7. He shall include an explanation of the circumstances upon which he based his judgment that the emergency needs of the investigation precluded the obtaining of the advance approval of the Attorney General.

§ 42.6 Procedures and reports.

(a) The Head of each DoD Component concerned shall require, under the administrative controls provided by this part, the following:

(1) That when wiretapping or eavesdropping is authorized, the investigative agent shall:

(i) If technically feasible, permanently record the conversations concerned on tape or other recording medium;

(ii) Preserve the recording, together with any logs, transcripts, summaries, or memoranda that are made concerning the conversations; and,

(iii) Report in writing to the Head of the DoD Component describing the uses made of each device for wiretapping or eavesdropping.

(2) As to information obtained by wiretapping or eavesdropping, that:

(i) Information is stored in an appropriate investigative file at a central location;

(ii) Information so stored is always identified, when used for any purpose, as information obtained by wiretapping or eavesdropping;

(iii) Access to information so stored is strictly controlled and recorded; and,

(iv) Information so stored shall not be disclosed outside the Department of Defense unless the Head of the DoD Component concerned determines that disclosure is essential to governmental operations.

(3) As to records and devices used for wiretapping and eavesdropping; that:

(i) Devices are obtained only to the extent necessary for use in conformance with this part;

(ii) Units be designated to maintain and control devices;

(iii) Centralized records be maintained of the inventory and use of devices. (A record must include the date a device was assigned to an agent, the date he returned it, and his report under paragraph (a) (1) (iii) of this section, on its use);

(iv) The need for devices be reevaluated once a year; and

(v) All records are maintained for a period of 6 years.

(b) The Head of each DoD Component shall report to the Assistant Secretary of Defense (Administration) as follows:

(1) Before the 10th day of each month stating whether there was any wiretapping or eavesdropping during the preceding month by personnel of the DoD Component concerned (i) in the United States or (ii) elsewhere, if any party to the conversation was a citizen of the United States. The report must include all information in § 42.8.

(2) Before July 10, annually, giving a complete inventory of all devices in the DoD Component concerned that are primarily designed for wiretapping or eavesdropping. The report shall include a statement that the inventory is being maintained at the lowest level that is consistent with operational requirements.

(c) The Assistant Secretary of Defense (Administration) shall report by July 31, annually, to the Attorney General on all uses of devices for wiretapping and eavesdropping in the Department of Defense during the previous fiscal year, to include, in each case, the information in § 42.8. The report shall contain the Department of Defense inventory of devices.

§ 42.7 Information to be included in a request for approval of proposed wiretapping or eavesdropping.

(a) Indicate whether the request is for a wiretap or an eavesdrop.

(b) The purpose. To the extent possible, describe the conversation expected to be intercepted.

(c) Identity of all persons under investigation, or affected.

(d) Statement if any party has consented, and if so, his identity.

(e) With respect to the particular operation:

(1) Identity of the operating unit;

(2) Types of equipment to be used, if any, to include method of transmission and recording device;

(3) Manner or method of installation;

(4) Physical location, to include the address, telephone number, room number, whether inside or outside a building, public or private property, and the means of access;

(5) The expected period of time for the operation. (The period should be as short as possible compatible with operational necessity.)

§ 42.8 Information to be included in wiretapping or eavesdropping reports.

(a) Indicate whether the report is on a wiretap or an eavesdrop.

(b) Identity of the persons against whom directed.

(c) Location.

(d) Identity of the performing organizational unit.

(e) Type of equipment used and manner and method of installation.

(f) Approval authority.

(g) Duration.

(h) Purpose served.

(i) Evaluation of results of operations that were completed during the reporting period.

PART 43—PERSONAL COMMERCIAL AFFAIRS

Sec.

43.1 Purpose.

43.2 Applicability and scope.

43.3 Policy guidance.

43.4 Responsibilities.

43.5 Effective date and implementation.

AUTHORITY: The provisions of this Part 43 are issued under sec. 301, 80 Stat. 379; 5 U.S.C. 301.

SOURCE: The provisions of this Part 43 appear at 34 F.R. 12580, Aug. 1, 1969, unless otherwise noted.

§ 43.1 Purpose.

(a) This Part 43 incorporates certain provisions of Public Law 90-321; restates policies for private commercial solicitation on military installations; sets forth procedures for withdrawal or suspension of privileges; extends counseling capability through credit unions and nonprofit organization educational programs; and restates policies and procedures on investigative and enforcement actions.

(b) The purpose of this Part 43 is to safeguard and promote the welfare and interests of military personnel as consumers by outlining the general Department of Defense policies governing the conduct of personal commercial solicitations, including the sale of goods,