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NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20506

February 22, 1994

ACTION

MEMORANDUM FOR ANTHONY LAKE

THROUGH:

ROBERT BELL *RBB*

FROM:

KEITH HAHN *VX*

SUBJECT:

Military Nomination for Admiral Frank Kelso

At Tab A the Chief of Naval Operations, Admiral Frank Kelso, has been nominated for appointment to the grade of admiral on the retired list and Admiral Mike Boorda has been nominated as his relief.

Included at Tab A are the results of the DoD Inspector General's review of the Tailhook investigation and the pertinent opinions of Circuit Military Judge, Captain Vest, whose recent findings concerning Admiral Kelso's involvement in Tailhook have been widely publicized. Like all other flag officers that attended the Tailhook Convention, Admiral Kelso received a nonpunitive letter for his accountability for the conduct of subordinates at that event.

Admiral Boorda did not attend Tailhook and has no adverse information noted on his nomination.

RECOMMENDATION

That you sign the memorandum to John Podesta at Tab I concurring in the attached military nominations.

Attachments

Tab I Memorandum to John Podesta

Tab A Military Nominations for Admiral Kelso and Admiral Boorda

THE WHITE HOUSE

WASHINGTON

MEMORANDUM FOR JOHN PODESTA

FROM: ANTHONY LAKE

SUBJECT: Military Nominations for Admiral Frank Kelso and
Admiral Mike Boorda

We have reviewed the information accompanying Admiral Frank Kelso's nomination for appointment to the rank of admiral on the retired list and concur in Secretary Perry's recommendation. We also concur in the nomination of Admiral Mike Boorda to be the next Chief of Naval Operations. We recommend that these nominations be forwarded to the Senate Armed Services Committee together.

Attachment

Tab A Military Nominations

THE WHITE HOUSE
WASHINGTON

February 22, 1994

MEMORANDUM FOR THE PRESIDENT

FROM: ALPHONSO MALDON, JR. *Mark A. Logans For*
DEPUTY ASSISTANT TO THE PRESIDENT AND
DIRECTOR, WHITE HOUSE MILITARY OFFICE

SUBJECT: Flag Officer Nomination

Forwarded for your approval and signature is the nomination of Admiral Frank B. Kelso, II, United States Navy, for appointment to the grade of admiral on the retired list.

This nomination is submitted by the Secretary of Defense after considering information pertaining to Admiral Kelso, which has been provided by the Assistant Secretary of Defense (Personnel & Readiness) (Tab A). If you approve this nomination, the information will be provided to the Senate Armed Services Committee.

This nomination has been staffed by the Secretary of the Navy and was approved by the Secretary of Defense.

Recommendation

That you approve and sign the attached.

Attachment



THE SECRETARY OF DEFENSE
WASHINGTON, THE DISTRICT OF COLUMBIA



22 FEB 1994

MEMORANDUM FOR THE PRESIDENT

SUBJECT: Flag Officer Nomination

I recommend you nominate Admiral Frank B. Kelso, United States Navy, for appointment to the grade of admiral on the retired list. Admiral Kelso, age 60, currently serves as Chief of Naval Operations.

Without calling into question the correctness of the ruling in a proceeding in which Admiral Kelso was not a party, I draw to your attention that the Department of Defense Inspector General found no credible evidence that Admiral Kelso had specific knowledge of the misconduct that occurred at Tailhook '91; that there was no evidence that he sought to thwart the Navy's internal investigation; and that he was fully supportive of the Department's Inspector General's investigation. I know that Admiral Kelso did not himself decide on the disposition of the various Flag Officer files developed by the Inspector General. Rather, Secretary Aspin withheld those files for review by civilian leadership, specifically, then-incoming Secretary of the Navy John Dalton. I will provide documents relevant to this nomination to the White House Military Office in separate correspondence.

I regard Admiral Kelso as a man of the highest integrity and honor. Under his leadership, the Navy has entered the post-Cold War world dramatically reshaped and fully prepared for new challenges. He made an enormous contribution to the safety and well-being of the Nation.

William J. Perry

Attachment

The White House

Washington

To the Senate of the United States:
I nominate:

The following named officer to be placed on the retired list in the grade indicated under the provisions of Title 10, United States Code, Section 1370:

To be Admiral

Admiral Frank B. Kelso, II, U. S. Navy, 410-50-8737

PERS-00F
15 Feb 1994

TRANSCRIPT OF NAVAL SERVICE FOR
ADMIRAL FRANK BENTON KELSO II
U.S. NAVY

11 JUL 1933 Born in Fayetteville, Tennessee
10 JUN 1952 Midshipman, U.S. Naval Academy
1 JUN 1956 Ensign
1 DEC 1957 Lieutenant (junior grade)
1 JUN 1960 Lieutenant
1 JUL 1965 Lieutenant Commander
1 OCT 1969 Commander
1 JUL 1976 Captain
JUL 1980 Designated Rear Admiral while serving in
billets commensurate with that grade
1 MAR 1981 Rear Admiral
1 MAY 1985 Vice Admiral
30 JUN 1986 Admiral
Service continuous to date

ASSIGNMENTS AND DUTIES	FROM	TO
Naval Amphibious Training Unit, Little Creek, Norfolk, VA (DUINS)	JUN 1956	AUG 1956
USS OGLETHORPE (AKA 100)	AUG 1956	DEC 1957
Naval Submarine School, New London	DEC 1957	JUN 1958
USS SABALO (SS 302)	JUN 1958	DEC 1959
Naval Submarine School, New London (DUINS)	DEC 1959	JUN 1960
Atomic Energy Commission, Schenectady Naval Reactor Operations Office and Naval Nuclear Power Training Unit, West Milton Site, Schenectady, NY	JUN 1960	JAN 1961
Naval Submarine School, New London, CT	JAN 1961	MAR 1962
Headquarters, FOURTH Naval District (CFO USS POLLACK (SS(N)603))	MAR 1962	JUN 1963
USS POLLACK (SSN 603)	JUN 1963	DEC 1964
USS DANIEL WEBSTER (SSBN 626) (BLUE) (Eng. Off.)	DEC 1964	DEC 1966
USS SCULPIN (SSN 590) (XO)	DEC 1966	OCT 1968
CO, Naval Nuclear Power School, NTC, Bain- bridge, MD	OCT 1968	AUG 1971
Division of Naval Reactors, U.S. Atomic Energy Commission	AUG 1971	DEC 1971
Staff, Commander Submarine Force, U.S. Atlantic Fleet (DUINS)	DEC 1971	MAR 1972
CO, USS FINBACK (SSN 670)	MAR 1972	SEP 1972
Staff, Commander Submarine Force, U.S. Atlantic Fleet (Asst. Force Nuclear Power Off.)	SEP 1972	FEB 1973
USS BLUEFISH (SSN 675) (PCO)	FEB 1973	APR 1973

TRANSCRIPT OF NAVAL SERVICE FOR
ADMIRAL FRANK BENTON KELSO II (CONT'D)

<u>ASSIGNMENTS AND DUTIES (CONT'D)</u>	<u>FROM</u>	<u>TO</u>
CO, USS BLUEFISH (SSN 675)	APR 1973	AUG 1975
CINCLANTFLT (Aide and EA) ADDU: Staffs, CINCLANT/CINCSOUTH/CINCPACFLT	AUG 1975	OCT 1976
CINCLANTFLT (EA to CINC/SACFLT) ADDU: Staffs, CINCLANT/CINCSOUTH/CINCPACFLT	OCT 1976	AUG 1977
Commander, Submarine Squadron SEVEN	AUG 1977	SEP 1978
Naval Military Personnel Command (Director, Submarine/Nuclear Power Distribution Control Div.) ADDU: Office of CNO (Head Submarine/ Nuclear Program Section/Nuclear Power Program Manager)	SEP 1978	JUL 1980
Office of CNO (Director, Strategic Submarine Div. and Trident Program Coordinator) (OP-21)	JUL 1980	JUL 1983
Office of Secretary of the Navy (Director, Office of Program Appraisal)	JUL 1983	FEB 1985
Commander, SIXTH Fleet	FEB 1985	JUN 1986
Commander in Chief, U.S. Atlantic Fleet	JUN 1986	NOV 1988
Supreme Allied Commander, Atlantic/Commander in Chief, U. S. Atlantic Command	NOV 1988	JUN 1990
Chief of Naval Operations	JUN 1990	TO DATE

MEDALS AND AWARDS

Defense Distinguished Service Medal
 Distinguished Service Medal with two Gold Stars
 Legion of Merit with three Gold Stars in lieu of subsequent awards
 Meritorious Service Medal
 Navy Commendation Medal
 Navy Achievement Medal
 Navy Unit Commendation with two Bronze Stars in lieu of subsequent
 awards
 Meritorious Unit Commendation
 Navy Expeditionary Medal
 National Defense Service Medal with two Bronze Stars in lieu of
 third award
 Armed Forces Expeditionary Medal
 Sea Service Deployment Ribbon

SPECIAL QUALIFICATIONS

BS (Naval Science) U.S. Naval Academy, 1956
 Language Qualifications: None of record

TRANSCRIPT OF NAVAL SERVICE FOR
ADMIRAL FRANK BENTON KELSO II (CONT'D)

PERSONAL DATA

Wife: Landess McCown, Florence, South Carolina
 Children: Thomas B. Kelso (Son)
 Born: 6 June 1958
 Robert D. Kelso (Son)
 Born: 5 December 1959
 Mary K. Kelso (Daughter)
 Born: 25 April 1962
 Kerry L. Kelso (Daughter)
 Born: 14 August 1969

SUMMARY OF JOINT DUTY ASSIGNMENT

<u>Assignment</u>	<u>Dates</u>	<u>Rank</u>
Executive Assistant and Aide, Commander in Chief, U.S. Atlantic Fleet/Commander in Chief, U.S. Atlantic Command and Supreme Allied Commander Atlantic	AUG 75 - AUG 77	CDR/ CAPT
*Director, Strategic Submarine Division and Trident Program Coordinator, Office of Chief of Naval Operations, OP-21	JUL 80 - JUL 83	RADM
*Director of Office of Program Appraisal Office of the Secretary of the Navy	JUL 83 - FEB 85	RADM
Commander SIXTH Fleet/Commander, Strike Force South	FEB 85 - JUN 86	VADM
*Commander in Chief, U.S. Atlantic Fleet	JUN 86 - NOV 88	ADM
Commander in Chief, U.S. Atlantic Command/ Supreme Allied Commander, Atlantic	NOV 88 - JUN 90	ADM
*Joint Duty Equivalent		

IMMEDIATE RELEASE

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FLAG OFFICER ANNOUNCEMENT

Secretary of Defense William J. Perry announced today that the President has nominated Admiral Frank B. Kelso, II, U.S. Navy, to be placed on the retired list in his current grade. Admiral Kelso is scheduled to retire in Spring 1994, after completion of more than thirty-eight years of active service. He is currently serving as Chief of Naval Operations in the Pentagon.

-END-



ASSISTANT SECRETARY OF DEFENSE

4000 DEFENSE PENTAGON
WASHINGTON DC 20301-4000



Honorable Sam Nunn
Chairman
Committee on Armed Services
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am writing in reference to the nomination of Admiral Frank B. Kelso which the President recently forwarded to the Senate.

Admiral Kelso was present at the Tailhook '91 Convention. He did not engage in any personal wrongdoing with respect to the planning for Tailhook or conduct at Tailhook. Accordingly, he was not the subject of any adverse action concerning those matters. However, because of his accountability as Chief of Naval Operations for the conduct of subordinates, he received nonpunitive correspondence in that regard. As guidance for the future performance of his duties, that letter described the Secretary of the Navy's standards concerning the leadership responsibilities of Flag Officers. By its express terms, it was not intended to have any adverse impact upon Admiral Kelso's retirement in the grade of admiral at the conclusion of his service in that grade.

I wish to further note the following matters which are relevant to the nomination:

- o The activities that occurred at the convention were the subject of a Department of Defense Inspector General investigation. The report of the investigation is at Tab A.
- o The court martial proceeding of three individuals that arose from the Department of Defense Inspector General investigation resulted in a recent court ruling which made findings with regard to Admiral Kelso's activities at the convention and his role in the processing of Tailhook '91 cases. The court ruling is at Tab B.
- o Subsequent to the court ruling, the Department of Defense Inspector General issued a memorandum concerning his conclusions with regard to Admiral Kelso's activities and role in the Tailhook '91 convention. His statement is at Tab C.
- o The Secretary of the Navy and the Secretary of Defense issued public statements with regard to the retirement of Admiral Kelso. These statements are at Tabs D and E, respectively.



Considering the forgoing in totality, the President nominated Admiral Kelso for retirement in the grade of admiral.

Sincerely,

Edwin Dorn

Enclosures:

As stated

SEPTEMBER 1992

DEPARTMENT OF DEFENSE OFFICE OF INSPECTOR GENERAL



TAILHOOK 91

PART 1 - REVIEW OF THE NAVY INVESTIGATIONS

ASSISTANT INSPECTOR GENERAL FOR DEPARTMENTAL INQUIRIES
ASSISTANT INSPECTOR GENERAL FOR INVESTIGATIONS

Department of Defense Inspector General



February 1993

Tailhook 91

Part 2:

Events at the 35th Annual Tailhook Symposium



**Assistant Inspector General for Investigations
Assistant Inspector General for Departmental Inquiries**

GENERAL COURT-MARTIAL
UNITED STATES NAVY
TIDEWATER JUDICIAL CIRCUIT
NORFOLK, VIRGINIA

UNITED STATES)

v.)

THOMAS R. MILLER
CDR USN)

AND)

UNITED STATES)

v.)

GREGORY E. TRITT
CDR USN)

AND)

UNITED STATES)

v.)

DAVID SAMPLES
LT USN)

ESSENTIAL FINDINGS AND
RULING ON DEFENSE MOTION
TO DISMISS

DATE:

I. NATURE OF MOTION

On motion through defense counsel, CDR Miller, CDR Tritt, and LT Samples¹ move this court to dismiss the charges brought against them for the following two separate but related reasons.

First, that ADM Frank B. Kelso II, Chief of Naval Operations (CNO) is an "accuser" within the meaning of Article 1(9), Uniform

¹ CDR Gregory E. Tritt, U.S. Navy, an accused before a separate general court-martial, requested leave of court to join in this motion with CDR Miller on grounds that a similar motion had been filed with the court in his case. CDR Tritt and his counsel were present for each hearing on this motion. After the presentation of evidence on the motion, LT David Samples, U.S. Navy, likewise an accused before a separate general court-martial, requested to join in the motion. Although coming in later, LT Samples claimed similar issues of law and fact on the motion and waived presentation of further evidence. The government had no objection. This court granted both the request of CDR Tritt and LT Samples to join the motion in the interest of judicial economy.

Code of Military Justice (UCMJ).² Further, that he was an "accuser" at the time he appointed VADM Paul Reason, Commander Naval Surface Force, U. S. Atlantic Fleet, to act as the convening authority in their respective cases. The defense then argues that pursuant to Rule for Courts-Martial (R.C.M.) 504, ADM Kelso's status as an "accuser" must result in the disqualification of VADM Reason from acting as the convening authority. This would be true if ADM Kelso is an "accuser," as R.C.M. 504 requires the disqualification of any convening authority junior in rank or command.

Second, the defense contends that since ADM Kelso may have been guilty of the same or similar crimes of omission as those alleged against CDRs Miller and Tritt, his appointment of a subordinate officer to act as convening authority effectively shielded him from prosecution and thus amounted to unlawful command influence within the meaning of Article 37, UCMJ.³

In support of these two broad contentions, CDR Miller, CDR Tritt and LT Samples more specifically contend the following chain of events:

(1) CDR Miller and CDR Tritt are charged, *inter alia*, with being present and then failing to take action to stop subordinate officers, including several officers assigned to their command, from assaulting certain unidentified females by touching them on the buttocks with their hands during the 1991 Tailhook Symposium (hereinafter "Tailhook 91").

(2) The alleged failure to act as well as the alleged assaults on the unidentified females by the subordinate Navy officers took place on the third floor pool patio of the Las Vegas Hilton (hereinafter "patio") during the evening hours of Saturday, 07 September 1991.

(3) ADM Frank B. Kelso II, CNO, was also present on the patio on 07 September 1991 at or about the time these alleged crimes took place.

(4) ADM Kelso later denied being present on the patio at any time during the evening hours of Saturday, 07 September 1991. He likewise denied being in the third floor hallway or in any of the various squadron hospitality suites at any time.

(5) Subsequent to this interview, the Defense Criminal

² Article 1(9), UCMJ, reads in pertinent part: "'Accuser' means . . . any other person who has an interest other than an official interest in the prosecution of the accused."

³ Article 37, UCMJ reads in part: "No person subject to this chapter may attempt to . . . by any unauthorized means, influence . . . the action of any convening, approving, or reviewing authority with respect to his judicial acts."

Investigative Service (DCIS)⁴ obtained the statements of a substantial number of eyewitnesses who recalled seeing, and in some cases speaking with, ADM Kelso on the patio during the evening hours of Saturday, 07 September 1991.

(6) Based on these eyewitness statements, ADM Kelso was reinterviewed by DCIS on 15 April 1993. At this interview ADM Kelso was advised of his rights under Article 31(b), UCMJ, as a suspect. He was advised that he was under suspicion of violating Articles 107 and 134, UCMJ (Making a False Official Statement and False Swearing, respectively), both suspected crimes stemming from his 23 July 1992 statement wherein he denied being on the patio Saturday evening, 07 September 1991.

(7) That likewise on the prior evening, Friday, 06 September 1991, ADM Kelso was present on the patio, which he acknowledges, and also in the third floor hallway and made personal visits to the various squadron hospitality suites, which ADM Kelso denies.

(8) That during this earlier Friday visit, ADM Kelso witnessed inappropriate conduct occurring on the patio and in the hospitality suites, including female "leg shaving." This personal knowledge of inappropriate behavior by subordinate officers, combined with his failure as the senior Navy officer present to stop the behavior, is sufficient to make ADM Kelso a suspect in the commission of the same type of crimes (failure to act) alleged against CDR Miller and CDR Tritt. At the very least, he would be considered a material witness to these events. That, furthermore, ADM Kelso's personal knowledge and involvement with the misconduct at Tailhook 91, and the subsequent publicity surrounding the allegations of assault and failure of Navy leadership, have so closely connected him with these events that he would reasonably be perceived to have a personal interest in the courts-martial of CDRs Miller and Tritt and LT Samples.

(9) On 01 February 1993, ADM Kelso personally appointed VADM Reason to act as the Consolidated Disposition Authority (CDA) to take administrative and disciplinary action for all Navy personnel found to have committed misconduct at Tailhook 91. ADM Kelso further directed that all related matters requiring review would be forwarded to his office for action.

The defense contends these events taken together lead to the disqualification of the convening authority. In short, they reason as follows: ADM Kelso's presence on the patio during the evening hours of 06 and 07 September 1991, at which times he either observed or knew of the inappropriate behavior of his subordinates and failed to act to stop such behavior; ADM Kelso's subsequent status as a criminal suspect and as a potential material witness; and, the current controversy regarding ADM Kelso's denial that he was ever physically present on the

⁴ The Defense Criminal Investigative Service (DCIS) is a part of the Department of Defense Inspector General's Office (DODIG) and throughout this hearing witnesses have referred to them interchangeably.

patio during the evening hours of 07 September 1991 -- viewed either separately or collectively -- give him an interest "other than official" in the outcome of the prosecution of courts-martial stemming from Tailhook 91...

If ADM Kelso has an "other than official interest" in this litigation generally or these three accused's cases specifically, he is an "accuser" within the meaning of Article 1(9), UCMJ. As an "accuser," ADM Kelso was disqualified from appointing any subordinate in rank or command to convene a court-martial stemming from Tailhook 91, and as a subordinate in rank and command to ADM Kelso, VADM Reason became a "junior accuser" and was disqualified from acting as the convening authority in these cases pursuant to R.C.M. 504(c)(2).

Finally, that ADM Kelso's action in appointing a subordinate, VADM Reason, to act as the CDA when ADM Kelso knew himself to be a possible suspect for his own actions related to Tailhook 91, which appointment effectively shielded himself and possibly other officers senior to VADM Reason from courts-martial, amounted to unlawful command influence within the meaning of Article 37, UCMJ.

Briefly, the government generally denies the above contentions and responds that ADM Kelso never visited the third floor hallway or the hospitality suites during his stay at Tailhook 91 and, although he did visit the patio on Friday, he never went to the third floor at all on Saturday evening, 07 September 1991. Further, since ADM Kelso never personally witnessed any inappropriate conduct, he would not be a material witness. That throughout this court-martial process, ADM Kelso has had only an official interest in the litigation and has taken no action that would in any way influence these proceedings. Finally, the government responds that the evidence fails to establish that ADM Kelso has been so closely connected to these events that a reasonable person would conclude that he had more than simply an official interest in the cases of CDRs Miller and Tritt and LT Samples.

II. BACKGROUND TO TAILHOOK 91

The defense claims that the nexus linking ADM Kelso's personal involvement in Tailhook 91 to the charges before this court does not arise from any single event. The defense argues that ADM Kelso's personal involvement derives from all of his connections with the events of these courts-martial beginning with his knowledge of reported incidents of inappropriate behavior at Tailhook Symposiums prior to 1991, and continuing up to his appearance as a witness before this court. In order to assess the merit of this claim by the defense, and to bring Tailhook 91 events germane to the defense issues into proper perspective, the court will begin with an analysis of the evidence relating to the Navy's past sponsorship of the Tailhook Association. This includes reports of inappropriate behavior occurring at past Tailhook Symposiums and the Navy's response to those reports.

This court finds that:

1. Tailhook 91 was held at the Las Vegas Hilton Hotel, Las Vegas, Nevada, from 05 through 08 September 1991. It was attended by hundreds of aviators, male and female, including active duty, reserve, and retired officers from both the Navy and Marine Corps aviation communities. Also in attendance were many high ranking uniformed Navy and Marine Corps officers and civilian Department of the Navy (DON) personnel, including ADM Kelso and then Secretary of the Navy (SECNAV), H. Lawrence Garrett III.

2. The Tailhook Symposium was an annual event sponsored by the Tailhook Association. At the time of Tailhook 91, the Association was officially sanctioned by the Department of the Navy. However, following reports of alleged assaults on female attendees and other inappropriate conduct at Tailhook 91, the Navy withdrew its support of the Association.

The stated purpose of the annual symposium was to provide a single forum within the Navy and Marine Corps aviation communities to address a broad range of matters affecting the state and future of naval aviation. Tailhook 91 was to be particularly significant since it provided an opportunity to address the recent combat successes of "Operation Desert Storm," and a future aviation plan then under consideration by the Congress. The future role of female aviators would also be a major topic of discussion, which was one of the primary reasons that ADM Kelso attended. See Appellate Exhibit LXXII, p. 17.

3. Despite the worthy official purpose, the evidence is replete with references to the annual symposium's long-standing and widely-known reputation for wild partying, heavy drinking, and lewd behavior by some attendees, particularly junior aviators. Reports of such activities at past Tailhook Symposiums had sparked concerns at the highest levels of the Navy.

In 1986, VADM Martin, then serving as the Assistant Chief of Naval Operations for Air Warfare (OP-05), formally expressed his concerns in writing regarding inappropriate behavior at the 1985 Symposium. See Appellate Exhibit CLXXXV. This led to a routine practice by Tailhook Association Presidents of sending a letter to aviation squadron commanders prior to each annual symposium urging moderation regarding social activities. CAPT Ludwig, then President of the Tailhook Association, sent such a letter to squadron commanders some weeks prior to Tailhook 91. In his correspondence, CAPT Ludwig, being concerned with past incidents of misbehavior among some symposium attendees, urged squadron commanders to guard against what he termed "late night gang mentality." See Appellate Exhibit CLXXXVI.

Col Wayne Bishop, USMC, former Special Assistant and Marine Corps Aide to SECNAV, and who attended Tailhook 91 with Secretary Garrett, harbored serious reservations concerning both Secretary Garrett's and his own attendance at Tailhook 91. Col Bishop's concerns stemmed from reports he had received of inappropriate behavior occurring at past Tailhook Symposiums. This included what he described as:

stories concerning pornographic movies, strippers

and prostitutes . . . lots of drinking, junior officers and senior officers, flag officers, removing themselves from their office for the purpose of discussing contentious issues in the aviation community one-on-one.

Appellate Exhibit CXL at pp. 14-18.

VADM Dunleavy, who was serving as the Assistant Chief of Naval Operations for Air Warfare (OP-05) at the time of Tailhook 91, was also keenly aware of the social climate at past Tailhook Symposiums. In his sworn statement to Mr. Suessman, DCIS, of 28 July 1992, VADM Dunleavy acknowledged his attendance at the 1990 Tailhook Symposium. In discussing his knowledge of reported incidents of inappropriate behavior at that Symposium, VADM Dunleavy stated,

I've seen some wild stuff over the years . . . broken furniture and spilled drinks . . . I heard of the '90 Gauntlet from my son . . . he says it is a bunch of drunks running around chasing girls . . . It's a grab ass of JOs [junior officers] . . . everyone just lines up in the passageway and every good looking girl that goes through they grab at some of that.

Appellate Exhibit LXXXII(A), pp. 7-9.

In commenting on the term "late night gang mentality" used by CAPT Ludwig in his letter to squadron commanders prior to Tailhook 91, VADM Dunleavy stated, "[t]he kids just getting out of hand in the sense of dancing and, you know, mooning people"

Secretary Garrett was also aware of the potential for inappropriate activities at Tailhook 91. He attended the 1990 Tailhook Symposium, at which time he acknowledged witnessing "female leg shaving" activities. The potential for inappropriate behavior at Tailhook 91 was also anticipated by members of Secretary Garrett's personal staff. He was warned by at least one highly vocal member of his staff not to attend Tailhook 91 because of the well-known reputation for lewd and inappropriate behavior. See Appellate Exhibit CXL at pp. 14-18.

4. This court finds that this quantum of information concerning the symposium's notorious social reputation prior to Tailhook 91, and in particular the warnings given by VADM Martin and CAPT Ludwig, could not have escaped ADM Kelso's attention. It served to place him and other high ranking officers on notice as to the social climate at past Tailhook Symposiums, and the kind of social environment to expect at Tailhook 91.

The failure by those responsible to take strong corrective action regarding inappropriate behavior that obviously occurred at past Tailhook Symposiums is incomprehensible. As events have proven, this embarrassing failure of leadership and "head in the sand" attitude, which conveyed a signal of condonation, contributed to the sexually offensive conduct which later

escalated to the actual sexual assaults on female attendees. This excusing attitude was underscored by Secretary Garrett's in-court testimony that he did not find the female leg shaving exhibition to be offensive. He further stated that he viewed the female leg shaving to be permissible as "conduct between consenting adults."³

Excessive drinking, "pornographic movies, strippers, and prostitutes," all of which had been a well known part of past Tailhook conferences were repeated again at Tailhook 91 as part of the planned activities in the hospitality suites. Finally, the infamous gauntlet, in which male Navy officers felt it was permissible to grab at any woman who walked past -- and which was at the heart of the complaints by female attendees -- was likewise a tradition of past Tailhook conferences. It should go without saying that this behavior should have never been permitted to start, having started should have been swiftly ended, and that over the years of permissive leadership had gotten completely out of hand. This common knowledge of inappropriate and offensive behavior at past symposiums and failure by senior Navy leadership to take corrective action is an inseparable part of the motion before this court.

5. Within days following Tailhook 91, LT Paula Coughlin, a female aviator, was the first to formally complain to the Naval Investigative Service (NIS) that she had been the victim of an assault in the gauntlet on the third floor. In the weeks that followed, other female attendees also came forward to complain of being assaulted. The growing reports of sexual assault quickly generated public outrage and a demand by the Congress for an investigation to both identify the assailants and secure individual accountability under the UCMJ. It is the actions of ADM Kelso in carrying out his codal role in the ensuing military justice process, and the extent to which his own accountability and personal involvement at Tailhook 91 may have affected the lawfulness of this process, that have been called into question by the defense.

III. ADM KELSO'S PERSONAL INVOLVEMENT AT TAILHOOK 91

ADM Kelso gave two sworn statements to DCIS investigators on

³ The female leg shaving exhibition was positioned directly behind the full-length window in one of the hospitality suites. Those on the patio outside the window and those in the suite were encouraged to watch an elaborate shaving process that included having the woman sit in a barber chair and expose her legs as much as she would permit, then two Navy officers would massage oil on her legs, apply the shaving cream, and then shave the legs. Although less offensive, it was intended to draw people to the suite in the same way as professional strippers and other lewd exhibitions were employed by other hospitality suites.

23 July 1992 and 15 April 1993, respectively. See Appellate Exhibits LXXII and LXXVIII. He also gave sworn testimony before this court. See Transcript at pp. 349-385.⁶ In both of his statements to DCIS and during his in-court testimony, ADM Kelso acknowledged that during the Tailhook 91 symposium he visited the patio of the Las Vegas Hilton Hotel (Hilton) during the evening hours of Friday, 06 September 1991. The patio adjoins the hospitality suites and it was there that most of the socializing and partying took place. Nevertheless, ADM Kelso denied: (1) that he witnessed any inappropriate behavior at any time; (2) that he visited any of the squadron hospitality suites during his sojourn on the patio Friday evening or at any other time during his two-day visit; and (3) that he ever visited the patio on Saturday evening, 07 September 1991.

Friday, 06 September 1991

This court finds the convincing weight of the evidence reveals the following chain of events on Friday, 06 September 1991.

6. ADM Kelso arrived at Nellis Air Force Base, located near Las Vegas, Nevada, at approximately 1700, to commence his official visit at Tailhook 91. He was accompanied by members of his personal staff which included CAPT Philip Howard, his Executive Assistant (EA); Maj Mike Edwards, USMC, his Flag Aide; Master Chief Roger Wise, his Flag Writer; and Petty Officer Dubell, his Communicator. ADM Kelso was greeted by LCDR Elizabeth Toedt, one of the Tailhook 91 VIP protocol officers. LCDR Toedt escorted ADM Kelso and his official party to the Hilton via limousines furnished by the Hilton. See Appellate Exhibit CLXX.

7. They arrived at approximately 1730 and ADM Kelso was greeted by CAPT Ludwig, President of the Tailhook Association. Maj Edwards checked the Admiral into the hotel and escorted him to his room, number 2124, located on the 21st floor. ADM Kelso settled into his room, changed into a suit and tie, and made final preparations for his keynote speech at the Friday evening reception and banquet. This reception and banquet was scheduled to begin at 1900.

8. At approximately 1845, Maj Edwards met ADM Kelso at his room and escorted him to the banquet room on the first floor of the Hilton. While enroute, ADM Kelso informed Maj Edwards that he would be going to the patio with VADM Dunleavy and Fetterman following the banquet. Maj Edwards did not attend the banquet. After escorting ADM Kelso to the banquet room, Maj Edwards went to survey the patio and the various squadron hospitality suites

⁶ These courts-martial have been consolidated for this motion only. All references to the transcript page numbers are to the unauthenticated record of United States v. Miller. If and when the record is fully reviewed and authenticated, the page numbers may be slightly different as a result of normal editing.

in advance of ADM Kelso's visit.

9. The banquet was attended by some 800 people, including VADM Dunleavy, VADM Fetterman, and a host of other flag officers. CAPT Howard also attended the banquet. Following the banquet, which ended at approximately 2100, Maj Edwards escorted ADM Kelso back to his room to change clothes. ADM Kelso changed into slacks and an open-collar sport shirt. At approximately 2200, VADMs Dunleavy and Fetterman, CAPT Howard, and Maj Edwards met with ADM Kelso at his room, and escorted him down the center bank of elevators to the third floor.

Tour of the Hospitality Suites

10. ADM Kelso testified that, upon arriving on the third floor, he immediately entered the patio from the center bank of elevators. ADM Kelso further testified that while on the patio he remained in about a 30-yard radius, talking and socializing. After about 40 minutes on the patio, he was escorted back to his room by Maj Edwards. Transcript at 351. However, VADM Dunleavy testified that after the Friday evening banquet, he and VADM Fetterman escorted ADM Kelso to the patio, and together they made a tour of the hospitality suites. ADM Dunleavy specifically testified that:

[A]fter the President's dinner Friday night . . . my partner [VADM Fetterman] and I escorted Kelso down, so that he could see the JOs [junior officers] and chat with them. We spent about probably 45 minutes to an hour down there, and then I escorted the CNO out, and he went to his room, and I think I went -- Friday night, I think I went back down and spent some more time with the JO's and then went back to my room, probably about 11, 1130 . . . Yes, in fact, I escorted him [referring to ADM Kelso] around, and we walked around. From the patio, finally made a swing through the suites down the passageway, up to another suite and back out on the patio . . . about 9:30, 9:45, immediately after the President's dinner . . . Yeah, but, you know, again we swing out through the patio and then up, usually 128 because for me it is the walkway in there and then back out again.

Transcript at pp. 501, 504, 515.

Maj Edwards' testimony also contradicts ADM Kelso's best recollection of the route he took when he initially entered the patio. In describing the route the party took onto the patio from ADM Kelso's room, Maj Edwards stated, "the party entered the patio from the doorway near room 308, the Rhino suite." Maj Edwards further stated, "if ADM Kelso gave a different account of the route onto the patio, he must have been mistaken." Transcript at pp. 1088-1090. This court finds Maj Edwards' testimony concerning this issue more accurate since it corroborates, at least in part, the detailed account given by

VADM Dunleavy. Moreover, Maj Edwards was more familiar with the patio area, having made a tour of the section earlier in the evening.

Based on the convincing weight of the testimony given by VADM Dunleavy, CAPT Howard and Maj Edwards, and despite ADM Kelso's best recollection, this court finds the following chain of events occurred relating to ADM Kelso's movements during his visit to the third floor on Friday evening:

Upon arrival on the third floor, VADMs Dunleavy and Fetterman, in company with CAPT Howard and Maj Edwards, escorted ADM Kelso onto the patio through the exit from the center bank of elevators. The group then walked past the front center planters and turned left towards the third floor hallway entrance from the patio adjacent to room 308, the Rhino suite. They entered the third floor hallway from that entrance and toured the various suites, during which time they talked and socialized with junior aviators and others present. Following a tour of the suites, the group exited back onto the patio through the same doorway from which they entered, where they spent a period of time talking and socializing with others individually and as a group. Later, ADM Kelso, VADM Dunleavy, CAPT Howard and Maj Edwards re-entered the third floor through the entrance to the center bank of elevators. Maj Edwards escorted ADM Kelso back to his room. VADM Dunleavy and CAPT Howard returned to the patio.

Activities in the Suites

This court further finds that ADM Kelso was exposed to, and actually witnessed incidents of inappropriate decorum and behavior while touring the various hospitality suites. More specifically:

11. Based on VADM Dunleavy's testimony, this court finds that both VADM's Dunleavy and Fetterman were keenly aware that activities of questionable propriety were occurring in the suites on Friday evening. In fact, VADM Dunleavy's testimony strongly suggests that VADM Fetterman moved ahead of him and ADM Kelso to alert unsuspecting aviators and others of ADM Kelso's approach. This was done in order to minimize ADM Kelso's exposure to untoward activities occurring in the suites. Transcript at 507-508. However, ADM Kelso was unavoidably exposed, at the very least, to the sexually oriented displays in the various suites, including the Rhino suite's large and very visible rhino mural, adorned with a "dildo" drink dispenser. See photographs, Appellate Exhibits CXXXVIII, CXXXIX, and CXCVI.

12. This court further finds that indisputable evidence has been presented showing that female "leg shaving" occurred in at least one of the suites during Tailhook 91. The occurrence of such activities is clearly and explicitly revealed in photographs taken during Tailhook 91. See Appellate Exhibit CXC VII. This court also finds that "leg shaving" activities were occurring during the time that ADM Kelso was on the patio and touring the various suites on Friday evening with VADMs Dunleavy and Fetterman.

For example, in a sworn statement to DCIS investigators on 18 July 1992, LT John Wood, then attached to VF-124, declared that he was on the patio from approximately 2200 to 2300 on Friday evening. During that time he witnessed "females having their legs shaved in the VAW-110 suite." Appellate Exhibit LXXVI, Attachment GG.

In a sworn statement to DCIS investigators on 09 December 1992, CAPT Daniel Whalen corroborated LT Wood's observation. CAPT Whalen, then serving as the TQL Program Coordinator in OP-05, related that he visited the patio on Friday evening from about 2100 to 2300. During his visit, he observed "leg shaving" occurring in the VAW-110 suite, room 303. Appellate Exhibit CII. CAPT Whalen affirmed the accuracy of his 09 December statement during his in-court testimony. Transcript at 553.

13. This court further finds that ADM Kelso actually witnessed "leg shaving" activities on either Friday or Saturday evening, or on both evenings.

For example, in his sworn statement to DCIS investigators on 16 September 1992, Col Raymond Powell, USMC (Ret), stated that he was on the patio on Saturday night, 07 September 1991, from approximately 2200 to 2300. He stated that during that time, he spent approximately 20 minutes talking with Secretary Garrett and a group of admirals including ADM Kelso. At that time, according to Col Powell, they were standing "approximately 20 feet from the leg shaving suite, and that women were lined up waiting to get into the suite." He also stated that someone in the group commented to the effect that, "the girls must like having their legs shaved." Col Powell further stated, "ADM Kelso walked in front of the window to the 'leg shaving' suite." Appellate Exhibit LXXVI, Attachment X.

Activities on the Patio

Even if one were to assume that ADM Kelso did not actually witness female "leg shaving," the evidence demonstrates that he could not help but know that such activities were occurring. In this respect, this court finds that:

14. The convincing weight of the evidence reveals that while he was on the patio, the sign over the doorway to room 303, the VAW-110 suite, advertising "Free Female Leg Shaves" was clearly visible to ADM Kelso. The sign was reported to be more than 15 feet long. Further, this finding is strongly corroborated by the testimony of both CAPT Howard and Maj Edwards. Maj Edwards, who initially viewed the "leg shaving" sign during his earlier tour of the patio area, testified that he was standing near ADM Kelso on the patio on Friday evening. Maj Edwards recalls the "leg shaving" sign was plainly visible from his vantage point. He specifically stated that, "[f]rom about 20 feet away from the Admiral, I could observe it It was pretty hard to miss It was a fairly large sign. Transcript at 1103-1104.

CAPT Howard also testified that he viewed the "leg shaving" sign during his visit to the patio with ADM Kelso on Friday

evening. In testimony mirroring that given by Maj Edwards, CAPT Howard stated that, "the sign was visible at a distance of about 20 to 25 feet from where [he] and ADM Kelso were standing." Transcript at pages 443-445.

15. ADM Kelso's exposure to "leg shaving" activities is also corroborated by LT Rolando Diaz. In a Stipulation of Expected Testimony, LT Diaz states that during Tailhook 91 he set up a leg shaving suite (VAW-110 suite, room 303) and placed a large banner across the entrance to the suite advertising free leg shaves. He further states that at sometime during either Friday or Saturday evening, he took a break from leg shaving activities and walked out onto the patio directly outside of the leg shaving suite. As he walked out, he observed ADM Kelso, dressed in a yellow "Izod" sport shirt, standing with a group of 3 to 4 individuals approximately 30 to 50 feet from him in the middle of the patio between his suite and the VAQ suite (room 302). LT Diaz states that ADM Kelso had a clear view of his suite and the leg shaving sign. See Appellate Exhibit CLX.

16. This court further finds the evidence clearly reveals that, in addition to "leg shaving" activities, incidents of rowdy and indecent behavior involving public nudity occurred in the third floor hallway, in the suites, and on the patio during both Friday and Saturday evenings. The occurrence of this kind of activity is clearly depicted in photographs taken during Tailhook 91. Appellate Exhibit CXCVIII.

In this respect, this court finds that ADM Kelso actually witnessed at least one such incident during his visit to the patio on Friday evening. None of the evidence presented is more convincing of this fact than the undisputed testimony of CAPT Robert Beck, a Naval Reserve aviator and commercial airline pilot who was in attendance at Tailhook 91. In describing a conversation he had with ADM Kelso while on the patio on Friday evening, CAPT Beck stated that he was well acquainted with VADM Dunleavy, having worked for him for two years while serving as Commanding Officer of a Reserve-Out unit supporting OP-05. He also stated that he had previously met and talked with ADM Kelso on several occasions in the Navy Command Center in Washington, D.C. He further described that ADM Kelso, in company with VADMs Dunleavy and Fetterman, approached him while he was standing on the patio. He first spotted the trio at a distance of 75 to 100 feet. As they approached, he was greeted by VADM Dunleavy. Shortly thereafter, ADM Kelso "kind of presented himself," and they began a conversation. As his conversation ensued, VADMs Dunleavy and Fetterman moved away towards the suites. Moments later, his conversation with ADM Kelso was interrupted by chants from several men and women who were surrounding a woman in the vicinity where they were standing. The few individuals surrounding the woman quickly grew into a large crowd, which he estimated numbered at least 100. According to CAPT Beck's graphic description of the event, the crowd was, trying to allure the young lady into exposing her breasts because they were shouting "tits, tits,

tits" . . . after about five or six of the chants, the admiral said to me, "Am I hearing what I think I am hearing?" and I said, "Well, Admiral, if you think that you are hearing 'tits' shouted, yes, you are absolutely right." About 15 to 20 seconds later . . . the crowd aroused in claps and hurrying, and one person in the center, and we could not see the center of it because we were at the same level, but I did and we could see the girl's top of her bathing suit being held up in the air by someone . . . the admiral turned to me and said, "Well, I guess that's the end of that," and I said, "Well, maybe not, maybe not, admiral." And subsequent to that, there was then a chorus, the words (sic) "bush" being used several times, and I was looking at the mass of humanity in front of me. At that time, the admiral started walking away . . . the security of the Hilton came and dispersed the crowd.

Transcript at 1000-1001.

In addition to the photographs mentioned above, CAPT Beck's testimony is also corroborated by the observations of LCDR Joseph Fordham. In a statement to DCIS investigators on 27 October 1992, LCDR Fordham stated that he was standing on the patio near the VA-126 suite on Thursday or Friday night at which time he heard a group of men chanting, "show us your tits." When he turned to observe the scene, he witnessed two women expose their breasts. He further stated that "the women were not being coerced" and were "laughing" during the incident. Appellate Exhibit LXXVI, Attachment I.

Saturday, 07 September 1991

The court next turns to the issue of whether ADM Kelso was ever present on the patio on Saturday evening, 07 September 1991.

17. This court finds that ADM Kelso's movements and activities during the morning, afternoon, and early evening hours of Saturday, 07 September 1991, are not in dispute. He departed the Hilton at approximately 0700 in the company of CAPT Howard for an official visit to a classified area located near Nellis Air Force Base. He returned to the Hilton around 1400. At approximately 1500, he attended a "Flag Panel," which ended at approximately 1700. At approximately 1800, ADM Kelso attended an official awards banquet on the first floor of Hilton, which featured Secretary Garrett as the guest speaker.

18. What is in dispute, however, is whether ADM Kelso ever visited the patio following his departure from the banquet and prior to his departure from the Hilton to Nellis Air Force Base for his return trip to Washington, D.C. The defense opines that this was the approximate time period numerous indecent assaults occurred in the third floor hallway and on the patio. The assaults were perpetrated upon female officers and civilian attendees in the hallway of the third floor and on the patio. It

was also during this time that CDRs Miller and Tritt were on the patio, and allegedly failed to prevent several of their subordinate officers from touching females on their buttocks.

As noted earlier, ADM Kelso testified that he never visited the patio on Saturday evening. He also testified that he never witnessed any assaultive or inappropriate behavior during that evening. The court now turns to the voluminous body of evidence presented on these most contentious issues.

Attendance at the "Flag Panel" and Saturday Evening Banquet

This court finds from the evidence that:

19. Secretary Garrett arrived at Tailhook 91 around 1400 on Saturday, 07 September 1991. Shortly following his arrival, he joined ADM Kelso and CAPT Howard in attendance at the "Flag Panel."

20. At approximately 1700, ADM Kelso departed the "Flag Panel" in the company of CAPT Howard, Secretary Garrett, and Col Wayne Bishop, USMC, Secretary Garrett's Executive Assistant (EA). Secretary Garrett invited ADM Kelso and CAPT Howard to accompany him and Col Bishop to view the symposium's exhibit area. ADM Kelso declined the invitation explaining that he had already viewed the exhibits. ADM Kelso and CAPT Howard then entered one of the first floor center elevators and proceeded to their individual rooms to rest and to prepare for attendance at the Saturday evening reception and banquet.

21. Maj Edwards did not attend the "Flag Panel" with ADM Kelso. He participated in a 5K running event during the time of ADM Kelso's Saturday morning/early afternoon official activities. Upon his return to the Hilton, Maj Edwards discovered that ADM Kelso had already departed the "Flag Panel" and returned to his room. He then went to see ADM Kelso in his room to ensure that he was properly informed as to the time of the banquet and the required dress. Transcript at 241, 1081.

22. At approximately 1830, Maj Edwards returned to ADM Kelso's room to escort him to the banquet, scheduled to begin at 1900. ADM Kelso was wearing a suit and tie and he wore these to the banquet. ADM Kelso and Maj Edwards were joined by CAPT Howard on the way to the banquet room located on the first floor of the Hilton. Maj Edwards did not attend the banquet. Upon arrival at the banquet area, Maj Edwards parted company with ADM Kelso and CAPT Howard.

23. During the banquet, ADM Kelso sat at the head table with a number of high ranking dignitaries, including Secretary Garrett who was the keynote speaker. Following the banquet, and prior to leaving the banquet room, Secretary Garrett, VADM Dunleavy, ADM Kelso, and other senior officers engaged in conversation about making a visit to third floor. During his in-court testimony, ADM Kelso acknowledged that he engaged in "some general discussion" with Secretary Garrett and VADM Dunleavy following the banquet. Transcript at pp. 352, 388, 427-428, 503.

The Question of ADM Kelso's Visit to the Patio

The defense initially submitted thirty-four Reports of Interview (ROI)' in support of their averment that ADM Kelso visited the patio on Saturday evening. The ROI's were prepared by DCIS investigators from notes taken during oral interviews of Tailhook 91 attendees. The vast majority of interviews were conducted during a period from approximately July 1992 to January 1993, some 8 to 14 months following Tailhook 91. Of the thirty-four attendees who were subjects of the ROI's, ten appeared as in-court witnesses, and five were the subjects of stipulations of expected testimony. The testimony of one of the nine who testified in court, Ms. Karye LaRocque, was withdrawn by the defense and disregarded by the court. The defense also withdrew the ROI relating to the statement of LCDR Paul LaRocque. All remaining ROI's, with related corrections or clarifications noted by counsel on the record, were considered by the court together with all other evidence of record. However, the court gave the greatest weight to the ROI's which were augmented by in-court testimony or by stipulations of expected testimony. See Appellate Exhibit CXCIV.

In addition to the ROI's and related derivative testimony, the defense and the government presented the testimony of other witnesses and numerous documents in support of their respective positions.

Key Evidence

The court further finds that:

24. In evaluating the key evidence in support of the defense position that ADM Kelso did, in fact, visit the patio on Saturday evening, the following corroborating facts supporting this contention were established by the evidence. More specifically, this court finds that:

(a) The patio area was well-lighted, making identification more certain.

(b) ADM Kelso's distinctive physical features make him easily recognizable, a fact which was noted by a number of witnesses.

' These Reports of Interview proved to be problematic throughout this hearing. The methodology for the DCIS investigators was to interview a witness and take handwritten notes, no audio or video recording was ever done, and then to prepare the ROI from the notes some days or even weeks later. The ROI was never shown to the witness and the witness was never asked to acknowledge the accuracy of the ROI, much less swear to the truth of the contents. This novice approach to criminal investigation resulted in the wholesale repudiation of the reports by many of the witnesses. This court has given minimal weight to the ROIs unless they have been subsequently verified through stipulation, in-court testimony, or some other reliable means, such as clear and specific references in the handwritten notes of the investigator.

(c) The vast majority of the witnesses observed ADM Kelso on the patio between 2130 and 2300, and close in time with the surge of banquet attendees coming onto the patio.

(d) ADM Kelso was observed by a large number of witnesses in the same general area of the patio, that is, along the front of the patio between the entrance to the center bank of elevators and the planters. Compare testimony of witnesses to related diagrams of the patio, Appellate Exhibits XCVII, CV, CXVIII.

(e) A number of witnesses observed ADM Kelso in the company of Secretary Garrett on the patio. Since Secretary Garrett did not arrive at Tailhook 91 until Saturday afternoon, this minimizes the likelihood these witnesses were confusing Friday and Saturday evenings.

(f) A number of witnesses observed ADM Kelso conversing with the young aviators on the patio on either Friday or Saturday evening, or on both evenings. VADM Dunleavy strongly encouraged the many flag officers in attendance to engage in one-on-one social interaction with junior aviators. This was a part of the Tailhook 91 agenda. Transcript at p. 1021. The purpose of this interaction was to elicit the views and true feelings of the junior aviators regarding the state of naval aviation. ADM Kelso stated to Mr. Suessman during his 23 July 1992 interview that he was most interested in obtaining the views of all attendees regarding the Navy's aviation plan for the future. As noted earlier, he was especially interested in obtaining the views of junior male aviators regarding the issue of expanding the role of female aviators. The evidence reveals that many of the junior aviators spent the majority of their time socializing and conversing on the patio and in the various squadron hospitality suites. Thus, it was in these areas that the flag officers, including ADM Kelso, found the greatest opportunity to meet and talk with junior aviators one-on-one.

25. This court further finds that many of the eyewitnesses gave persuasive detailed accounts of their observations of ADM Kelso's presence on the patio on Saturday evening, notwithstanding disparities regarding exact times, modes of dress, and specific locations. Moreover, a number of the witnesses insisted that their recollections were uncommonly clear not only because of the rare and memorable opportunity of seeing the CNO and SECNAV in person, but also because of other memorable events surrounding their personal activities during Tailhook 91, and Saturday evening in particular. These key witnesses include: CAPT James Terrill, USN; CDR Kathleen Ramsey, JAGC, USN; LCDR Richard Scudder, USN; Col Raymond Powell, USMC (Ret); CDR John Hoefel, USN; CDR David Cronk, USN; LCDR James Quinn, USN; CDR Richard Martin, USN; CAPT Robert Nordgen, USN (Ret); CDR George Ghio, USN; Capt Ronald Rives, USMCR; and LT John Moriarty, USN.

26. CAPT James Terrill, currently assigned to the staff of Commander Naval Air Force, Atlantic (COMNAVAIRLANT), testified with confidence concerning his observation of ADM Kelso on the patio on Saturday evening. CAPT Terrill was previously

interviewed by DCIS investigators, however, he stated that he was never asked during the interview to comment on whether ADM Kelso was ever present on the patio. He added that his knowledge of ADM Kelso being on the patio on Saturday evening was discussed with the COMNAVAIRLANT Staff Judge Advocate, CDR Tom Taylor, after he had read an article in a local Tidewater area newspaper that ADM Kelso's presence on the patio was in question. In discussing the article's speculation regarding the location of ADM Kelso on Saturday evening, CAPT Terrill stated that he commented, "Well, I know where he was." His discussion with CDR Taylor was later brought to the attention of one of the defense counsel, and this resulted in his being called as a witness.

In describing his activities on Saturday evening, CAPT Terrill testified he did not attend the banquet. Following dinner at the Hilton, he went up to the third floor patio to visit with friends. He stated he was not wearing a watch, but estimated he arrived on the patio around 2000, and departed at approximately 2200. CAPT Terrill testified further that just after finishing a conversation, he looked up to see who else was on the patio. At that moment he observed ADM Kelso about one arm's length to his left and Secretary Garrett about one arm's length to his right, and that both were engaged in conversation with separate groups. He estimated that his observation of ADM Kelso and Secretary Garrett occurred sometime between 2130 and 2200. He stated that he was sure, however, that his observation occurred shortly after he observed "all of the suits coming in from the banquet." This was one of the reasons he recalled that the sightings occurred on Saturday night rather than Friday. CAPT Terrill further stated that he was able to recognize ADM Kelso from "numerous exposures, videos and pictures." He also stated that he was embarked on several aircraft carriers in the Mediterranean during the time ADM Kelso was the Sixth Fleet Commander, and he had seen him in person several times. He further stated he recognized Secretary Garrett from photographs, both official and unofficial. See Transcript at pp. 688-701.

27. CDR Kathleen Ramsey, JAGC, USN, currently a sitting military trial judge, was interviewed by an NIS special agent on 14 November 1991, only five weeks following Tailhook 91. At that time, the question of whether ADM Kelso was present on the patio at any time during Tailhook 91 was not at issue. In fact, as will be addressed later in a separate finding, the evidence reveals that the NIS investigation never focused on the conduct or accountability of any flag officer in attendance at Tailhook 91, nor were any flag officers or high ranking civilian officials ever interviewed during the NIS investigation. (See Finding of Fact 63.) During the NIS interview, CDR Ramsey stated that she was on the patio on Saturday evening between 2200 and 2330, during which time she observed Secretary Garrett, ADM Kelso and VADM Dunleavy in the pool area. See Appellate Exhibit LXXVII.

In a stipulation of expected testimony, CDR Ramsey related

that although she could not now swear to seeing either Secretary Garrett or ADM Kelso on the patio that evening due to the lap of time, she believes her statement to NIS was accurate at the time she gave it. In describing her activities, she stated she attended Tailhook 91 with her husband, CAPT Robert Ramsey, an aviator who retired from the Navy in July 1993. In a detailed description of events, she stated she and her husband attended the Saturday afternoon "Flag Panel." Later, at approximately 1800, they attended the Saturday evening banquet featuring Secretary Garrett as the guest speaker. Following the banquet, which concluded sometime between 2100 and 2130, she and her husband went directly to the third floor pool patio area. She stated that they entered the patio through the revolving doors leading from the elevators to avoid the hallway or the hospitality suites. She did not want to transit either of these areas because of an incident that occurred during the 1988 Symposium, at which time someone threw drinks on her in the hallway. In confirming the accuracy of her prior statement to NIS concerning her observation of Secretary Garrett, ADM Kelso and VADM Dunleavy, CDR Ramsey explained that they did not appear to be together. She believed she was near the NSWC suite (room 305) at the time she observed ADM Kelso, and she recognized him because of his distinctive eyebrows. She also stated she spoke to VADM Dunleavy, exchanging pleasantries. See Appellate Exhibit CXXXVI.

28. LCDR Richard Scudder, assigned to HS-3, NAS Jacksonville, Florida, furnished an oral statement to DCIS investigators on 28 September 1992. See Appellate Exhibit CX. With the exception of several minor corrections, he confirmed the accuracy of his 28 September statement during his in-court testimony.

LCDR Scudder testified that he attended the Saturday evening banquet, which ended between 2100 and 2115. Following the banquet, he returned to his room to change into casual clothing. He immediately departed his room and set out to find his commanding officer, who was lodged at the hotel "Circus Circus," to inform him of a time change for their Sunday morning return flight to NAS Cecil Field, Florida. On the way to the hotel, he decided to make a swing through the third floor patio to determine if his commanding officer might be in that area since he had been unable to reach him earlier by telephone. He moved around the patio area and through several of the suites but did not see his commanding officer. As he was departing the patio area at approximately 2200, he observed Secretary Garrett, ADM Kelso, and VADM Dunleavy. LCDR Scudder testified that they were all in a group surrounded by what he described as "well-wishers and smoozers." He further stated that all three appeared to be dressed in casual clothing, except that Secretary Garrett looked as if he had only taken off his necktie. Transcript at pp. 642-662.

29. Col Raymond Powell, USMC (Ret), gave a statement to DCIS investigators on 16 December 1992, which was referenced

earlier in Finding of Fact number 13. He was requested by the defense as an in-court witness, but was unable to appear due to physical incapacitation. However, when questioned by both defense and government counsel, he confirmed the accuracy of the ROI summarizing his prior oral statement.

In describing his activities, Col Powell reported he was on the patio for approximately forty-five minutes on Saturday night, the only night he visited the patio. He further stated that during that time, he spent about 20 minutes talking to Secretary Garrett and a group of admirals, including ADM Kelso. Col Powell also stated that they were standing about 20 feet from the leg shaving suite where women were lined up to get their legs shaved. He stated that someone in the group commented, "the girls must like to have their legs shaved." Also, according to Col Powell, he observed ADM Kelso walk in front of the window to the leg shaving suite. See Appellate Exhibit LXXVI, Attachment X.

30. CDR John Hoefel, then assigned as VAQ-131 Executive Officer, provided a statement to DCIS investigators on 30 October 1992. He reported observing ADM Kelso on the patio on Saturday evening. See Appellate Exhibit CXI. With the exception of several minor corrections, CDR Hoefel confirmed his 30 October statement during his in-court testimony.

In describing his activities and observations, CDR Hoefel testified that he was sure he observed ADM Kelso on the patio on Saturday evening because he had retired to bed very early on Friday night. He explained further that around 1900 on Saturday evening he had dinner with two of his friends, CDRs Lane and Waltman. The trio returned to the Hilton at approximately 2100 and went directly to the third floor patio. CDR Hoefel further stated that he staked out an area in the vicinity of the VAQ-129 suite, room 302, near a large planter with a ledge that was comfortable for sitting. He stated he had a good view of the patio area from his location, and of the individuals passing nearby. He stated that while he was in that area someone in his group exclaimed: "There's Secretary Garrett!" He stated he was not familiar with Secretary Garrett, but when he looked to his right, he observed ADM Kelso and VADM Dunleavy in company with the individual identified as Secretary Garrett. He stated that when he saw ADM Kelso and VADM Dunleavy the thought came to him, "here are some people who have a large impact on your career." He further stated that the trio appeared to be looking over the patio, and it was his impression they had just entered the patio from the elevators since he was aware the banquet had broken up some thirty minutes earlier. He stated that he observed the trio for about five minutes before they left the area. CDR Hoefel explained to the best of his recollection ADM Kelso and VADM Dunleavy were wearing blue blazers and gray slacks. When asked how he was able to identify ADM Kelso, CDR Hoefel said, "ADM Kelso's not the tallest man in the world and he has a face that looks like it's got a lot written on it...a heavily lined face." Transcript at pp. 663-683.

31. CDR David Cronk, VAQ-309 Executive Officer, gave a

statement to DCIS investigators on 09 November 1992. See Appellate Exhibit CIII. At that time, CDR Cronk stated he observed Secretary Garrett, ADM Kelso, and VADM Dunleavy on the patio on Saturday evening. Except for several minor corrections, he confirmed the accuracy of his 09 November statement during his in-court testimony.

CDR Cronk testified that he arrived on the patio on Saturday evening between 2030 and 2100. He stated that around 2200 that evening he observed ADM Kelso, VADM Dunleavy, and someone who he believed to be Secretary Garrett. Although he was not sure of the exact time, he remembered it was shortly after the banquet ended. He mentioned that when he spotted them he remembered saying: "Hey, there's SECNAV and CNO and Dunleavy." In describing the incident, he also stated that one of his friends, CDR "Kilo" Parks, went over and talked to someone in the group. When Parks returned from the group, he was given "some verbal abuse about sucking up to the senior guys." CDR Cronk testified he was certain it was Saturday evening. He stated that he stayed up very late on Thursday night and actually watched the sun rise on Friday morning. He explained that he did not recall going to the third floor anytime on Friday night, and he was in bed by around 2000 that evening. He also stated that a glass window was broken that evening. (The window was broken on Saturday, see Appellate Exhibit CXLIV.) He remembered glass falling and thinking to himself, "God, I'm glad nobody was standing under that." Transcript at pp. 583-600.

The court notes that CDR Kenneth "Kilo" Parks provided an oral statement to DCIS investigators on 03 November 1992. At that time CDR Parks stated he was on the patio on Saturday night; however, he did not state that he talked to Secretary Garrett, ADM Kelso, or VADM Dunleavy. He stated he observed VADM Dunleavy on the patio on both Friday and Saturday nights. He further stated he had only heard that Secretary Garrett and ADM Kelso were on the third floor on Saturday night. However, this court finds CDR Cronk's account more credible since he appeared as an in-court witness. Further, CDR Parks' reference to the third floor could mean the hallway, the suites, or the pool patio. See Appellate Exhibit CLXXXII.

32. LCDR James Quinn, then assigned as the Operations Officer, COMFITAEEWINGPAC, gave an oral statement to DCIS investigators on 14 July 1992. LCDR Quinn stated that he attended the awards banquet on Saturday evening, 07 September 1991. In describing the occasion, he stated that he sat beside CAPT Jim Burin, a member of his group, who received the Carrier Airlift Award, and J.A. Campbell, who received the Tailhook of the Year Award for his work during "Operation Desert Storm." He further stated that following the banquet, he was on his way to the third floor and he observed Secretary Garrett, ADM Kelso and VADM Dunleavy enter an elevator. He entered the next elevator and arrived on the third floor immediately following the elevator carrying Secretary Garrett, ADM Kelso and VADM Dunleavy. He followed the group to the patio. See Appellate Exhibit CXXVII.

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In response to a message inquiry seeking to confirm his 14 July 1992 statement, LCDR Quinn does not mention the elevator incident. However, his observation of ADM Kelso, Secretary Garrett and VADM Dunleavy entering the elevator is specifically recorded in notes taken by the investigator during the interview. See Appellate Exhibit CLVIII.

33. CDR Richard Martin, then assigned to VAQ-132, gave an oral statement to DCIS investigators on 23 October 1992. At that time, CDR Martin stated that after visiting exhibits and attending presentations, he went to the third floor hospitality area. He arrived on the third floor at approximately 2100 and departed at approximately 0200 the next morning. He stated he visited some of the suites, but spent most of his time on the patio. He further stated sometime that evening he observed Secretary Garrett, VADM Dunleavy, and ADM Kelso walking on the patio towards the entrance to the elevator lobby. See Appellate Exhibit LXXVI, Attachment R.

In response to a naval message inquiry seeking to confirm the accuracy of his statement, CDR Martin stated he was on the patio on both Friday and Saturday evenings. He further stated that he observed ADM Kelso and VADM Dunleavy walking towards the third floor main guest elevators with a person he believed to be Secretary Garrett. He further stated to the best of his recollection the sighting occurred on Saturday night between 2100 and 2200. See Appellate Exhibit CXLV.

34. CAPT Robert Nordgen, USN (Ret), testified he attended the Saturday evening banquet. He stated during the banquet he talked with CAPT Howard, an old friend with whom he had served on board USS Constellation. During the conversation, he asked CAPT Howard how his job was going and what time he would be heading back to Washington. CAPT Howard replied, "we're going to be wheels in the well at midnight...the CNO has a family meeting on Sunday afternoon and we need to get back for that." CAPT Nordgen further stated ADM Kelso sat at the head table at the banquet with Secretary Garrett. He stated the banquet ended around 2130.

CAPT Nordgen testified that following the banquet he returned to his room to change clothes. He stated that as he was preparing to enter an elevator on the first floor, he observed Secretary Garrett enter a separate elevator. He revealed that after changing clothes, he returned to the patio, exiting the elevator onto the patio near the VR-57 suite, room 357. He remained in that general area talking with old shipmates. Sometime later, he observed Secretary Garrett, VADM Dunleavy, and other senior officers standing in a group. He also observed someone he believed to be ADM Kelso walking alone towards the center bank of elevators. He recalled at that moment he remarked to RADM Walker, "Hey, that's amazing....I know that the Admiral's got to catch a midnight flight....He's pushing it pretty close." He further stated he believed it was about 2315 when he sighted ADM Kelso. When asked how he would be able to recognize ADM Kelso, CAPT Nordgen stated he met ADM Kelso when he visited Naval

Air Command Pacific Headquarters in San Diego, and he had been briefed by ADM Kelso in Washington. Transcript at pp. 702-717.

35. Capt Ronald Rives, USMCR (Inactive) gave a statement to DCIS investigators on 21 October 1992. See Appellate Exhibit LXXVI, Attachment BB. At that time he related he observed three admirals on the patio on Saturday evening, ADM Kelso, VADM Dunleavy, and VADM Fetterman. Except for minor corrections, he confirmed the accuracy of his statement during his in-court testimony.

Capt Rives testified that on Saturday afternoon he gambled for a short time in the hotel "Circus Circus" casino. He returned to the Hilton and went to the patio around 1900, and he stayed in that area until about 0100, Sunday morning. While on the patio, he stated he observed the three admirals within a half-hour on either side of a time frame between about 1930 and 2200. He stated the admirals were standing about 20 feet apart, and he observed them as he was moving across the patio from the VMFAT suite (room 355) to the Rhino suite (room 308). He further stated he was able to recognize ADM Kelso from the many official photographs of him he had seen, and he had been embarked on ADM Kelso's Sixth Fleet flagship as a Naval Academy midshipman. When asked how he was sure that it was Saturday night, Capt Rives explained he attended the Saturday afternoon "Flag Panel," and during the discussions there was heated dialog regarding a number of topics including women and F-18's. He stated that he was surprised at how open the discussion was between junior officers and flag officers. He further stated when he observed ADM Kelso on the patio that evening he wondered why he had not been a member of the flag panel. See Transcript at pp. 601-617.

36. CDR George Ghio, then assigned to CF-14, gave a statement to DCIS investigators on 22 July 1992. CDR Ghio stated that he was on the patio on Saturday evening, and he spotted ADM Kelso and VADM Dunleavy on the pool deck; however, he could not recall the approximate time. See Appellate Exhibit CXXVI. CDR Ghio confirmed his earlier statement to DCIS investigators by message from USS Kitty Hawk. See Appellate Exhibit CLVII.

37. LT John Moriarty, then assigned to VFA-15, NAS Cecil Field, Florida, supplied a statement to DCIS investigators on 25 September 1992. LT Moriarty revealed that on Saturday, 07 September 1991, he went to the third floor of the Hilton at around 1100, and again between 2100 and 2130. When he arrived that evening, he found the third floor area "packed with wall-to-wall people." He also stated the hallway "stunk." LT Moriarty further stated that he exited the revolving doors leading to the patio. Upon arriving on the patio, he observed "a bunch of admirals" talking to "guys." Included in this group were Secretary Garrett, ADM Kelso, and VADM Dunleavy. He stated that he talked with VADM Dunleavy for a few minutes. See Appellate Exhibit LXXVI, Attachment U. When asked by defense counsel to confirm his account set forth in the ROI, LT Moriarty stated he could not recall his statement.

38. The court further finds that a number of the witnesses

who testified were ambivalent regarding their prior statements to DCIS investigators. Some of these witnesses admitted to being personally intimidated in knowing that ADM Kelso denied ever being on the patio during his in-court testimony. However, the majority of these witnesses confirmed the accuracy of their prior statements. These witnesses include: RADM Paul Parcells, Deputy Commander, Naval Forces, Central Command; CAPT Daniel Whalen, USN (Ret); Mrs. Margaret Handy, GS-9; and LT Ellen Moore, VA-42.

39. RADM Parcells furnished a sworn statement to DCIS investigators on 15 October 1992. See Appellate Exhibit CXXX. At that time, he related that he observed Secretary Garrett on the patio on Saturday evening in the company of ADM Kelso. However, during his in-court testimony, RADM Parcells stated although he believed his statement was true at the time he gave it, he reanalyzed his statement after learning ADM Kelso had testified he was not present on the patio on Saturday. In addressing the impact of ADM Kelso's denial, he stated, "What I've got to say is that I still feel that I saw him there, but my degree of confidence in that feeling is very, very low"

In describing his visit to the patio on Saturday evening, RADM Parcells stated that he attended the Saturday evening banquet. Following the banquet he returned to his room at the Hilton to change clothes. Sometime later he visited the patio. He explained that he exited the elevator entrance onto the patio. After walking a short distance, he observed Secretary Garrett and ADM Kelso in front of him dressed in sport clothing. Transcript at pp. 973-996.

40. CAPT Whalen gave a statement to DCIS investigators on 09 December 1992. At that time, CAPT Whalen stated he observed ADM Kelso, VADM Dunleavy, and CAPT Howard on the patio on Saturday evening for a short time. See Appellate Exhibit CII.

During his in-court testimony, CAPT Whalen revealed that he visited the patio on Friday night and observed ADM Kelso conversing with a crowd of individuals. He estimated he was only on the patio that evening for 15 to 20 minutes. He testified further that he visited the patio again on Saturday evening and he observed CAPT Howard in a "transient mode." He recalled the event because he wanted to speak with ADM Kelso regarding being free for certain duties since having been relieved of his TOL responsibilities. He explained that when he approached CAPT Howard and indicated a desire to speak with ADM Kelso, CAPT Howard replied, "You aren't going to get to the big guy tonight . . . we're out of here." When questioned as to why he stated that he observed ADM Kelso on the patio that evening, CAPT Whalen stated "it was his gait." He also stated he was in company with Ms. Margaret Handy and other civilian OPNAV personnel on the patio for most of the evening.

Following further intense questioning, CAPT Whalen stated that he was no longer sure he observed ADM Kelso with CAPT Howard. He specifically stated "if Frank Kelso says that he wasn't out there on Saturday, I take him at his word, absolutely." Transcript at pp. 544-579.

41. Ms. Margaret Handy, GS-9 Secretary, OPNAV (N88), in an oral statement to DCIS investigators on 07 December 1992 explained that after the banquet on Saturday evening, she went to the third floor patio. While on the patio, she observed Secretary Garrett, ADM Kelso, VADM Dunleavy and VADM Fetterman. She stated the group walked by her and stopped to say hello. They were all wearing civilian clothing. She was unable to recall the time of the encounter. See Appellate Exhibit CXIV. During her in-court testimony, Ms. Handy denied she ever stated on 07 December that she observed ADM Kelso on the patio. She stated that she could not remember whether she observed other members of the group on Friday or Saturday evening. In short, Ms. Handy stated that due to the passage of time, she was now unable to recall the events of Saturday evening, or what she mentioned to the interviewing investigators. She did acknowledge she was aware ADM Kelso had denied being on the patio on Saturday night. She also acknowledged she was in the process of moving to a new position in OPNAV and she would be working closely with personnel in the CNO's office. Transcript at pp. 721-746, 797-791.

42. LT Ellen Moore, then assigned to VA-42, gave an oral statement to DCIS investigators on 15 September 1992. LT Moore stated that she visited the patio on Saturday afternoon, 07 September 1991. She stated that during this time, she was shocked at observing a "topless" female being carried on the shoulders of an unidentified male. She mentioned how Tailhook literally "takes over" the pool and the hotel, and "the prevailing attitude displayed to the general public is that you should not be here knowing how drunk sailors can act." She further stated that she visited the patio on Saturday evening, but avoided the hallway because she did not want to subject herself to any abuse. LT Moore said she observed ADM Kelso and VADM Dunleavy on the patio early Saturday evening. She departed the patio around 0400 Sunday morning. See Appellate Exhibit CVIII.

LT Moore testified in court that many aspects of the ROI reporting her oral statement were inaccurate. See Transcript at pp. 617-641. For example, she noted that she did not state she observed a "topless" female. In addition, she testified she did not state she observed either ADM Kelso or VADM Dunleavy on the patio on Saturday evening. However, she testified that she was aware she was being called to testify since the ROI summarizing her oral statement indicated she had observed ADM Kelso on the patio on Saturday evening. She further acknowledged that during a prior discussion with LCDR Little, CDR Tritt's detailed defense counsel, she expressed concerns about being the only one who would place ADM Kelso on the patio on Saturday evening. Transcript at 631. This court finds the tenor of LT Moore's testimony revealed she was intimidated by the prospect of having to testify regarding the accuracy of the ROI reflecting her 15 September 1992 oral statement. However, the statement given by her at that time is specifically confirmed by the

interviewer's notes taken during the interview. See Appellate Exhibit CIX.

43. This court further finds some of the witnesses stated they observed ADM Kelso on the patio, but were unsure whether the sighting occurred on Friday or Saturday night. These witnesses include: RADM James Finney, USN; LCDR Lawrence Rice, USN; and 1stLt Adam Tharp, USMC.

44. RADM Finney was questioned by DCIS investigators on 02 October 1992 in a taped interview which was later transcribed. During the interview, RADM Finney was asked if he observed ADM Kelso on the patio on Friday night. He responded that he did not see ADM Kelso on Friday night, but he did see him on the patio on Saturday night. Later in the interview, the investigator returned to the subject of who RADM Finney had seen on the patio on Saturday evening. During this part of the interview, RADM Finney stated he arrived on the patio that evening around 2200. He then stated to the investigator, "[Y]ou asked me before did I see the CNO Friday night . . . I saw him Saturday night out there . . . around 2300 . . . plus or minus a few [minutes]." When questioned as to how ADM Kelso was dressed, RADM Finney stated, "I don't remember . . . I'm not 100 percent sure, but I think he may have still been in his suit." When pressed further on his recollection of his observation of ADM Kelso on Saturday night, the investigator stated, "You sure that's not Friday night?" In response to RADM Finney's response in the affirmative, the investigator stated, "We think he left before Saturday night." (The investigator was wrong.) In making this comment, the investigator explained to RADM Finney that he was not attempting to change his mind but was trying to test the firmness of his recollection. At that point, RADM Finney acquiesced by stating, "Well, if you think he left already, maybe I didn't see him . . . Maybe it was Friday night." RADM Finney stated further that he was aware CAPT Howard was a part of ADM Kelso's group, but he did not see him on the patio that evening with ADM Kelso. See Enclosure to Appellate Exhibit CXXXIV.

In a stipulation of expected testimony, Appellate Exhibit CXXXIV, RADM Finney stated that when he made the statement to the investigator that he observed ADM Kelso on the patio on Saturday evening "there was no question in his mind." He was very firm about the time being Saturday. He questioned his recollection only after the investigator stated to him that ADM Kelso had left before Saturday night.

In describing his activities on Friday and Saturday evenings, RADM Finney stated he attended the banquets on both evenings; he went to his room and changed clothes following each banquet; he visited the patio on both Friday and Saturday evenings; and he visited the Strike Warfare suite during each visit. He stated that he related his observation of ADM Kelso to these activities. He stated he saw ADM Kelso around 2200 on the patio outside of the planters straight out from the Strike Warfare suite. ADM Kelso was approximately 10 to 20 feet from

his position. He stated that he is sure he observed ADM Kelso on the patio only one night. He did not recall seeing Secretary Garrett except at the banquet on Saturday. RADM Finney further stated that his recognition of ADM Kelso was based on previous face-to-face meetings and briefings given to him on several occasions.

45. In separate statements to DCIS investigators, both LCDR Rice and 1stLt Tharp stated they observed ADM Kelso on the patio on Saturday evening. LCDR Rice stated that while on the patio that evening, he observed Secretary Garrett and ADM Kelso "gathering" with a group of individuals, none of whom he recognized. He estimated the time to be around 2000. He recalled the sighting as occurring on Saturday because that was the day of the "Flag Panel." See Appellate Exhibit LXXVI, Attachment 2. 1stLt Tharp stated sometime during that evening he was introduced to ADM Kelso and VADM Fetterman. See Appellate Exhibit LXXVI, Attachment EE.

In separate stipulations of expected testimony, LCDR Rice and 1stLt Tharp stated they observed ADM Kelso on the patio, but could not now recall whether the sighting occurred on Friday or Saturday night. Both stated they had no reason to lie to the investigators at the time of their statements. Each also stated that no one influenced their respective statements to counsel in arriving at the stipulations of expected testimony. See Appellate Exhibits CXXXVII and CXXXV.

Finding that ADM Kelso Visited the Patio on Saturday Evening

46. Based on the convincing nature of the testimonial evidence and the many corroborating facts and circumstances surrounding such evidence, this court finds ADM Kelso is in error in his assertion that he did not visit the patio on Saturday evening. This court specifically finds ADM Kelso visited the third deck patio at some time during the evening hours of 07 September 1991. This court further finds ADM Kelso was exposed to incidents of inappropriate behavior while on the patio on Saturday evening, including public nudity and "leg shaving activities."

The finding by this court that ADM Kelso is in error as to his movements and activities on Saturday evening is further supported by the highly contradictory, and often implausible, nature of the testimony presented by the government. More specifically, this court further finds:

47. ADM Kelso gave a summary account of his movements and activities on Saturday evening during his in-court testimony. He testified that following the banquet he proceeded to the casino which was located on the same floor; gambled with VADM (then RADM) Spane for about an hour and a half; and he never left the casino until he departed for Nellis Air Force Base at approximately 2330. He also related he "believed" Maj Edwards was with him in the casino. When questioned by the trial counsel as to how sure he was that he did not visit the patio on Saturday evening, ADM Kelso replied, "I am positive I was not."

Transcript at pp. 352 - 354.

This court finds, however, the degree of certainty expressed by ADM Kelso during his in-court testimony was much more definite than it was during his sworn statement to Mr. Suessman, DCIS, on 15 April 1993, some nine months earlier. At that time, ADM Kelso stated he could have gone back to his room following the Saturday banquet. He also stated to the "best of his recollection" he did not visit the third floor that evening. See Appellate Exhibit LXXII.

48. VADM Spane testified in support of ADM Kelso's account of his activities following the banquet. See Transcript at pp. 519-543. VADM Spane testified that he was with ADM Kelso in the casino following the banquet, and ADM Kelso never left the casino prior to departing for Nellis Air Force Base.

VADM Spane, currently serving as Commander, Naval Air Force, U. S. Pacific Fleet, testified he first met ADM Kelso while ADM Kelso was serving as Commander, Sixth Fleet. In 1990, he served as ADM Kelso's Operations Officer on the CINCLANTFLT Staff.

In describing the events of Saturday evening, VADM Spane testified he attended the Saturday evening banquet, which ended about 2130. He mentioned observing ADM Kelso sitting at the head table but did not speak to him during the banquet. He did not change clothes following the banquet, but went straight to the casino and to the same crap table where he had won the night before. He related that he left the banquet room before ADM Kelso departed. About fifteen minutes later, ADM Kelso arrived unexpectedly in the casino. Following a brief discussion, they began playing craps. He described ADM Kelso as wearing a doubled breasted suit and tie. He acknowledged there was a structure between the banquet room and the casino, so he was unable to determine the direction of ADM Kelso's entry into the casino. He stated ADM Kelso never left the casino, and they played craps and the slot machines until ADM Kelso departed the Hilton, which he estimated was around midnight. VADM Spane said his son arrived while he and ADM Kelso were gambling, as did various other individuals throughout the evening. He said he knew ADM Kelso had two aides, CAPT Howard and a Marine, and they were around him from time to time while they were in the casino, stressing ADM Kelso is never alone. VADM Spane said the aides entered the casino while they were playing the slot machines, and informed ADM Kelso it was time to depart.

VADM Spane gave a sworn statement to DCIS investigators on 14 October 1992. During that interview, he never mentioned being in the casino with ADM Kelso on Saturday night. When questioned as to why he did not mention this event, VADM Spane stated he did not consider it appropriate to use ADM Kelso's presence at the dice tables to establish his location that night. He acknowledged, however, he did name others he was in company with at other times during Tailhook 91 in explaining his activities. See Appellate Exhibit CI.

VADM Spane was interviewed a second time on 17 April 1993.

See Appellate Exhibit CLXXXI. He acknowledged that prior to this interview, he was informed by the interviewing investigators that they were trying to establish ADM Kelso's movements and location on Saturday night.

During this interview, VADM Spane explained he was in the casino with ADM Kelso following the banquet. He stated ADM Kelso was walking around the casino talking with various individuals and he just stopped at his table to talk. He stated that he did not see CAPT Howard with ADM Kelso. He also said that he could have been in the casino for as long as thirty minutes before ADM Kelso arrived. When questioned in court regarding the disparity in his testimony and his statement to DCIS investigators concerning how long he had been in the casino prior to ADM Kelso's arrival, VADM Spane stated he was just trying to bracket the time.

49. LTJG Robert Spane II, son of VADM Spane, was interviewed by telephone on 18 April 1993, by Mr. Mike Suessman, DCIS. The results of the telephone interview were reduced to a written ROI by Mr. Suessman on 19 April 1993. See Appellate Exhibit CLXXIX.

During the interview, LTJG Spane stated he attended Tailhook 91. On Saturday night, he met his father, VADM Spane, in the casino lobby next to the craps tables. He could not recall whether ADM Kelso was with his father at the time they met. He recalled playing craps and the slot machines with his father and ADM Kelso sometime after he met his father in the casino. He stated a Marine officer was with ADM Kelso, but could not recall if a second aide was present. He stated further that he stayed with ADM Kelso and his father for some time. He stated he then left and visited the third floor. He did not recall when ADM Kelso and his father separated, and he presumed they left and went up to their rooms for bed. He stated he did not recall going up the elevator with either his father or ADM Kelso. He also said he did not see either his father or ADM Kelso on the third floor that evening.

50. Maj Edwards, currently assigned to the Marine Security Force Battalion, Norfolk, Virginia, testified in-court on two occasions. During his testimony, Maj Edwards testified he was contacted by ADM Kelso in early September 1993. At that time, ADM Kelso asked if Maj Edwards could confirm the Admiral was not on the patio on Saturday night. He responded that he would be glad to testify or make any statements necessary, and agreed to the release of his name and telephone number. Maj Edwards also stated he had been contacted by CAPT Donald Guter, JAGC, USN, ADM Kelso's senior Staff Judge Advocate. He testified it was his understanding that DODIG had reinterviewed ADM Kelso, and that CAPT Guter wanted to inform him that his name had been mentioned during the interview.

In describing ADM Kelso's movements and activities following the Saturday evening banquet, Maj Edwards testified he met ADM Kelso as he was exiting the banquet room in the company of a "group of individuals" at approximately 2130. Except for

CAPT Howard, he could not recall the names of the individual. He mentioned that he walked with ADM Kelso and CAPT Howard to the casino area near the front doors on the first floor. He said ADM Kelso then asked him "what the plan was." Maj Edwards stated he replied, "Sir, you're out a little bit early. You've got about an hour and a half before the transportation is here." He explained to ADM Kelso the pre-flight of his aircraft would take time, and the flight crew had not been informed they might leave early. At about that time, according to Maj Edwards, VADM Spane approached ADM Kelso and they began a conversation. Shortly thereafter, ADM Kelso stated to him that he and VADM Spane were going to the casino to gamble. Maj Edwards testified he and CAPT Howard accompanied ADM Kelso and VADM Spane into the casino area. CAPT Howard remained with the group for a short while and then went to the patio area to bid farewell to some of his friends.

Maj Edwards testified further that he stayed in the casino with ADM Kelso until their departure for Nellis Air Force Base, except for several visits to the lobby area to check with Master Chief Wise concerning baggage and ground transportation to Nellis Air Force Base for the Master Chief and Petty Officer Dubell. He also stated while in the casino, ADM Kelso was wearing the suit and tie he wore to the banquet and he never changed clothes prior to their departure for Nellis Air Force Base. Maj Edwards also testified that he was responsible for ensuring the timely provision of ground transportation to Nellis Air Force Base. However, he was unable to explain who, when, and how he was informed that ADM Kelso's ground transportation to Nellis Air Force Base had arrived at the Hilton. This court finds this lack of explanation, at best, puzzling. Transcript at pp. 239-247, 1073-1130.

While this court finds Maj Edwards' testimony is generally corroborative of ADM Kelso's account of his movements and activities following the banquet, the court also finds several material contradictions between his testimony and that of Master Chief Wise. Maj Edwards stated that during the time ADM Kelso was attending the banquet, he went to Master Chief Wise's room to check with him on a plan to handle baggage and to ask the Master Chief to call Nellis Air Force Base and determine if the departure flight could be moved to an earlier time. See Transcript at pp. 1081, 1084. However, Master Chief Wise testified he collected ADM Kelso's baggage from his room prior to ADM Kelso's departure for the banquet. He also denied he was ever requested by Maj Edwards to contact Nellis Air Force Base concerning moving ADM Kelso's departure flight to an earlier time. Master Chief Wise testified the flight was pre-scheduled to depart at 2400, and to the best of his knowledge no attempt was ever made to alter the schedule. Transcript at pp. 899-919.

In addition, the testimony of Col Bishop, Secretary Garrett's EA, contradicts Maj Edwards' testimony that he was with ADM Kelso the entire time ADM Kelso was in the casino. Col Bishop testified he was on the patio on Saturday evening, but

departed the patio around 2200 and went to the casino on the first floor. He stated while in the casino he observed Maj Edwards, but he did not see ADM Kelso with Maj Edwards. See Transcript at 1035. When Maj Edwards was asked during his in-court testimony to explain why he might have been seen by Col Bishop in the casino without ADM Kelso, Maj Edwards responded that he was always within view of ADM Kelso, but ADM Kelso might not have been aware of his presence, describing his presence with ADM Kelso at certain times as that of a "shadow figure." Transcript at 1083.

51. CAPT Howard testified he attended the Saturday evening banquet with ADM Kelso. Following the banquet, in company with ADM Kelso and Maj Edwards, he walked to the casino area on the first floor. Shortly thereafter, ADM Kelso encountered VADM Spane and VADM Spane's son. "[T]hey started playing craps together." CAPT Howard further stated that since he didn't gamble, he asked Maj Edwards to remain with ADM Kelso. He then went to the patio and third floor area. When he returned to the casino area around 2330, he found Maj Edwards about waiting for ADM Kelso. He asked Maj Edwards about ADM Kelso's location since he was not at the crap tables. Maj Edwards stated to him, "He's about finished and he's asked if the plane was ready to return to Washington." CAPT Howard testified he then stated to Maj Edwards that the plane was ready, to which Maj Edwards replied, "Well, he may want to leave early, in about 5 or 10 minutes." CAPT Howard stated that about ten minutes later, ADM Kelso walked up to him and said, "When can we return to Washington?" He replied, "We're ready to go now, sir, if you're ready." The group then departed for Nellis Air Force Base. CAPT Howard also testified he may have returned to his room to change clothes before going to the patio; that Master Chief Wise took care of his luggage; and he checked himself out of the Hilton. He also stated to the best of his knowledge, ADM Kelso did not visit the patio on Saturday evening. Transcript at pp. 424-498.

This court further finds, unlike typical witness evidence concerning events several years past, CAPT Howard's in-court testimony is noticeably aligned with that of ADM Kelso and Maj Edwards regarding their activities immediately following the banquet. This court also finds, further, CAPT Howard's in-court testimony is conspicuously different from his oral statement originally reported by Special Agent Jack Kennedy, Director of Criminal Investigative Policy, Oversight Division, DODIG, on 08 December 1992. As recorded in the ROI prepared by Special Agent Kennedy, CAPT Howard in explaining his own movements was reported to have stated:

[D]uring the evening [referring to Saturday, 07 September 1991] he attended the banquet, made a short visit to the Las Vegas Hilton casino and went to the third floor, all with the CNO. Again, [contrasting CAPT Howard's account of his Friday evening visit to the patio with ADM Kelso] he estimated their entire

time on the third floor did not exceed 45 minutes. At about 2330, CAPT Howard and the CNO departed the Las Vegas Hilton to catch their return flight to Washington from Nellis Air Force Base."

See ROI, Appellate Exhibit LXXXIII.

During his in-court testimony, CAPT Howard insisted Mr. Kennedy was in error when he quoted him in the ROI as stating that he visited the patio with ADM Kelso on Saturday evening. He insisted further that his statement was that he (CAPT Howard) went to the patio after the banquet. He acknowledged, however, except for that one aspect of his statement, the ROI reflected an accurate account of the interview. When asked to explain the circumstances regarding his discovery of what he believed to be an error on the part of Special Agent Kennedy, CAPT Howard stated he was never provided a copy of the ROI following the interview with Mr. Kennedy. He further stated that on 14 April 1993, the day before ADM Kelso was scheduled to be reinterviewed by Mr. Suessman, DODIG, he engaged in a conversation with General Jumper, who was then serving as a military assistant in the Office of the Secretary of Defense, regarding the scheduling of forthcoming meetings. During the conversation, he mentioned ADM Kelso was scheduled to be interviewed the next day. He asked General Jumper if he had any idea what the subject of the interview might be. General Jumper informed him that a number of people had placed ADM Kelso on the patio on Saturday night, and there were "differences" in CAPT Howard's statement to DCIS and that of ADM Kelso. CAPT Howard testified he was not informed of the disparity at that time, but later learned the following day, 15 April 1993, from CAPT Guter, JAGC, USN, ADM Kelso's senior legal advisor, that the ROI summarizing CAPT Howard's statement to Special Agent Kennedy placed ADM Kelso on the third floor on Saturday evening. CAPT Howard explained he immediately went to the DODIG's office and discussed the situation with Mr. Suessman. He arranged for a second interview which occurred that same day. During the interview, which was conducted by Special Agent Kennedy and his supervisor, Special Agent Tom Bonnar, CAPT Howard clarified his prior statement, denying ADM Kelso was ever with him on the patio on Saturday evening. See Appellate Exhibit LXXXVII; Transcript at pp. 435-441.

52. Special Agent Kennedy, who appeared as an in-court witness on two occasions, testified that prior to conducting the second interview of CAPT Howard on 15 April 1993, he was informed by Special Agent Bonnar of the discrepancy claimed by CAPT Howard in the ROI. He was specifically informed that CAPT Howard denied ever stating to him that he visited the patio on Saturday evening with ADM Kelso. Special Agent Kennedy testified that upon review of his interview notes, Appellate Exhibit LXXXIV, he concluded that at the time he prepared the ROI, which occurred some two weeks following the interview, he had made an error with respect to the entry in his notes, which read, "-- w/ to 3rd FL Patio or VX-4 ste." He specifically explained while drafting the ROI he

misinterpreted the beginning symbol "w/" to mean "with," and he should have interpreted the symbol to mean "witness." In short, Special Agent Kennedy testified the entry should have been recorded in the ROI as "witness to third floor or VX-4 suite." He further explained he had been careless in reading his notes at the time he prepared the ROI. He said he concluded he had misinterpreted the meaning of the symbol "w/" since there was nothing in his notes indicating ADM Kelso was with CAPT Howard on Saturday night. He stated further he could not recall CAPT Howard ever stating during the interview that he had visited the third floor with ADM Kelso. He acknowledged that in his some 19 years of experience as an investigator, he could not recall another instance when he had incorrectly interpreted his interview notes. When questioned as to how such a mistake could have been made, Agent Kennedy explained he frequently used the symbol "w/" interchangeably to mean "with" or "witness." However, Mr. Mancuso testified in his experience the symbol "w/" is routinely used by investigators to mean "with." See Transcript at pp. 297-329.

53. VADM Dunleavy testified that following the banquet, he asked ADM Kelso if he would like to make one more swing on the third deck "to see the JO's [junior officers]." According to VADM Dunleavy, ADM Kelso declined, stating he was tired; that he had been at it all day; and he had an early flight. VADM Dunleavy stated he returned to his room, changed clothes, went down to the third deck, and he did not see ADM Kelso on the third floor following the banquet. However, VADM Dunleavy stated there was a very large crowd on the patio on Saturday evening, and ADM Kelso could have been there without being seen by him. Transcript at pp. 494-516.

54. Secretary Garrett testified he arrived at Tailhook 91 about 1400 on Saturday afternoon. Shortly thereafter he attended the "Flag Panel," and he was the guest speaker at the Saturday evening banquet. Following the banquet, he asked ADM Kelso if he was going to the third floor and "mingle with the troops." ADM Kelso declined stating he was not going to do that since he had been on the third floor on Friday night and had an early flight. According to Secretary Garrett, ADM Kelso also stated "he was going back to his room, pack, and prepare to leave." Transcript at 388.

This court specifically finds the statement by ADM Kelso to Secretary Garrett that "he was going to his room and pack" is wholly consistent with his statement to Mr. Suessman on 15 April 1993, when he said that he may have gone back to his room to change clothes following the banquet. (See Finding of Fact number 47).

55. In a stipulation of expected testimony, VADM John Petterman provided a summary account of his activities and his association with ADM Kelso on Friday evening. He stated following the Friday evening banquet, he and VADM Dunleavy escorted ADM Kelso from his room to the patio. He further stated that he remained on the patio with ADM Kelso for about one hour

and twenty minutes.

VADM Fetterman's account of events on Saturday evening is equally abbreviated. In describing these events, he states that he attended the Saturday evening banquet. Following the banquet, he discussed plans for the remainder of the evening with Secretary Garrett, who informed him that he was going to the patio. He stated that he went to his room, changed clothes, and went immediately to the patio. He then linked up with Secretary Garrett and talked for a short time in an area directly out from the glass doors leading to the elevators. He further stated he was within 15 to 20 feet of Secretary Garrett for about one and a half hours, and he never observed ADM Kelso on the patio. He further stated he had no interface with ADM Kelso following the banquet. See Appellate Exhibit CXCIV.

While the court finds VADM Fetterman's testimony is supportive of the government's position, his explanation of ADM Kelso's movements and activities on the patio on Friday evening is contrary to VADM Dunleavy's testimony that he and VADM Fetterman escorted ADM Kelso through the various squadron hospitality suites. Further, his statement that ADM Kelso was on the patio on Friday evening for one hour and twenty minutes far exceeds the 40 to 45 minute time frame given by ADM Kelso, CAPT Howard and Maj Edwards.

Additional Key Evidence

This court further finds:

56. LCDR Charles Henry, CVWR-20, provided an oral statement to DCIS investigators on 12 January 1993. At the time, LCDR Henry stated that during Tailhook 91 he was in charge of the Transportation Committee, a position he had held for several years.

In describing his activities during Tailhook 91, LCDR Henry stated his committee occupied a suite on the eighth floor of the Hilton where he spent the majority of his time working out transportation arrangements. He stated that he was present on the third floor and the patio from approximately 2200 to 2400 on Friday evening during which time he visited some of the suites. He stated further that he witnessed one individual "ball-walking" on the patio. While in the suites, he witnessed men cheering as some females voluntarily removed their blouses. The women were rewarded with T-shirts. He also witnessed "zappers" on some women. See Appellate Exhibit CLXI.

LCDR Henry also stated while in the transportation suite on Saturday night, he received a telephone call around midnight reporting that things had gotten out of hand on the third floor. He went immediately to the third floor. He met someone who he identified as CDR Nagelin, VP-202, who informed him that some females had gotten their clothes torn off. He was also informed by a security guard that a naked female had been thrown out into the hallway. He stated that he remained in the area for about an hour. While in the area of the third floor, he observed Secretary Garrett and VADM Dunleavy.

In a stipulation of expected testimony, LCDR Henry clarified his 12 January 1993 statement to DCIS investigators. In the stipulation, LCDR Henry stated while in the transportation suite on Saturday night he received the telephone call reporting the disturbance on the third floor around 2300. He went immediately to the third floor. While on the third floor, he observed Secretary Garrett and VADM Dunleavy in the third floor passageway in front of a suite located approximately two doors down from the Rhino suite. At about that same time, he was informed ADM Kelso was on the patio. He walked out onto the patio through the doors at the center of the building near the main elevators. Upon entering the patio, he observed ADM Kelso near the entrance to the elevator exit. He stated ADM Kelso was wearing casual clothing. He also stated that he had never met ADM Kelso or seen him in person prior to seeing him on the patio that evening. He stated that he recognized ADM Kelso that evening from photographs and videotapes. See Appellate Exhibit CLXI(A).

57. The court further finds that a 29 December 1993 statement given by LCDR Elizabeth Toedt to Special Agent Brewer of the Naval Investigative Service further contradicts the testimony of the key government witnesses. As noted earlier, LCDR Toedt was one of the Tailhook 91 Navy protocol officers who met ADM Kelso at Nellis Air Force Base upon his arrival on Saturday, 06 September 1991. She was also in charge of arranging ground transportation for ADM Kelso and his official party on Saturday night, 07 September 1991.

In describing her involvement in arranging limousine transportation for ADM Kelso on Saturday night, LCDR Toedt related that following the banquet she walked to the head tables in the banquet room. She spoke with someone she believed to be Maj Edwards and asked him if there were any changes in ADM Kelso's departure plans. He replied there was no change in plans, and they would be leaving as soon as they changed clothes. She recalled ADM Kelso was present, and he was wearing a suit and tie. She departed the banquet room to ensure the Hilton limousines and drivers were out in front of the lobby area of the Hilton. She also contacted Air Force protocol officers at Nellis Air Force Base to ensure ADM Kelso's party would not encounter any problems getting through the main gate.

After making these arrangements, she returned to the lobby and waited for ADM Kelso and his party. She estimated that she did not wait for more than fifteen minutes before CAPT Howard entered the lobby. CAPT Howard was the first to arrive, followed by Maj Edwards and the two enlisted personnel in ADM Kelso's party. She stated ADM Kelso arrived last, but she could not recall the direction from which he entered. She stated all members of the party had changed into casual clothing. ADM Kelso was wearing slacks and an open-collar casual shirt. She stated that she asked Maj Edwards if they would need an escort to Nellis Air Force Base. He replied an escort would not be necessary. ADM Kelso and his party then departed for Nellis Air Force Base. See Appellate Exhibits CLXX and CLXXXVIII.

LCDR Toedt stated the banquet ended between 2215 and 2230. She further estimated the time between the end of the banquet and ADM Kelso's departure for Nellis Air Force Base was approximately forty minutes. This court finds LCDR Toedt, like all witnesses who testified or provided statements, gave only their best estimates of time in relation to descriptions of events. Nonetheless, this court finds LCDR Toedt's account to be consistent with the convincing weight of evidence showing ADM Kelso changed clothes following the banquet, and he visited the patio prior to his departure for Nellis Air Force Base. In particular, this court finds LCDR Toedt's account is remarkably consistent with CAPT Howard's account of events as set forth in his first statement to DCIS special agent Kennedy on 08 December 1992. See Finding of Fact Number 52.

58. This court notes, finally, a revealing declaration in the sworn statement of Ms. Barbara Pope to DCIS investigators on 30 June 1992. Ms. Pope, then Assistant Secretary of the Navy for Manpower and Reserve Affairs, stated she discussed the events at Tailhook 91 with Secretary Garrett on several occasions. During the discussion of an early conversation with Secretary Garrett regarding his visit to Tailhook 91, she stated:

I mean, right when all that came public about Paula Coughlin having been assaulted and her letter. We talked about his being there. We talked about he and the CNO going up, you know, after the banquet and having a drink on the patio.

Appellate Exhibit CXLVI, at 61.

Evidence Related to the Occurrence of Misconduct

This court further finds the defense claim that while on the patio on Saturday evening ADM Kelso may have witnessed the same or similar conduct to that alleged in the charges against CDRs Miller and Tritt, is supported by the evidence. More specifically, this court finds:

59. In findings of fact set forth earlier, this court found incidents of inappropriate and sexually offensive behavior occurred in the third floor hallway, in the various hospitality suites, and on the patio on Friday evening, 06 September 1991. These findings were supported by the testimony of eyewitnesses and photographs taken by various individuals during Tailhook 91. The evidence reveals the same or similar incidents of improper decorum and inappropriate behavior also occurred in these same areas during the evening hours of Saturday, 07 September 1991. None of the evidence presented is more convincing of this fact than an eyewitness account given by VADM Dunleavy.

In a statement to DCIS Special Agent Eckert on 05 August 1992, VADM Dunleavy remarked that while present on the third floor of the Hilton on Saturday evening, he became aware that a "gauntlet" was operating in the third floor hallway. In describing this activity, VADM Dunleavy stated while in that area

he heard "guys" yelling, "show us your tits." He then walked into the third floor hallway and observed it was crowded with people. He stated that he further observed a commotion in the hallway as many in the crowd "hooted and hollered." He stated that he did not attempt to stop the commotion because he knew that he would not be heard above the noise. He stated it appeared to him the "gauntlet" activities were in fun, rather than molestation. He specifically stated: "It was my impression, from what I saw, that no one was upset, and I felt that they [referring to females] wouldn't have gone down the hall if they didn't like it."

In describing other activities, VADM Dunleavy stated there were incidents of "mooning" the crowd on the patio by young men and women from hotel windows. He also acknowledged that he observed some women who were "bearing (sic) their clothing" and allowing aviators to stick squadron stickers on their breasts and buttocks. He also stated that he heard "strippers" had been hired by some of the groups to perform in the suites. However, he denied ever observing such activity. See Appellate Exhibit CXCII.

This court finds VADM Dunleavy's reference to the hiring of "strippers" is corroborated by the oral statement of LT Kenneth Carel, VF-124, to DCIS investigators on 21 July 1992. At that time, LT Carel stated that he arrived on the third floor at approximately 1800. He stated that he and several of his fellow aviators sought out "strippers" to perform in the suites. He further stated a disc jockey working in the VF-124 suite helped negotiate the hiring of "strippers" to perform later that evening in the VF-124 suite. He stated at approximately 2300, the "strippers" arrived in company with the disc jockey for their scheduled performance in the VF-124 suite. LT Carel stated that he did not stay for the entire performance since he had an early flight the next morning. LT Carel's oral statement is recorded in the investigator's interview notes. See Appellate Exhibits CXC and CXC(A).

IV. KEY EVENTS FOLLOWING TAILHOOK 91

The evidence reveals the following chain of key events following Tailhook 91 related to the claim by the defense that ADM Kelso attempted to shield his personal involvement at Tailhook 91, and he possessed a "personal interest" rather than an "official interest" in the prosecution of the cases at bar at the time he appointed VADM Reason as the CDA.

ADM Kelso's Initial Involvement in the Investigative Process

This court finds:

60. Shortly following Tailhook 91, LT Paula Coughlin complained to her immediate superior, RADM John Synder, then serving as Commander, Naval Air Test Center, Patuxent, Maryland, that she had been assaulted in the third floor hallway of the Hilton during the Saturday evening hours of 07 September 1991. When RADM Synder failed to act on her complaint, LT Coughlin sent

a letter of complaint to VADM Dunleavy in early October 1991. VADM Dunleavy met with LT Coughlin on 10 October 1991. Following this meeting, he informed ADM Jerome Johnson, then Vice Chief of Naval Operations (VCNO), of his meeting with LT Coughlin and of her written complaint. ADM Kelso was also advised of LT Coughlin's complaint and of RADM Synder's failure to act on her complaint. This marked the beginning of ADM Kelso's active involvement in the aftermath of Tailhook 91. See Appellate Exhibit LXXII at 27.

61. In mid-October 1991, amid escalating public and Congressional concern, RADM Duvall Williams, JAGC, USN, then Commander, NIS, and in ADM Kelso's direct chain of command, was ordered by the VCNO to open a criminal investigation into the alleged criminal assault on LT Coughlin at Tailhook 91 and on the additional reported incidents of assault on other female attendees. Simultaneously, the Navy Inspector General (Navy IG), RADM George Davis, was ordered by Secretary Garrett to open an investigation into Tailhook 91 to examine matters relating to alleged non-criminal violations of the Standards of Conduct such as the improper use of government material assets, like air transportation, in support of Tailhook 91. During the course of the ensuing NIS and Navy IG investigations, numerous meetings and briefings were conducted among representatives of the Offices of SECNAV, CNO, the Navy Judge Advocate General, NIS, and the Navy IG. This included Mr. Daniel Howard, Under Secretary of the Navy, who was tasked by Secretary Garrett to oversee the overall conduct of the investigations; Ms. Barbara Pope, Assistant Secretary of the Navy for Manpower and Reserve Affairs; RADM John E. Gordon, Judge Advocate General of the Navy; RADM Davis; RADM Williams; and other representatives from the offices of SECNAV and CNO. In addition, Secretary Garrett and ADM Kelso were briefed at least weekly on the progress of the investigations.

The Limited Scope of the NIS and Navy IG Investigations

62. An NIS "Tailhook Task Force" was established by RADM Williams to deal with the voluminous number of anticipated interviews among the thousands of attendees at Tailhook 91. This included the appointment of LCDR Henry F. Sondag, JAGC, USN, as a special counsel responsible for marshalling evidence for use in any resulting criminal prosecutions.

63. The scope of the NIS investigation was strictly limited to allegations of criminal assault on LT Coughlin and other female attendees. The investigation did not include an inquiry into the personal involvement of any of the numerous flag officers and senior civilian DON officials in attendance at Tailhook 91, nor were any of these attendees ever interviewed by NIS special agents during the course of the investigation.

The exclusion of flag officers and senior DON officials from the focus of the NIS investigation led to conflict between RADM Williams and RADM Davis. One reason for the conflict was the number of personnel assigned to the Navy IG's staff was

diminutive in comparison to the large world-wide cadre of NIS special agents available to RADM Williams. Thus, RADM Davis looked to NIS for assistance in interviewing flag and other senior officers concerning possible violations of the Standards of Conduct. Another reason for conflict stemmed from RADM Williams' apparent desire to dominate the interview process to ensure full compliance with required investigative procedures and thus protect future prosecutions. Secretary Garrett and ADM Kelso were aware of the disparity in investigative manpower and the fact that flag officers and senior DON officials were not being interviewed. However, despite warnings by LCDR Sondag that both the NIS and Navy IG investigations should address the accountability of flag officers and senior DON officials, the evidence does not reveal that any action was ever taken by either Secretary Garrett or ADM Kelso to expand the scope of the NIS or Navy IG investigations to include flag officer accountability, or to remedy the disparity in investigative manpower. This court specifically finds this inaction was part of a calculated effort to minimize the exposure of the involvement and personal conduct of flag officers and senior DON officials who were present at Tailhook 91. See Transcript at pp. 747-786; ADM Kelso's Statement of 23 July 1992, Appellate Exhibit LXXII at pp. 49-50.

The Allen Report of Interview

64. The effort to shield high ranking Tailhook 91 attendees, including ADM Kelso, from the investigative process is further evidenced by RADM Williams' handling of an ROI placing Secretary Garrett in one of the suites on Saturday night. During an oral interview with NIS special agents on 19 February 1992, Capt Raymond Allen, USMC, stated he recalled that Secretary Garrett visited one of the suites (later identified by LCDR Sondag as the Rhino suite). See Enclosure (7) to Appellate Exhibit CXCIX. However, the Allen ROI was not included in the original NIS Report of Investigation by RADM Williams. A later discovery of this omission forced RADM Williams to issue a fifty-five page supplemental report containing the Allen ROI and other revealing statements obtained during the investigation. See Appellate Exhibit CXCIX. The omission of the Allen ROI ultimately lead to RADM Williams being relieved as Commander, NIS, and it was a contributing factor to the later resignation of Secretary Garrett. It would also eventually result in the Tailhook 91 investigation being removed from the jurisdiction of the Navy and assigned to the office of the DODIG. From that point the investigation finally focused on the involvement and personal accountability of senior officials in attendance at Tailhook 91, including ADM Kelso.

In describing the handling of the Allen ROI, LCDR Sondag testified that the ROI was received by NIS Headquarters in Washington on 20 February 1992. He then informed special agents Beth Iorio and Tim Danehy, who were working with him full-time on the investigation, on the content of the Allen ROI. He testified that he also informed Mr. Charles Lanham, RADM Williams' Deputy

Director, and John Devanzo, NIS Director, Capital Region. He later briefed RADM Williams and RADM Gordon.

LCDR Sondag testified further he was not concerned at that stage of the investigation with the issue of ADM Kelso's activities or whereabouts during Tailhook 91. He assumed all along that ADM Kelso was present on the third floor on Saturday night based on the ROI of CDR Kathleen Ramsey who stated she observed Secretary Garrett, ADM Kelso, and VADM Dunleavy together on the pool patio that evening. See Finding of Fact Number 27.

In explaining his interest in the Allen ROI, LCDR Sondag testified that LT Coughlin had earlier identified Capt Greg Bonham, USMC, as her assailant. In an effort to establish a case against Capt Bonham, he requested NIS special agents interview Capt Allen, who had been Capt Bonham's roommate during Tailhook 91. He stated that he had developed information that Capt Bonham may have been present in the Rhino suite that night. When he learned Secretary Garrett may have been present in the Rhino suite on Saturday night, he concluded Secretary Garrett might be able to provide information to establish Capt Bonham's presence in the suite. He stated that Mr. Lanham agreed to arrange an interview with Secretary Garrett to inquire about his visit to the Rhino suite on Saturday night. He stated the interview with Secretary Garrett never occurred because he obtained other credible information which he believed linked Capt Bonham to the alleged assault on LT Coughlin. He stated, however, that he instructed special agents Iorio and Danehy to include the Allen ROI in the final NIS report of investigation.

LCDR Sondag stated that following completion of the NIS investigation in late March 1992, he returned to Norfolk and resumed his regularly assigned duties. He stated that in early June, he was informed during a conference call from CDR Ronald Swanson, SJA to VADM Johnson, and CAPT Guter, SJA to ADM Kelso, that Secretary Garrett had made a formal statement reporting he did not visit any of the suites on Saturday night. CDR Swanson and CAPT Guter related they had received a report that the NIS investigation had developed information placing Secretary Garrett in the Rhino suite on Saturday night. LCDR Sondag stated he was informed by CDR Swanson that RADM Williams had briefed VADM Johnson on the Allen ROI, but never mentioned the reference in the ROI to Secretary Garrett visiting one of the suites. CAPT Guter indicated that RADM Williams had also personally briefed ADM Kelso on the results of the NIS investigation. During that briefing, according to CAPT Guter, ADM Kelso had asked RADM Williams point blank, "Is there anything in your investigation that's going to place the Secretary on the third floor at Tailhook?" or words to that effect. RADM Williams responded to the effect, "I've taken the pulse of all the agents in the field and there's nothing out there that's going to implicate the Secretary." This court finds while this statement expressed a direct interest in any information linking Secretary Garrett to misconduct that occurred in the third floor, it also signaled ADM Kelso's personal concern for any information that

might link him to such conduct. It also discloses an early appreciation for the potential embarrassment should it become known that a senior Navy official was present on the third floor of the Hilton when the assaults took place. See Transcript at pp. 747-786.

LCDR Sondag's account of the NIS investigation and the missing Allen ROI is corroborated by ADM Kelso in his sworn statement of 23 July 1992. ADM Kelso stated that after being informed of the Allen ROI, he telephoned RADM Williams and demanded an explanation as to why the ROI had been left out of the investigation. He stated that RADM Williams explained that the ROI was not relevant to the investigation. ADM Kelso stated he expressed outrage that anyone would consider the ROI irrelevant. He was concerned that the original report had already been forwarded to Congress, and someone might get the idea that something was being hidden. He stated that he then discussed the ROI with Secretary Garrett and suggested the DODIG be requested to review the results of the NIS investigation. He also recommended RADM Williams be relieved. See Appellate Exhibit LXXII at pp. 50-57.

The Preparation of ADM Kelso's Itinerary

This court further finds:

65. A concerted effort to minimize ADM Kelso's personal involvement at Tailhook 91 is further evidenced by the circumstances surrounding the response of ADM Kelso and members of his staff to a press inquiry regarding his movements and activities while at Tailhook 91. In late May 1992, and almost simultaneously with similar press inquiries to Secretary Garrett, ADM Kelso's office received a press inquiry from Mr. David Evans of the Chicago Tribune requesting ADM Kelso's itinerary during Tailhook 91. A similar request was also made by Mr. Eric Schmidt of the New York Times. See Appellate Exhibit CXXIX.

In describing the handling of Mr. Evans' inquiry, LCDR Debra Burnett, ADM Kelso's Public Affairs Officer (PAO), testified she was informed by Secretary Garrett's PAO that Mr. Evans had made a request for Secretary Garrett's schedule and he would be calling and making the same request concerning ADM Kelso's schedule. She testified that shortly thereafter Mr. Evans called her and requested a minute-by-minute, detailed account of ADM Kelso's movements and activities during his visit to Tailhook 91. She stated Mr. Evans desired a detailed account to determine if ADM Kelso had visited any of the squadron hospitality suites. She also stated that she was aware the question of whether Secretary Garrett had visited any of the suites was also at issue at that time.

LCDR Burnett testified she drafted a response to Mr. Evans based on ADM Kelso's planned itinerary, which had been prepared by Maj Edwards prior to ADM Kelso's visit to Tailhook 91. The planned itinerary contained only general entries such as, "2000, CNO Keynote Speaker." It did not contain a detailed account of events such as a visit to the casino. She stated that

the planned itinerary did contain the entry, "2300, Checkout," referring to ADM Kelso's departure from the Hilton on Saturday night.

LCDR Burnett further stated that after drafting her proposed response, she asked Maj Edwards for verification. She stated Maj Edwards added detailed entries regarding ADM Kelso's activities following the Friday and Saturday evening banquets. These entries included ADM Kelso's visit to the pool patio on Friday evening and his visit to the casino on Saturday night. She then discussed the proposed itinerary with CAPT Howard, who agreed with the entries added by Maj Edwards. They then discussed the final draft, Appellate Exhibit XC, with ADM Kelso. ADM Kelso approved the itinerary. She stated that during the discussion of the itinerary with ADM Kelso, he only asked why Mr. Evans was interested in the information, and if she had cleared the account of events with Maj Edwards. Transcript at 951-956.

LCDR Burnett further testified she never discussed the issue of whether ADM Kelso visited the patio on Saturday with ADM Kelso, CAPT Howard, or Maj Edwards. However, when asked to explain the entry, "CNO did visit the pool/patio area of the third floor, where he spent about 40 minutes visiting with naval aviators," on Appellate Exhibit XC following the 07 September 1991 entries, she stated the thrust of Mr. Evans' question was not whether ADM Kelso had visited the patio, but whether he had visited any of the suites. She stated that Mr. Evans called her after she released the itinerary to him and asked if that entry pertained to Saturday night. She responded that ADM Kelso visited the patio on Friday evening, not on Saturday evening. She further explained that she corrected the original itinerary to state ADM Kelso visited the patio on Friday evening prior to a second, later release in response to an inquiry from Mr. Greg Vista of the San Diego Union Tribune.

LCDR Burnett was then asked to explain the next entry, "He did not visit any of the squadron suites." She stated this entry pertained to both Friday and Saturday nights. She acknowledged that she discussed this entry with both Maj Edwards and ADM Kelso. She explained that she concluded the entry, "where he spent about 40 minutes visiting with naval aviators" pertained to Friday night since it matched the time (40 minutes) between the two entries listed under 06 September events, "2200 - Depart Dinner; arrive pool/patio area, Hilton," and "2240 - Depart pool/patio area; arrive hotel room." She again denied, however, that she ever asked ADM Kelso if he visited the patio on Saturday evening. She stated that she only received an acknowledgement from ADM Kelso when she showed him the original draft stating he was on the patio only on Friday night. She also denied anyone ever stated during any of the discussions pertaining to the preparation of the itinerary that, "We were not on the third floor on Saturday evening." She stated that she did not recall that ever being an issue. The only issues were whether ADM Kelso ever visited any of the suites, and whether he observed any inappropriate conduct.

LCDR Burnett testified further she could not explain why the copy of the planned itinerary she used to prepare her response to the press inquiries was now missing. She stated that she obtained the copy she used from Maj Edwards' files, and to the best of her recollection she returned the copy to his files. She explained that when she went to retrieve the copy at a later time, the itinerary and ADM Kelso's travel file were missing. She stated, however, ADM Kelso's planned itineraries are normally maintained on file for only about one year. Thereafter, responses to inquiries concerning his past travel schedule are taken from a master calendar which did not reflect details of his activities. Transcript at pp. 948-970.

Maj Edwards testified he prepared a planned itinerary for ADM Kelso prior to their departure for Tailhook 91. He stated copies were given to everyone in the official party, including CAPT Howard and Master Chief Wise. He stated that he would not be surprised that a copy of the planned itinerary could not be found. In explaining the disposition of ADM Kelso's itineraries following an official trip, he stated:

[I]t's not required to maintain it. It's solely an information paper that I put together. In fact, if you ask them do they have other information papers from other trips, the answer is 'No.' There's no requirement to keep it. Usually they're discarded once a trip is complete other than trips outside the continental United States. Those are kept and maintained.

Transcript at 1073.

In explaining his role in assisting LCDR Burnett, Maj Edwards stated he recalled she was trying to reconstruct the events that actually occurred during ADM Kelso's visit to Tailhook 91, in response to some kind of news release. He stated that he provided LCDR Burnett with the facts surrounding ADM Kelso's movements and activities that were not on the planned itinerary. This included entries regarding arrival and departure times from the patio and the casino, and the time regarding check out. He acknowledged, however, the check out time of 2300 was incorrect. He stated he checked ADM Kelso out of the Hilton during the time ADM Kelso was attending the Saturday evening banquet. He stated the 2300 entry might have referred to the time CAPT Howard checked out of the Hilton. See Transcript at pp. 1073-1075, 1107-1108.

CAPT Howard testified that no written itinerary was ever prepared prior to ADM Kelso's visit to Tailhook 91. He stated there was a schedule, but it was not in writing. He explained ADM Kelso's activities were a part of the schedule of events listed in a schedule prepared by CAPT Ludwig, President of the Tailhook Association. He stated further that during the visit to Tailhook 91, everyone in the official party made entries in a 3"x

5" booklet maintained by Maj Edwards. The purpose of the booklet was to provide a means of keeping each member of the party informed as to the whereabouts of other members. He further stated that an itinerary depicting ADM Kelso's movements and activities was prepared some months following Tailhook 91 in preparation for ADM Kelso's initial interview with the DODIG.

In explaining his role in reconstructing ADM Kelso's itinerary, CAPT Howard stated the itinerary was reconstructed from the booklet maintained by Maj Edwards. He stated that he had discussions with LCDR Burnett and CAPT Guter during morning staff meetings concerning the reconstruction process. He stated that he also had a discussion with ADM Kelso concerning his activities on Saturday evening prior to finalizing the itinerary.

In response to a question by defense counsel concerning whether ADM Kelso asked him if he had been on the third floor on Saturday evening, CAPT Howard responded that he could not recall ADM Kelso's exact words, but he stated words to the effect, "There's no way I could have gone on the third floor on Saturday night, right?" When asked why ADM Kelso would ask that question, CAPT Howard stated ADM Kelso depended on him and others with him at Tailhook 91 to be able to account for his whereabouts, and to ensure he was at the right place at the right time. He added, however, ADM Kelso was not unsure about whether he ever visited the patio on Saturday night. He stated that was never an issue during his discussions with ADM Kelso concerning his activities during Tailhook 91. Transcript at pp. 453-461.

ADM Kelso testified he approved the itinerary after it was presented to him by CAPT Howard, Maj Edwards and LCDR Burnett. He also testified the itinerary was an accurate account of his activities and movements during Tailhook 91. Transcript at 350. ADM Kelso also used the itinerary during his interview with DODIG on 23 July 1992. See Appellate Exhibit LXXII at pp. 6,8.

Based on the above explanations, this court further finds the itinerary as submitted by the government lacks credibility for the following reasons:

- a. It was prepared well after the events at issue.
- b. It was prepared at a time when official concern and press interest had been raised concerning ADM Kelso's proximity to the third-floor improprieties which occurred on 07 September 1991.

- c. The rationale for its creation as an assist during the DCIS interview is obviously incorrect and misleading. In fact, ADM Kelso's initial interview occurred some two months later.

- d. Whether such an itinerary was ever prepared, and how and why it can no longer be located, are glaring omissions in the evidence presented. CAPT Howard testified no written itinerary was ever prepared prior to ADM Kelso's visit to Tailhook 91. Maj Edwards testified he prepared a planned itinerary for ADM Kelso and copies were given to everyone in the official party, including CAPT Howard.

For the above reasons, the document carries little weight in the resolution of the issues presented by the motion.

ADM Kelso's Status as a Suspect

This court further finds:

66. In late June 1992, Secretary Garrett requested that the DODIG review the NIS and NAVY IG investigations to ensure a thorough review of Tailhook 91 activities and events. Shortly thereafter, the DODIG assumed full responsibility for the Tailhook 91 investigation and requested the Navy suspend all investigative activities and disciplinary actions.

67. The DODIG investigation continued through December 1992. During the approximate six months of investigation, DCIS investigators obtained hundreds of statements from Tailhook 91 attendees at numerous geographical locations. One of the main goals of the DODIG investigation was to determine the involvement of senior DON civilian officials and high ranking Navy and Marine Corps officers at Tailhook 91.

68. ADM Kelso was initially interviewed by DODIG investigators on 23 July 1992. As noted earlier, ADM Kelso denied he ever visited any of the squadron hospitality suites during his two-day visit to Tailhook 91. He also denied ever witnessing any inappropriate behavior, or that he ever visited the patio on Saturday evening.

69. During the ensuing months of investigation following the 23 July 1992 interview with ADM Kelso, DCIS investigators interviewed a number of Tailhook 91 attendees who stated ADM Kelso was present on the patio on Saturday evening, an issue which has already been addressed by this court in previous findings of fact. Based on these statements, Mr. Mike Suessman, DODIG's office, interviewed ADM Kelso a second time on 15 April 1993. Prior to that interview, ADM Kelso was advised of his rights as a suspect pursuant to Article 31(b), UCMJ. ADM Kelso was specifically advised that many of the attendees interviewed by DCIS investigators had stated that he was present on the third floor of the Hilton on Saturday evening. He was advised these statements were in conflict with his sworn statement of 23 July 1992 in which he denied ever visiting the third floor that evening. ADM Kelso was then advised that he was suspected of committing violations of Articles 107, UCMJ, Making False Official Statements, and Article 134, UCMJ, False Swearing, all stemming from his denial. During that interview, ADM Kelso again denied he was ever on the third floor of the Hilton on Saturday evening; or he ever visited any of the suites; or he ever witnessed any inappropriate behavior during Tailhook 91. See Appellate Exhibit LXXVIII.

ADM Kelso's Appointment of VADM Reason as the CDA

This court further finds:

70. ADM Kelso served as the Acting Secretary of the Navy from 20 January 1993 to August 1993. During that time, he also continued to serve as the Chief of Naval Operations.

71. On about 30 January 1993, VADM Paul Reason, USN, Commander, Surface Force, U. S. Atlantic Fleet, received a

telephone call from ADM Kelso informing him that he would be designated as the Navy CDA On 01 February 1993. ADM Kelso officially appointed VADM Paul Reason, USN, as the Navy CDA to handle all allegations of misconduct against Navy personnel stemming from Tailhook 91.

The CDA designation was formalized by CNO letter dated 01 February 1993. Appellate Exhibit LXVII. By this letter, the VCNO, acting on behalf of ADM Kelso, made it clear to VADM Reason that he was to exercise his authority as CDA "independently" and with "sole discretion" in deciding the appropriate disposition of all cases considered by him. Paragraph 2. states:

In exercising this authority, you, in your sole discretion, may take such administrative or disciplinary action you deem appropriate, within the guidelines of R.C.M. 306(c). . . . This includes, but is not limited to: no action, counseling, non-judicial punishment, or referral to trial by court-martial."

In a subsequent letter dated 23 April 1993, Appellate Exhibit LXVII(A), the VCNO reemphasized to VADM Reason that he was to act as CDA with "sole and unfettered discretion."

72. By appointing VADM Reason as the CDA, ADM Kelso withheld convening authority power from all other subordinate officers in command with the authority to dispose of alleged violations of the UCMJ stemming from Tailhook 91.

73. At the time ADM Kelso appointed VADM Reason as the CDA, VADM Reason was junior in rank and command to ADM Kelso.

Withholding of the Flag Files from VADM Reason

This court further finds:

74. During the DODIG investigation, information was obtained regarding the personal involvement of some thirty-three flag officers, including ADM Kelso, who attended Tailhook 91. The information on flag officers was cataloged in separate "flag files" and delivered to ADM Kelso as Acting Secretary of the Navy. The "flag files" were sealed for delivery to the newly appointed Secretary of the Navy, the Honorable John Dalton. Following a review of the "flag files" by Secretary Dalton, ADM Kelso was issued a Letter of Caution citing his failure of leadership during his visit to Tailhook 91.

75. Information contained in the "flag files," including information on the involvement of ADM Kelso during Tailhook 91, was never provided to VADM Reason prior to his action in referring the cases at bar for trial. The release of information contained in the "flag files" was released only after this court issued an order permitting defense discovery of the information.

V. LEGAL ANALYSIS

The court now turns to the task of applying the findings of fact to the requirements of the law. This first involves

determining whether ADM Kelso is an "accuser" as claimed by the defense, and, if so, the effect of such a status on VADM Reason, the convening authority.

Secondly, the court must determine if any unlawful command influence has been brought to bear upon VADM Reason by virtue of ADM Kelso's involvement in Tailhook 91, and ADM Kelso's subsequent actions surrounding his appointment of VADM Reason as the CDA.

Since the charges at issue against CDRs Miller and Tritt are different from the single charge alleged against LT Samples, the application of the law regarding the "accuser" concept and unlawful command influence will be first analyzed as to its application to CDRs Miller and Tritt, followed by an analysis of its application to LT Samples.

THE ACCUSER CONCEPT

An "accuser" is defined in Article 1(9), UCMJ, as any person who: (1) signs and swears to charges; (2) directs that charges nominally be signed and sworn by another; or (3) has an interest other than an official interest in the prosecution of the accused. The evidence presented primarily involves the third type of "accuser."

One prong of the government's argument is that even if the court were to find that ADM Kelso was exposed to untoward behavior during Tailhook 91, or that he even witnessed such behavior, no credible evidence has been presented showing that ADM Kelso has any personal interest in the prosecution of either CDR Miller, CDR Tritt, or LT Samples. More specifically, the government contends that the defense has failed to show a relevant nexus between ADM Kelso's involvement at Tailhook 91 and the actions of VADM Reason in referring the cases at bar to trial by general court-martial.

The government is correct in its assertion that no evidence has been presented showing that ADM Kelso possessed a direct or specific interest in any of the cases at bar when applying a literal interpretation of the wording of Article 1(9), that is, "an interest other than official in the prosecution of the accused." However, the government's interpretation of Article 1(9), UCMJ, falls short of the interpretation given this Article by the U.S. Court of Military Appeals, which has consistently applied a much broader interpretation of the "type-three accuser" than the bare reading of the Article 1(9) would indicate.

In United States v. Gordon, 2 C.M.R. 161, (1952), the U.S. Court of Military Appeals rejected an argument by government counsel that an accused should be required to show that the convening authority had an actual and personal interest in his prosecution. The court states that:

We do not believe the true test is the animus of the convening authority. This undoubtedly was the early rule but, as we view it, the test should be whether the appointing authority was so closely connected to the offense that a reasonable person would

conclude that he has a personal interest in the matter.

Gordon at 167 (emphasis added).

During the past 41 years, the United States Court of Military Appeals has refused to narrow the expansive protection provided by its interpretation in Gordon of Article 1(9).^{*} In United States v. Crossley, 10 M.J. 376, 378 (CMA 1981), the court states that:

We do not attempt here to psychologize the mind of the convening authority nor should this opinion be read as a criticism of this convening authority's animus or decision-making. We only perceive a reasonable probability that his review of the matter reflected personal interest. Cf. United States v. Conn [6 M.J. 351 (CMA 1979)]. We reiterate merely that "[c]onvening [authorities] should remember that there are easy and adequate means to have" reviewing functions performed by an authority with no personal feeling in the outcome of the litigation. United States v. Gordon (citation omitted) (emphasis added)

In this case, Chief Judge Everett, in a concurring opinion, summarizes the reason the court has chosen to maintain a broad interpretation of the "type-three accuser:"

Among the most vehement complaints against military justice are those which concern the role of the military commander, who has the responsibility for maintaining discipline and yet appoints the court-martial members and reviews the findings and sentence. Congress has made the determination that in this situation a commander may "carry water on both shoulders." At the same time, however, by providing that an "accuser" may not convene a special or general court-martial [references omitted], Congress revealed its intention that, in a case where observers might reasonably conclude that a commander had more than a purely official involvement, he should turn over his responsibilities to a superior commander.

Crossley at 379. Chief Judge Everett also states that, "the Court remains aware that to give a narrow interpretation to 'accuser' would fan the criticism of the broad responsibilities Congress has assigned to military commanders." Id.

^{*} It is important to note that not only has the U.S. Court of Military Appeals maintained a consistent interpretation of "accuser" for over 40 years, but given this long-standing interpretation, Congress has made no changes to the law.

In its most recent decision involving a "type-three accuser," the U. S. Court of Military Appeals restates its prior interpretation of Article 1(9), UCMJ, and provides an objective test setting forth the criteria to be applied in determining whether a convening authority is an "accuser" within the meaning of Article 1(9), UCMJ:

The test of a convening authority's status as an accuser is "whether, under the particular facts and circumstances . . . a reasonable person would impute to him a personal feeling or interest in the outcome of the litigation." United States v. Gordon, 1

USCMA 255, 260, 2 CMR 161, 166 (1952).

United States v. Jeter, 35 M.J. 442, 445 (CMA 1992) (emphasis in original).

In Jeter, the court found the reviewing authority to be a "type-three accuser" even though his only possible bias was in favor of the accused and "even though [the court had] no doubt that, at all times involved, the general's motives were good." Jeter at 446. Thus, it is not some level of enmity or hostility against an accused that defines an "accuser," but rather any level of personal interest in the litigation.

Although Article 1(9), UCMJ, is silent on the subject, appellate court decisions, upon which R.C.M. 504(b)(2) is based, clearly provide that a military commander who is subordinate to an "accuser" will also be disqualified as a convening authority. It is for this reason that Articles 22(b) and 23(b), UCMJ, require, in instances where the convening authority is an "accuser," that the charges shall be forwarded to another convening authority who is both superior in grade and position in the chain of command. This procedure is mandated in both special and general courts-martial.

The disqualification of a military commander who is subordinate to an "accuser" is referred to as the "junior accuser" concept. The disqualification of the junior commander may occur when he or she stands in one of the following positions in relation to the superior "accuser":

1. Subordinate in the chain of command. See United States v. Grow, 11 C.M.R. 77 (1953); United States v. Haygood, 31 C.M.R.

* Judge Gierke, concurring in result, takes issue with the expansive interpretation of a type-three accuser. "I believe that the correct definition of 'accuser' is limited to anyone who has a personal interest in ensuring that the accused is prosecuted." Jeter at 448. Judge Cox, also in a concurring opinion, takes the opposite approach and would require the convening authority to have the highest level of judicial impartiality. "I ask only the question, 'Should I have removed myself as the judge in the case?'" Jeter at 447. Although this court did not employ either of these outermost standards, I will note that given the facts of this case, the current finding of this court would be the same.

67 (1961). But see United States v. Avery, 30 C.M.R. 885 (A.C.M.R. 1960); United States v. Garcia, 16 C.M.R. 674 (A.C.4.R. 1954).

2. Junior in rank and outside the chain of command. See United States v. LaGrange, 3 C.M.R. 76 (1952); United States v. Burnette, 5 C.M.R. 522 (A.B.R. 1952); United States v. Navarro, 20 C.M.R. 778 (A.B.R. 1955); United States v. Chaves, 23 C.M.R. 701 (C.G.B.R. 1957).

3. Successor in command, at least where junior in rank. See United States v. Corcoran, 17 M.J. 137 (C.M.A. 1984); United States v. Kostas, 38 C.M.R. 512 (A.B.R. 1967).

Further, the "junior accuser" concept is applicable whether or not the superior "accuser" ordinarily would act as convening authority. See, e.g., United States v. Grow, 11 C.M.R. at 77. Also, the application of the accuser law is primarily a question of "fact and must be resolved in light of each case." United States v. Gilfilen, 35 M.J. 699, 701 (NMCMR 1978). Finally, when a determination is made that the convening authority is an "accuser," or the convening authority is a "junior accuser," the law requires the dismissal of charges. United States v. Crossley, 10 M.J. 376, 379 (CMA 1981).

Having reviewed the body of law in the area, the court must now apply the Gordon standard to determine whether ADM Kelso is so closely connected to the three cases at bar that a reasonable person would impute to him a level of personal feeling or interest in the outcome of the litigation.

The court first notes that no military appellate court has ever addressed the "accuser" concept in a factual situation where either the convening authority, or the immediate superior appointing the convening authority, has been allegedly involved in the same or similar misconduct as that alleged against the accused. However, in United States v. Allen, 31 M.J. 578 (NMCMR 1990), aff'd 33 M.J. 209 (CMA 1991), the Navy-Marine Corps Court of Military Review discusses the "accuser" concept in a situation where there existed the potential for the Secretary of the Navy to be designated an "accuser," and thus the disqualification of all of his subordinate convening authorities. The facts in Allen are worthy of discussion here in order to bring into perspective the circumstances surrounding ADM Kelso's interest in the cases before this court. Further, a comparison of some of the key aspects of the Navy Secretary's involvement in Allen to those involving ADM Kelso at Tailhook 91 is helpful to the determination of whether ADM Kelso's interest in the cases of CDRs Miller and Tritt is purely official or personal in nature.

The Allen case involved charges of espionage on behalf of the Philippine government and violations of security regulations. Prior to the Allen case, the Walker spy ring had been discovered and prosecuted. The ringleader, a retired Navy officer, Walker, had been convicted in a Federal District Court pursuant to his pleas. The Secretary of the Navy strongly and publicly criticized the handling and the sentence of the Walker case.

Although without jurisdiction in the Department of Justice

arena, the Secretary took action within his naval sphere of control. He issued directives restricting both convening authority referral discretion and military judge assignment to cases involving national security issues. Subsequently, claims were made that the Secretary's vocal disapproval of the handling of the Walker spy case gave him a personal interest in all later courts-martial involving violations of law protecting national security. It was further claimed that his personal interest branded him a "type-three accuser" and disqualified both him and all subordinate convening authorities from referring any case involving national security violations, and in particular, Senior Chief Radioman Allen.

In addressing this issue, the Navy-Marine Corps Court of Military Review first agreed that if the Secretary of the Navy had any personal interest in the prosecution of Senior Chief Allen he would be an "accuser" within the meaning of Article 1(9), UCMJ. Further, that his status as an "accuser" would serve to disqualify all subordinate commanders under his command from convening these types of courts-martial. The Court then made two factual determinations. First, all national security directives were promulgated by the Secretary with legitimate statutory and regulatory authority. Second, in holding that the Secretary's interest was official only, the Court found no reasonable probability existed that the Secretary's displeasure with the Walker case so closely connected him to the Allen prosecution that it could be deemed to amount to a personal interest in the outcome of that litigation.

As noted in the above factual summation, the Secretary was, at best, displeased with the outcome of the Walker case, and equally embarrassed by the indignation suffered by the Navy, as well as the more critical matter of the immeasurable damage to the national security of the United States. In a similar vein, the revelation of inappropriate behavior and assaultive conduct at Tailhook 91 has led to an unprecedented level of public embarrassment and a corresponding loss of confidence in the leadership of the Navy. These unfortunate circumstances were clearly at the heart of many of ADM Kelso's comments to DCIS investigators during his 23 July 1992 interview. During the interview ADM Kelso decried the misconduct of junior aviators at Tailhook 91 and reflected on actions that should have been taken to prevent such conduct.

Thus, as was asked of the Secretary's involvement in Allen, did ADM Kelso's obvious indignation and embarrassment amount to a personal interest in the ensuing investigations of Tailhook 91, and the litigation that followed? This court reasons that, standing alone, ADM Kelso's vehement disapproval would not amount to a personal interest. As in Allen, official indignation, no matter how strong, is not disqualifying when it is espoused in a purely official capacity.

However, unlike the Secretary's involvement in Allen, ADM Kelso was actually present and personally involved in the events at Tailhook 91. This court has determined that, as is

alleged against CDRs Miller and Tritt, ADM Kelso actually observed sexually oriented misconduct on the patio and in the various squadron hospitality suites on Friday night, and on Saturday evening as well, and he failed to take action to stop such conduct.

Applying the objective "reasonable person" standard of the Gordon case to these circumstances, the critical issue is whether ADM Kelso's own presence and personal knowledge of some of the inappropriate conduct on the patio and in the hospitality suites, and his apparent failure to act to stop such conduct, would lead a reasonable person to conclude that he must therefore be so closely connected to these cases that his interest in the outcome of the instant cases is more than purely official. Based on the totality of evidence presented and this court's related findings of fact, the answer can only be yes. A reasonable person would have to conclude that ADM Kelso would have more than a purely official interest. Thus, under the Gordon standard, ADM Kelso is an "accuser" within the meaning of Article 1(9), UCMJ.

ADM Kelso's personal interest is further demonstrated by other aspects of his involvement as set forth in this court's findings of fact. First, this court found that the NIS investigation was limited only to the complaints of criminal assault against female attendees. The subsequent DODIG investigation was expanded to focus on the presence and behavior of flag and general officers, including ADM Kelso. During the course of the this DODIG investigation, Admiral Kelso was interviewed by DCIS investigators at which time he stated that he did not recall ever being present on the third floor of the Hilton on Saturday, 07 September 1991. During the ensuing months of investigation, a large number of eyewitnesses stated to DCIS investigators that they observed ADM Kelso on the patio on Saturday evening.

Based on the inconsistencies between ADM Kelso's account and the accounts given by the eyewitnesses, DODIG investigators interviewed ADM Kelso a second time. This interview was preceded by advisement pursuant to Article 31(b), UCMJ, that ADM Kelso was suspected of making a false statement to investigators regarding his presence on the third floor of the Hilton on Saturday. A number of eyewitnesses had contradicted his account of his activities and movements on Saturday evening by reporting their observations of him on the patio and near the area where known assaultive conduct had allegedly occurred. Under these circumstances, a reasonable person would conclude that ADM Kelso's status as a suspect would make him personally interested in the investigation of his activities at Tailhook 91, and in the litigation of any case that might focus on his involvement as claimed by the eyewitnesses.

Secondly, in examining the trial itself, where numerous, credible witnesses came forward to testify that they saw ADM Kelso on the third floor pool patio area of the Hilton on Saturday evening in obvious contradiction to ADM Kelso's sworn denial before this court, a reasonable person would be forced to

conclude that ADM Kelso had a personal interest in this litigation. The motive for ADM Kelso's denial that he ever witnessed any inappropriate conduct at any time during Tailhook 91, and his denial that he was ever present on the patio on Saturday evening, clearly define ADM Kelso's personal stake and interest in these cases.

Considering the totality of ADM Kelso's personal involvement in Tailhook 91, this court harbors no doubt that at the time ADM Kelso appointed VADM Reason as the CDA, he was so closely connected to the events surrounding the charges of omission against CDRs Miller and Tritt that his interest was primarily personal.

While it may be that ADM Kelso's took no direct action related specifically to the Miller and Tritt cases based solely upon his personal interest, the law makes no exception. Having a personal interest in the litigation, ADM Kelso is an "accuser" within the meaning of Article 1(9), UCMJ.

Finally, this court must analyze whether the "accuser" concept extends to LT Samples. The nexus that exists between ADM Kelso's actions and the charges against LT Samples is much less than that which exists in the cases of CDRs Miller and Tritt. LT Samples is not charged with failure to prevent misconduct. He is charged with actual, assaultive behavior. This misconduct allegedly occurred on the evening of 07 September 1991. Moreover, there no convincing evidence (and the court does not believe) ADM Kelso personally witnessed any of the criminal assaults that allegedly occurred in the third floor hallway of the Hilton on Saturday evening.

It is apparent, however, from the charges in the Miller and Tritt cases that the government alleges a failure of leadership on the part of senior officers in attendance at Tailhook 91. The defense claims that this failure of leadership was displayed from the highest ranking officer to the lowest, and to lodge criminal charges of omission against two commanders, from a group of what admittedly is a large number of officers, is patently unfair and unjust.

Given what reasonable citizens would perceive to be a naval officer duty to intervene when faced with obvious improprieties by his subordinates, a failure to intervene would constitute abandonment of the leadership responsibilities entrusted to them by their station and rank. As noted earlier in the background discussion, if senior officers had intervened weeks, days, hours, or even minutes prior to these criminal assaults, a high probability exists that both the assaults and much of the Navy's embarrassment could have been avoided. The greatest responsibility must lie with the most senior officers, and ADM Kelso was the most senior military officer present.

This court has found that ADM Kelso was present on the third floor patio on both Friday and Saturday evenings, near the location where alleged assaults on females attendees occurred. This court has also found that ADM Kelso witnessed improper conduct being committed by junior officers. Many other senior

naval officers witnessed similar activity. It is clear from the record that no one attempted to intervene to end the lewd and improper sexually oriented behavior. Conduct which began as being merely in bad taste quickly escalated and finally ended in physical assaults. If proper leadership had been shown, the subsequent assaults and other inappropriate conduct might have been prevented.

All commanders who observed improprieties in officer conduct at Tailhook 91 and failed to act are consequently disqualified as convening authorities. All commanders who personally witnessed improper conduct at prior Tailhook symposiums and consequently knew personally of the history of these symposiums as opportunities for excessive alcohol consumption, rowdy behavior and immoral, sexually-oriented activities, and who voiced no protest, are similarly disqualified. This court harbors no doubt that their personal inaction in failing to intervene to prevent inappropriate conduct would be viewed by reasonable people as being a significant contributing factor in the unrestrained atmosphere which escalated to the sexual assaults on female attendees that ensued on the evening of 07 September 1991.

These circumstances can only be viewed as a personal embarrassment for all senior naval officers who could have acted, but did not. The opportunity to spare the Navy and the Marine Corps the chagrin and humiliation that has been heaped upon it was lost. Given the intense media interest, Presidential and Congressional condemnation, and the general loss of public confidence in the Navy, no senior officer who was personally involved in Tailhook 91 can exercise that high degree of impartiality required as a convening authority in this situation.

For these reasons, although less direct, ADM Kelso has a personal interest in the outcome of the litigation involving LT Samples as well.

Irrespective of the rationale stated above for the denomination of ADM Kelso as an "accuser" in either of the cases at bar, this court strongly views the necessity to follow the spirit of Article 1(9), UCMJ, as an equally justifiable basis for disqualifying ADM Kelso as an "accuser" in all three cases at bar. Clearly, the protective spirit of this Article dictates that any military commander convening a court-martial calling a subordinate to account for an act of misconduct in violation of the UCMJ, must be free from any suspicion of involvement, directly or indirectly, in the same or any related act of misconduct. This is matter of fundamental fairness. Whenever even the appearance of personal involvement on the part of the military commander cannot be dispelled with reasonable certainty, that commander must be deemed to possess an interest "other than official" in the prosecution of his or her subordinate and must be disqualified as an "accuser" from acting as the convening authority.

Likewise, under such circumstances, any junior commander in the direct chain of command of a superior "accuser" must be disqualified. A junior commander in the chain of command simply

cannot act with the degree of impartiality demanded by the UCMJ under the "chilling" effect of his or her senior's actual or suspected personal involvement.

This court's ultimate finding on this issue is that ADM Kelso is an "accuser" in all three cases joined for the purpose of this motion. Considering all the circumstances related above, one can ask the question Judge Cox proposes in the Jeter case to determine personal interest, "[s]hould I have removed myself as the judge in the case?" Jeter, 35 M.J. at 447. While this standard is too strict, there is no doubt that ADM Kelso could not under any circumstances judge either CDR Miller, CDR Tritt, or LT Samples, with the degree of impartiality mandated by the UCMJ.

As far as the cases of CDR Miller, CDR Tritt and LT Samples are concerned, this court has carefully reviewed the circumstances of ADM Kelso's activities relating to Tailhook 91. The court's inevitable conclusion is that the current convening authority, VADM Reason, as with all commanders subordinate to ADM Kelso, cannot function as the convening authority in the manner envisioned by Congress. Although VADM Reason's conduct has been above reproach, as an officer subordinate to ADM Kelso, he is a "junior accuser." Therefore, VADM Reason must be disqualified as a matter of law.

Command Influence

To protect those responsible for administering the military justice systems from unlawful command influence in the exercise of their official Codal responsibilities, the Congress enacted Article 37, UCMJ, as a part of the 1951 Code. This Article states that:

No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

One of the principal purposes of Article 37, UCMJ, is to ensure the impartiality of the military judicial process by protecting the convening authority from undue command influence in the exercise of his or her independent judgment in disposing of alleged violations of the UCMJ. In addition to ensuring the impartiality of the military justice process, it is also intended to convey a sense of confidence in the integrity of the military justice process in the public eye.

Military appellate courts have recognized two types of unlawful command influence, actual and apparent.

First, actual unlawful command influence occurs when there is an intentional or unintentional influence exerted by higher authority which works to undermine the impartiality of the military justice system. This may be an intentional effort to

assist the prosecution or it may be an innocent action, such as a call to action to get tough on drug use, which inadvertently serves to bias members of the court. This is true for influence directed at the convening authority, for example, it is unlawful for a superior commander by personal persuasion to adversely interfere with the independent decision-making process of a subordinate commander.

Unlawful command influence can also occur by regulation, memorandum, or briefing, initiated or made by the convening authority, the staff judge advocate, trial counsel, or higher authority. For policy directives see United States v. Brice, 19 M.J. 170 (C.M.A. 1985) and United States v. Treakle, 18 M.J. 646 (A.C.M.R. 1984), where policy directives were interpreted by many as mandating a policy not to give character evidence for an accused at court-martial. The appearance of unlawful command influence that existed in that case mandated reversal as to sentence.

The test for actual unlawful command influence is "figuratively" described by the Navy-Marine Corps Court of Military Review as being "whether the convening authority has been brought into the deliberation room." See Allen at 509 (quoting U. S. v. Grady, 15 M.J. 275 (C.M.A. 1983)).

Apparent unlawful command influence, on the other hand, is premised on the external perception of fairness in the military justice system. This form of unlawful command influence centers on the loss of confidence in the integrity of the process in the public eye as discussed above. The Navy-Marine Corps Court of Military Review provides a standard for this type of unlawful command influence. As formulated by that court, "the test for apparent unlawful command influence is whether a reasonable member of the public, if aware of all the facts, would have a loss of confidence in the military justice system and believe it to be unfair." Allen at 509 (citing both U. S. v. Rosser, 6 M.J. 267 (C.M.A. 1979); U. S. v. Cruz, 20 M.J. 873, 890 (ACMR 1985)).

Turning now to the application of the law to this court's findings of fact, the first issue is whether ADM Kelso's action in appointing VADM Reason as CDA amounted to unlawful command influence in any of the cases at bar.

Although tied more directly to the issue of ADM Kelso's status as an "accuser," the defense claims that ADM Kelso exerted actual unlawful command influence by appointing VADM Reason as the CDA, thereby withholding authority to convene courts-martial from all other commanders, including those in CDR Miller, CDR Tritt, and LT Samples chain of command who would ordinarily be responsible under the UCMJ for convening their respective cases.

The withholding of convening authority power from the immediate superior of an accused is rare. However, as acknowledged by the defense, such a withholding is not proscribed by the UCMJ. Further, it does not infer any unlawful infringement on the discretionary authority vested in the commanders from which the convening authority power is withheld. For example, in Allen at 591-592, the Navy-Marine Corps Court of

Military Review held that it was proper to limit the discretion of Commander Naval Forces Pacific in the disposition of national security cases so long as the Secretary did not interfere with the exercise of that discretion once a case was in his hands. Thus, the issue is not whether it was unlawful for ADM Kelso to appoint VADM Reason as the CDA, the issue is whether VADM Reason was allowed to exercise his independent discretion following the CDA appointment.

Case law holds the existence of improper command influence must be determined on a case-by-case basis and is a factual decision to be made by the court. See U.S. v. Accodino, 20 M.J. 870 (AFCMR 1985).

This court has found that ADM Kelso was cognizant of the narrow focus of the NIS investigation, i.e., excluded any inquiry into the personal involvement of flag officers at Tailhook 91, including his own personal involvement. The court has also found that following the DODIG investigation, ADM Kelso received the separately maintained files containing information describing the alleged failure of leadership and other personal involvement of a number of flag officers, including his own file. This court further found that none of these files were ever delivered to VADM Reason for consideration in his referral decision process. This court also found that ADM Kelso attempted to shield his personal involvement at Tailhook 91 by denying that he ever observed any inappropriate behavior on the part of junior aviators during his visit to Tailhook 91. The court further found that ADM Kelso, despite his denial, was, in fact, present on the patio on Saturday evening at about the same time that the alleged acts of omission occurred supporting the allegations of dereliction of duty and conduct unbecoming that of an officer charged against CDRs Miller and Tritt.

During the course of the litigation of the motion at bar, this court determined that all of this information was withheld from VADM Reason prior to his decision to refer CDRs Miller and Tritt's cases to trial by court-martial. It was only after extensive litigation and numerous orders by this court that this information was finally disclosed and made available to VADM Reason.

Based on these circumstances, and despite ADM Kelso's 01 February 1993 written direction to VADM Reason that he utilize his independent discretion in disposing of Tailhook cases, this court finds that ADM Kelso manipulated the initial investigative process and the subsequent CDA process in a manner designed to shield his personal involvement in Tailhook 91. This manipulation of the process by ADM Kelso and others was for their own personal ends and not directed at these accused. However, this court further finds that ADM Kelso's actions, although not intentionally directed at either the prosecution of CDRs Miller or Tritt, had a significant influence on VADM Reason's decision to bring charges against them. In this respect, this court can only speculate as to what VADM Reason's referral decision may have been as to the charges alleged against CDRs Miller and Tritt.

had he known of the extent of ADM Kelso's personal involvement, and that of other senior flag officers, at Tailhook 91. This is particularly true in light of the fact that the evidence strongly suggests that ADM Kelso was present on the patio at the same time the alleged acts of misconduct took place which CDRs Miller and Tritt are charged with failing to stop.

The government suggests that the decision by VADM Reason to prosecute CDRs Miller and Tritt may have been the same even if he was aware of ADM Kelso's involvement. This may be true, but it is a matter of speculation at best. In any case it does not serve to cure the adverse impact on the referral process. Thus, this court finds that the totality of ADM Kelso's actions not only served to denominate him an "accuser," his actions also amounted to actual unlawful command influence.

Even if it could be determined that ADM Kelso's actions did not amount to actual unlawful command influence, it could not be denied that the totality of his actions amounted to at least apparent unlawful command influence.

The Court of Military Appeals held in U. S. v. Karlson, 16 M.J. 469 (C.M.A. 1983), that the public's confidence in a fair and impartial military justice system must be maintained, and the appearance of manipulation by superiors cannot be permitted to exist. The Court has also held:

Nothing erodes public confidence in the military justice system as quickly as the perception that the outcome of a trial, be it findings or sentence, is preordained by the improper exercise of command position. One of the basic objectives of the Uniform Code of Military Justice is to eradicate the misuse of command power.

U.S. v. Tucker, 20 M.J. 863, 865 (AFCMR 1985) (citing U.S. v. Cole, 17 U.S.C.M.A. 296, 38 C.M.R. 94 (C.M.A. 1967)).

This public confidence would certainly be lost if this court were to allow ADM Kelso's obvious manipulation of the Tailhook 91 investigative process and the subsequent CDA appointment process to stand. This court has no doubt that any reasonable member of the public would view the military justice system as being unfair if he or she knew of the circumstances surrounding ADM Kelso's involvement at Tailhook 91, and his subsequent involvement in the investigative and CDA processes. The appearance of shielding senior officers while permitting the courts-martial of the more junior officers under the convening authority of VADM Reason cannot be denied. While this may not rise to the level of selective prosecution, the public would likely view it as such. At the very least, the public would perceive the military justice process as promoting an unfair double standard. Under the mandate of the court's holding in Karlson, such an appearance must be avoided, and cannot be allowed by this court to stand without providing a corrective remedy.

The Court of Military Appeals has held that where any doubt exist as to the presence of unlawful command influence, the doubt

must be resolved in favor of the accused. See U. S. v. Kitchens, 12 U.S.C.M.A. 589, 31 C.M.R. 175 (1961). Moreover, the government must prove beyond a reasonable doubt that the existence of unlawful command influence will not adversely impact the right of CDR Miller and CDR Tritt to a fair trial on the merits. See U. S. v. Dykes, 38 M.J. 270 (CMA 1993). This court finds that in the cases of CDR Miller and CDR Tritt the government has not met that burden.

The issue of how ADM Kelso's actions impacted on VADM Reason's decision to refer LT Samples' case to trial is not as easy to discern as in the cases of CDRs Miller and Tritt. As previously stated, the charge against LT Samples involves only assaultive conduct, allegedly occurring in the third floor hallway of the Hilton on Saturday evening.

No direct evidence exists supporting that ADM Kelso was actually present in the hallway that evening, or that he witnessed any assaultive behavior in the third floor hallway at any time during Tailhook 91. Therefore, the nexus between ADM Kelso's actions as discussed above and the single offense charged against LT Samples, and any potential adverse impact on VADM Reason's deliberative referral process, is much less evident than in the cases of CDRs Miller and Tritt.

Had VADM Reason known of ADM Kelso's involvement in Tailhook 91, would the referral of charges against LT Samples been any different? This court cannot determine with reasonable certainty the extent of potential impact on the CDA's referral decision. This uncertainty must be resolved in favor of LT Samples. See Kitchens.

In light of all of the facts and circumstances which have been established during the five weeks of litigation on the motion at bar, many of which were unknown to VADM Reason at the time he referred LT Samples case to trial, this court finds that LT Samples' case should be reviewed de novo by a convening authority superior in rank and command to ADM Kelso to ensure that he has been given fair and impartial treatment in the critical referral process.

IT IS HEREBY ORDERED, based upon the findings of this court (1) that ADM Kelso is an "accuser" within the meaning of Article 1(9), UCMJ, with regard to each accused and (2) that there has been both actual and apparent unlawful command influence in each case, the charges against CDR Thomas R. Miller, U.S. Navy, CDR Gregory E. Tritt, U.S. Navy, and LT David Samples, U.S. Navy are hereby DISMISSED WITHOUT PREJUDICE to the government's right to reinstate court-martial proceedings against the accused for the same offenses at a later date.

IT IS FURTHER ORDERED that VADM Reason is disqualified as convening authority pursuant to R.C.M. 504. In light of this order, VADM Reason may proceed with the following actions only:

- (1) Make a decision to take no further adverse actions against any or all of the three accused, effectively ending the proceedings;

- (2) Take administrative or non-judicial disciplinary action in any or all of the cases in lieu of further judicial proceedings;
- (3) Forward the charges to an authority senior in rank and command to ADM Kelso pursuant to R.C.M. 401(c) and section 0129 of the JAG Manual for disposition by superior competent authority, which may include the reinstatement of charges against these accused.

William T. Vest, Jr.
Captain, JAGC, USN
Circuit Military Judge



INSPECTOR GEN RAL
DEPARTMENT OF DEFENSE
400 ARMY NAVY DRIVE
ARLINGTON, VIRGINIA 22202-2884



February 11, 1994

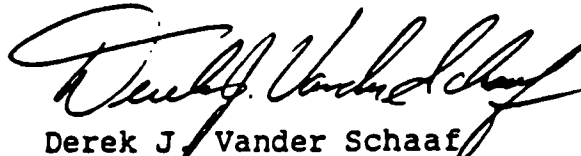
MEMORANDUM FOR SECRETARY OF DEFENSE

As a result of a motion to dismiss filed on behalf of naval officers facing charges stemming from the 1991 Tailhook Association Convention, a judicial ruling has been issued that calls into question the integrity of the Chief of Naval Operations, Admiral Frank Kelso, as well as his conduct at the convention and during the investigations and judicial process that followed.

The Office of Inspector General conducted an exhaustive investigation of activities at the Tailhook Convention and the conduct of those who attended. We also examined the circumstances surrounding the Navy's flawed investigation of the Tailhook matter. We especially focused on the role of senior Navy and Marine Corps leadership. Investigative files were prepared on each flag officer and squadron commander who attended. The result was a detailed public report that described a serious failure of leadership, a failure for which Admiral Kelso and several other admirals received appropriate reprimands.

During our investigation we were unable to find any credible evidence that Admiral Kelso had specific knowledge of the improper incidents and events that took place. We reached that conclusion based on numerous witness interviews. We found individuals who believed they saw Admiral Kelso on the third floor during that infamous Saturday night. However, based on all the testimony, we believe that he was not present on Saturday and that those who believed they saw him are mistaken. We continue to believe that Admiral Kelso had no specific knowledge of the indecent activity that took place. We have not had a chance to examine the entire court record, however we are in the process of comparing testimony from the court proceedings with information from our investigation files. We have identified several discrepancies in the court's opinion that call into question the factual basis for the court's conclusion that Admiral Kelso had specific and detailed knowledge of those events and the implication that he lied to Federal investigators and the court when he testified that he did not have such knowledge.

In addition, it should be noted that Admiral Kelso's conduct during our investigation was beyond reproach. He offered his assistance in making himself and other senior witnesses available and ensured that the Navy provided "logistical" support and related assistance. Additionally, we found no evidence either testimonial or documentary that Admiral Kelso sought to thwart the Navy's internal investigation of the Tailhook matter. In short, his conduct was certainly not what one would expect from a person in authority who had a lot to lose from a thorough public airing of the facts.



Derek J. Vander Schaaf
Deputy Inspector General

cc: Secretary of the Navy



NEWS RELEASE

**OFFICE OF ASSISTANT SECRETARY OF DEFENSE
(PUBLIC AFFAIRS)**
WASHINGTON, D.C. 20301
PLEASE NOTE DATE

IMMEDIATE RELEASE

February 15, 1994

No. 075-94

(703)697-5131(media)

(703)697-3189(copies)

(703)697-5737(public/industry)

SECRETARY OF THE NAVY STATEMENT ON ADMIRAL FRANK B. KELSO, II

The Secretary of the Navy released today a statement concerning the Chief of Naval Operations, Admiral Frank B. Kelso, II. A copy of that statement is attached.

-END-

IMMEDIATE RELEASE

February 15, 1994

**SECRETARY OF THE NAVY STATEMENT ON THE FORTHCOMING
RETIREMENT OF ADMIRAL FRANK B. KELSO, II**

Secretary of the Navy John H. Dalton has released the following statement concerning the retirement request of Admiral Frank B. Kelso, II:

"Admiral Kelso's dedicated service as Chief of Naval Operations and Acting Secretary of the Navy exemplify his life long commitment to our Nation and our Navy.

I am grateful to have had the opportunity to serve with him and to work together to promote the best interests of the naval service.

In deciding to request retirement, he has acted, as he has throughout his 38 year career, with the best interests of the United States Navy in mind. The nation owes him a debt of gratitude for his extraordinary service in war and peace."

-END-

15 February 1994

STATEMENT BY THE HONORABLE JOHN H. DALTON

SECRETARY OF THE NAVY

"The lessons of Tailhook have been hard ones -- but they are lessons that the men and women of the Navy and Marine Corps must not forget.

It is important that we always treat our shipmates with dignity. It is also important that we put the bitterness of Tailhook behind us. The time for healing is now.

I wish to make clear that although I have questioned the leadership which permitted the excesses of Tailhook to take place, I have never questioned the personal integrity and honor of Frank Kelso. I fully concur in Secretary Perry's judgment regarding the Admiral's character.

Admiral Kelso's intellect and leadership have set the Navy on the correct course to meet the challenges of the post cold war era. Since Tailhook '91, he has taken the lead in educating the Navy that sexual harassment will not be tolerated and in fostering an environment of mutual respect and genuine opportunity for women in the naval service.

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NEWS RELEASE

**OFFICE OF ASSISTANT SECRETARY OF DEFENSE
(PUBLIC AFFAIRS)
WASHINGTON, D.C. - 20301
PLEASE NOTE DATE**

No. 073-94
(703)697-5131(media) .
(703)697-3189(copies)
(703)697-5737(public/industry)

IMMEDIATE RELEASE February 15, 1994

SECRETARY OF DEFENSE STATEMENT ON ADMIRAL FRANK B. KELSO, II

Secretary of Defense William J. Perry has released the following statement concerning the Chief of Naval Operations, Admiral Frank B. Kelso, II:

"I have discussed with the Secretary of the Navy the ruling made last week in the Tailhook matter and reviewed the DoD Inspector General's conclusions from his investigation.

Without calling into question the correctness of the ruling in a proceeding in which Admiral Kelso was not a party, I note that the DoD Inspector General found no credible evidence that Admiral Kelso had specific knowledge of the misconduct that occurred on the third floor of the Hilton Hotel; that there was no evidence that Admiral Kelso sought to thwart the Navy's internal investigation; and that Admiral Kelso was fully supportive of the DoD Inspector General's investigation. I know that Admiral Kelso did not himself decide on the disposition of the various Flag Officer files developed by the Inspector General. Rather, Secretary Aspin decided to hold those files for review by civilian leadership, specifically, then-incoming Secretary of the Navy John Dalton.

I regard Admiral Kelso as a man of the highest integrity and honor. Under his leadership, the Navy has entered the post-Cold War world dramatically reshaped and fully prepared for new challenges. He has made an enormous contribution to the safety and well-being of the nation. With respect to the underlying causes of the events of Tailhook '91, he understood the importance of addressing this issue and taking all necessary measures to permit the Navy to move on to a new era."

-END-

WHITE HOUSE STAFFING MEMORANDUM

1341

DATE: 2/19/94 ACTION/CONCURRENCE/COMMENT DUE BY: 2/23

SUBJECT: Nomination of Admiral Jeremy M. Boorda, United States Navy,
for reappointment to the grade of admiral and a recommendation
for his assignment as Chief of Naval Operations.

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☐	NUSSBAUM	☐	☐
McLARTY	☐	☐	QUINN	☐	☐
LADER	☐	☐	RASCO	☐	☐
ICKES	☐	☐	RUBIN	☐	☐
PANETTA	☐	☐	SEGAL	☐	☐
BAGGETT	☐	☐	SEIDMAN	☐	☐
EMANUEL	☐	☐	STEPHANOPOULOS	☐	☐
GEARAN	☐	☐	TYSON	☐	☐
GERGEN	☐	☐	VARNEY	☐	☐
GIBBONS	☐	☐	WATKINS	☐	☐
GRIFFIN	☐	☐	WILLIAMS	☐	☐
HALE	☐	☐	Bob Bell	☒	☐
HERMAN	☐	☐		☐	☐
LAKE	☐	☐		☐	☐
LINDSEY	☐	☐		☐	☐
McGINTY	☐	☐		☐	☐
MYERS	☐	☐		☐	☐

REMARKS:

RESPONSE:

The National Security Council staff concurs with the attached military nomination.

JOHN D. PODESTA
Assistant to the President
and Staff Secretary
Ext. 2702

Anthony Lake

2/22/94

THE WHITE HOUSE

WASHINGTON

February 18, 1994 ⁹⁴ FEB 19 A 9:06

MEMORANDUM FOR THE PRESIDENT

FROM: ALPHONSO MALDON, JR. *Amx*
DEPUTY ASSISTANT TO THE PRESIDENT AND
DIRECTOR, WHITE HOUSE MILITARY OFFICE

SUBJECT: Flag Officer Nomination

Forwarded for your approval and signature is the nomination of Admiral Jeremy M. Boorda, United States Navy, for reappointment to the grade of admiral and a recommendation for his assignment as Chief of Naval Operations.

Admiral Boorda's mandatory retirement date is September 1, 1997, I recommend you defer his mandatory retirement date while serving as Chief of Naval Operations under the provisions of title 10, United States Code, section 637(b). This will allow Admiral Boorda to complete a four year term as prescribed by title 10, United States Code section 5033. Your signature on the attached memorandum will signify your approval of the deferral.

As required by title 10, United States Code, section 601 (2) (d) (1), the Secretary of Defense has certified Admiral Boorda's performance in joint duty assignments. The Chairman of the Joint Chiefs of Staff concurs.

This nomination has been staffed by the Secretary of the Navy and was approved by the Secretary of Defense.

Recommendation

That you approve and sign the attached.

Attachment

THE SECRETARY OF DEFENSE

WASHINGTON, THE DISTRICT OF COLUMBIA

17 FEB 1994

MEMORANDUM FOR THE PRESIDENT

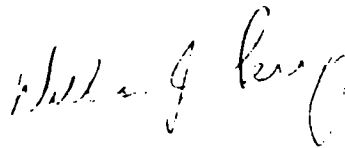
SUBJECT: Flag Officer Nomination

I recommend you assign Admiral Jeremy M. Boorda, United States Navy, as Chief of Naval Operations, a position previously designated to carry the grade of admiral. I further recommend you nominate Admiral Boorda for reappointment to the grade of admiral. Admiral Boorda, age 55, currently serves as Commander in Chief, U. S. Naval Forces, Europe/Commander in Chief, Allied Forces Southern Europe. He will succeed Admiral Frank B. Kelso, United States Navy, who is retiring.

Admiral Boorda's mandatory retirement date is September 1, 1997. I recommend you defer his mandatory retirement date while serving as Chief of Naval Operations under the provisions of title 10, United States Code, section 637(b). This will allow Admiral Boorda to complete a four year term as prescribed by title 10, United States Code, section 5033. Your signature on this memorandum will signify your approval of the deferral.

In order to carry out the duties and responsibilities of the proposed assignment, a flag officer must have demonstrated highly effective performance in senior leadership positions. He must be able to serve as the principal naval advisor and naval executive to the Secretary of the Navy on the conduct of the activities of the Department of the Navy. The Chief of Naval Operations is the Navy member of the Joint Chiefs of Staff and is responsible for informing the Secretary of the Navy on matters considered or acted on by the Joint Chiefs of Staff. He must have significant experience in joint assignments and at least one full tour of joint duty as a flag officer. Admiral Boorda meets these qualifications.

This action will not cause the Navy to exceed the number of officers authorized to be serving in the grade of admiral.



Attachment

APPROVED _____
President of the United States

DATE _____

The White House

Washington

To the Senate of the United States:

I nominate:

The following named officer for reappointment to the grade of Admiral while assigned to a position of importance and responsibility under Title 10, United States Code, Sections 601 and 5033:

To be Chief of Naval Operations

To be Admiral

Admiral Jeremy M. Boorda, U. S. Navy, 332-32-6007



CHAIRMAN OF THE JOINT CHIEFS OF STAFF
WASHINGTON, D.C. 20318-9999

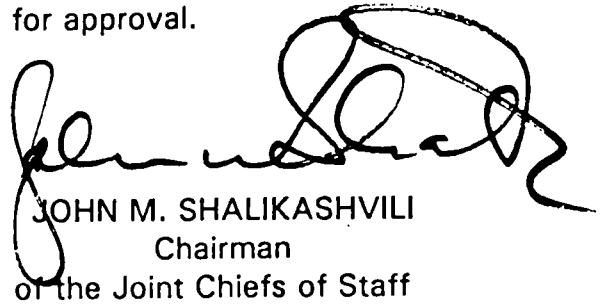
CN-108-94
15 February 1994

MEMORANDUM FOR THE SECRETARY OF DEFENSE

Through: Deputy Secretary of Defense

Subject: Flag Officer Nomination

In accordance with the provisions of title 10, United States Code, and DOD Instruction 1320.4, the Secretary of the Navy has recommended Admiral Jeremy M. Boorda for assignment as Chief of Naval Operations, reappointment to the grade of admiral, and mandatory retirement date deferment. I concur in the Secretary's nomination and recommend you forward it to the President for approval.


JOHN M. SHALIKASHVILI
Chairman
of the Joint Chiefs of Staff

Enclosure

PERS-00F
15 FEB 1994

TRANSCRIPT OF NAVAL SERVICE FOR
ADMIRAL JEREMY MICHAEL BOORDA
U.S. NAVY

26 NOV 1938 Born in South Bend, Indiana
10 FEB 1956 Enlisted in the U.S. Navy
16 AUG 1962 Honorably discharged
17 AUG 1962 Ensign to rank from 1 July 1962
1 JAN 1964 Lieutenant (junior grade)
1 JAN 1966 Lieutenant
1 FEB 1970 Lieutenant Commander
1 JUL 1974 Commander
1 AUG 1980 Captain
31 JAN 1985 Designated Rear Admiral (Lower Half)
while serving in billets commensurate
with that grade
1 JAN 1987 Rear Admiral (Lower Half)
26 JUN 1989 Rear Admiral
8 JUL 1988 Designated Vice Admiral while serving
in billets commensurate with that grade
1 OCT 1988 Vice Admiral
7 NOV 1991 Designated Admiral while serving in
billets commensurate with that grade
2 MAR 1992 Admiral
Service continuous to date

ASSIGNMENTS AND DUTIES	FROM	TO
USS PORTERFIELD (DD 682)	SEP 1962	JAN 1964
Naval Destroyer School, Newport, RI (DUINS)	JAN 1964	JUL 1964
Nuclear Weapons Training Center Pacific (DUINS)	JUL 1964	OCT 1964
USS JOHN R. CRAIG (DD 885)	OCT 1964	JUL 1966
Naval School of Mine Warfare, Naval Base Charleston, SC (DUINS)	JUL 1966	AUG 1966
CO, USS PARROT (MSC 197)	AUG 1966	MAR 1968
Naval Destroyer School, Newport, RI (Weapons Dept. Instructor/Administrative Asst.)	MAR 1968	AUG 1970
Naval War College (DUINS)	AUG 1970	AUG 1971
Naval Destroyer School, Newport, RI (DUINS)	AUG 1971	DEC 1971
USS BROOKE (DEG 1) (XO)	DEC 1971	FEB 1973
University of Oklahoma, NROTC (Special Instructor)	FEB 1973	JUN 1973
Bureau of Naval Personnel (Asst. Surface Captain Detailer)	JUN 1973	MAY 1975
CO, USS FARRAGUT (DDG 37)	JUN 1975	JUL 1977
Office of Assistant Secretary of the Navy (Manpower, Reserve Affairs and Logistics) (EA and Principal Asst.)	JUL 1977	DEC 1980
Assistant Secretary of the Navy (Manpower, Reserve Affairs and Logistics) (Acting)	JAN 1981	JUL 1981

TRANSCRIPT OF NAVAL SERVICE FOR
ADMIRAL JEREMY MICHAEL BOORDA (CONT'D)

<u>ASSIGNMENTS AND DUTIES (CONT'D)</u>	<u>FROM</u>	<u>TO</u>
Commander, Destroyer Squadron 22	AUG 1981	SEP 1983
Naval War College (DUINS)	SEP 1983	OCT 1983
Office of Deputy CNO (Manpower, Personnel and Training) (EA) (OP-01A)	NOV 1983	DEC 1984
Office of CNO (EA to CNO) (OP-002)	DEC 1984	JUL 1986
Commander, Cruiser Destroyer Group EIGHT	AUG 1986	JUL 1988
Office of CNO (DCNO (MP&T)/CNP)	AUG 1988	DEC 1991
Commander in Chief, U.S. Naval Forces, Europe/ Commander in Chief, Allied Forces, Southern Europe	DEC 1991	TO DATE

MEDALS AND AWARDS

Distinguished Service Medal with two Gold Stars in lieu of subsequent awards
 Legion of Merit with two Gold Stars in lieu of third award
 Meritorious Service Medal with one Gold Star in lieu of second award
 Navy Commendation Medal with Combat "V"
 Navy Achievement Medal with Combat "V"
 Navy "E" Ribbon
 Navy Good Conduct Medal with Bronze Star in lieu of second award
 Navy Expeditionary Medal
 National Defense Service Medal with one Bronze Star
 Armed Forces Expeditionary Medal
 Vietnam Service Medal with two Bronze Stars
 Sea Service Deployment Ribbon with three Bronze Stars
 Republic of Vietnam Campaign Ribbon

SPECIAL QUALIFICATIONS

Graduate of Naval War College, 1971 and 1983
 BA (Political Science) University of Rhode Island, 1971
 Language Qualification: None of record

PERSONAL DATA

Wife: Bettie M. Moran of Norman, Oklahoma
 Children: David A. Boorda (Son)
 Born: 12 December 1957
 Edward M. Boorda (Son)
 Born: 28 November 1958
 Anna E. Boorda (Daughter)
 Born: 16 May 1960
 Robert N. Boorda (Son)
 Born: 22 April 1961

TRANSCRIPT OF NAVAL SERVICE FOR
ADMIRAL JEREMY MICHAEL BOORDA (CONT'D)SUMMARY OF JOINT DUTY ASSIGNMENTS

<u>Assignment</u>	<u>Dates</u>	<u>Rank</u>
*Office of Assistant Secretary of the Navy (Manpower, Reserve Affairs and Logistics) (EA and Principal Asst.)	JUL 77 - AUG 81	CDR/ CAPT
*Office of CNO (EA to CNO) (OP-002)	DEC 84 - JUL 86	RDML
Commander in Chief, U.S. Naval Forces, Europe/Commander in Chief, Allied Forces, Southern Europe	DEC 91 - TO DATE	ADM
*Joint Duty Equivalent		



(1) subject to subsections (c) and (d) of section 5014 of this title, prepare for such employment of the Navy, and for such recruiting, organizing, supplying, equipping (including those aspects of research and development assigned by the Secretary of the Navy), training, servicing, mobilizing, demobilizing, administering, and maintaining of the Navy, as will assist in the execution of any power, duty, or function of the Secretary or the Chief of Naval Operations;

(2) investigate and report upon the efficiency of the Navy and its preparation to support military operations by combatant commands;

(3) prepare detailed instructions for the execution of approved plans and supervise the execution of those plans and instructions;

(4) as directed by the Secretary or the Chief of Naval Operations, coordinate the action of organizations of the Navy; and

(5) perform such other duties, not otherwise assigned by law, as may be prescribed by the Secretary.

(Added P.L. 99-433, § 512(b), Oct. 1, 1986, 100 Stat. 1049 [former § 5032 transferred to § 5013a].)

§ 5033. Chief of Naval Operations

(a)(1) There is a Chief of Naval Operations, appointed by the President, by and with the advice and consent of the Senate. The Chief of Naval Operations shall be appointed for a term of four years, from officers on the active-duty list in the line of the Navy who are eligible to command at sea and who hold the grade of rear admiral or above. He serves at the pleasure of the President. In time of war or during a national emergency declared by Congress, he may be reappointed for a term of not more than four years.

(2) The President may appoint an officer as the Chief of Naval Operations only if—

(A) the officer has had significant experience in joint duty assignments; and

(B) such experience includes at least one full tour of duty in a joint duty assignment (as defined in section 664(f) of this title) as a flag officer.

(3) The President may waive paragraph (2) in the case of an officer if the President determines such action is necessary in the national interest.

(b) The Chief of Naval Operations, while so serving, has the grade of admiral without vacating his permanent grade. In the performance of his duties within the Department of the Navy, the Chief of Naval Operations takes precedence above all other officers of the naval service.

(c) Except as otherwise prescribed by law and subject to section 5013(f) of this title, the Chief of Naval Operations performs his duties under the authority, direction, and control of the Secretary of the Navy and is directly responsible to the Secretary.

(d) Subject to the authority, direction, and control of the Secretary of the Navy, the Chief of Naval Operations shall—

(1) preside over the Office of the Chief of Naval Operations;

(2) transmit the plans and recommendations of the Office of the Chief of Naval Operations to the Secretary and advise the Secretary with regard to such plans and recommendations;

(3) after approval of the plans or recommendations of the Office of the Chief of Naval Operations by the Secretary, act as the agent of the Secretary in carrying them into effect;

(4) exercise supervision, consistent with the authority assigned to commanders of unified or specified combatant commands under chapter 6 of this title, over such of the members and organizations of the Navy and the Marine Corps as the Secretary determines;

(5) perform the duties prescribed for him by section 171 of this title and other provisions of law; and

(6) perform such other military duties, not otherwise assigned by law, as are assigned to him by the President, the Secretary of Defense, or the Secretary of the Navy.

(e)(1) The Chief of Naval Operations shall also perform the duties prescribed for him as a member of the Joint Chiefs of Staff under section 151 of this title.

(2) To the extent that such action does not impair the independence of the Chief of Naval Operations in the performance of his duties as a member of the Joint Chiefs of Staff, the Chief of Naval Operations shall inform the Secretary regarding military advice rendered by members of the Joint Chiefs of Staff on matters affecting the Department of the Navy.

(3) Subject to the authority, direction, and control of the Secretary of Defense, the Chief of Naval Operations shall keep the Secretary of the Navy fully informed of significant military operations affecting the duties and responsibilities of the Secretary.

(Added P.L. 99-433, § 512(b), Oct. 1, 1986, 100 Stat. 1049 [formerly covered by § 5081] (former § 5033 repealed and now covered by § 5015) and, amended P.L. 100-456, § 519(a)(3), Sept. 29, 1988, 102 Stat. 1972).

§ 5034. Chief of Naval Operations: retirement

An officer who is retired while serving as Chief of Naval Operations, or who, after serving at least two and one-half years as Chief of Naval Operations, is retired after completion of that service while serving in a lower grade than admiral, may, in the discretion of the President and by and with the advice and consent of the Senate, be retired with the grade of admiral.

(Added P.L. 99-433, § 512(b), Oct. 1, 1986, 100 Stat. 1050 [formerly covered by § 5083] (former § 5034 repealed and now covered by § 5016); P.L. 102-190, § 505(a), Dec. 5, 1991, 105 Stat. 1358.)

§ 5035. Vice Chief of Naval Operations

(a) There is a Vice Chief of Naval Operations, appointed by the President, by and with the advice and consent of the Senate, from officers on the active-duty list in the line of the Navy serving in grades above captain and eligible to command at sea.

637(b)

(2) An officer subject to retirement under section 635 or 636 of this title who is serving in the grade of brigadier general, rear admiral (lower half), major general, or rear admiral may, subject to the needs of the service, have his retirement deferred and be continued on active duty by the Secretary concerned. An officer subject to retirement under section 635 or 636 of this title who is serving in a grade above major general or rear admiral may have his retirement deferred and be continued on active duty by the President.

(3) Any deferral of retirement and continuation on active duty under this subsection shall be for a period not to exceed five years, but such period may not (except as provided under section 1251(b) of this title) extend beyond the date of the officer's sixty-second birthday.

(c) Continuation of an officer on active duty under this section pursuant to the action of a selection board convened under section 611(b) of this title is subject to the approval of the Secretary of the military department concerned. The period of the continuation on active duty of an officer under this section may be reduced by the Secretary concerned in the case of any officer as provided in section 638a of this title.

(d) For purposes of this section, a period of continuation on active duty under this section expires or is completed on the earlier of (1) the date originally established for the termination of such period, or (2) the date established for the termination of such period by any shortening of such period under section 638a of this title.

(e) The Secretary of Defense shall prescribe regulations for the administration of this section.

(Added P.L. 96-513, §105, Dec. 12, 1980, 94 Stat. 2863, and amended P.L. 97-22, §4(e), July 10, 1981, 95 Stat. 127; P.L. 97-86, §405(b)(1), Dec. 1, 1981, 95 Stat. 1105; P.L. 98-525, §1405(15), Oct. 19, 1984, 98 Stat. 2622; P.L. 99-145, §514(b)(1), Nov. 8, 1985, 99 Stat. 628; P.L. 101-510, §521(b)(1), Nov. 5, 1990, 104 Stat. 1561.)

§ 638. Selective early retirement

(a)(1) A regular officer on the active-duty list of the Army, Navy, Air Force, or Marine Corps may be considered for selective early retirement by a selection board convened under section 611(b) of this title if the officer is described in any of subparagraphs (A) through (D) as follows:

(A) An officer holding the regular grade of lieutenant colonel or commander who has failed of selection for promotion to the grade of colonel or, in the case of an officer of the Navy, captain two or more times and whose name is not on a list of officers recommended for promotion.

(B) An officer holding the regular grade of colonel or, in the case of an officer of the Navy, captain who has served at least four years of active duty in that grade and whose name is not on a list of officers recommended for promotion.

(C) An officer holding the regular grade of brigadier general or rear admiral (lower half) who has served at least three



PERSONNEL AND
READINESS

ASSISTANT SECRETARY OF DEFENSE

4000 DEFENSE PENTAGON
WASHINGTON DC 20301-4000



Honorable Sam Nunn
Chairman
Committee on Armed Services
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am writing in reference to the nomination of Admiral Jeremy M. Boorda, United States Navy, which the President recently forwarded to the Senate. Neither the Department of Defense nor the Department of Navy identified Admiral Boorda as "potentially implicated" for conduct related to the Tailhook '91 incident.

There is no adverse information concerning Admiral Boorda since his last Senate confirmation. To the Department's knowledge, there is no pending investigation of alleged adverse information.

Sincerely,

Edwin Dorn

(3) The authority of the Secretary of Defense to grant a waiver under paragraph (2) may only be delegated to the Deputy Secretary of Defense, an Under Secretary of Defense, or an Assistant Secretary of Defense. Such a waiver may be granted only on a case-by-case basis in the case of an individual officer.

(b) **JOINT MILITARY EDUCATION SCHOOLS.**—The Secretary of Defense, with the advice and assistance of the Chairman of the Joint Chiefs of Staff, shall periodically review and revise the curriculum of each school of the National Defense University (and of any other joint professional military education school) to enhance the education and training of officers in joint matters. The Secretary shall require such schools to maintain rigorous standards for the military education of officers with the joint specialty.

(c) **OTHER PROFESSIONAL MILITARY EDUCATION SCHOOLS.**—The Secretary of Defense shall require that each Department of Defense school concerned with professional military education periodically review and revise its curriculum for senior and intermediate grade officers in order to strengthen the focus on—

(1) joint matters; and

(2) preparing officers for joint duty assignments.

(d) **POST-EDUCATION DUTY ASSIGNMENTS.**—The Secretary of Defense shall ensure that—

(1) unless waived by the Secretary in an individual case, each officer with the joint specialty who graduates from a joint professional military education school shall be assigned to a joint duty assignment for that officer's next duty assignment; and

(2) a high proportion (which shall be greater than 50 percent) of the other officers graduating from a joint professional military education school also receive assignments to a joint duty assignment as their next duty assignment.

(e) **DURATION OF PRINCIPAL COURSE OF INSTRUCTION AT ARMED FORCES STAFF COLLEGE.**—(1) The duration of the principal course of instruction offered at the Armed Forces Staff College may not be less than three months.

(2) In this subsection, the term "principal course of instruction" means any course of instruction offered at the Armed Forces Staff College as Phase II joint professional military education.²

(Added P.L. 99-433, § 401(a), Oct. 1, 1985, 100 Stat. 1027, and amended P.L. 101-189, § 1123(c)(1), Nov. 29, 1989, 103 Stat. 1557; P.L. 102-190, § 912(a), Dec. 5, 1991, 105 Stat. 1452.)

§ 664. Length of joint duty assignments

(a) **GENERAL RULE.**—The length of a joint duty assignment—

(1) for general and flag officers shall be not less than two years; and

(2) for other officers shall be not less than three years.

(b) **WAIVER AUTHORITY.**—The Secretary of Defense may waive subsection (a) in the case of any officer.

²Section 912(b) of the National Defense Authorization Act for Fiscal Years 1992 and 1993 (P.L. 101-190, 105 Stat. 1452), as amended, provides that subsection (e)(2) shall not apply with respect to the Armed Forces Staff College until January 1, 1994.