

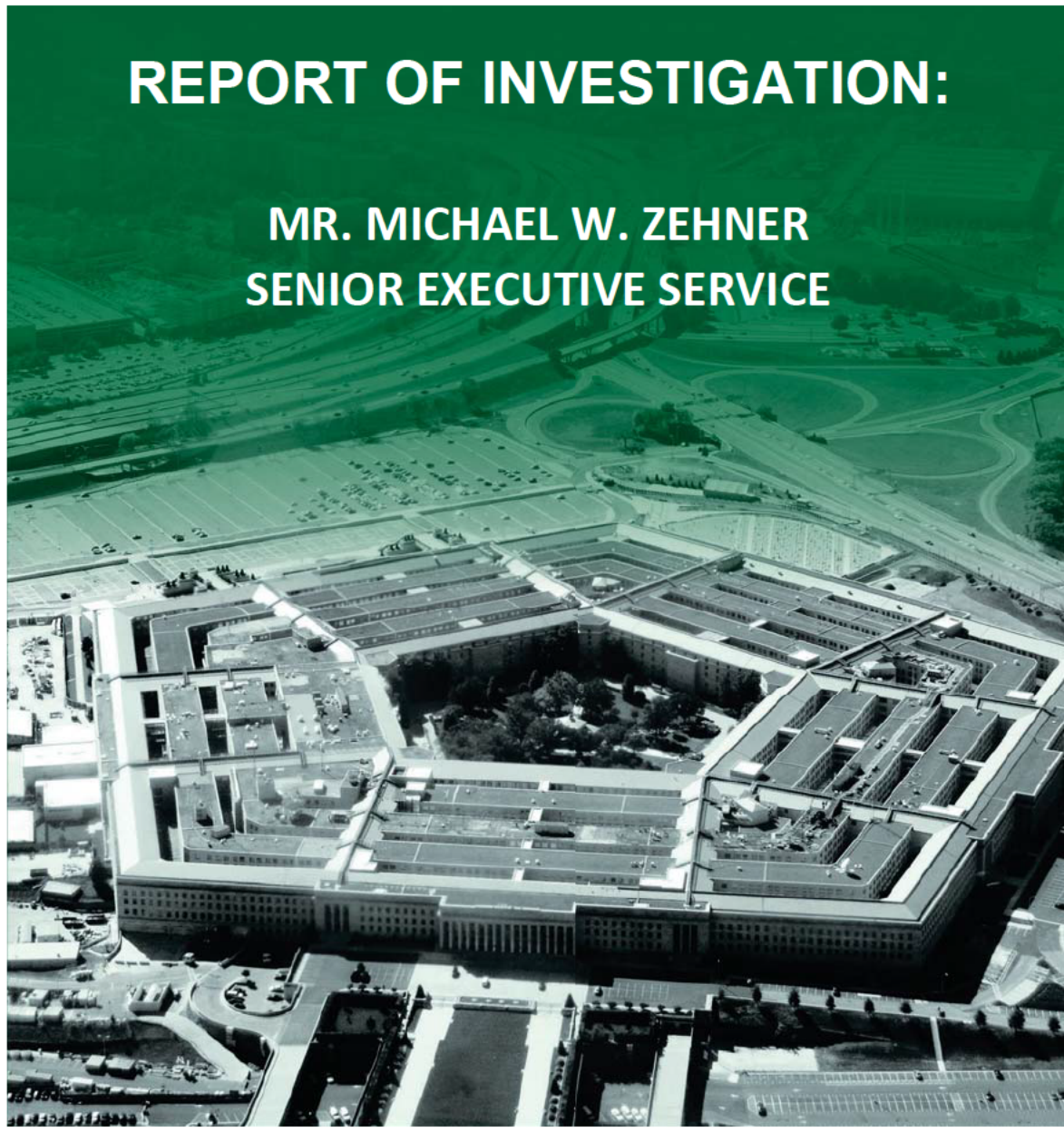
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INVESTIGATIONS OF SENIOR OFFICIALS

INSPECTOR GENERAL

U.S. Department of Defense

MAY 20, 2014



REPORT OF INVESTIGATION:

MR. MICHAEL W. ZEHNER
SENIOR EXECUTIVE SERVICE

INTEGRITY ★ EFFICIENCY ★ ACCOUNTABILITY ★ EXCELLENCE

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**REPORT OF INVESTIGATION:
MR. MICHAEL W. ZEHNER, SENIOR EXECUTIVE SERVICE**

I. INTRODUCTION AND SUMMARY

We initiated this investigation to address the allegations that Mr. Michael W. Zehner, while serving as a Deputy General Counsel, Department of the Air Force, improperly gifted airline seat upgrades to his official superior and (b)(6), (b)(7)(C)

(b)(6), (b)(7)(C) ¹ If substantiated, this conduct would violate the Department of Defense (DoD) 5500.07-R, "Joint Ethics Regulation (JER)," and the "Office of Personnel Management (OPM) Guide to Senior Executive Service (SES) Qualifications."

We substantiated one allegation. We conclude that Mr. Zehner improperly gifted airline seat upgrades to his official superior and solicited a gift of an airline seat upgrade from another employee for his official superior. We found that Mr. Zehner provided at least 10 airline seat upgrades to his official superior. The upgrading of Mr. Zehner's official superior's seating was so commonplace that a mutual expectation developed. On one occasion, Mr. Zehner solicited (b)(6), (b)(7)(C) to upgrade his (Mr. Zehner's) official superior's seating for one flight.

The JER prohibits an employee from giving a gift to an official superior or soliciting a contribution from another employee for a gift to his official superior. The JER defines a gift as any item with monetary value and allows employees on an occasional basis to give an official superior a gift with a value of \$10 or less. The JER also provides that on special infrequent occasions an employee may give an official superior a gift appropriate to the occasion. We determined that Mr. Zehner routinely gifted to, and on one occasion solicited for, his official superior at least 11 United Airlines Economy Plus seat upgrades with a collective value between \$1,199 and \$1,859. We also determined that no JER exceptions applied regarding Mr. Zehner gifting airline seat upgrades to, or soliciting airline seat upgrades for, his official superior, Mr. Blanchard.

We did not substantiate the remaining allegation.

By letter dated March 14, 2014, we provided Mr. Zehner the opportunity to comment on the results of our investigation. In his response, dated April 25, 2014, Mr. Zehner disagreed with our conclusion that he improperly gifted airline seat upgrades to his official superior. Mr. Zehner contended that the upgrades were generated from official travel and were not gifts as defined by the Title 5, Code of Federal Regulations, Section 2635.203(b), "Gifts." After reviewing the matters presented by Mr. Zehner, we stand by our conclusion.²

¹ The complaint contained additional allegations. Based on our investigation, these allegations did not merit further investigation and are addressed in Section III of this report.

² While we have included what we believe is a reasonable synopsis of Mr. Zehner's response, we recognize that any attempt to summarize risks oversimplification and omission. Accordingly, we incorporated Mr. Zehner's comments where appropriate throughout this report and provided a copy of his response to the Secretary of the Air Force together with this report.

We will provide a copy of this report to the Secretary of the Air Force and notify the Director, Office of Personnel Management, of the substantiated allegation.

This report sets forth our findings and conclusions based upon the preponderance of evidence.

II. BACKGROUND

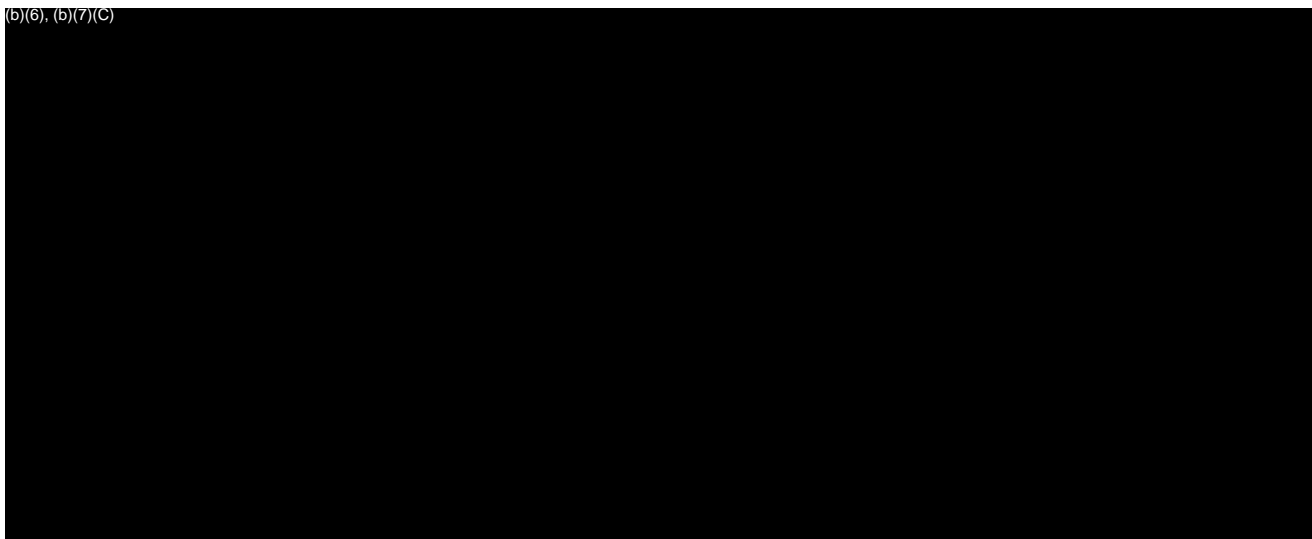
Mr. Zehner assumed duties as the Deputy General Counsel for International Affairs (SAF/GCI) in 1994 and concurrently performed the duties of the position of the General Counsel, Department of the Air Force, from May until June 2009. Mr. Zehner served as the Deputy General Counsel for GCI until April 2013 and subsequently retired from Government service in August 2013.

III. SCOPE

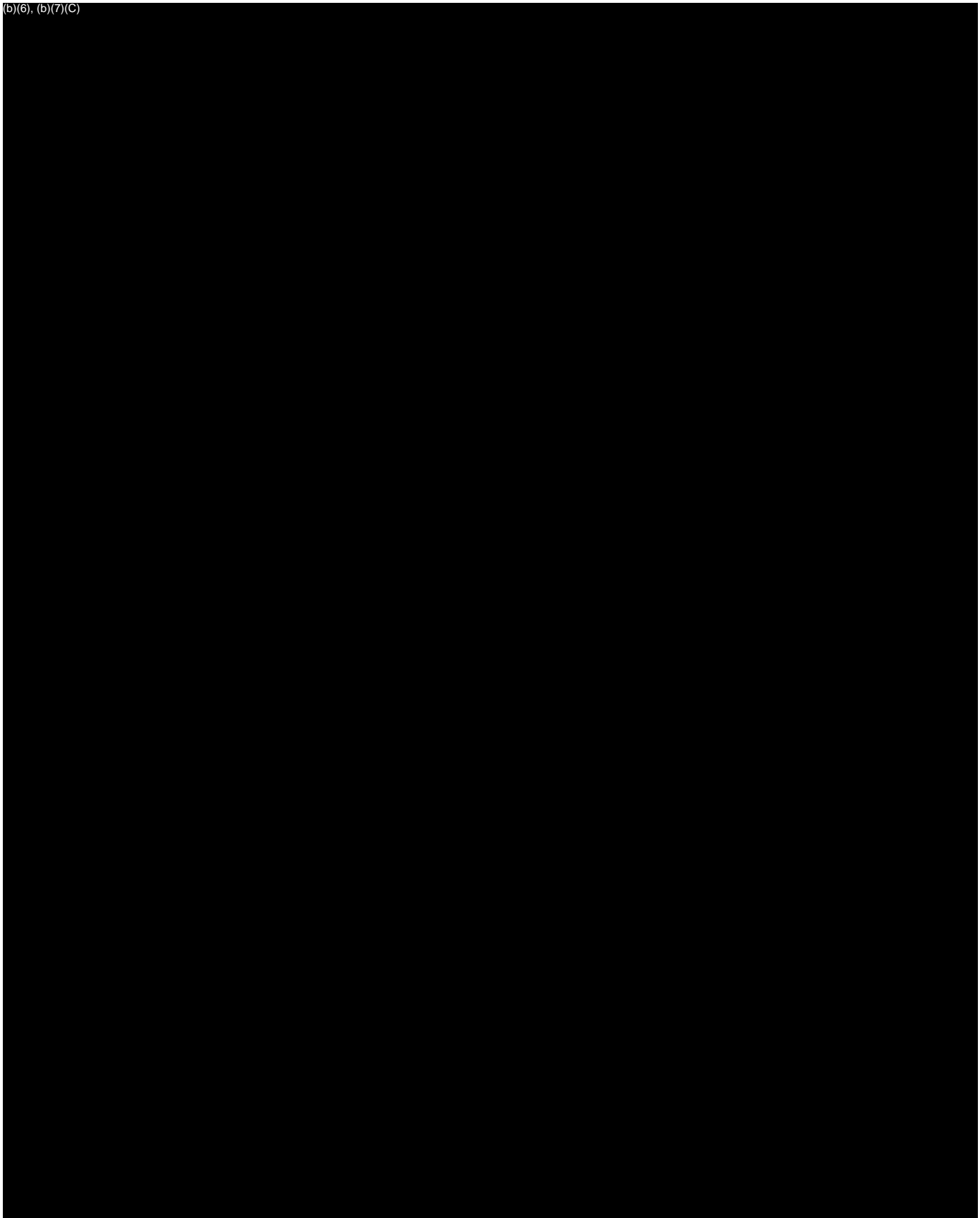
We interviewed Mr. Zehner and nine witnesses with knowledge of the matters under investigation. The witnesses included senior military and civilian personnel currently or formerly assigned to the Office of the General Counsel, Department of the Air Force (SAF/GC), or the Office of The Judge Advocate General (TJAG), U.S. Air Force. We reviewed Defense Finance and Accounting Service (DFAS) travel records, personal airline mileage statements, official email messages, and other relevant documents and standards that govern the issues under investigation.

The DoD Hotline complaint included allegations against Mr. Zehner's official superior, Mr. Charles A. Blanchard, former General Counsel, Department of the Air Force, who resigned in December 2013. Allegations against Mr. Blanchard are addressed in a separate case.

(b)(6), (b)(7)(C)



(b)(6), (b)(7)(C)



IV. FINDINGS AND ANALYSIS

A. Did Mr. Zehner improperly gift airline seat upgrades to his official superior?

Standards

DoD 5500.07-R, “Joint Ethics Regulation (JER),” August 23, 1993, including changes 1-7 (November 17, 2011)

The JER provides a single source of standards of ethical conduct and ethics guidance for DoD employees. Chapter 2, “Standards of Ethical Conduct,” incorporates Title 5, Code of Federal Regulations (CFR), Part 2635, “Standards of Ethical Conduct for Employees of the Executive Branch,” in its entirety.

Subpart A, “General Provisions,” Section 2635.101, “Basic obligation of public service,” states in paragraph (b)(1) public service is a public trust, requiring employees to place loyalty to the Constitution, the laws, and ethical principles above private gain; and in paragraph (b)(14) that employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.

Subpart B, “Gifts From Outside Sources”

Section 2635.203, “Definitions,” states that a gift is any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value. It includes gifts of transportation whether provided in-kind, by purchase of a ticket, payment in advance, or reimbursement after the expense is incurred. Market value is the retail cost the employee would incur to purchase the gift.

Subpart C, “Gifts Between Employees”

Section 2635.302(a), “Gifts to Superiors,” states an employee may not, except as provided in this subpart, (1) directly or indirectly, give a gift to or make a donation toward a gift for an official superior; or (2) solicit a contribution from another employee for a gift to either his own or the other employee’s official superior.

Section 2635.303, “Definitions,” states a gift has the meaning as stated above in Subpart B, Section 2635.203. An official superior is any employee, including but not limited to an immediate supervisor, whose official responsibilities include directing or evaluating the performance of the employee’s official duties. An employee is the subordinate of any of his official superiors. Solicit means to request contributions by personal communication or by general announcement.

Section 2635.304(a), “General exceptions,” provides that on an occasional basis, including any occasion on which gifts are traditionally given or exchanged, a subordinate may give to an official superior items, other than cash, with an aggregate market value of \$10 or less per occasion; food and refreshments to be shared in the office; personal hospitality provided at a residence; and items given in connection with receipt of personal hospitality.

Section 2635.304(b), “Special, infrequent occasions,” provides that a subordinate may give an official superior a gift appropriate to the occasion (1) in recognition of infrequently occurring occasions of personal significance such as marriage, illness, or the birth of a child; or (2) upon occasions that terminate a subordinate-official superior relationship, such as retirement, resignation, or transfer.

Facts

The complaint alleged that Mr. Zehner improperly gave gifts of United Airlines seat upgrades to Mr. Blanchard while on official travel. During the conduct of the investigation, a witness testified that (b)(6), (b)(7)(C) told her that Mr. Zehner asked him to use his frequent flyer status to upgrade Mr. Blanchard’s seating on a flight to Singapore.

United Airlines’ Frequent Flyer Program

Mileage Plus is United Airlines’ frequent flyer program. Mileage Plus members who travel the required number of qualifying miles or segments may earn premier status of silver, gold, platinum, or 1K. Premier status members have complimentary access to Economy Plus seating for themselves and companion(s) at check-in or booking based on Premier level. Table 1 lists the Economy Plus seating benefits available to each Premier level.

Table 1. United Airlines’ Frequent Flyer Program Status and Benefits

Benefit	Premier Silver	Premier Gold	Premier Platinum	Premier 1K®
Complimentary Access to Economy Plus Seating	At check-in	At booking	At booking	At booking
Maximum Number of Economy Plus Companions	1	1	8	8
Confirmation of Economy Plus Seat Upgrades As Early As	Day of departure	48 hours	72 hours	96 hours

Mr. Blanchard’s Mileage Plus account statements reflected that he opened a Mileage Plus account with United Airlines in (b)(6), (b)(7)(C). He achieved (b)(6), (b)(7)(C).

Mr. Zehner’s Mileage Plus account statements reflected that he had (b)(6), (b)(7)(C).

Economy Plus Seat upgrades

Witnesses testified Mr. Zehner arranged upgraded seating for Mr. Blanchard. A witness testified that Mr. Blanchard directed (b)(6), (b)(7)(C) “to get seats ticketed as soon as possible, so that Mr. Zehner could work his magic and get him special seats.” The witness related that she assumed Mr. Zehner called United Airlines to upgrade Mr. Blanchard’s seats because Mr. Blanchard would ask Mr. Zehner if he had “worked his magic and had he called, or words to that effect.”

A second witness testified that Mr. Zehner and (b)(6), (b)(7)(C) (b)(6), (b)(7)(C) always discussed in Mr. Blanchard’s presence whether Mr. Zehner or (b)(6), (b)(7)(C) would use their airline points to upgrade Mr. Blanchard’s seating.³ The witness related they asked her to get them ticketed sooner than normal for a trip to Australia.

On May 1, 2012, in an email concerning Mr. Zehner and Mr. Blanchard’s May 13, 2012, trip to Southwest Asia, Mr. Zehner asked (b)(6), (b)(7)(C) and Mr. Blanchard’s (b)(6), (b)(7)(C) to “please let me know as soon as ticketed so I can try and get Mr. Blanchard into Economy Plus.” On May 9, 2012, the commercial travel office issued airline tickets for the trip. On May 12, 2012, the trip was cancelled because they had not received their approved visas.

A witness testified that (b)(6), (b)(7)(C) told her that Mr. Zehner asked him to use his United Airlines frequent flyer status to upgrade Mr. Blanchard’s seating on a flight to Singapore. (b)(6), (b)(7)(C) and Mr. Zehner both confirmed that Mr. Zehner asked (b)(6), (b)(7)(C) to upgrade Mr. Blanchard to Economy Plus seating for the June 2012 flight to Singapore.

Travel itineraries and DFAS travel vouchers indicated that from June 2009 to October 2012, Mr. Zehner traveled with Mr. Blanchard on 20 United Airlines flights. Mr. Blanchard had Economy Plus seating on 10 of the 20 flights and upgraded himself to First Class seating on one of the 20 flights. Additionally, witness testimony indicated that Mr. Blanchard had Economy Plus seating on one of the two United Airlines flights he traveled with (b)(6), (b)(7)(C) in June 2012. Table 2 lists by year the number of United Airlines flights by type of seating when either Mr. Zehner or (b)(6), (b)(7)(C) accompanied Mr. Blanchard.

Table 2. Mr. Blanchard’s Upgraded Seating on United Airlines Flights with Subordinates

Year	Number of United Airlines Flights	Coach	Economy Plus	First Class
2009	2	2	0	0
2010	7	1	6	0
2011	4	0	4	0
2012	9	7	1	1
Total	22	10	11	1

³ In this report we identify (b)(6), (b)(7)(C)

Mr. Blanchard testified that Mr. Zehner called and upgraded his (Mr. Blanchard's) seating for several flights. He added that he did not remember how many times Mr. Zehner had done this as he could only upgrade actual United Airlines flights. Mr. Blanchard also testified that he had Economy Plus seating on the June 2012 flight to Singapore and that he and (b)(6), (b)(7)(C) were on the same flight. Mr. Blanchard stated that Mr. Zehner could not upgrade him because Mr. Zehner was not on the flight. Mr. Blanchard added that he thought Mr. Zehner asked (b)(6), (b)(7)(C) to upgrade his (Mr. Blanchard's) seating for this flight.

When asked why he asked (b)(6), (b)(7)(C) to upgrade Mr. Blanchard's seating for the flight to Singapore, Mr. Zehner testified:

I was going to do it like I always do, and when it turned out that I wasn't going to be on the same flight, I obviously couldn't do it because he wouldn't be my companion, but when I found out that (b)(6), (b)(7)(C) and [Mr. Blanchard] were on the same flight, I said, (b)(6), (b)(7)(C) would you mind doing that if you're not doing it for somebody else?"

Mr. Zehner stated that (b)(6), (b)(7)(C) agreed to upgrade Mr. Blanchard's seating and was "happy to do it." Mr. Zehner related he might have told Mr. Blanchard that he asked (b)(6), (b)(7)(C) to upgrade Mr. Blanchard's seating.

Mr. Zehner testified he upgraded Mr. Blanchard's seating "[w]henever I traveled with him. Sometimes it worked, sometimes it didn't." Mr. Zehner stated that he and Mr. Blanchard developed a "mutual expectation" that when they traveled together, he (Mr. Zehner) would call United Airlines and use his status to upgrade their seats. Mr. Zehner related he would use his status to upgrade seating for an employee who was accompanying him. He stated he had upgraded (b)(6), (b)(7)(C) seating. Mr. Zehner added it "was a no brainer."

Mr. Zehner further testified that if he could only upgrade seating for one companion he would always choose "the boss over the boss" (b)(6), (b)(7)(C). Mr. Zehner stated:

I think in the military there's a structure of trying to make sure the boss is as comfortable as possible. ... I don't think that I would be in the minority here that you would suggest that your boss would be the appropriate one to do.

Fair Market Value of Economy Plus Seat Upgrades

Participants in the United Airlines' frequent flyer mileage program, Mileage Plus, could exchange mileage to upgrade to Economy Plus seating. Travelers could also purchase Economy Plus seating for each flight at a cost ranging from \$109 to \$169 based on the aircraft, passenger load, and time of year.

Mr. Blanchard testified that the seat upgrades did not have value because Mr. Zehner was able to upgrade due to his Premier Plus status. Mr. Blanchard did not know the fair market value of the seat upgrades he received and stated that upgrades were available for purchase for some flights.

Mr. Zehner testified he thought travelers could purchase Economy Plus seat upgrades on international flights for about \$50 or \$60. Mr. Zehner related that his United Airlines Mileage Plus Premier status allowed him to upgrade a traveling companion thus alleviating the need for Mr. Blanchard to purchase upgraded seating. Mr. Zehner speculated that “perhaps” Mr. Blanchard would have purchased upgraded seating had he (Mr. Zehner) not been able to use his status to upgrade seating for Mr. Blanchard.

Ethics Advice Regarding Seat Upgrades

Mr. Zehner testified he did not view his upgrading of Mr. Blanchard’s airline seating as “even coming into the realm of ‘gee, should I seek advice for this.’” Mr. Zehner continued that he “probably” would have sought advice had he used his frequent flyer miles to upgrade a companion’s seating. Mr. Zehner related that using miles to upgrade was “a different matter,” because it would be “kind of a gift” in that he would need to use over 20,000 or 30,000 miles to upgrade a companion.

Discussion

We conclude that Mr. Zehner improperly gave his official superior, Mr. Blanchard, gifts of airline seat upgrades. We also conclude that Mr. Zehner improperly solicited a gift of an airline seat upgrade from another employee for Mr. Blanchard. We found that Mr. Zehner provided at least 10 United Airlines Economy Plus seat upgrades to Mr. Blanchard. Mr. Zehner testified he would always choose his official superior over a subordinate when upgrading a companion’s airline seating. Mr. Zehner further testified he upgraded Mr. Blanchard’s seating whenever they traveled together.

We also found the upgrading of Mr. Blanchard’s airline seating was so commonplace that a mutual expectation developed for Mr. Zehner to upgrade Mr. Blanchard’s seating. Evidence of the expectation was further reinforced in that Mr. Zehner solicited (b)(6), (b)(7)(C) to provide Mr. Blanchard a seat upgrade for one flight. In total, Mr. Zehner provided at least 10 United Airlines Economy Plus seat upgrades to Mr. Blanchard and solicited one seat upgrade for Mr. Blanchard from (b)(6), (b)(7)(C). We further found that each United Airlines Economy Plus seat upgrade had a market value ranging from \$109 to \$169.

The JER prohibits an employee from giving a gift to an official superior or soliciting a contribution from another employee for a gift to his official superior. A gift is any item with monetary value. The JER provides that on an occasional basis an employee may give an official superior a gift with a value of \$10 or less. The JER also provides that on special infrequent occasions an employee may give an official superior a gift appropriate to the occasion.

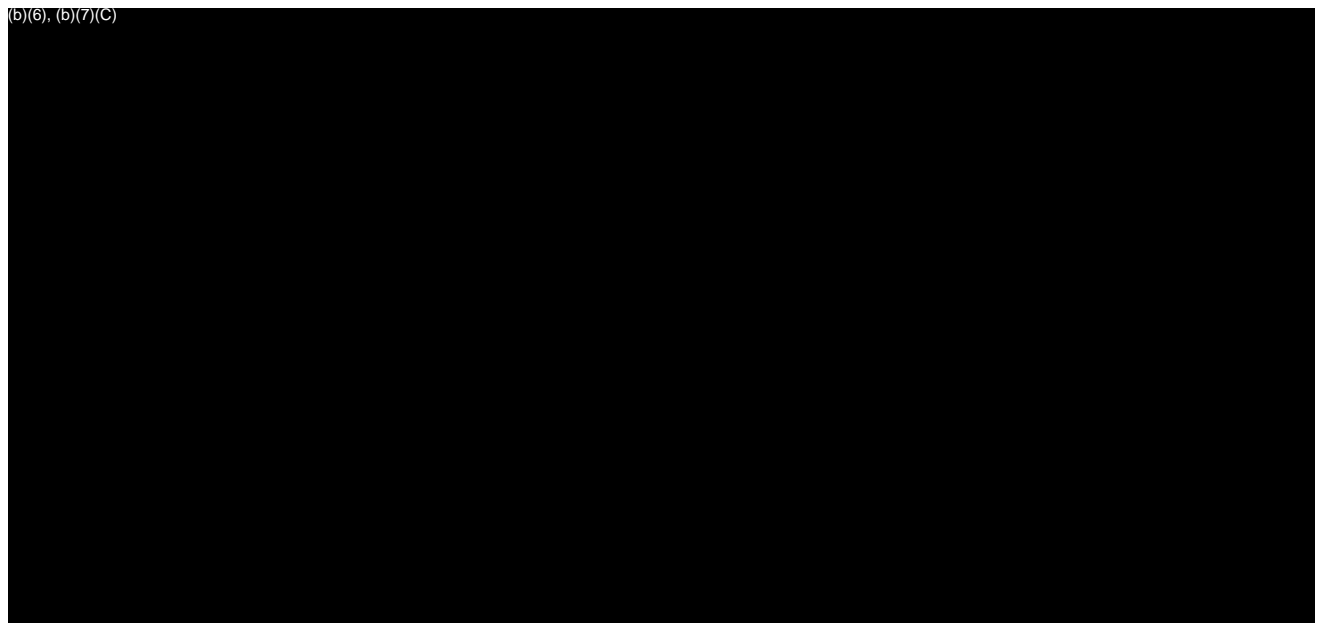
We determined that Mr. Zehner routinely provided gifts totaling 10 United Airlines Economy Plus seat upgrades to his official superior, Mr. Blanchard. We also determined that Mr. Zehner solicited (b)(6), (b)(7)(C) to provide Mr. Blanchard with a gift of one United Airlines Economy Plus seat upgrade. The gifts of airline seat upgrades had a collective market value between \$1,199 and \$1,859. We further determined that no JER exceptions applied regarding Mr. Zehner giving airline seat upgrades to or soliciting airline seat upgrades for his official superior, Mr. Blanchard. Accordingly, we conclude Mr. Zehner violated the JER by routinely giving gifts to and soliciting a gift for his official superior.

Response to Tentative Conclusion

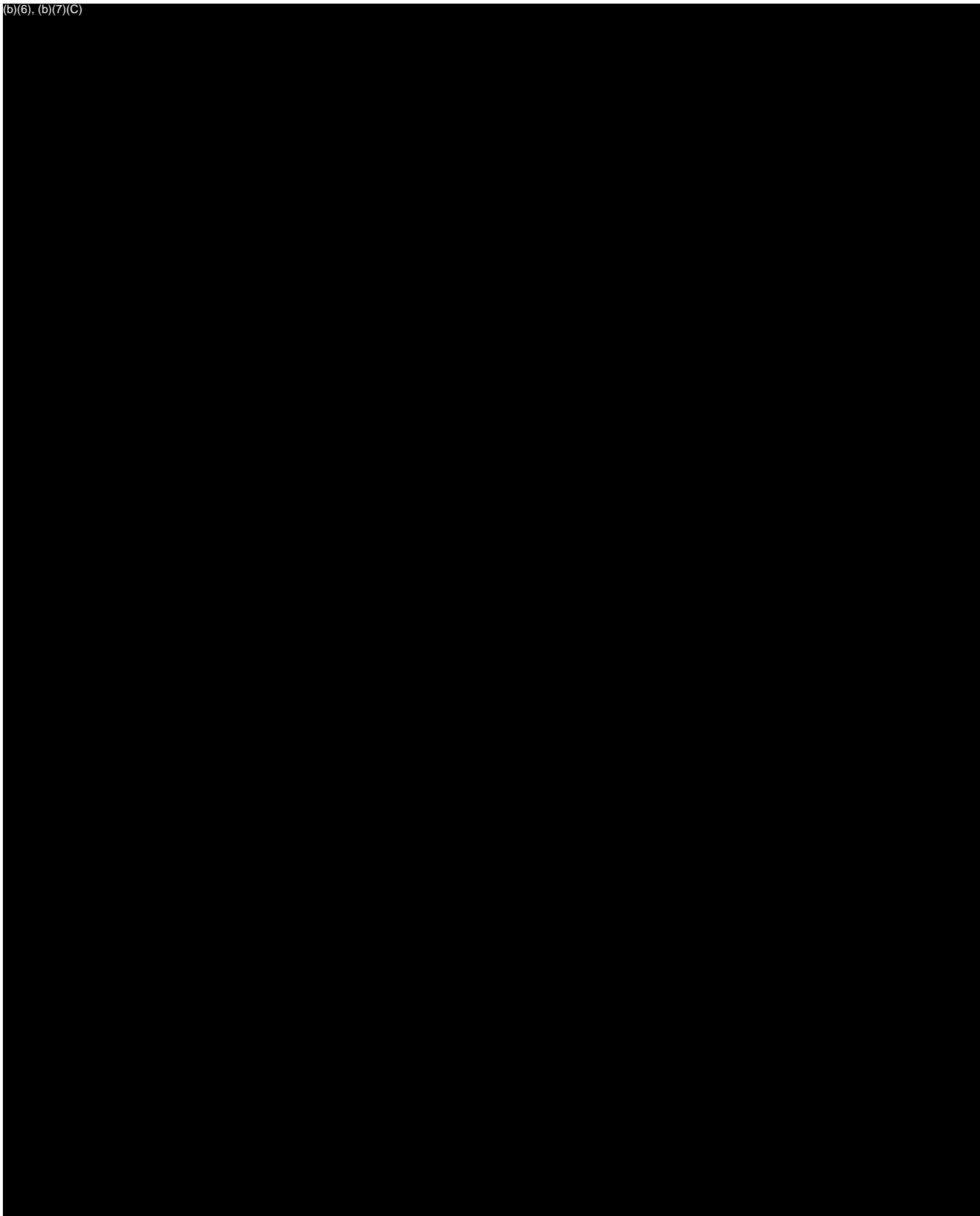
In his response, Mr. Zehner wrote that United Airlines allowed Mileage Plus members with Premier Gold or higher status to request Economy Plus seating for a travel companion. Mr. Zehner continued that “the privilege authorized by United to allow Mr. Blanchard to travel in Economy Plus seating had no ‘market value’ to me whatsoever.” Mr. Zehner wrote that he earned his (b)(6), (b)(7)(C) status solely through Government funded travel and that he designated Mr. Blanchard to receive upgraded seating only on Government funded flights. Mr. Zehner contended that companion seat upgrades were not gifts as defined by 5 CFR 2635.203. Mr. Zehner also contended that providing the upgraded seating to Mr. Blanchard “actually saved the Government money” in that Mr. Blanchard could have had the Government pay for the Economy Plus seating.

We acknowledge promotional items generated from official travel, such as frequent flyer benefits, may be retained by an official traveler for personal use. However, Mr. Zehner repeatedly used his frequent flyer status to provide Mr. Blanchard with seat upgrades. The seat upgrades meet the definition of a gift as defined by 5 CFR 2635.203. Additionally, the fair market value of the seat upgrades is based on the retail cost that Mr. Blanchard, as the receiver of the gifts, would have incur to purchase the seat upgrades. After carefully considering Mr. Zehner’s response, we stand by our conclusion that Mr. Zehner improperly gifted airline seat upgrades to and solicited a gift of an airline seat upgrade for his official superior.

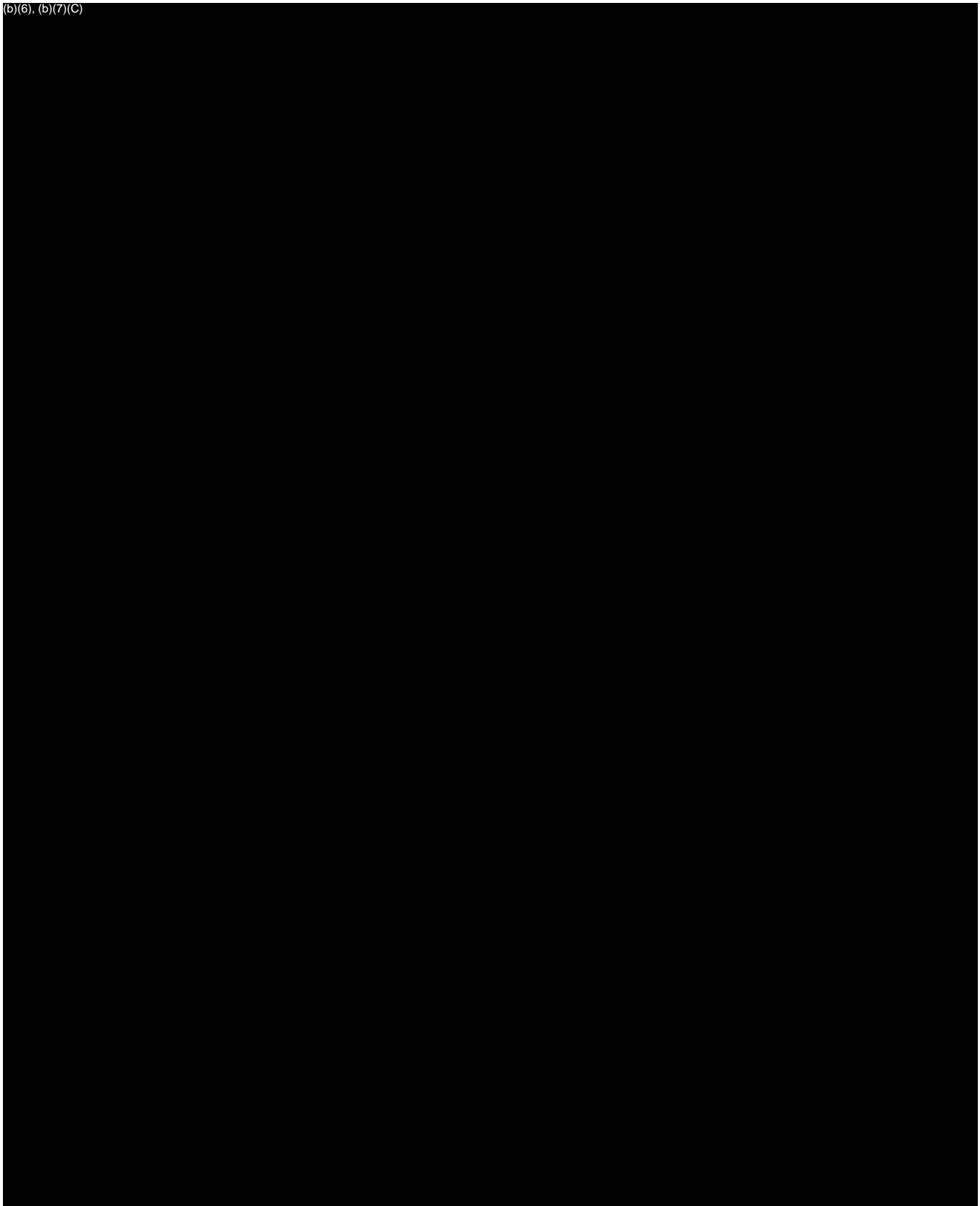
(b)(6), (b)(7)(C)



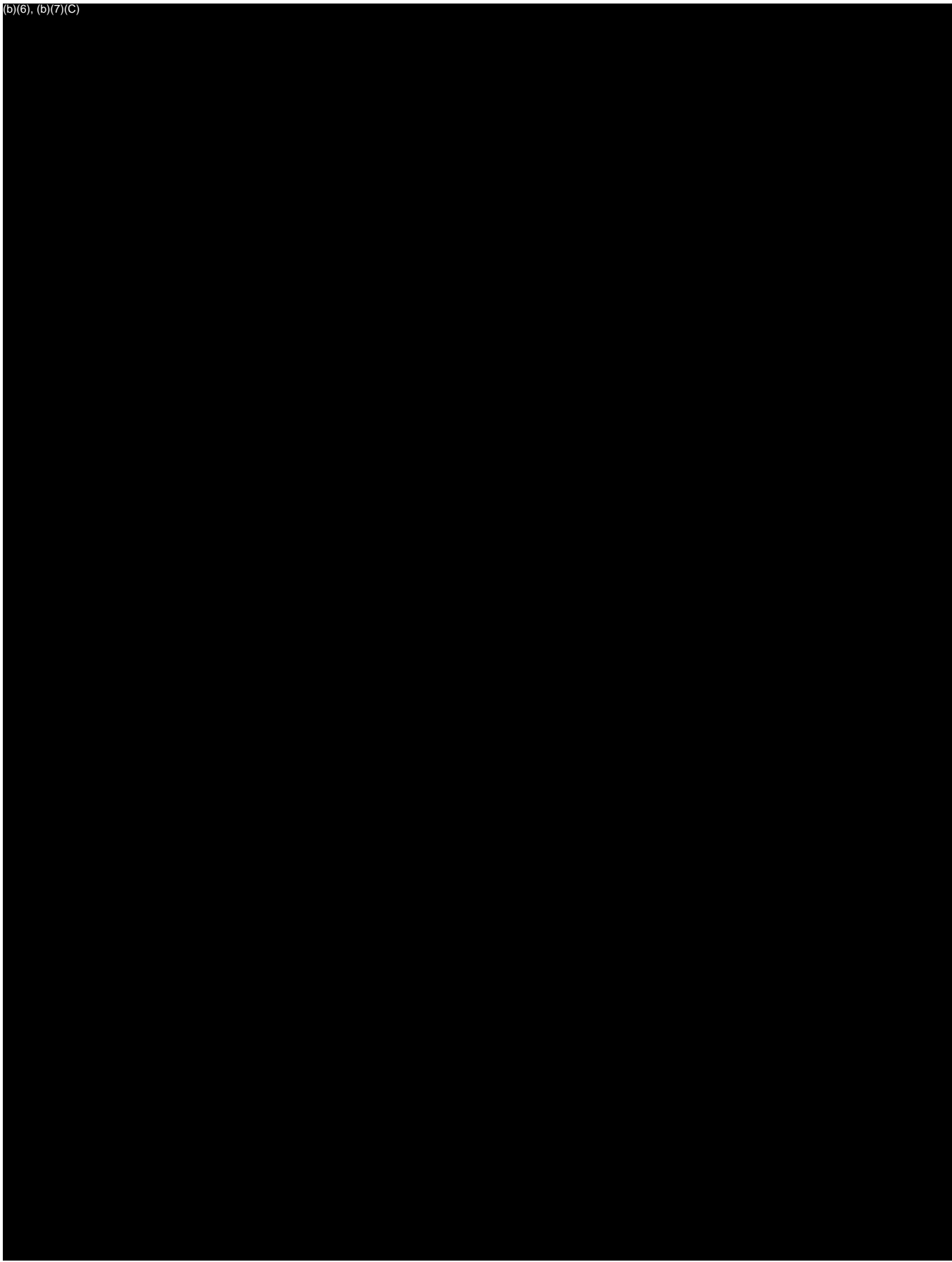
(b)(6), (b)(7)(C)



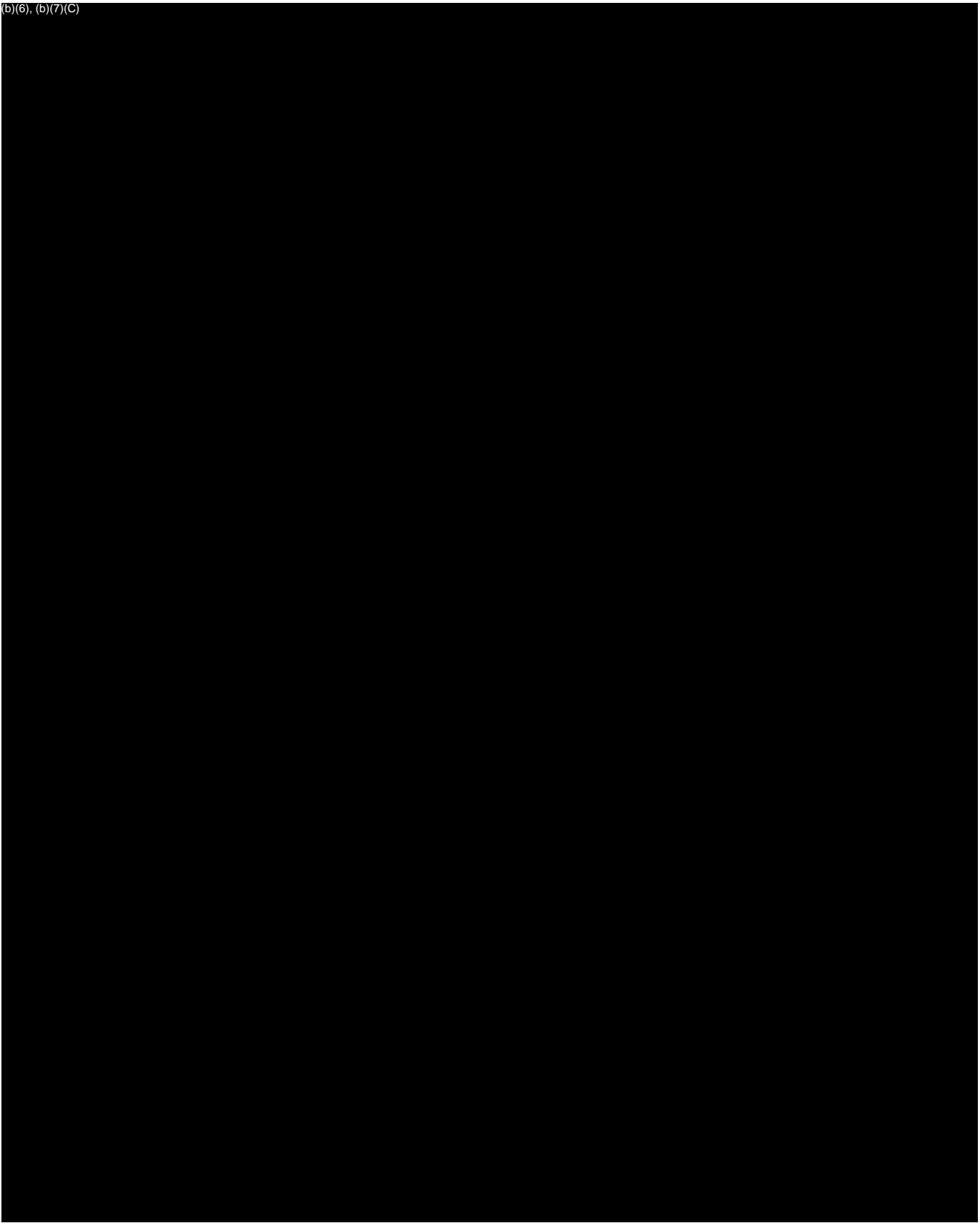
(b)(6), (b)(7)(C)



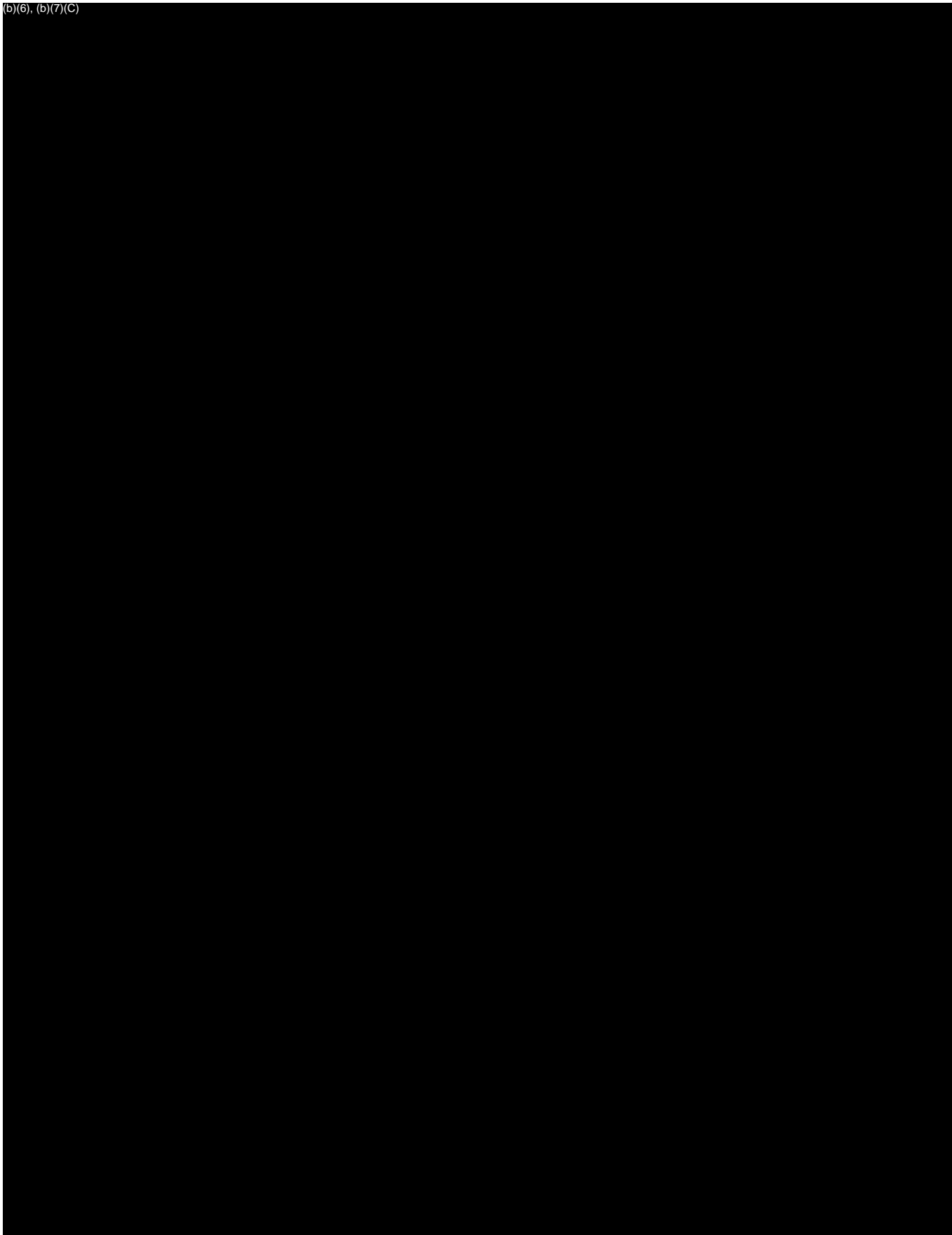
(b)(6), (b)(7)(C)



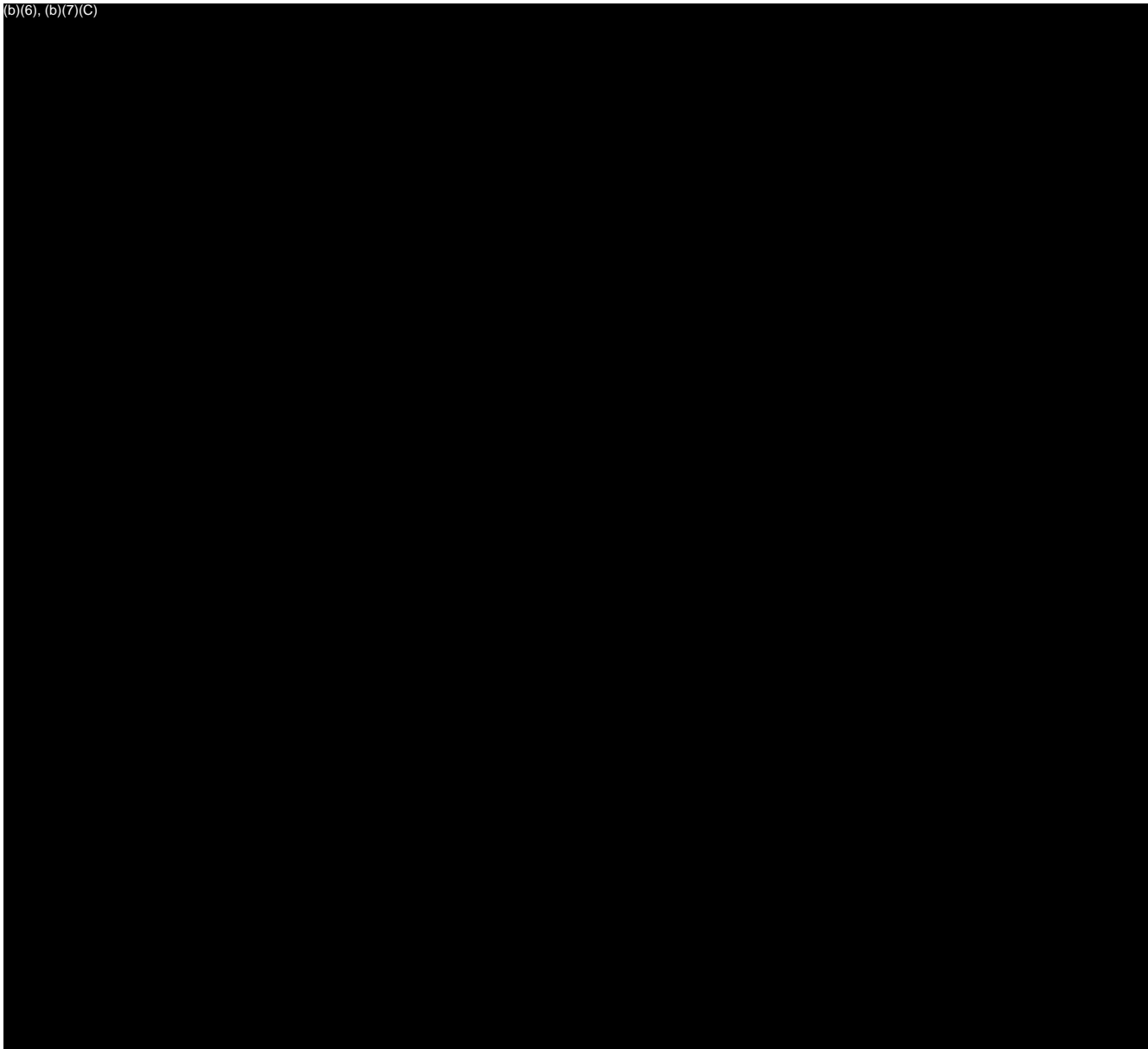
(b)(6), (b)(7)(C)



(b)(6), (b)(7)(C)




(b)(6), (b)(7)(C)



V. CONCLUSIONS

A. Mr. Zehner improperly gifted airline seat upgrades to and solicited a gift of an airline seat upgrade for his official superior.

B. (b)(6), (b)(7)(C)



VI. RECOMMENDATION

A. Provide a copy of this report to the Secretary of the Air Force.

B. Notify the Director, Office of Personnel Management, of the substantiated allegation.

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