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## Legal and Policy Issues

**Joe D. Whitley and Lynne Zusman, Editors**

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## CFIUS and Foreign Investment

**Jonathan G. Cedarbaum and Stephen W. Preston**[1]

Foreign acquisitions of U.S. companies are a routine fact of commercial life. But government and media scrutiny of deals in industrial sectors with potential homeland security implications have become more demanding since 9/11. Although the U.S. is generally open to foreign acquisitions, there are inevitable tensions between promoting open markets, free trade and competition, on the one hand, and ensuring U.S. national security, on the other. Responsibility for resolving those tensions falls largely on the multi-agency Committee on Foreign Investment in the United States (CFIUS).[2/] In addition, several federal departments or agencies oversee industry-specific regimes—in telecommunications, air transport, and nuclear power—that allow government review of direct foreign investment with national security concerns.

Spurred by the weak dollar and booming government revenues in China and several oil-rich countries, acquisitions in the U.S. by foreign entities reached $407 billion in 2007, up 93% from 2006.[3/] Foreign buyers accounted for 46% of the $230.5 billion of U.S. mergers and acquisitions in the fourth quarter of 2007,[4/] the largest percentage of foreign buyers since 1998.[5/]

Although CFIUS is 20 years old, controversial transactions since 9/11, most notably the outcry over the initial approval of United Arab Emirates-based Dubai Ports World's acquisition of a company operating marine terminals in a number of major U.S. ports, have elevated CFIUS

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1 We are very grateful for the extraordinary assistance of Zachary Clopton in the preparation of this chapter.

2/ *See* United States Department of the Treasury, Committee on Foreign Investment in the United States (CFIUS), http://www.ustreas.gov/offices/international-affairs/cfius.

3/ *Weak dollar Fuels China's Buying Speed of U.S. Firms*, Washington Post (Jan 28, 2008)

4/ Zachary R. Mider, *International Deals: Americans Sell Out to Foreign Firms at Record Rate*, Bloomberg News Service, Jan. 9, 2008.

5/ *Id.*

from relative obscurity to the front pages. The increasing investments in the United States by sovereign wealth funds—large pools of investment capital controlled by foreign governments—have also raised new questions in Congress and the Executive Branch about the regulation of foreign investment.[6/] As with investments by other sorts of foreign investors, investments by sovereign wealth funds emanating from countries such as China and the Gulf Arab states, with which the United States has important strategic and geopolitical entanglements, have raised particular concerns.

Responding to these trends, Congress passed the Foreign Investment and National Security Act (FINSA) in late 2007,[7/] which brought some significant changes to the CFIUS regime. The President provided additional clarification through an Executive Order on January 23, 2008.[8/] Further clarification has come in the Treasury Department's revised CFIUS regulations, required under FINSA, and effective as of December 22, 2008.[9/] Industry-specific regimes managed by various departments and agencies have also continued to develop alongside the CFIUS process.

All of these developments are pointed reminders that, although the United States prides itself on openness to foreign investment, such transactions may raise special regulatory and political issues. Parties to potential foreign acquisitions of U.S. companies or assets need to consider carefully the CFIUS and other regulatory processes in planning—and potentially in valuing—such transactions.

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6/ For helpful brief overviews, see Robert M. Kimmitt, *Public Footprints in Private Markets*, FOREIGN AFFAIRS, Vol. 87, No. 1, at 119-30 (Jan./Feb. 2008); *Asset-backed Insecurity*, THE ECONOMIST 78-80 (Jan. 19, 2008).

7/ Pub. L. No. 110-49, 121 Stat. 246 (2007).

8/ Executive Order: Further Amendment of Executive Order 11858 Concerning Foreign Investment in the United States, Jan. 23, 2008.

9/ *See* 73 Fed. Reg. 70,702 (Nov. 21, 2008).

## I. CFIUS

### A. Basic Framework and History

In response to concerns about possible effects of foreign direct investment on national security, in 1988 Congress enacted the Exon-Florio Amendment to the Defense Production Act of 1950. Exon-Florio authorizes the President to investigate the impact on U.S. national security of "mergers, acquisitions, and takeovers" by "foreign persons" that result in foreign control over a U.S. company or certain U.S. assets.[10/] If the President finds (1) "credible evidence" that a transaction would impair national security, and (2) that no other provision of law grants him authority to take steps to ameliorate this impact, he may act to block the transaction.[11/] The President's findings are not subject to judicial review.[12/]

Exon-Florio applies both to proposed mergers and acquisitions and to completed transactions. Unless a party to the transaction voluntarily seeks pre-consummation review, there is no time limit on the President's authority to investigate a completed transaction. A voluntary notice that results in CFIUS clearance grants the transaction a safe harbor from post-closing review and challenge (except possibly if the parties make material misrepresentations in noticing the transaction or materially breach a condition of CFIUS's clearance approval).[13/]

CFIUS is charged with implementing Exon-Florio. An inter-agency body, CFIUS was initially established by executive order and has now been codified in statute by FINSA.[14/] Chaired by the Secretary of the Treasury, it includes among its members the Secretaries of Defense, Homeland Security and Commerce, and the Attorney-General. The Director of National Intelligence serves as an *ex officio* member. The Committee's review process is

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10/ 50 U.S.C. app § 2170.
11/ *Id.* at § 2170(d)(4).
12/ *Id.* at § 2170(e).
13/ *Id.* at § 2170(b)(1)(D)(iii).
14/ Pub. L. No. 110-49, 121 Stat. 246 (2007), and Executive Order 11858, discussed below.

confidential, and the process is intended to focus on the true national security implications of particular deals rather than political considerations.[15/]

The CFIUS notification process is voluntary, requires no filing fee, and imposes no mandatory waiting period before closing the transaction, though parties to a CFIUS review or investigation typically wait until the process is complete before closing. The CFIUS process involves four steps: (1) a voluntary filing submitted by one or both parties to the transaction; (2) a 30-day Committee review of the transaction; (3) a potential additional 45-day Committee investigation; and (4) a 15-day period during which the President decides to permit or block the acquisition (or seek divesture after an ex post facto review).[16/]

CFIUS had traditionally approved the vast majority of notified transactions during the initial 30-day period, but a growing number of transactions are now being subjected to a second-phase 45-day investigation. Indeed, in 2006 alone, CFIUS launched seven 45-day investigations, as many as had been initiated in the previous five years combined.[17/] In 2007, CFIUS conducted six 45-day investigations and parties withdrew at least six voluntary notices.[18/] This trend will almost certainly continue, especially in light of increased political pressure from Congress for CFIUS to scrutinize transactions and the general increase in foreign investment in the United States.

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15/ *See* 50 U.S.C. app § 2170.

16/ *Id* at § 2170(b) and (d).

17/ *See* Testimony of Treasury Assistant Secretary Clay Lowery before the House Financial Services Committee, Feb. 7, 2007 (available at http://www.treas.gov/press/releases/hp250.htm).

18/ *See* Government Accountability Office, *Foreign Investment: Laws and Policies Regulating Foreign Investment in 10 Countries*, Report to the Honorable Richard Shelby, Ranking Member, Committee on Banking, Housing, and Urban Affairs, U.S. Senate, GAO-08-320, February 2008, at 6; Council on Foreign Relations, "Global FDI Policy Meeting," Washington, D.C., June 26, 2008.

## B. Scope and Focus of CFIUS Review

In determining whether voluntarily to seek "safe harbor" protection by notifying CFIUS of a potential transaction, parties should consider three threshold questions: (1) does the transaction involve a "foreign person" acquiring a "U.S. business"?; (2) might the transaction implicate U.S. national security interests?; and (3) might the structure of the transaction bring it outside CFIUS's jurisdiction altogether?

The first question can be surprisingly tricky and sometimes requires close analysis of the Exon-Florio provisions and the CFIUS regulations. For instance, under Exon-Florio, the same entity could be a "foreign entity" or a "U.S. business" depending on whether it is the target or the acquirer.[19/] Any entity is a U.S. person to the extent of its business activities in the United States. Accordingly, the application of the statute could be triggered if a foreign company acquires (directly or indirectly) the U.S. branch office or subsidiary of a foreign company.[20/] On the other hand, the same foreign-controlled U.S. branch or subsidiary would itself be deemed a foreign person for Exon-Florio purposes if it acquires a U.S. company or U.S. assets because the new regulations define a "foreign person" to include "any entity over which control is exercised or exercisable by a foreign national, foreign government, or foreign entity."[21/]

The second inquiry is extraordinarily open-ended and may be susceptible to changing public policy concerns. The notion of "national security interests" can be writ quite large. The newly enacted FINSA gives some limited guidance, making clear that national security includes "homeland security" concerns but not, apparently, "economic security."[22/] FINSA also makes clear that transactions involving "critical infrastructure," "critical technologies," and "major

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19/ *See* 31 C.F.R. § 800.216 (2008) (examples 3 and 4); *id.* § 800.226 (2008).
20/ *See* 31 C.F.R. § 800.226 (2008).
21/ *See* 31 C.F.R. § 800.216 (2008).
22/ 50 U.S.C. app. § 2170(a)(5).

energy assets" may well raise national security concerns.[23/] The new regulations, described more fully below, offer some additional clarity but still leave considerable room for debate and Executive Branch discretion.

As a practical matter, the Committee has often shown particular interest in transactions when the target U.S. company has classified contracts with the U.S. government or provides products or services involving U.S. export-controlled technologies, operates or supplies U.S. critical infrastructure such as the telecommunications network, or has significant holdings in strategic natural resources such as petroleum; or when CFIUS member agencies have specific "derogatory intelligence" about the foreign purchaser. CFIUS may also examine whether the transaction will result in an absence of U.S.-controlled companies that supply technology or products deemed important to U.S. security.

Finally, the limits of CFIUS's jurisdiction have become an increasingly important subject for inquiry as foreign entities have stepped up the pace of investment in the United States. Under the statute, only transactions that "could result in foreign control" are "covered transactions" subject to CFIUS review.[24/] The new regulations, described below, provide additional guidance about the meaning of "foreign control" in the CFIUS context.

### C. Recent Developments

#### 1. FINSA

In 2007, Congress enacted the Foreign Investment and National Security Act of 2007 ("FINSA"). FINSA addresses many of the issues that have been the focus of concern with CFIUS review and codifies elements of CFIUS membership and process.

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[23/] *Id.* at § 2170(f)(6) & 2170(f)(7).
[24/] 50 U.S.C. app. § 2170(a)(3).

FINSA established the membership of CFIUS by statute.[25] The Secretary of the Treasury chairs the Committee, but, under FINSA, other agencies may be appointed "lead agency" with respect to particular investigations depending on the nature of the transaction.[26] The Departments of Defense, Homeland Security, Commerce, and Justice often take the most active roles in the CFIUS process. Other cabinet departments and economic and national security bodies within the Executive Office of the President also serve on the Committee.[27] An important addition that FINSA mandated is a defined role for the Director of National Intelligence, who is now an *ex-officio* member and must evaluate a transaction's national security implications.[28]

Under FINSA, if CFIUS decides not to clear the transaction in the 30-day review period, then it must commence an additional 45-day investigation at or before the end of the initial review period.[29] FINSA requires an extended investigation whenever the transaction threatens to "impair national security," is a "foreign government-controlled transaction," or results in foreign control of "critical infrastructure."[30] FINSA leaves CFIUS with broad discretion to determine if a transaction threatens national security. The statute also leaves the term "critical

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25 *See id.* at § 2170(k) (listing the membership as: "(A) the Secretary of the Treasury; (B) the Secretary of Homeland Security; (C) the Secretary of Commerce; (D) the Secretary of Defense; (E) the Secretary of State; (F) the Attorney General of the United States; (G) the Secretary of Energy; (H) the Secretary of Labor (nonvoting, *ex officio*); (I) the Director of National Intelligence (nonvoting, *ex officio*); and (J) the heads of any other executive department, agency, or office, as the President determines appropriate, generally or on a case-by-case basis."

26 *Id.*

27 *See* Executive Order: Further Amendment of Executive Order 11858 Concerning Foreign Investment in the United States, Jan. 23, 2008.

28 50 U.S.C. app § 2170(b)(4)(D).

29 50 U.S.C. app. § 2170(b)(2)(B)(i)(I).

30 *Id.* at §§ 2170(b)(2)(B)(i)(II) and 2170(b)(2)(B)(i)(III). An investigation of a foreign government-controlled or critical infrastructure transaction is not required if the Secretary of the Treasury (or the Deputy Secretary) and the head of the lead agency (or deputy head) jointly determine that the transaction will not impair the national security of the United States. *Id.* at § 2170(b)(2)(D)

infrastructure" defined in only general terms[31]; experience suggests that telecommunications and transportation infrastructure would typically qualify, and the statute suggests that energy assets are a specific form of critical infrastructure.[32] The range of other assets that could fall within this definition seems almost limitless, however.

Among the additional factors CFIUS must now consider in its review are the impact of the transaction on critical infrastructure, broadly defined, as well as energy assets and critical technologies.[33] In the case of foreign government-controlled transactions – that is, transactions in which the buyer is owned or controlled by a foreign government – CFIUS must also consider the relevant country's compliance with U.S. and multilateral counter-terrorism, non-proliferation, and export control regimes.[34]

Reflecting the seriousness with which the U.S. Government views foreign investment, FINSA requires high-level sign-off for foreign government-controlled or critical infrastructure transactions that do no proceed to the 45-day investigation stage.[35] In addition, high-level sign-off is required for certifications of completed investigations, which CFIUS must submit to Congress.[36] The Act also creates specific authority for CFIUS to enforce mitigation agreements.[37] Furthermore, it explicitly establishes CFIUS's "evergreen" authority to reopen a

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31 *Id.* at § 2170(a)(6): "The term 'critical infrastructure' means, subject to rules issued under this section, systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security."

32 *Id.* at § 2170(f)(6).

33 "The term 'critical technologies' means critical technology, critical components, or critical technology items essential to national defense, identified pursuant to this section, subject to regulations issued at the direction of the President." *Id.* at § 2170(a)(7).

34 *Id.* at § 2170(f).

35 *Id.* at § 2170(b)(2)(D) (requiring sign-of at Secretary or Deputy level by Treasury and lead agency).

36 *Id.* at § 2170(b)(3)(C)(iv)(II)(bb).

37 *Id.* at § 2170(l)(1).

transaction that has been approved if there has been an intentional breach, and no other remedies will suffice.[38/]

Although FINSA preserved the review process's confidentiality requirements, Congress added requirements designed to allow it to exercise increased supervision. CFIUS must now report to Congress at the end of reviews and formal investigations and also report annually about its activities.[39/]

As a result of FINSA, companies can expect that more transactions will be reviewed, and that more reviews will be exacting, resulting in full, formal investigations. This is inevitable given both Congress' increased attention and the Act's expansive view of national security—one that the CFIUS agencies already seem to have adopted. Because of this expected increase in scrutiny, as well as the Act's clear support for spontaneous CFIUS review and action if any deal presents concerns, companies should be careful to consider whether any aspect of their transactions might trigger CFIUS's jurisdiction. That question may become more complex as companies employ innovative financial structures for their acquisitions. Companies also should expect more involved mitigation undertakings given the FINSA's mandate to CFIUS to use such measures. Finally, they should expect longer-term interaction with and oversight by the relevant CFIUS agencies in the wake of any deal that raises national security concerns.

### 2. Executive Order

On January 23, 2008, President Bush issued Executive Order 13456, amending Executive Order 11858, concerning foreign investment in the United States.[40/] The new Executive Order provides guidance concerning the implementation of FINSA.[41]

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38/ *Id.* at § 2170 (b)(1)(D)(iii)(I).

39/ *Id.* at § 2170(g).

40/ "Executive Order 13456: Further Amendment of Executive Order 11858 Concerning Foreign Investment in the United States," January 23, 2008.

The Order carefully reiterates the administration's pro-investment policy, stating that the United States "unequivocally supports" international investment, which "promotes economic growth, productivity, competitiveness, and job creation," while stressing that such investment must be "consistent with the protection of the national security." That same careful balancing act can be seen in the Order's addition of new members and observer agencies to CFIUS: on the "pro-business" side, the order adds the U.S. Trade Representative as a member and the Office of Management and Budget, the Council of Economic Advisors, and the Assistant to the President for Economic Policy as observers. On the "national security" side, the Order adds the Office of Science and Technology Policy as a member and, as observers, the Assistants to the President for National Security Affairs and for Homeland Security and Counterterrorism.

At the same time, the Order contains several provisions clearly designed to formalize and strengthen Treasury's authority over the CFIUS process. The Order expressly delegates to Treasury the President's power to initiate review of a transaction that has been submitted to CFIUS or to initiate a review unilaterally. It also provides Treasury with explicit authority (after consultation with the Committee) to request that the Director of National Intelligence prepare an analysis of the risks presented by a proposed transaction.

Some of the clarifying measures adopted in the Executive Order may have a more direct impact on transactions subject to CFIUS. For example, the Order provides that CFIUS must initiate a 45-day, second-stage "investigation" of a transaction if even one member agency so requests. Under the Order, CFIUS may require a mitigation agreement to remedy "any national security risk"; however, the agency proposing that agreement must provide the Committee with a written showing concerning the perceived national security risk posed by the transaction and the

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[41] Whether President Obama will revise the Executive Order further remains to be seen. Until then, President Bush's Order 13456 will continue to be effective.

"risk mitigation measures" that will address such national security risks, and CFIUS must decide whether to approve the mitigation proposal. Such agreements should not, except in "extraordinary circumstances," require that a party consent to comply with existing law. The Order also provides that the provision in FINSA permitting "reopening" of a previously reviewed deal should be read narrowly, as the Administration expects that it will be triggered only in "extraordinary circumstances."

Finally, the Order reminds the agencies that will carry out FINSA that they are bound not to disclose information that could impair "foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties"—a provision likely designed as a reminder to CFIUS agencies of the Administration's emphasis on Executive secrecy in the face of FINSA's new emphasis on reports to Congress.

### 3. New Regulations

FINSA required the Treasury Department to issue new implementing regulations, and on November 21, 2008, Treasury published the final regulations in the *Federal Register*.[42] The regulations became effective December 22, 2008.[43] The new regulations do not govern transactions where the parties had made a commitment to enter into the transaction before December 22, 2008, whether, for example, by signing a written agreement with material terms, making a public offer to purchase shares, or soliciting proxies in the election of the board of directors of a target company.[44] Transactions noticed to CFIUS before December 22, 2008 will continue to be governed by the prior procedural regulations.[45]

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42 *See* 73 Fed. Reg. 70,702 (Nov. 21, 2008). For the proposed regulations, see 73 Fed. Reg. 21,861 (April 23, 2008).

43 *See* 31 CFR § 800.210 (2008).

44 *See* 31 CFR § 800.103 (2008).

45 *See id.*

The new regulations address both the process and substance of CFIUS review. Overall they make the review process a little more streamlined and the substantive standards a little more fully defined, often codifying the CFIUS "common law" that had evolved in secret over the past two decades. Procedurally, the regulations "encourage" pre-filing submissions,[46] more detailed information in the voluntary notice,[47] and certifications of accuracy (with civil penalties of up to $250,000 per material misstatement or omission).[48] The regulations also authorize the CFIUS Chairperson to designate one or more agencies as a lead agency for all or a portion of a review, investigation, negotiation, or mitigation agreement monitoring assignment, as established in FINSA.[49]

The new regulations also address many definitional issues, three of which warrant particular mention. First, the proposed regulations adopt a functional definition of "control," and avoid a categorical bright line test.[50] Recall that CFIUS jurisdiction extends only to transactions that involve a change in control. The proposed regulations include a list of ten "important matters affecting an entity," as well as a list of six minority shareholder protections that are not generally considered to confer "control." While the lists clearly expand upon the prior regulations, most of the new provisions simply codify the "common law" of CFIUS, that is, the practice that often had been followed in particular cases to come before CFIUS. Common minority shareholder protections, such as the power to prevent the sale or pledge of all or substantially all of the assets of an entity and the power to purchase additional shares to prevent dilution, are among the rights that will not, in and of themselves, be deemed to confer "control." On the other hand, the ability to select new business lines or ventures that an entity will pursue

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46/ *See* 31 CFR § 800.401(f) (2008).
47/ *See* 31 CFR § 800.402 (2008).
48/ *See* 31 CFR §§ 800.701(c), 800.801 (2008).
49/ *See* 31 CFR § 800.218 (2008).
50/ *See* 31 CFR § 800.204 (2008).

and the power to appoint or dismiss officers or senior managers are deemed to be indicia of "control."[51]

Notably, the new regulations preserve the so-called "10% rule"—that purchases of no more than 10% of voting securities made solely for the purpose of investment are not covered transactions.[52] They do provide useful clarification, by reference to examples. Thus, the new version of the 10% rule makes clear that a ten-percent-or-less investment does not satisfy the rule where, among other things, the foreign person has contractual rights that give it the power to control important matters or where the foreign person has the right to appoint one or more board seats.[53]

Second, the proposed regulations broaden the definition of "foreign person" to include "foreign entities," which are defined to mean companies, branches, trusts, associations organized under the laws of a foreign country "whose equity securities are primarily traded on one or more foreign exchanges" or whose "principal place of business is outside the United States," unless the entity can demonstrate that a majority of its equity "is ultimately owned by U.S. nationals."[54]

Third, the regulations track the statutory definition of "critical infrastructure" as "a system and asset, whether physical or virtual, so vital to the United States that the incapacity or destruction of the particular system or asset of the entity over which control is acquired pursuant to [the] covered transaction would have a debilitating impact on national security," while making clear that this determination is to be made on a case-by-case basis with reference to the particular assets at issue in the proposed transaction.[55] The statutory definition of "critical technologies," however, is expanded upon to incorporate by reference the definitions from various existing

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51 *See* 31 CFR § 800.204(a)(5), (a)(8) (2008).
52 *See* 31 CFR §§ 302(b), 800.223 (2008).
53 *See id.* (examples 2 and 3).
54 *See* 31 CFR §§ 800.216(a), 800.212 (2008).
55 *See* 31 CFR § 800.208 (2008).

regulatory regimes that deal with the export, trade, or handling of sensitive goods, technologies, and services. Specifically, the new regulations define "critical technologies" to include, among other things, "[d]efense articles or defense services covered by the United States Munitions List"; "[t]hose items specified on the Commerce Control List ... that are controlled pursuant to multilateral regimes (*i.e.*, for reasons of national security, chemical and biological weapons proliferation, nuclear nonproliferation, or missile technology), as well as those that are controlled for reasons of regional stability or surreptitious listening"; certain "nuclear equipment, parts and components, materials, software and technology specified in the Assistance to Foreign Atomic Energy Activities regulations"; and "[s]elect agents and toxins specified in the Export and Import of Select Agents and Toxins regulations."[56/] The regulations state that voluntary notices filed with CFIUS shall identify, among other things, any "critical technologies" produced or traded by the U.S. business that is the subject of the covered transaction.[57/]

### 4. Sovereign Wealth Funds

The increasing prominence of sovereign wealth funds has added an additional layer of concern about the possible national security significance of foreign investment. Sovereign wealth funds presently control about $2.5 trillion, and that figure is expected to grow by perhaps $1 trillion per year for the next decade at least.[58/] Sovereign wealth funds' present holdings represent only about 3% of global assets, but they already top the capital held by private equity firms and hedge funds.[59/]

The U.S. Government has taken notice. FINSA itself mandates the additional 45-day investigation where the buyer is a foreign sovereign wealth fund or other state-owned enterprise.

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56/ *See* 31 CFR § 800.209 (2008).
57/ *See* 31 CFR § 800.402(c)(4) (2008).
58/ Kimmitt, *Public Footprints in Private Markets*, at 119.
59/ *Asset-backed Insecurity*, at 79.

The Executive Order described above directs the Department of Commerce to monitor and report on foreign investment trends and significant developments. The Treasury Department has initiated a review of policies related to sovereign wealth funds, has engaged in bilateral talks with governments controlling significant funds, and has encouraged dialogue between investor and recipient countries. The U.S. has also pushed for the International Monetary Fund, with the help of the World Bank, to develop a set of best practices to encourage transparency and strictly market-based, rather than politically motivated, investment by sovereign wealth funds. At the same time, the U.S. has supported efforts of the Organization for Economic Cooperation and Development (OECD) to encourage a parallel set of best practices for recipient countries, emphasizing openness to investment and evenhandedness in the treatment of foreign investors.[60/]

These steps suggest that, for the moment, the Executive Branch does not see the need for any legislative modifications of the CFIUS process to deal with sovereign wealth funds. But some voices in Congress are already questioning that approach and suggesting that further revision of the CFIUS statute may be necessary.[61/]

### 5. Investment Review Regimes in Other Countries

The United States is not alone in regulating foreign direct investment with an eye toward national security. In the last few years, at least eleven major recipients of foreign direct investment have approved or are considering new laws that could create barriers to foreign

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60/ On all these efforts, see Kimmitt, *Public Footprints in Private Markets*. In September 2008, the International Working Group of Sovereign Wealth Funds, coordinated by the IMF, reached agreement on a draft set of Generally Accepted Practices and Principles (GAPP). *See* Press Release No. 08/04, September 2, 2008, available at http://www.iwg-swf.org/pr/swfpr0804.htm. In April 2008, the OECD published a report on recipient country investment policies, encouraging openness to sovereign wealth fund investment. *See* OECD - Investment Committee Report, "Sovereign Wealth Funds and Recipient Country Policies," April 4, 2008, available at http://www.oecd.org/dataoecd/34/9/40408735.pdf.

61/ *See, e.g.*, Hearing of the Senate Foreign Relations Committee, "Sovereign Wealth Funds: Foreign Policy Consequences in an Era of New Money," *Federal News Service*, June 11, 2008; Sovereign *Funds Need Best Practices, Not New Legislation, Treasury Official Says*, BNA Daily Report for Executives A-28 (Feb. 14, 2008).

investment. Countries have passed new laws protecting "economic security," established new national security review processes for foreign investment, or created additional mechanisms to address investment by foreign governments. According to a Council on Foreign Relations report, three common forces are driving the new investment restrictions: the appearance of new sources of investment; greater governmental ownership and involvement in cross-border investment; and the strong economic positions of host countries.[62/]

## II. Industry Specific Review Regimes

Beyond the general rules of CFIUS and FINSA, the U.S. Government has established regulations for foreign investment as it relates to specific industries.

### A. Telecommunications

The Communications Act of 1934 includes various mechanisms by which the Federal Communications Commission (FCC) may review foreign participation in the telecommunications industry. First, the FCC can regulate foreign participation in the U.S. telecommunications industry at the license issuance and transfer stages. The FCC must approve any application for any new license. The FCC is required to consider the public interest, which can include national security considerations vis-à-vis foreign applicants.[63] Similarly, any transfer of a license requires FCC approval and includes a public interest factor.[64] As a condition of granting (or approving the transfer of) a license, the FCC may ask applicants to sign Network Security Agreements with various executive agencies, which are designed to mitigate the

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62/ David M. Marchick and Matthew J. Slaughter, "Global FDI Policy: Correcting a Protectionist Drift," Council on Foreign Relations Press, June, 2008.

63 47 U.S.C. § 309(a). *See* 47 C.F.R. §§ 20.5, 22.5, 22.7, 24.12, 27.12, 27.302, 73.3564, and 90.1303. A similar requirement and review procedure exists for submarine cable licenses pursuant to 47 U.S.C. § 34-35.

64 47 U.S.C. § 310(d).

Government's concerns with particular application.[65] Unlike CFIUS mitigation agreements, Network Security Agreements are generally made public as part of the license.[66]

In addition, the Communications Act regulates the ownership of wireless communication, including radio stations, broadcast television, cellular telephone companies and most "landline" telephone companies (but not to cable companies), regardless of whether a technical "acquisition" or "transfer" of the license occurred.[67] Section 310(b) proscribes direct ownership by aliens, corporations organized under the laws of any foreign government, and corporations where more than one-fifth of the capital stock is owned of record or voted by aliens, foreign governments, foreign corporations, or their representatives.[68] This section also allows the Federal Communication Commission to deny licenses to corporations owned by corporations of which are more than 25% owned by aliens or foreign governments if the Commission finds that the public interest will be served by such refusal.[69] No analogous provision relating to foreign ownership or control over wire licenses exists. Still, the FCC may review the application and transfer of such licenses.

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65 The FCC's authority to require Network Security Agreements derives from its various authorities to approve license applications and other communication-related transactions. The FCC may append the Network Security Agreement to a license pursuant to an informal request for Commission action under 47 C.F.R. § 1.41. *See also* Rules and Policies on Foreign Participation in the U.S. Telecomm. Mkt. & Mkt. Entry and Reg. of Foreign-Affiliated Entities, *Report and Order and Order on Reconsideration*, 12 F.C.C.R. 23891, para. 59-66 (1997) ("Foreign Participation Order").

66 *See* Federal Communications Commission website, http://www.fcc.gov.

67 Recall that under Exon-Florio, CFIUS reviews transactions only if a change in control occurs.

68 47 U.S.C. § 310(b).

69 *Id.* This provision is another mechanism by which the FCC has discretion with respect to foreign direct investment. The FCC issued the Foreign Participation Order that expressed a general policy encouraging foreign applications and provided certain benefits to applicants from World Trade Organization member countries. *See* Foreign Participation Order, *supra* note 65, at para. 29. *See also* Foreign Ownership Guidelines for FCC Common Carrier and Aeronautical Radio Licenses, available at http://www.fcc.gov/ib/Foreign_Ownership_Guidelines_Erratum.pdf.

## B. Air Carriers

The Federal Aviation Act defines an "air carrier" as "a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation."[70] The Act provides that, in order to be a "citizen of the United States," an air carrier must satisfy each of the following requirements: (1) the carrier (if a corporation) must be organized under the laws of the United States or a State, the District of Columbia or a U.S. territory or possession; (2) the carrier's president and at least two-thirds of its board of directors and other managing officers must be U.S. citizens; (3) at least 75% of the voting interest in the carrier must be owned or controlled by U.S. citizens;[71] and (4) the carrier must be under the actual control of U.S. citizens.[72]

The first three elements set-forth above essentially constitute a bright-line numerical citizenship test. The final element, by contrast, involves an assessment by the U.S. Department of Transportation ("DOT") as to whether (assuming a carrier satisfies the numerical test), the carrier is under the actual control of U.S. citizens. DOT review is mandatory.[73] DOT makes its actual control determinations on a case-by-case basis, reviewing "the totality of the circumstances of an airline's organization, including its capital structure, management, and contractual relationships"[74] to ascertain that non-citizens could not "exert any substantial influence" over the carrier's affairs.[75] This interpretation of "actual control" is sometimes

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[70] 49 U.S.C. § 40102(a)(2).

[71] Although the statute only permits non-citizens to own up to 25% of the voting equity in a U.S. air carrier, DOT policy may permit non-citizens to own up to 49% of a U.S. carrier's total equity (as long as the non-citizens' total voting interest does not exceed 25%). DOT Order 91-1-41.

[72] 49 U.S.C. § 40102(a)(15).

[73] 49 U.S.C. § 41101 *et seq.*

[74] 70 Fed. Reg. 67389, 67390 (Nov. 7, 2005) (Docket OST-03-15759).

[75] 71 Fed. Reg. 26425, 26426 (May 5, 2006) (Docket OST-03-15759).

referred to as the "no semblance of foreign control" test.[76] It appears that DOT's definition of control is broader than CFIUS's definition, although neither entity has stated so explicitly. Moreover, it remains uncertain whether a foreign investment in a U.S. airline should ever undergo CFIUS review when, by law, DOT must determine that the airline is under the actual control of U.S. citizens, applying arguably a stricter control requirement than CFIUS.

### C. Nuclear Power

The Energy Reorganization Act of 1974 empowers the Nuclear Regulatory Commission (NRC) to issue licenses for the ownership and operation of nuclear power plants.[77] The Act prohibits the NRC from issuing licenses to any entity that the "Commission knows or has reason to believe [] is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government."[78] The NRC has adopted fluid standards for determining ownership, control, or domination with "an orientation toward safeguarding the national defense and security."[79]

To implement this proscription, the NRC has adopted a Standard Review Plan.[80] Three aspects of the Plan merit attention here. First, the NRC will review each co-applicant for a nuclear power license independently to determine whether it is subject to foreign ownership, control, or domination. Second, where a reviewer "has reason to believe that [an] applicant may be owned, controlled, or dominated by foreign interests," he or she will request additional information to supplement the application. Finally, the Plan states that a applicant is foreign

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76/ Memorandum from Jeffrey N. Shane, Under Secretary for Policy, U.S. Department of Transportation, dated Dec. 15, 2005, at 1 (Docket OST-03-15759). DOT makes its actual control determinations on a case-by-case basis by reviewing "the totality of the circumstances of an airline's organization, including its capital structure, management, and contractual relationships, . . . ." to ascertain that non-citizens could not "exert any substantial influence" over the carrier's affairs. 70 Fed. Reg. 67389, 67390 (Nov. 7, 2005) (Docket OST-03-15759); 71 Fed. Reg. 26425, 26426 (May 5, 2006) (Docket OST-03-15759)

77/ Pub. L. No. 93-438, 88 Stat. 1233.

78/ 42 U.S.C. § 2133(d).

79/ NRC Final Standard Review Plan on Foreign Ownership, Control, or Domination, 64 Fed. Reg. 52,355, 52,358 (Sept. 28, 1999).

80/ *Id.* at 52,357-58.

owned, controlled or dominated when a foreign interest has the power to direct or decide matters affecting the management or operations – "the words 'owned, controlled, or dominated' mean relationships where the will of one party is subjugated to the will of another."[81/]

## III. Conclusion

With the anticipated increase in foreign direct investment in the U.S., ever-evolving concepts of national security, and heightened awareness of the clearance process under Exon-Florio, one may expect CFIUS issues to arise more frequently and play a more significant role in M&A transactions for the foreseeable future. Virtually any deal involving foreign interests on the acquiring side and U.S. assets on the acquired side is a possible candidate for CFIUS review. And the wide-open standard as to what may constitute a threat to impair national security makes each CFIUS case a potential act of policy-making. This counsels careful consideration of CFIUS implications early in the negotiations between the parties, attention to the structure of the contemplated transaction as it may affect CFIUS jurisdiction, formulation of a comprehensive strategy addressing the regulatory and political risks associated with the transaction, and effective engagement with the CFIUS staff and stakeholder agencies to identify and resolve any national security concerns, to the extent possible, before the transaction is formally submitted for review.

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81/ *Id.* at 52,358.

# National security versus business

Amid a ferment of speculation, President George Bush has taken the first step in implementing legislative reform of the rules governing foreign investment in the US. Internal review processes are now more transparent and definitive say STEPHEN PRESTON and LYNN CHARYTAN



With the passage by the US congress of the Foreign Investment and National Security Act (FINSA) last year, it now falls to the executive branch of the government to implement the reforms enacted in the wake of the Dubai Ports World controversy.

On 23 January, President Bush took the first step, issuing a new executive order relating to US foreign ownership restrictions. The order provides guidance concerning the process by which corporate transactions potentially affecting the country's national security are reviewed by the inter-agency Committee on Foreign Investment in the United States (CFIUS).

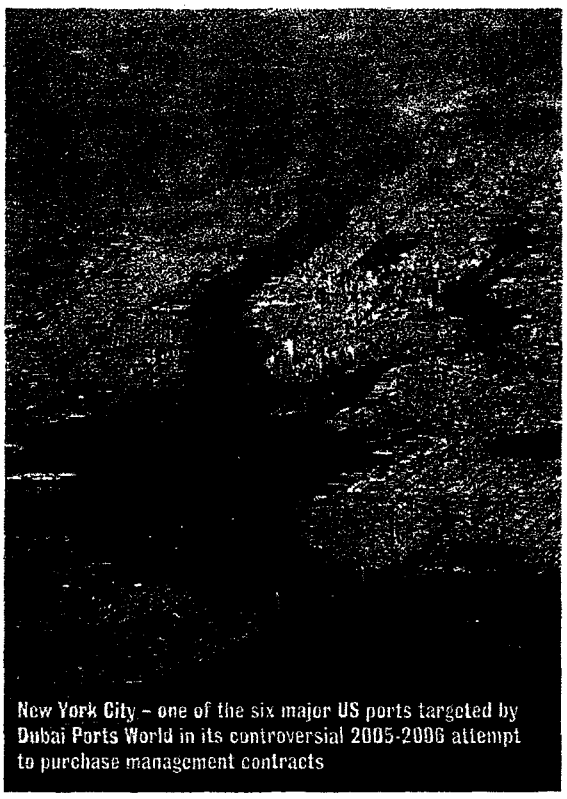
The guidance – issued pursuant to presidential executive power under article II of the US Constitution and to the Defense Production Act of 1950 – has the full force and effect of law and is binding on the federal agencies that comprise CFIUS.

The order has been the subject of speculation and some dispute for several months. Rumors abounded in CFIUS-watching circles that it was intended to empower the pro-business agency members of CFIUS, while reducing the role of the national security agencies. In response, those agencies, as well as members of congress, made clear their view that this would undermine a key intention of the CFIUS reform enacted by FINSA.

## No drastic change

In fact, the final order does not make drastic changes to FINSA in either direction. It carefully reiterates the administration's policy, stating that the US "unequivocally supports" international investment that "promotes economic growth, productivity, competitiveness and job creation", while stressing that such investment must be "consistent with the protection of the national security".

That same careful balancing act is seen in the order's addition of new members and observer agencies to CFIUS. On the 'pro-business' side, the order adds the US trade representative as a member and the Office of Management and Budget, the council of economic advisors and the assistant to the president for economic policy as observers. On the 'national security' side, the order adds the Office of Science and Technology policy as a member and, as observers, the assistants to the president for national >



New York City – one of the six major US ports targeted by Dubai Ports World in its controversial 2005-2006 attempt to purchase management contracts

>securities blanket

to bring charges against such businesses, and associated individuals, and can impose significant financial penalties. These penalties, in turn, can be distributed to any investors harmed by the illegal conduct. And, because these actions can be brought only by regulators acting in the public interest, and not by self-interested plaintiff lawyers, there is much less of a threat that liability will be imposed on innocent companies or individuals.

Notwithstanding this result – refusing to give plaintiff lawyers a broader field for coercing class action settlements and relying instead on government enforcement – the scheme liability story may not be over. After the Supreme Court's decision, some allies of plaintiff lawyers urged Congress to enact a statute authorising scheme liability claims. No legislation has been introduced but, if history is any guide, the entrepreneurial US plaintiff lawyers will never stop looking for ways to expand the reach of the securities class action. ■

security affairs and for homeland security and counterterrorism.

As anticipated, the executive order contains several provisions clearly designed to formalise and shore up the Treasury Department's authority over the CFIUS process. For example, it expressly delegates to the treasury the president's power to initiate review of a transaction that has been submitted to CFIUS or to initiate a review unilaterally; clarifies that the treasury, which chairs CFIUS, may communicate with the public and congress on CFIUS's behalf, and otherwise act on the committee's behalf 'exclusive' of the other members; and provides the treasury with explicit authority (after consultation with the committee) to request that the director of national intelligence prepare an analysis of the risks presented by a proposed transaction.

The CFIUS review process requires complex interagency co-operation – a difficult goal even in the absence of CFIUS's stringent timelines. If the process is to run – and if the treasury, as the CFIUS 'chair' is to have any ability to make it run – the rules of the road have to be clear. These and other procedural guidelines imposed by the executive order should help ensure that the member agencies can focus on substance rather than inter-agency politics – to the benefit of any party with a transaction before CFIUS. As several business groups observed in a joint statement responding to the order: "A clear and certain CFIUS process helps the United States to remain an attractive location for global capital."

## Clarifying measures

Some of the clarifying measures adopted in the executive order may have a more direct impact on transactions subject to CFIUS review. For example, the order provides that CFIUS must initiate a 45-day second-stage 'investigation' of a transaction if even one member agency determines that it is warranted. The member agencies are permitted to conduct their own inquiry into a transaction, though any interaction they have with parties to the transaction is to take place in the company of the lead agency for the transaction or the CFIUS chair (namely, the treasury). CFIUS may require a mitigation agreement to remedy 'any national security risk' – however, the agency proposing that agreement must provide the committee in writing with its views concerning the perceived national security risk posed by the transaction and the 'risk mitigation measures' that will address such national security risks, and CFIUS must decide whether to approve the mitigation proposal. Such agreements should not, except in 'extraordinary circumstances', require that a party consent to comply with existing law.

> As anticipated the executive order contains several provisions clearly designed to formalise and shore up the treasury department's authority over the CFIUS process

In addition, the provision in the act permitting 'reopening' of a previously-reviewed transaction should be read narrowly, as the administration expects that it will be triggered only in 'extraordinary circumstances'.

The latter restrictions respond to business community concerns about avoiding the burdens of an unnecessary mitigation agreement in cases where the national security is adequately protected by existing law and preserving the 'safe harbour' that CFIUS clearance affords the parties.

The order also gives a nod towards the ongoing controversy on sovereign investment funds, directing the Department of Commerce to monitor and report on foreign investment trends and significant developments. And it instructs the agencies that will carry out FINSA that they are bound not to disclose information that could impair "foreign relations, national security, the deliberative processes of the executive, or the performance of the executive's constitutional duties" – a provision that might be intended as a subtle reminder to CFIUS agencies in the face of FINSA's new emphasis on reports to congress.

Ultimately, parties should not expect to see dramatic changes as a result of the executive order, though it makes some of the internal processes more transparent and definitive. Substantive guidance on CFIUS reviews, if it comes at all, is more likely to be found in the implementing regulations the treasury is required to issue this spring. ■

WILMERHALE

# THE CFIUS REVIEW PROCESS: A REGIME IN FLUX

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**ABA International Law Section**
The Foreign Investment and National Security Act of 2007:
Navigating the New Regulations
**April 4, 2008**

Beginning about five years ago, several controversial transactions, culminating with the Dubai Ports debacle in 2006, elevated CFIUS from relative obscurity to the front pages. Responding to this increased focus, Congress passed the Foreign Investment and National Security Act (FINSA) in late 2007,[1] which brought some significant changes to the CFIUS regime. The President provided some further clarification through an Executive Order on January 23, 2008.[2] Additional clarification will come when the Treasury Department issues new regulations required under FINSA by April 2008.

The growing significance of sovereign wealth funds, large pools of investment capital controlled by governments, and their increasing investments in the United States, notably in the financial sector, have also raised new questions in Congress and the Executive Branch about the regulation of foreign investment.[3] As with investments by other sorts of foreign investors, investments by sovereign wealth funds emanating from countries such as China and Gulf Arab states, with which the United States has important strategic and geopolitical entanglements, have raised particular concerns. At the urging of the United States, the International Monetary Fund (IMF) is developing a set of proposed "best" practices for sovereign wealth funds, while the Organization for Economic Cooperation and Development (OECD) is working on a parallel set of best practices for countries that receive significant investments from sovereign wealth funds.

Spurred by the weak dollar and booming state revenues in China and oil-rich countries, acquisitions in the U.S. by foreign firms reached $407 billion in 2007, up 93% from 2006.[4] Foreign buyers accounted for 46% of the $230.5 billion of U.S. mergers and acquisitions in the fourth quarter of 2007,[5] the largest percentage of foreign buyers since 1998.[6]

All these developments are pointed reminders that, although the United States prides itself on openness to foreign investments, such transactions may raise special regulatory and political issues. Parties to potential foreign acquisitions of U.S. companies or assets need to consider carefully the CFIUS process in planning—and potentially in valuing—the transaction.

## Background

Since Congress passed the "Exon-Florio" amendment in 1988, the President has been authorized to investigate the impact on U.S. national security of "mergers, acquisitions, and

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[1] Pub. L. No. 110-49, 121 Stat. 246 (2007).

[2] Executive Order: Further Amendment of Executive Order 11858 Concerning Foreign Investment in the United States, Jan. 23, 2008.

[3] For helpful brief overviews, see Robert M. Kimmitt, *Public Footprints in Private Markets*, Foreign Affairs, Vol. 87, No. 1, at 119-30 (Jan./Feb. 2008); *Asset-backed Insecurity*, The Economist 78-80 (Jan. 19, 2008).

[4] *Weak dollar Fuels China's Buying Speed of U.S. Firms*, Washington Post (Jan 28, 2008)

[5] Zachary R. Mider, *International Deals: Americans Sell Out to Foreign Firms at Record Rate*, Bloomberg News Service, Jan. 9, 2008.

[6] *Id.*

takeovers" by "foreign persons" that result in foreign control over a U.S. company or certain U.S. assets.[7] If the President finds: (1) "credible evidence" that a transaction would impair national security, and (2) that no other provision of law grants him authority to take steps to ameliorate this impact, he may act to block the transaction.[8]

Exon-Florio applies both to proposed mergers and acquisitions and to completed transactions. Unless a party to the transaction voluntarily seeks pre-consummation review, there is no time limit on the President's authority to investigate a completed transaction. A voluntary notice that results in CFIUS clearance grants the transaction a safe harbor from post-closing review and challenge (except possibly if the parties materially breach a condition of CFIUS's clearance approval).[9]

CFIUS is charged with implementing Exon-Florio. The Secretary of the Treasury chairs the Committee, but, under FINSA, other agencies may be appointed "lead agency" with respect to particular investigations depending on the nature of the transaction.[10] The Departments of Defense, Homeland Security, Commerce, and Justice often take the most active roles in the CFIUS process. Other cabinet departments and economic and national security bodies within the Executive Office of the President also serve on the Committee.[11] An important addition that FINSA mandated is a defined role for the Director of National Intelligence, who is now an ex-officio member and must evaluate a transaction's national security implications.[12]

President Bush's recent Executive Order establishes a variety of rules to clarify the Committee's procedures and ensure that the different agencies can work together smoothly, under Treasury's ultimate leadership. The Committee's review process is confidential, and the process is intended to focus on the true national security implications of particular deals rather than political considerations.

The CFIUS notification process is voluntary, requires no filing fee, and imposes no mandatory waiting period before closing the transaction, though parties to a CFIUS review or investigation typically wait until the process is complete before closing. The CFIUS process involves four steps: (1) a voluntary filing, which must be submitted by both parties to the transaction; (2) a 30-day Committee review of the transaction; (3) a potential additional 45-day Committee investigation, and, following such an investigation and the Committee's recommendation, (4) a 15-day period during which the President decides to permit or deny the acquisition (or seek divesture after an ex post facto review).

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[7] 50 U.S.C. app § 2170.

[8] *Id.* at § 2170(d)(4).

[9] *Id.* at § 2170(b)(1)(D)(iii).

[10] *See id.* at § 2170(k).

[11] *See* Executive Order: Further Amendment of Executive Order 11858 Concerning Foreign Investment in the United States, Jan. 23, 2008.

[12] 50 U.S.C. app § 2170(b)(4)(D).

The Treasury Department's Office of International Investment administers the CFIUS process. Although FINSA preserved the confidentiality requirements, Congress added requirements designed to allow it to exercise increased supervision. CFIUS must now report to Congress at the end of reviews and formal investigations and also report annually about its activities.[13]

CFIUS had traditionally approved the vast majority of notified transactions during the initial 30-day period, but a growing number of transactions are now being subjected to a second-phase 45-day investigation. Indeed, in 2006 alone, CFIUS launched seven 45-day investigations, as many as had been initiated in the previous five years combined.[14] Though numbers for 2007 have not yet been made available, the trend almost certainly continued, especially in light of increased political pressure from Congress for CFIUS to scrutinize transactions and the general increase in foreign investment in the United States.

**Scope and Focus of CFIUS Review**

In determining whether voluntarily to seek "safe harbor" protection by notifying a transaction to CFIUS, parties should assess the risk that CFIUS could investigate the transaction on its own initiative. If that investigation is undertaken post-closing, it could potentially result in the unwinding of the transaction (or the imposition of terms and conditions that could affect the economics of the deal). In assessing these risks, parties should consider three threshold questions: (1) does the transaction involve a "foreign person" acquiring a "United States person"?; (2) might the transaction implicate U.S. national security interests?; and (3) might the structure of the transaction bring it outside CFIUS's jurisdiction altogether?

The first question can be surprisingly tricky and sometimes requires close analysis of the Exon-Florio statute and the CFIUS regulations. For instance, under Exon-Florio, the same entity could be a "foreign" or "United States" person depending on whether it is the target or the acquirer.[15] Any entity is a U.S. person to the extent of its business activities in the United States. Accordingly, the application of the statute could be triggered if a foreign company acquires (directly or indirectly) the U.S. branch office or subsidiary of a foreign company.[16] On the other hand, the same foreign-controlled U.S. branch or subsidiary would be deemed a foreign person for Exon-Florio purposes if it acquires a U.S. company or U.S. assets.

The second inquiry is extraordinarily open-ended and may be susceptible to changing public policy concerns. The notion of "national security interests" can be writ quite large. The newly enacted FINSA gives some limited guidance, making clear that national security includes

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[13] *Id.* at § 2170(g).

[14] *See* Testimony of Treasury Assistant Secretary Clay Lowery before the House Financial Services Committee, Feb. 7, 2007 (available at http://www.treas.gov/press/releases/hp250.htm).

[15] *See* 31 C.F.R. § 800.213 (example 3).

[16] *Id.*

"homeland security"[17] concerns but not "economic security." FINSA also makes clear that transactions involving "critical infrastructure," "critical technologies," and "major energy assets" may frequently raise national security concerns.[18] More clarity may be forthcoming in April 2008, when, as required by FINSA, the Department of Treasury is required to issue "guidance on the types of transactions that the Committee has reviewed and that have presented national security considerations."[19]

As a practical matter, the Committee has often shown particular interest in transactions when the target U.S. company has export-controlled technologies, classified contracts with the U.S. government, or technologies critical to national defense; or when CFIUS member agencies have specific "derogatory intelligence" about the foreign purchaser. CFIUS may also examine whether the transaction will result in an absence of U.S.-controlled companies that supply technology or products deemed important to U.S. security. Treasury, however, is unlikely to tie CFIUS's hands by defining "national security" to include only these or other narrowly defined areas.

Some recent examples illustrate the broad range of transactions that may implicate national security for CFIUS purposes:

- ***Bain Capital/3Com.*** After undergoing a 30-day review, followed by several weeks of a 45-day investigation, Bain Capital in February 2008 withdrew its proposed takeover of 3Com, a U.S.-based information technology company.[20] The proposed transaction received considerable attention because a division of 3Com supplies anti-hacking technology to the Defense Department, and Chinese telecommunications company Huawei, which reportedly has ties to the People's Liberation Army, was a minority partner in the Bain Capital acquisition proposal.

- ***Citic Securities/Bear Stearns.*** In the second half of 2007, Citic Securities, a leading state-controlled investment bank in China, invested $1 billion in Bear Stearns after clearing a voluntarily initiated CFIUS review.

- ***Alcatel/Lucent.*** In November 2006, after a 75-day review and investigation period, the committee recommended that President George W. Bush clear the merger of Lucent Technologies with French telecommunications firm Alcatel. However, the President's approval of the deal, which included the transfer of Lucent's Bell Labs, was conditioned on the companies entering into a national security agreement with U.S. government agencies, which included an "evergreen" clause allowing the government to reopen its review of the transaction if certain specific conditions were not met. As publicly

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[17] 50 U.S.C. app. § 2170(b)(1)(A)(i).

[18] *Id.* at § 2170(f)(6) & 2170(f)(7).

[19] *See* Regulations Pertaining to Mergers, Acquisitions, and Takeovers, 72 Fed. Reg. 57,900 (Oct. 11, 2007).

[20] *See* Bain, *3Com Deal Hits Obstacle on Chinese Stake*, Reuters (Feb 20, 2008).

disclosed, the parties also agreed that an independent U.S. subsidiary would handle sensitive government projects.[21] (The President recently required similar provisions in connection with a $20 billion networking joint venture between Nokia and Siemens.[22])

- ***Check Point/Sourcefire.*** In 2006, Check Point, an Israeli company, cited the CFIUS process as the basis for abandoning a deal to acquire a U.S. company, Sourcefire.[23] Sourcefire produced intrusion detection technology used by many U.S. government departments in various sensitive contexts. Check Point made its announcement while CFIUS's 45-day investigation was ongoing.

- ***Smartmatic/Sequoia Voting Systems.*** In 2006, CFIUS may have played a role in a decision by Smartmatic, a Florida company controlled by Venezuelan shareholders alleged to have connections with Venezuelan President Hugo Chavez, to sell its U.S. voting machine business Sequoia Voting Systems. Smartmatic had sought post-closing review of its acquisition of a U.S. electronic voting machine manufacturer, and members of Congress and pundits pressured CFIUS to conduct an extensive review based on concerns about the security of U.S. elections. Smarmatic sold the business during the course of that review.[24]

Finally, the limits of CFIUS's jurisdiction have become an increasingly important subject for inquiry as foreign funds have stepped up the pace of investment in the United States. The CFIUS regulations provide that only transactions that "involve a change in control" of some type are "covered transactions" over which CFIUS has jurisdiction.[25] Thus, acquisitions of voting securities that do not afford the acquirer de jure or de facto control do not trigger CFIUS. The acquisition of convertible options or warrants would be similarly exempt until such time as exercised (assuming they then resulted in control). Further, acquisitions that are made solely for investment purposes are exempt if the acquirer will hold 10 percent or less of the outstanding voting securities.[26] An "ordinary course" investment by a bank or investment company that does not typically acquire businesses may also fall outside CFIUS's purview. In all these cases, the acquirer typically should not have board seats or other indicia of day-to-day control.

Recently, significant foreign investments in U.S. financial institutions by sovereign wealth funds and other investors have been structured to avoid CFIUS review using these guidelines. Typically, the investor has taken no board seats, obtained less than a 10 percent

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[21] Jeff Bliss and Otis Bilodeau, *Carlyle, Dubai Aerospace Deal May Clear Congressional Hurdles*, Bloomberg News Service, March 20, 2007.

[22] *U.S. Imposes Restrictions on Nokia-Siemens JV: Paper,* Washington Post, Jan. 8, 2007.

[23] Clifford Carlsen, *Sourcefire Gets Second Wind,* May 25, 2006.

[24] Bill McConnell, *Smartmatic to Divest Unit*, Daily Deal, Dec. 25, 2006.

[25] 50 U.S.C. app. § 2170(a)(3).

[26] 31 C.F.R. § 800.302.

interest, and publicly disclaimed any ability to oversee or engage in the management of the company or business.

**The CFIUS Review Process and Strategic Considerations**

For transactions that potentially raise CFIUS issues, parties generally engage in pre-filing consultations and negotiations with the Committee or member agencies. Such discussions can influence the outcome and lead parties to modify their transaction before filing to expedite clearance; they may also help parties avoid the possibility that they may have to abandon a transaction mid-review that is unlikely to be cleared at all (or only on unacceptable terms).

The formal notification itself must contain a detailed description of the transaction, including timelines and assets or businesses to be acquired, and detailed background concerning the parties.[27] The information submitted must be certified by both parties to the transaction according to a form publicized by the Treasury Department. The 30-day initial review period commences once the CFIUS staff gives notice it is satisfied that the filing contains all of the required information.

If CFIUS decides not to clear the transaction in the 30-day review period, then it must commence an additional 45-day investigation before the end of the initial review period.[28] Under FINSA, the extended investigation is mandated when the transaction threatens to "impair national security." FINSA leaves CFIUS with broad discretion to make that determination, but it suggests two circumstances where an extended review is presumed more likely: when the transaction would result in "foreign government control," or in foreign control of "critical infrastructure."[29] Although the statute leaves the term "critical infrastructure" vague, experience suggests that telecommunications and transportation infrastructure would typically qualify, and the statute suggests that energy assets are a specific form of critical infrastructure. The range of other assets that could fall within this definition seems almost limitless, however.

At the conclusion of the 45-day investigation, CFIUS will submit a recommendation to the President. The President has 15 days from the date of referral to clear, prohibit, or suspend the transaction.[30]

**The Future**

With the enactment of FINSA, the issuance of the President's Executive Order, and the forthcoming Treasury regulations, CFIUS review of foreign investments is undergoing a period of flux. The Treasury regulations, which are due in April 2008, should provide more guidance about recurring procedural and definitional issues, mitigation agreements, and information

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[27] *Id.* at § 800.401(c).

[28] 50 U.S.C. app. § 2170(b)(2)(B)(i)(I).

[29] *Id.* at §§ 2170(b)(2)(B)(i)(II) and 2170(b)(2)(B)(i)(III).

[30] *Id.* at § 2170(d)(1).

collection and confidentiality issues.[31] The regulations' clarification of the definitions of "critical infrastructure," "critical technologies," and "control" will be particularly important.

The increasing prominence of sovereign wealth funds has added an additional layer of concern about the possible political or national security significance of foreign investment. Sovereign wealth funds presently control about $2.5 trillion, and that figure is expected to grow by perhaps a $ 1 trillion per year for the next decade at least.[32] Sovereign wealth funds' present holdings represent only about 3% of global assets, but they already top the capital held by private equity firms and hedge funds.[33] The Treasury Department has initiated a review of policies related to sovereign wealth funds, has engaged in bilateral talks with governments controlling significant funds, and has encouraged dialogue between investor and recipient countries. The U.S. has also pushed for the IMF, with the held of the World Bank, to develop a set of best practices to encourage transparency and strictly market-based, rather than politically motivated, investment by sovereign wealth funds. At the same time, the U.S. has supported the OECD's efforts to encourage a parallel set of best practices for recipient countries, emphasizing openness to investment, evenhandedness in the treatment of foreign investors.[34]

These steps suggest that, for the moment, the Executive Branch does not see the need for any legislative modifications of the CFIUS process to deal with sovereign wealth funds. But some voices in Congress are already questioning that approach and suggesting that further revision of the CFIUS statute may be necessary.[35]

Important insights about the substance of CFIUS reviews may come from the reports CFIUS now must make to Congress, providing publicly available precedents that should be useful for investors seeking to chart the likely course of CFIUS reviews for particular types of transactions.

One thing is clear: The heightened scrutiny that CFIUS is applying to foreign acquisitions will affect tactics for merger and acquisition activity that might raise national security issues. Foreign acquiring companies may need to be more active in making commitments to address the risk of national security reviews, so as not to be at a disadvantage relative to domestic bidders. And in some cases, parties may wish to structure their transactions to try to avoid CFIUS review altogether.

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[31] *See* Regulations Pertaining to Mergers, Acquisitions, and Takeovers, 72 Fed. Reg. 57,900 (Oct. 11, 2007).

[32] Kimmitt, *Public Footprints in Private Markets*, at 119.

[33] *Asset-backed Insecurity*, at 79.

[34] On all these efforts, see Kimmitt, *Public Footprints in Private Markets*.

[35] *See, e.g., Sovereign Funds Need Best Practices, Not New Legislation, Treasury Official Says*, BNA Daily Report for Executives A-28 (Feb. 14, 2008).

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Executive COUNSEL

C-LEVEL INSIGHTS FOR BUSINESS LEADERS

# When Will Security Squelch a Foreign Investment Deal?

## Government Review Committee Still Largely Inscrutable

By Lynn R. Charytan, Stephen W. Preston, and Jason Mehta

**COMPANIES WATCHING** the process had hoped that the long-awaited passage of the Foreign Investment and National Security Act (FINSA) by Congress late last year would provide the market with more concrete guidance about how foreign investments in U.S. assets are approved by the Committee on Foreign Investment in the United States (CFIUS).

FINSA does indeed make several key substantive and process modifications to the law that previously governed CFIUS reviews. But anyone assuming that the way forward for investors or merger partners under the new law will be clearer or more predictable may be disappointed.

CFIUS is an inter-agency committee, chaired by the Secretary of Treasury. As Treasury says on its web site, CFIUS seeks to "serve U.S. investment policy through thorough reviews that protect national security while maintaining the credibility of our open investment policy and preserving the confidence of foreign investors here and of U.S. investors abroad so that they will not be subject to retaliatory discrimination."

Even as the Treasury Department seeks comment on how it might refine some of the key terms and provisions of the new law, CFIUS can be expected to guard the flexibility it feels that it needs to address national security issues as they arise. Accordingly, while Treasury will clarify certain aspects of the process, companies should not expect the concrete guidelines that some have suggested would make it easier to predict whether a transaction should be submitted to CFIUS and what the likely results of a review might be.

HOW CAN ONE DETERMINE, PRIOR TO A NATIONAL SECURITY INVESTIGATION, WHETHER AN ASSET'S CONTROL WOULD IN FACT AFFECT NATIONAL SECURITY?

Past practice may continue to be the most helpful guide. Nevertheless, CFIUS will produce at least some helpful reports and guidance, and the market should watch the process as it unfolds.

#### BACKGROUND

The once-little known CFIUS committee has been tasked since 1988 with reviewing the security risks of foreign acquisitions of U.S. assets. The Committee caught the attention of both Congress and the public during the Dubai Ports debacle in 2006, but it has stayed in the public eye as the country struggles to address post-9/11 security concerns in an increasingly global economy and with escalating foreign investment in the United States.

Although CFIUS theoretically has the right to review transactions on its own, transactions involving foreign investment typically are submitted for review voluntarily. While any transaction involving foreign control of a U.S. asset may be submitted for review, voluntary review generally has been considered advisable only where the transaction could affect "national security."

Nevertheless, in the wake of Dubai Ports and 9/11, and in the absence of any concrete information concerning what the term "national security" encompassed, more and more transactions were prophylactically submitted to CFIUS to protect against the unwelcome possibility of CFIUS instigating its own investigation, conceivably even doing so post-closing.

Meanwhile, as a condition of approval, CFIUS was apparently requiring more companies to commit to "mitigation" agreements, including agreements that included an "evergreen" clause, allowing CFIUS to revoke approval in the event of a material breach.

But even as this trend developed, a core question remained unclear: what transactions actually require approval? The lack of certainty on this question, among others, muddied the waters of foreign-U.S. transactions, even while administration officials said repeatedly that the United States was open for business and welcomed such investment.

#### CFIUS "REFORM"

The move to reform CFIUS initially grew out of concerns in Congress–arising from the Dubai Ports proceeding–that there was a need for more accountability and visibility in the review process. FINSA readily provides it, by requiring sign-offs by high level officials for decisions made during the review and investigation process, and by imposing several reporting requirements, including an annual report summarizing all reviews and investigations completed over the prior year.

In passing FINSA, Congress modified the process to make it more concrete, and to clarify the Committee's jurisdiction and what it might legitimately take into account in conducting an investigation or imposing mitigation agreements. While any transaction involving foreign control of a U.S. business remains a potentially covered transaction, FINSA mandates the more protracted investigation only where the transaction threatens to "impair national security." FINSA leaves the Committee with discretion to find such a threat, but it suggests two circumstances where this would be presumptively more likely: where the transaction would result in "foreign government-control," or where the transaction would result in foreign control of "critical infrastructure."

To avoid any question, FINSA clarifies that mitigation agreements are appropriate to address national security concerns, and that a previously approved transaction may be reopened (the so-called evergreen clause), but only in limited, specified circumstances involving discovery of false information or a material breach of a mitigation agreement.

#### QUESTIONS REMAIN

These provisions are welcome and help dispel certain fears and misconceptions. FINSA makes clear, for example, that national security includes homeland security, but not "economic security." That was a significant concern for the business community. Also, the clarification regarding the evergreen clauses should reassure compa-

nies that CFIUS will not have a free-floating right to reopen its prior transaction approvals.

But, as Congress itself seemed to recognize, FINSA still leaves many questions unanswered. The statute requires Treasury to publish guidance on "the types of transactions that the Committee has reviewed and that have presented national security considerations," including those that "would result in control of critical infrastructure," because these and other terms in the Act remain obscure.

Treasury's solicitation of comments on these issue is welcome, and the comments that have been received, though few, are consistent enough to indicate areas where clarification is needed. For example, what is critical infrastructure? The statute defines it as "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security."

Past experience suggests that telecommunications and transportation infrastructure would qualify, and the statute obliquely suggests, in defining areas that might be relevant for presidential-level review, that energy assets and "critical technologies" likely qualify, as well. But other examples that could fit this definition seem potentially limitless: What about health care infrastructure, or agriculture, or water treatment? In short, how can one determine, prior to a national security investigation, whether an asset's control would in fact affect national security?

Even though these issues were raised by several commenters and seem to be recognized as vexing by Congress itself, it is uncertain how Treasury can resolve them. Efforts to clarify the definitions will inevitably undermine the flexibility the member agencies want to preserve, as they consider the unique national security issues that particular transactions may trigger. These issues may reveal themselves only after an investigation is underway, and sometimes only after looking at classified information.

Some commenters suggested that the Committee should offer certain bright line rules, such as that a financial institution or highway never be deemed critical infrastructure or that, more generally, any infrastructure for which a competitor offers a "viable alternative" be exempt from the statute. CFIUS indeed may be able to provide some guidance, for example to clarify that control of a small portion of a competitive market that has other domestic players creates a favorable presumption.

But it seems fundamentally unrealistic to expect CFIUS to concede that the presence of other competitors makes a particular asset non-critical for national security purposes. Even companies that compete in the same market may have unique attributes that raise a heightened foreign ownership concern in one case but not another. For example, the particular technology one competitor uses — or the customers it serves — may trigger particular issues. That may be especially true if the company supplies the U.S. government itself, and its product is not readily replaced by a competitor's. Or, the government may have particular concerns about the available competitors that are not publicly known. As badly as industry needs guidance, it seems undeniable that CFIUS itself needs flexibility that is at odds with that guidance.

There are some issues, however, that may lend themselves to clarification. For example, commenters noted that Treasury could provide more guidance about what constitutes foreign control. FINSA itself does not define the term, but the related regulations define control broadly to include direct and indirect control, through majority or "dominant minority" ownership, contractual arrangements or "other means."

Current regulations also indicate that investments that are below 10 percent of voting power and that involve no board seats may stop short of vesting control in the foreign investor. But the broad concept of "de facto control," through other means, still forces investors to structure major international transactions based on conjecture or anecdotal experience with past CFIUS transactions, and this is not consistent with the U.S. government's repeated assertions that the welcome mat is out for foreign investment.

IT'S LIKELY THAT INDUSTRY'S MOST USEFUL GUIDANCE WILL CONTINUE TO BE THE AFTER THE FACT REPORTS THAT CFIUS MUST MAKE TO CONGRESS, CONCERNING BOTH TRANSACTIONS THAT HAVE RAISED SECURITY CONCERNS AND THE MITIGATION AGREEMENTS THAT IT HAS BEEN WILLING TO NEGOTIATE.

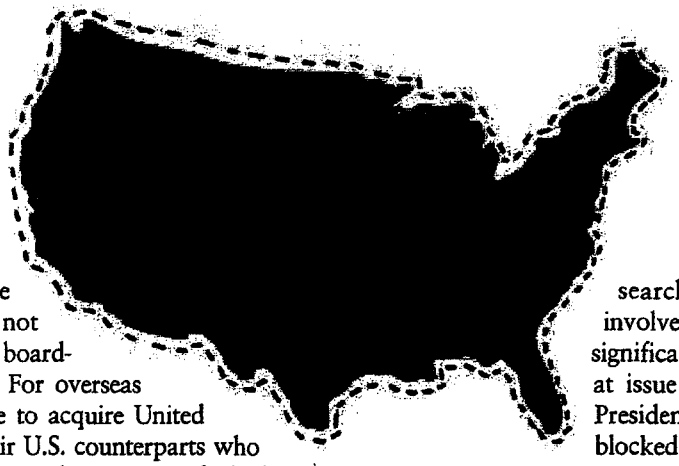
Other agencies define foreign control with more detail, by way of written decisions and publication of illustrative examples. The Committee could do the same, especially by way of the examples. Treasury also might consider allowing that where a parallel regulatory process governing the transaction defines foreign control, that definition will be considered binding for the CFIUS process, as well.

Executive COUNSEL
C-LEVEL INSIGHTS FOR BUSINESS LEADERS

# Many Transnational Deals Now Face a Security Review

## Address "CFIUS" Concerns in Advance

By Jamie S. Gorelick and Stephen W. Preston



International corporate acquisitions are not resolved just in the boardrooms of the parties. For overseas dealmakers who hope to acquire United States companies — and their U.S. counterparts who wish to court foreign investors — the question of whether a merger or acquisition conflicts with U.S. national security interests is an increasingly vital concern.

Of special interest today, growing numbers of cross-border transactions are being subjected to the review process conducted by the Committee on Foreign Investment in the United States ("CFIUS").

CFIUS — a panel of officials from over a dozen federal agencies and offices — is charged with thoroughly vetting all acquisitions by foreign corporations (whether stock purchases or acquisitions of assets) that could affect U.S. national security. CFIUS has the authority to mount an intrusive and detailed inquiry that one government official recently characterized as a "full body search" of the companies involved. CFIUS can demand significant alterations to a deal at issue or recommend to the President that a transaction be blocked or rescinded.

Because of the ambiguity as to what might raise a "national security" concern, a CFIUS review may be necessary even in circumstances that one would not necessarily associate with our national security. The proposed deal needn't be in sophisticated munitions to trigger a CFIUS review; transactions involving communications equipment or energy properties could also prompt a review. Even deals involving companies chartered in countries considered staunch and trusted allies may be fair game. Moreover, the CFIUS process may be used as the trigger for clearance by other agencies of the U.S. government, such as Federal Communications Commission approvals of license transfers.

In the post-9/11 environment, the Committee's scope has expanded and is likely to expand further as the national security community increasingly focuses on China, and as Chinese companies seek more foreign acquisitions. Indeed, recent bids by Chinese interests to acquire prominent U.S. companies were vigorously opposed by those concerned about China's long-term strategic objectives in the Pacific Basin and beyond.

> CFIUS has the authority to mount an intrusive and detailed inquiry that one government official recently characterized as a "full body search."

IBM's proposed sale of its personal computer business to the Chinese company Lenovo prompted CFIUS to investigate, delay approval, and eventually impose conditions on the transaction. The bid by Chinese oil company CNOOC Ltd. to purchase California-based Unocal Corp. for $18.5 billion set off a firestorm of protest in the United States, with some seeking to block the transaction asserting a national security interest in preserving domestic oil production and refining capabilities. Seeing the opposition, CNOOC withdrew its bid.

Adding to the attention that CFIUS has received is the recently issued Government Accounting Office report criticizing CFIUS for taking an overly narrow view of "national security" and for its alleged lack of transparency. The report led some senators to propose revisions to the CFIUS review process, including one that would more than double the length of the review period. The GAO criticism has led some participating agencies to consider how broadly they should be defining the national security interests they are charged with protecting.

Whether a proposed merger or acquisition involves a company from China or elsewhere, charting a successful course through the CFIUS process requires anticipation and assessment of potential national security concerns and a plan to address the concerns of each "stakeholder" agency on the Committee.

#### HOW THE CFIUS PROCESS WORKS

CFIUS was created in 1975 to monitor the impact of and to coordinate U.S. policy on foreign investment in the United States. Its current role is rooted in the 1988 "Exon-Florio Amendment" to the Defense Production Act of 1950. That amendment authorized the President to block any merger, takeover, or acquisition of a U.S. corporation by a foreign entity if it would threaten to impair national security. Before the President can block a transaction – or force a divestiture of a completed transaction – there must be credible evidence that the "foreign interest exercising control" over the acquired U.S. corporation "might take action that threatens to impair the national security" and that other measures would not provide adequate protection. The President must reach a decision within 90 days of official notification of the transaction.

CFIUS was set up to make a recommendation to the President on transactions like these. The Secretary of the Treasury chairs the panel; Treasury's Office of International Investment coordinates and manages Committee activities. Other members include the Secretaries of Defense, State, Commerce and Homeland Security, the Attorney General, the Chairman of the Council of Economic Advisors, the United States Trade Representative, the National Security Advisor, the Director of the Office of Management and Budget, the Director of the Office of Science and Technology Policy, and the Assistant to the President for Economic Policy. The nature of the transaction dictates which members are most active on that transaction.

The CFIUS review process consists of four steps: (1) a voluntary "notice" filed with CFIUS by the parties to the transaction; (2) a 30-day review of the transaction by the Committee; (3) a potential further 45-day investigation, if warranted; and (4) a decision by the President to permit or deny the transaction (or to seek divestment in the case of a post-facto review of a completed acquisition). Approval at any stage of the process means that the transaction is cleared for Exon-Florio purposes.

Although the CFIUS review process is normally initiated by a voluntary notice filed by the parties, an investigation may also be opened by CFIUS itself, even long after a deal is concluded. Dealmakers therefore proceed at their own risk if they incorrectly determine that their transaction does not need to be reviewed.

When should notice be given? A transaction may be voided if (1) a "foreign" person is to acquire a "United States" person; and (2) there is the potential for the acquisition to harm U.S. "national security." Where these circumstances may be present, the question of CFIUS review must be considered.

One would think that determining whether a "foreign" person is acquiring a "U.S." person should be fairly straightforward, but it is not. Any entity that conducts business activities in the United States is a U.S. person. So, even a U.S. branch office or subsidiary of a foreign-owned and organized company is considered a U.S. person, triggering review if acquired by another foreign firm. At the same time, that U.S. branch or subsidiary is under foreign control, so it is also considered a foreign person if it attempts to acquire a U.S. company.

The second condition – whether the transaction could threaten U.S. national security – is inherently ambiguous and getting more so every day. "National security" is not defined by Exon-Florio, with the statute leaving its scope "within the President's discretion." The list of some of the factors reflecting whether a transaction has the potential to harm national security includes:

- Domestic production of a given product needed for national defense.
- The capability of domestic industry to meet these requirements.
- The effect foreign control over production might have on meeting national defense needs.
- Whether foreign control will lead to increased risk of proliferation of weapons of mass destruction or missile technology.
- The impact on U.S. technological leadership in defense areas.

While the transactions subject to CFIUS review extend well beyond those involving traditional "defense" concerns, scrutiny is heightened when the targeted company has technologies that cannot lawfully be exported or those that would be critical to national defense. The same is true if the company has classified contracts with the U.S. government. The motives of the foreign purchaser or its plans for the U.S. company once acquired can also cause CFIUS to pause over a transaction.

Because of these types of concerns, both parties to such a transaction have to disclose a great deal of information to the Committee, including detailed background on those with ownership interests or management responsibilities in the purchasing company and descriptions of all sensitive technologies and information held by the company to be acquired.

Compromises are often struck before formal filing of these materials or in the initial 30-day review period. In 2000, for example, CFIUS required a Japanese telecommunications firm to agree to bar involvement in the firm by the Japanese government as a condition for approving its acquisition of a U.S. Internet service provider. Similarly, a Dutch firm's 2001 acquisition of a U.S. company was approved when it agreed to divest itself of the acquired company's optics and semiconductor businesses, which produced manufacturing technologies for U.S. military satellites.

At the end of the 30-day review, CFIUS is generally required to either approve the transaction or begin a far more detailed and intrusive 45-day investigation, culminating in the Committee's formal recommendation to the President. CFIUS has discretion to decide whether to conduct a 45-day investigation, but if the acquiring entity is controlled by or acting on behalf of a foreign government, it must do so. In practice, the parties often will decide to withdraw the notice to give the Committee more time for review or to structure a set of conditions that would allow it to approve the transaction. To avoid rejection of the transaction, it is important to have explored what those conditions might be well in advance of formal filing.

At the end of the formal 45-day investigation, CFIUS is to issue findings and a recommendation to the President about whether the transaction should be blocked or rescinded. On rare occasions there are "dissenting opinions" for the President to consider. The President has 15 days to act. He then submits a report to Congress explaining his decision.

### CAREFUL PLANNING NEEDED

Each transaction that comes before CFIUS is unique. No two are likely to present the same national security issues or business objectives, and the policy environment in which CFIUS is making its decisions changes constantly. Therefore careful planning is required.

- **Understand the particular concerns of each stakeholder at the CFIUS table.** Perhaps the most important step that merger or acquisition proponents can take is to plan an approach to CFIUS well in advance of the conclusion of the transaction, assessing how each CFIUS participant would view the transaction and whether to notify CFIUS of the impending deal.

> CFIUS often makes rapid-fire requests for information and demands short-fused decision-making regarding possible alterations to the deal.

While a party is not *required* to notify CFIUS before concluding the transaction – even if it appears likely that it will implicate national security concerns – parties must carefully consider whether it makes sense to submit a preemptive alert. Any CFIUS member may, on its own initiative, provide "notice of a transaction" at any time within three years of the transaction's completion, and the President may void the transaction. Although the resulting CFIUS inquiry may be burdensome and time-consuming, especially in the busy period

immediately prior to concluding a transaction, a lingering, long-term threat of potential divestiture can inject crippling uncertainty into a deal.

Advisers who understand the relevant national security issues and how they will be viewed, especially in the political and business context, are critical to evaluating the risks and rewards of notification and the mitigating measures that may permit a transaction to pass muster. Because of the compressed time frame of the CFIUS process (a maximum of 90 days from notice to decision), the parties will need advice on the interests and perspectives of each department and agency likely to be concerned with a given transaction. Knowledge of related regulatory schemes applicable to transnational business with national security implications – such as antitrust, export controls, personnel security clearances, and the Foreign Corrupt Practices Act – is also important.

• **Do not file a notification until a favorable outcome is assured.** Most of the material work before CFIUS should be addressed before filing with CFIUS. This includes vetting potentially problematic aspects of a transaction with each relevant stakeholder and working to resolve its concerns, either by addressing them on the merits or accommodating them with measures that mitigate national security concerns. Similar planning and consultation can immunize a transaction from Congressional or media criticism, especially if CFIUS members can assure policy makers that they have considered and addressed potential problems.

Just as experienced trial lawyers adhere to the adage, "never ask a witness a question unless you know what the answer will be," parties to a transaction with national security implications should not file a CFIUS notification until they have developed a high degree of confidence that the transaction will be quickly cleared.

• **Do not underestimate the demands of the CFIUS process.** Of the 470 notifications filed with CFIUS, only eight have resulted in formal investigations. These numbers should not, however, be read to suggest that CFIUS is a paper tiger. The relatively low number of formal, 45-day investigations does not reflect the dialogue and negotiation that occur between the parties and CFIUS before the filing of a notice or during the initial 30-day preliminary review period. In practice, the vast majority of filings are settled during the initial 30 days, either by approval of the acquisition – often after the parties agree to mitigate concerns raised during the review – or voluntary withdrawal of the filing.

During this compressed period, CFIUS often makes rapid-fire requests for information and demands short-fused decision-making regarding possible alterations to the deal. As a result, parties must stand ready to respond quickly, and to evaluate costs and benefits of proposed changes rapidly. Parties should not be lulled into thinking the process is a formality merely because few formal 45-day investigations occur. When the notice is filed, parties should expect high-tempo action.

### A SENSITIVE FORUM

Most business executives have never heard of the Committee on Foreign Investment in the United States, but with the increased pace of foreign acquisitions and the growing number of technologies, resources and infrastructures that can be considered to be part of our national security, the CFIUS process will become a more common venue for competitive battles. Remote national security implications can be exploited by opponents, who may be able to generate public and political pressures that could drive the CFIUS process in unexpected and potentially disadvantageous directions.

Remote national security implications can be exploited by opponents, who may be able to generate public and political pressures.

It has never been easy to anticipate which transactions will trigger scrutiny and concern. In a changing business and national security climate, this little understood process is likely to present many more traps for the unwary, fraught with peril for the unsuspecting or the unprepared. Those carefully armed with a well-designed and informed strategy will successfully navigate the shoals.

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*Stephen W. Preston is a partner at WilmerHale, in Washington, DC. He was previously general counsel of the Department of the Navy and acting general counsel of the Department of Defense, as well as deputy assistant attorney general at the Department of Justice. He is currently vice chair of the Defense, National Security and Government Contracts Department at WilmerHale.*

# LEGAL SERVICES IN THE DEPARTMENT OF DEFENSE

## ADVANCING PRODUCTIVE RELATIONSHIPS

**INDEPENDENT REVIEW PANEL**

**TO STUDY THE RELATIONSHIPS BETWEEN**

**MILITARY DEPARTMENT**

**GENERAL COUNSELS**

**AND**

**JUDGE ADVOCATES GENERAL**

**SEPTEMBER 15, 2005**

**INDEPENDENT REVIEW PANEL TO STUDY THE RELATIONSHIPS BETWEEN MILITARY DEPARTMENT GENERAL COUNSELS AND JUDGE ADVOCATES GENERAL**



September 15, 2005

The Honorable Donald H. Rumsfeld
Secretary of Defense
1000 Defense Pentagon
Washington, DC 20301-1000

Dear Mr. Secretary:

We, the members of the Independent Review Panel to Study the Relationships Between Military Department General Counsels and Judge Advocates General, submit this Report containing our findings and recommendations regarding the effectiveness of those relationships and the legal support provided to the leadership of the Military Departments and the Armed Forces.

Respectfully submitted,

F. Whitten Peters
Chairman

John O. Marsh, Jr.
Co-Chairman

John A. Shaud
Panel Member

Stephen W. Preston
Panel Member

Walter B. Huffman
Panel Member

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# LEGAL SERVICES IN THE DEPARTMENT OF DEFENSE:

## ADVANCING PRODUCTIVE RELATIONSHIPS

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# Foreword

The Secretary of Defense appointed this Independent Review Panel to Study the Relationships between Military Department General Counsels and Judge Advocates General (hereinafter referred to as "the Panel") in accordance with section 574 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Public Law 108-375.[1] Section 574 required the establishment of an independent panel of outside experts to conduct a study and review of the relationships between the legal elements of each of the Military Departments.

At the outset, it is important to note the Panel's unanimous view that the Department of Defense, at all levels, is served by an exceptionally able, committed, and dedicated cadre of military and civilian lawyers. Collaboration and mutual respect among uniformed judge advocates and civilian lawyers, career officers and political appointees, at headquarters and in the field, and across Service lines have ensured the delivery of quality legal services where and when needed.

It is also clear that lawyers at headquarters and in the field play an important role in combat operations of the Department and that commanders increasingly turn to their assigned counsel for advice on a wide range of issues. As General John Abrams said in his testimony before the Panel, the role of the lawyer today is far broader than in earlier conflicts where the legal counsel focused on "enforcement of standards and discipline in dealing with misconduct."[2]

Operational commanders and headquarters officials testified that the rule of law has never been more important than today and that lawyers are an integral part of their staffs and missions. They have come to rely on their attorneys for more than just legal

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[1] Pub. L. No. 108-375, 118 Stat. 1811 (2004).

[2] Army General [hereinafter GEN] (Retired) John N. Abrams, former Commanding General, U.S. Army Training and Doctrine Command, Transcript of June 28, 2005 Hearing, at 66-67.

advice, drawing on their critical thinking skills and judgment.[3] For this reason, attorneys' roles are expanding into areas that have not historically been considered legal in nature.[4] Even in this time of personnel constraints within the Department of the Defense, the demand for attorneys is growing.[5] Commanders have an abiding sense of accountability for their actions and are looking to and relying upon attorneys, both civilian and military, to assist them in fulfilling their critical missions within the rule of law.

Evidencing the important role of lawyers, today hundreds of legal personnel, from judge advocates to legal specialists, are deployed overseas in the Global War on Terrorism. To give some examples:

- A senior DoD civilian attorney deployed to Iraq and served as the general counsel to the Coalition Provisional Authority (CPA). A civilian attorney from the Department of the Navy also deployed to Iraq to provide legal support to the CPA.

- In May of 2005, the Army had over 600 judge advocates and paralegals deployed overseas, and the Navy currently has 32 judge advocates and legalmen deployed to Iraq, Afghanistan, and afloat in these areas of operations.

- To better adapt and respond to the needs of the operational commander, the Marine Corps has assigned judge advocates down to the battalion level, and the

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[3] *See, e.g.*, GEN Richard A. Cody, Vice Chief of Staff, Transcript of June 2, 2005 Hearing, at 228-229 and 240-241; Vice Admiral [hereinafter VADM] John G. Morgan, Jr., Deputy Chief of Naval Operations for Information, Plans and Strategy, Transcript of June 2, 2005 Hearing, at 66-67.

[4] USMC Brigadier General [hereinafter BGen] Kevin Sandkuhler, Staff Judge Advocate to the Commandant, Transcript of May 19, 2005 Hearing, at 78-79; Army Major General [hereinafter MG] Thomas Romig, The Judge Advocate General, Transcript of May 19, 2005 Hearing, at 228.

[5] MG Romig, *supra* note 4, at 168.

Army has restructured itself to assign judge advocates to combat units, including Stryker brigades.[6]

- Air Force judge advocates have performed a variety of missions in Iraq, such as serving as legal advisor to the Iraq Survey Group and as members of Joint Services Law Enforcement Teams.

These forward-deployed legal teams are exposed to dangers not typically associated with the provision of legal services. Indeed, the Panel notes with sadness that four military legal professionals have been killed in Iraq and many have been wounded.

The growing importance of lawyers in the Department should be viewed as a positive development. Commanders understand that the scope of their authority is defined by law and by specific rules of engagement authorized by the President and Secretary of Defense. In the war on terrorism, a commander's scope of authority is perhaps less clear because operations take place outside of familiar legal frameworks, such as those associated with NATO or those used in earlier conflicts.[7] It is the commander's lawyer, sometimes in coordination with legal offices in the Pentagon, who advises the commander on the range of options available to him.

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[6] *Id.* at 228; BGen Sandkuhler, *supra* note 4, at 65.

[7] As GEN Abrams testified:

> What's happened now is we're operating in environments that do not have the structure . . . of formal treaty arrangements—either with the host nation or with our allies and friends. And when you put a senior commander in that kind of an environment . . . what you find is the legal counsel will help you bridge the lack of ... structure of these arrangements. . . .

Abrams, *supra* note 2, at 67. USMC (Retired) General Michael Williams agreed:

> [I]f wars of the coming century looked more like Iraq and less like Korea, we're going to see an increased demand for legal services . . . . We're going to need to provide the point man who is going to be less senior and less experienced than he used to be—that commander—[and] we're going to have to provide him with legal services."

Transcript of June 28, 2005 Hearing, at 74-75.

The Panel notes that because of the ubiquity of satellite communications and Internet access on the battlefield, lawyers who are forward deployed are able to use "reachback" to get advice from higher headquarters on unique issues facing front line commanders.[8] This is completely appropriate, especially where novel issues have been presented. For example, when the advice needed is in the area of fiscal or acquisition law, the most knowledgeable lawyers may be found at the headquarters, either in the Office of the Judge Advocate General or in the Office of the General Counsel. At other times, advice requires coordination with the Legal Counsel to the Chairman of the Joint Chiefs of Staff or with the DoD General Counsel, both of whom lead highly expert legal offices.

As discussed in this Report, while the structure of legal support within the Department is complex, with many interacting and sometimes overlapping parts, that structure is fundamentally sound. Therefore, the Panel is not recommending further legislation regarding the organizational structure of the Military Departments' legal services. On the other hand, the relationship between the Departments' General Counsels and Judge Advocates General has, from time-to-time, become strained. This can be avoided if Service Secretaries and their legal teams recognize the largely complementary roles that Congress intended for the General Counsels and Judge Advocates General when it established these offices.

In the Report that follows, the Panel describes the legal structure of the Department of Defense, tracing its history and evolution, as well as its current size and organization. The Report further addresses the proper roles of the Service General Counsel and Judge Advocate General and concludes with observations on current issues

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[8] Joint doctrine defines reachback as "the process of obtaining products, services, and applications, or forces, or equipment, or material from organizations that are not forward deployed." *See* JOINT PUBLICATION 1-2, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 440 (12 April 2001, as amended through 9 May 2005). The term was coined to describe intelligence and command and control processes, but has since broadened to include virtually any process for supporting in-theater forces with resources located outside of the theater.

relating to legal advice to the joint commander and the future structure of the Military Department legal organization.

## I. Scope of Review

In carrying out this study and review, the Panel is charged by statute with five main responsibilities:

- Review the history of relationships between the uniformed and civilian legal elements of each of the Armed Forces;[9]
- Analyze the division of duties and responsibilities between those elements in each of the armed forces;[10]
- Review the situation with respect to civilian attorneys outside the offices of the Service General Counsels and their relationships to the Judge Advocates General and the General Counsels;[11]
- Consider whether the ability of judge advocates to give independent, professional legal advice to their Service staffs and to commanders at all levels in the field is adequately provided for by policy and law;[12] and,

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[9] *See infra* Section III.

[10] *See infra* Section IV; *see also* U.S. DEP'T OF ARMY, SUBMISSION TO THE INDEPENDENT REVIEW PANEL TO STUDY THE RELATIONSHIPS BETWEEN MILITARY DEP'T GENERAL COUNSELS AND JUDGE ADVOCATES GENERAL 1 (May 10, 2005) [hereinafter Army Submission]; U.S. DEP'T OF NAVY, NAVY COMBINED OUTLINE OF LEGAL ELEMENTS BRIEF 9 (27 Apr. 2005) [hereinafter Navy Submission]; Memorandum, SAF/GC to The Honorable F. Whitten Peters, Chair, the Honorable John Marsh, Co-Chair, and the Members of the Section 574 Review Panel (Apr. 29, 2005) [hereinafter AFGC Submission]; U.S. AIR FORCE JUDGE ADVOCATE GENERAL'S CORPS, IMPROVING HEADQUARTERS AIR FORCE LEGAL SERVICES: AIR FORCE JUDGE ADVOCATE GENERAL'S CORPS SUBMITTAL TO THE INDEPENDENT PANEL (May 2005) [hereinafter AFJAG Submission].

[11] *See infra* Section VI and Appendix D, Professional Development and Supervision of Attorneys across the Department of Defense.

[12] *See infra* Section V.

- Consider whether the Judge Advocates General and General Counsels possess the necessary authority to exercise professional supervision over judge advocates, civilian attorneys, and other legal personnel practicing under their cognizance in the performance of their duties.[13]

In addition, the Department of Defense Charter authorized the Panel to consider other related issues deemed appropriate. As the Panel's review progressed, three other issues emerged that deserved consideration: legal support to joint commands;[14] the Presidentially appointed, Senate confirmed status of the General Counsels; and, determining whether the grade of the Judge Advocates General should be elevated to three stars.[15]

## II. Methodology

The Panel held seven public hearings, at which 46 current and former officials of the Department of Defense and other interested members of the public presented their views. Witnesses included the current General Counsels (GCs) and the Judge Advocates General (TJAGs) of the Military Departments;[16] the Department of Defense General Counsel; the Counsel for the Commandant of the Marine Corps; and a cross-section of senior civilian and uniformed clients at the Department headquarters and major command levels including representatives from the Office of the Chairman of the Joint Chiefs of Staff and from joint and operational commands. The Panel also heard from former Military Department Secretaries, General Counsels, Judge Advocates

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[13] *See infra* Section VI.A and Appendix D, Professional Development and Supervision of Attorneys across the Department of Defense.

[14] *See infra* Section VII.

[15] *See infra* Section VIII.

[16] For ease of reference, the term "TJAG" includes the Judge Advocates General of the Army, the Navy, and the Air Force, and unless otherwise specified or indicated by context, the Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC).

General, and from professional organizations. The Members considered written submissions from the Military Departments, professional organizations, and members of the public. The Panel discussed this information in several deliberation sessions, all of which were open to the public. The Members thank the many individuals who have informed their work over the past several months. The Panel has based its findings and recommendations in this Report upon the written submissions and the testimony received, as well as upon the depth and breadth of experience of the Panel members.

## III. The Department of Defense Legal Community

Legal organizations and organic legal support are integrated into every facet of the Department of Defense. The Military Departments are each served by a General Counsel with attendant staff, along with a Judge Advocate General heading a JAG Corps. The Secretary of Defense and Chairman of the Joint Chiefs of Staff each has his own legal staff, as do the Defense Agencies, the Unified commands.

As of May 2005, the Department of Defense listed a total of 10,874 personnel authorizations dedicated to legal services and support across the Defense establishment. This aggregate number encompasses civilian attorneys, active duty and reserve judge advocates, paralegals, and administrative staff. The structure and defined responsibilities of the varied legal organizations to which these personnel are assigned are addressed in more detail later. Nevertheless, as a starting point for analysis, it is important to note that these 10,874 authorizations, whether designated uniformed or civilian, are all government employees or Service members.

### *A. Legal Support: 1775 - 1986*

The number of positions for attorneys in the U. S. military has gradually grown from the first judge advocate to a large and diverse staff of uniformed and civilian lawyers. At first, the few full-time military attorneys were judge advocates responsible for advice to field commanders and for the administration of

courts-martial under the Articles of War. As the size of the standing armed services grew, the legal requirements became more complex. Today, a cadre of senior civilian and military attorneys in DoD guide the provision of legal services to meet these diverse requirements. These senior attorneys have become integral members of the various components' leadership teams.

In early U.S. military history, many citizen-soldiers who happened to be lawyers provided legal services for commanders, but the need for an officer who could concentrate on command legal matters emerged over time. The first of the statutory military attorneys was the forerunner of today's Army Judge Advocate General, appointed in 1775.[17] The Navy had intermittent authorizations for a senior uniformed attorney until the Office of The Judge Advocate General was established by statute in 1880. In 1947, when the Air Force was established as a separate Service, the senior Air Force military attorney was the Air Judge Advocate, under the Director of Personnel. The next year, Congress created the Office of the Judge Advocate General of the Air Force, mirroring positions within the Army and Navy. The duties of these offices ebbed and flowed over the history of each Service, but the centerpiece of uniformed military practice has always been the provision of advice to commanders on the law of armed conflict and on the administration of military justice.

The forerunners of the modern General Counsel positions grew out of a need for advice to the Secretary of War and the Secretary of the Navy on largely commercial, legislative, and political matters. Prior to 1947, the War Department and the Department of the Navy each had a civilian headquarters staff, which was dedicated to supporting the Secretaries and was almost completely separate from the military staff. As early as 1941, the Navy established a Procurement Legal Division and, in 1944, designated a General Counsel in the civilian headquarters staff to oversee procurement aspects of the

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[17] On July 29, 1775, the Second Continental Congress, at the request of General George Washington, created the position of Judge Advocate General of the Army, and appointed William Tudor of Boston, a 25-year old Harvard graduate, as Judge Advocate General with the rank of Lieutenant Colonel.

mobilization for World War II. Within the Army, the need for specialized legal services to the technical bureaus responsible for procurement also led to the creation of large civilian staffs, independent of the Judge Advocate General. The senior civilian official responsible for air forces, the Assistant Secretary of War for Air, also had an assistant executive officer responsible for legal aspects of the office, including legislative affairs.

With the enactment of the National Security Act of 1947, the Military Departments, including the newly created Department of the Air Force, were consolidated under the National Military Establishment, later renamed the Department of Defense. While the Act generally contemplated "unification" of the four Services, it explicitly rejected the notion of a single general staff with command authority. As part of its formation as an independent Service in 1947, the Air Force followed the Navy in creating a General Counsel within the Office of the Secretary. In 1950, the Army created a similar position known as the Department Counselor "to serve as a trouble shooter for the Secretary in the political-legislative-legal field."[18] The position was later designated the General Counsel.

Thus, by 1986 when Congress enacted the Goldwater-Nichols Act,[19] each of the Military Departments had a well-established Office of General Counsel, although the positions were not yet established in statute.

The position of General Counsel of the Department of Defense was established by Defense Reorganization Plan No. 6 of 1953,[20] implemented by DoD Directive 5145.1,

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[18] Army Submission, *supra* note 10, at 1.

[19] Pub. L. No. 99-433, 100 Stat. 992 (1986).

[20] 67 Stat. 638 (1953). President Eisenhower submitted Reorganization Plan No. 6 to both Houses of Congress on April 30, 1953. The Plan advised Congress of organizational changes in the Department of Defense made pursuant to the President's executive authority. It also sought legislative action for those organizational modifications requiring statutory changes. The first of three stated Presidential objectives for the Plan was to strengthen civilian control of the military: "Our military Establishment must be founded upon our basic constitutional principles and traditions. There must be a clear and unchallenged civilian responsibility in the Defense Establishment. This is essential not only to maintain democratic institutions, but also to protect the integrity of the military profession. Basic decisions relating to the military forces

August 24, 1953.[21] The position was derived from one of the original three Special Assistants to the Secretary (1947) and the Assistant Secretary of Defense (Legal and Legislative Affairs) (1949). Congress accepted Reorganization Plan No. 6, and it became effective on June 30, 1953. The Plan established the General Counsel of the Department of Defense as substantially equivalent in rank to the Assistant Secretaries of Defense. It also designated the General Counsel as the Department's "chief legal officer," a term that has been carried through into the current statutory authorization found at 10 U.S.C. § 140.[22] The term "chief legal officer" is not defined in either the statute or DoD Directive 5145.1.

DoD Directive 5145.1 delineates 21 specific responsibilities of the DoD General Counsel, including advising the Secretary and Deputy Secretary of Defense on all legal matters and services affecting DoD. The DoD General Counsel is responsible for resolving "disagreements within the Department of Defense" on specific legal and policy matters.[23] The Directive expressly delegates to the General Counsel the authority to issue legal guidance and instructions to the Military Departments through their Secretaries, and to the Combatant Commands through the Chairman of the Joint Chiefs of Staff.[24] It also

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must be made by politically accountable civilian officials." The Plan requested that Congress make the DoD General Counsel a statutory position: "In addition, the plan also provides that, in view of the importance of authoritative legal opinions and interpretations, the office of General Counsel be raised to a statutory position with rank substantially equivalent to that of an Assistant Secretary."

[21] U.S. DEP'T OF DEFENSE, DIR. 5145.1, GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE (as amended 2 May 2001) [hereinafter DoD DIR. 5145.1].

[22] 10 U.S.C. § 140(a) provides:

> There is a General Counsel of the Department of Defense, appointed from civilian life by the President, by and with the advice and consent of the Senate. (b) The General Counsel is the chief legal officer of the Department of Defense. He shall perform such functions as the Secretary of Defense may prescribe.

[23] DoD DIR. 5145.1, *supra* note 21, at para. 3.10.

[24] *Id.* at para. 5.

explains that the DoD General Counsel shall perform such other duties as the Secretary or Deputy Secretary of Defense assigns.[25]

## *B. Goldwater-Nichols Act and Subsequent Legislation*

During the 1980s, Congress conducted a comprehensive examination of the organizational and command structure of the U.S. military, culminating in the Goldwater-Nichols Department of Defense Reorganization Act of 1986 (Goldwater-Nichols).[26] The legislative history of Goldwater-Nichols provides guidance regarding the statutory and organizational relationship between General Counsels and Judge Advocates General for each Military Department.

A stated purpose of Goldwater-Nichols was "[t]o revise the organization of the Military Departments to increase civilian control and to eliminate duplication and staff layering."[27] Goldwater-Nichols required that the Secretaries of the Military Departments be solely responsible for the functions of (1) acquisition, (2) auditing, (3) comptroller, including financial management, (4) information management, (5) inspector general, (6) legislative affairs, and (7) public affairs.[28] It prohibited the creation of a parallel military staff in areas of exclusive Secretarial authority and directed the Secretaries of the Military Departments to eliminate duplicative functions between Military Department Secretaries and Service Chiefs throughout the headquarters.[29]

Importantly for present purposes, while Congress codified the positions of General Counsels in the Military Departments, it did not merge the General Counsel and

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[25] *Id.* at para. 3.21.

[26] Pub. L. No. 99-433, 100 Stat. 992 (1986).

[27] H.R. REP. NO. 99-700, at 20 (1986); *see also* S. REP. NO. 99-280, at 1 (1986).

[28] Pub. L. No. 99-433, 100 Stat. 992 (1986) (§§ 501 (Army), 511 (Navy), 521 (Air Force)); *see also* 10 U.S.C. §§ 3014(c)(1) (Army), 5014(c)(1) (Navy), 8014(c)(1) (Air Force) (1986).

[29] *Id.; see also* H.R. CONF. REP. NO. 99-824, at 146-152 (1986).

Judge Advocate General organizations.[30] In an effort to avoid duplication and staff layering, the Senate Armed Services Committee (SASC) Professional Staff did present an option to the Committee to amend the organizational structures of each Service to require the Judge Advocates General to report to the General Counsels instead of the Service Chiefs or, in the case of the Navy, to the Secretary.[31] The SASC did not adopt this option.

The Senate Report on the Goldwater-Nichols bill expressly noted the decision to continue some duplication in headquarters legal organizations, notwithstanding the overarching purpose of Goldwater-Nichols to weed out duplicative functions between Military Department secretariats and Service staff. During its consideration of the bill, the SASC noted that:

> Subsection (c) of Section 8014 would require the Secretary of the Air Force to ensure that the Office of the Secretary of the Air Force does not duplicate specific functions for which the Air Staff has been assigned responsibility. While recommending the elimination of duplication, the Committee does see a continuing need for the General Counsel of the Air Force as a key assistant to the Secretary of the Air Force, particularly on sensitive matters directly related to civilian control of the military.[32]

The Senate Report contains substantially identical language relating to the Department of the Army and Department of the Navy.[33] Thus, while Congress was concerned about

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[30] Pub. L. No. 99-433, 100 Stat. 992 (1986) (§§ 501 (Army), 511 (Navy), 521 (Air Force), codified at 10 U.S.C. §§ 3019, 5019, 8019).

[31] S. REP. NO. 99-86, STAFF OF SENATE COMM. ON ARMED SERVICES, 99TH CONG., DEFENSE ORGANIZATION: THE NEED FOR CHANGE, at 456-462 (Comm. Print 1985).

[32] S. REP. NO. 99-280, at 69-70 (1986); *see also* H.R. REP. NO. 99-700 (1986).

[33] S. REP. NO. 99-280, at 56 (Army), 63 (Navy) (1986); *see also* H.R. CONF. REP. NO. 99-824, at 149 (1986).

duplication, it acknowledged and accepted the need for both General Counsels and Judge Advocates General in each Military Department.

The bill left many questions unanswered, including "where the ... general counsels would fit into the organization" of the respective Military Departments.[34] In its conference report accompanying the bill, Congress explained that it was establishing the positions of General Counsel of the Military Departments in law as they existed in fact on the date of passage and left the specific duties of the General Counsels to the discretion of the Military Department Secretaries.[35]

In 1988, Congress added the requirement that General Counsels of the Military Departments be appointed with the advice and consent of the Senate.[36] The SASC intended that the General Counsel would have the status of an Assistant Secretary and would be involved in the management of the Department at the highest levels.[37]

### *C. Defense Memoranda: 1992*

Starting in the early 1990s, Congress signaled that it intended to limit executive discretion to delegate certain authorities to the General Counsels. An indication of this occurred in response to a March 3, 1992 memorandum issued by Deputy Secretary of Defense D. J. Atwood. The memorandum identified General Counsels of all Military Departments as "chief legal officers ... responsible and

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[34] H.R. CONF. REP. NO. 99-824, at 169-170 (1986).

[35] *Id.* at 153-154.

[36] National Defense Authorization Act, Fiscal Year 1989, Pub. L. No. 100-456, 102 Stat. 1918 (1988) (codified as amended at 10 U.S.C. §§ 3019 (Army), 5019 (Navy), 8019 (Air Force)).

[37] The Honorable Craig S. King served as General Counsel of the Department of the Navy from November 22, 1989 through January 20, 1993, and was the first Senate confirmed General Counsel of the Department of the Navy. Mr. King testified before the Panel that the Staff Director and General Counsel of the SASC informed him at the time that the SASC intended the General Counsel to have the status of an Assistant Secretary and to be involved in the management of the Department of the Navy at the highest levels. Transcript of June 15, 2005 Hearing, at 280-283; *see also* BACKGROUND MATERIAL ON STRUCTURAL REFORM OF THE DEPARTMENT OF DEFENSE, Staff Report of the House Committee on Armed Services, 99th Cong., 2nd Sess., Mar. 1986, at 21 ("Each department shall have a general counsel who will have the status of an assistant secretary.").

accountable for proper, effective and uniform interpretation and application of the law and delivery of legal services," whose opinions "shall be the controlling legal opinions of their respective Departments."[38] In addition, the March memorandum directed that the "civilian and military personnel performing legal duties ... under the Secretary ... shall be subject to the authority of the General Counsel ...."[39]

The sense of the Senate regarding the March memorandum was reflected in the Senate report accompanying the National Defense Authorization Act for Fiscal Year 1993. The report stated that it did not intend to "restrict ... the service General Counsels in exercising any authority provided to them by the Secretary of Defense or the Secretary of the Military Department concerned under either current regulations or such future regulations as may be authorized by applicable law."[40] It did, however, express concerns regarding potential interpretations of the memorandum:

> [The memorandum] is also susceptible to an interpretation that would assign to the military department General Counsels specific management duties with respect to the diverse legal organizations within their departments. If so interpreted, the memorandum could require the DOD and service General Counsels to undertake a range of specific duties that would diminish their ability to concentrate attention on important oversight responsibilities.[41]

In connection with the subsequent nomination of David S. Addington to serve as General Counsel of the Department of Defense, the Senate asked questions relating to the Atwood Memorandum. Mr. Addington clarified that the memorandum did not provide a

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[38] Memorandum, D. J. Atwood, Deputy Secretary of Defense, Dep't of Defense, to the Secretaries of the Military Dep'ts, subject: Effective Execution of the Laws and Effective Delivery of Legal Services (Mar. 3, 1992) [hereinafter Atwood Memorandum].

[39] *Id.*

[40] S. REP. NO. 102-352 (1992).

[41] *Id.*

basis for the General Counsel of a Military Department to direct the Judge Advocate General in the execution of any statutory responsibility of the respective TJAG.[42]

On August 14, 1992, then-Acting Secretary of Defense Atwood issued a second memorandum superseding the March memorandum.[43] It stated that the Secretaries of the Military Departments shall ensure that the General Counsels serve as chief legal officers of their respective Departments and may issue controlling legal opinions. The August 14 memorandum further stated that it shall be implemented consistent with the statutes relating to the Judge Advocates General of the Military Departments. After the responses from Mr. Addington during his confirmation hearing and the issuance of the August 14 memorandum, Congress took no further action on the matter.

In 1994, Congress added the General Counsels to the order of succession to Secretaries of the Military Departments.[44] In passing this provision, Congress noted that General Counsels were established in law under Goldwater-Nichols at one grade below Assistant Secretaries, and in 1991, "Title [5] was amended to raise General Counsels to Level IV of the Executive Schedule, equal in rank to the Assistant Secretaries."[45] Also in 1991, Executive Order 12787 established the order of succession to the Secretary of

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[42] *See* Nominations of David S. Addington to be General Counsel of the Department of Defense, and Robert S. Silberman to be Assistant Secretary of the Army for Manpower and Reserve Affairs; to Consider Certain Pending Civilian Nominations; to consider Certain Pending Army and Air Force Nominations; and to Discuss, and Possibly Consider Pending Navy and Marine Corps Nominations, U.S. Senate, Committee On Armed Services, 102nd Cong. 302 (1992) (statement of David S. Addington), at 325-327, answers to sub-questions 30h (*the second*) through 30k [hereinafter Addington Nomination Hearing and Advance Questions].

[43] Memorandum, D. J. Atwood, Acting Secretary of Defense, Dep't of Defense, to the Secretaries of the Military Dep'ts, subject: Effective Execution of the Laws and Effective Delivery of Legal Services (Aug. 14, 1992) [hereinafter August 14 Atwood Memorandum].

[44] National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 902, 108 Stat. 2663, 2823, (1994) (amending 10 U.S.C. §§ 3017 (Army), 5017 (Navy), 8017 (Air Force)). The General Counsel of the Department of the Navy had already been added to the order of succession to the Secretary of the Navy under an Executive Order. Exec. Order No. 12879, 58 Fed. Reg. 59,929 (Nov. 8, 1993). The General Counsel of the Army was also added to the order of succession to the Secretary of the Army through an Executive Order. Exec. Order No. 12908, 59 Fed. Reg., 21,907 (Apr. 22, 1994).

[45] 140 CONG. REC. S5062 (daily ed. May 3, 1994) (statement of Senator Nunn). *See also* 5 U.S.C.S. § 5315.

Defense, grouping the General Counsels with Assistant Secretaries of the Military Departments.[46] Congress passed Section 902 of the National Defense Authorization Act for Fiscal Year 1995 to include General Counsels in the order of succession of their respective Military Departments.[47]

### *D. Secretary of the Air Force Orders: 2003 - 2005*

The issue of the appropriate roles and missions of a Service General Counsel and Judge Advocate General arose again in 2003, when Air Force Secretary James Roche was attempting to eliminate duplication between the functions of the Air Force Secretariat and the Air Staff. As Secretary Roche explained in testimony to the Panel, in his view, there was unnecessary duplication between the office of the General Counsel and the office of the Judge Advocate General. As he put it, "I was in a situation that no firm—no business firm—would tolerate, which would be two independent competing law firms within it ...."[48] In addition, Secretary Roche felt "[he] really had no insight into how [lawyers were] recruited, how they trained, how they developed, how they were assigned, how numbers are chosen."[49] To address his concerns, he asked the General Counsel and Judge Advocate General to present a plan for improving visibility into the Air Force legal structure and for eliminating duplication between their respective offices. When that effort failed, he issued Secretary of the Air Force Order[50] (SAFO) 111.5 on May 15, 2003.[51]

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[46] *Id.*; Executive Order 12787, 57 Fed. Reg. 517 (Jan. 7, 1992); Executive Order 13000 modified EO 12787 to reflect organizational changes in the Department of Defense. 61 Fed. Reg. 18,483 (Apr. 24, 1996). EO 13000 did not change the ranking of General Counsels of the Military Departments in the order of succession to the Secretary of Defense. *Id.*

[47] 140 CONG. REC. S5062, *supra* note 45.

[48] The Honorable Dr. James G. Roche, former Secretary of the Air Force, Transcript of June 15, 2005 Hearing, at 102.

[49] *Id.* at 108.

[50] Formal, standing orders of the Secretary of the Air Force are published as SAFOs. These orders serve the same institutional purpose as General Orders in the Army and Secretary of the Navy Instructions. SAFOs are used to implement the statutory authority of the Secretary of the Air Force to organize and

Among other things, the SAFO gave the General Counsel broad authority to set legal policy for the Department, to become involved in any legal matter, to oversee the provision of legal services throughout the Department, and to review all legal training within the Department. In addition, the General Counsel was made "solely responsible ... for legal aspects of major matters arising in or involving the Department ...." Further, TJAG was given a "dotted line reporting relationship to the General Counsel, serving as the Principal Military Advisor to the General Counsel."[52]

By giving the General Counsel apparent executive authority over TJAG and by creating a relationship in which TJAG appeared to become subordinate to the General Counsel, the Secretary's Order seemed to many in the judge advocate community to create precisely the type of relationship contemplated in the withdrawn Atwood Memorandum, a relationship that had been abandoned after opposition by the Senate. It became apparent to the Panel that the Secretary's 2003 Order was evidence of, and exacerbated, what had been a poor working relationship between the Air Force General Counsel and the Judge Advocate General that continues to the present.

In light of the Air Force Order, in 2004 Congress revisited the respective roles and responsibilities of the General Counsels and TJAGs of the Military Departments. Congress enacted legislation stating that no officer or employee of the Department of Defense may interfere with the ability of the Judge Advocates General to give independent legal advice to their respective Secretary or Service Chief, or the ability

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administer the Department of the Air Force. SAFOs have frequently been used to memorialize long-term Secretarial delegations of authority and to define the responsibilities of various Air Force organizations.

[51] U.S. DEP'T OF AIR FORCE, SEC'Y OF THE AIR FORCE ORDER 111.5, FUNCTIONS AND DUTIES OF THE GENERAL COUNSEL AND THE JUDGE ADVOCATE GENERAL (May 15, 2003).

[52] This structure, in which a senior staff officer became the principal military advisor to an Assistant Secretary-level official, was consistent with the reporting relationships between Assistant Secretaries and their related military equivalents that Secretary Roche established throughout the Air Force Headquarters. Letter from Dr. James G. Roche to Mr. F. Whitten Peters, Chairman, GC/JAG Independent Review Panel (Aug. 11, 2005).

of judge advocates in military units to give independent legal advice to commanders.[53] The statute also gave the Judge Advocate General of the Air Force authority to direct the duties of Air Force judge advocates, reflecting language that already existed for the Army.[54] Congress noted in the report that this was "the second time in 12 years that attempts to consolidate legal services in the Department of Defense have led to congressional action."[55] The legislation, therefore, appears to set a boundary on Secretarial discretion to give executive control of the legal function of a Military Department to the General Counsel and to subordinate the Judge Advocate General to the General Counsel's organization.

On July 14, 2005, the Acting Secretary of the Air Force issued a new SAFO 111.5, superseding the May 15, 2003 SAFO.[56] The "dotted line" reporting relationship language quoted above was not included in the new SAFO.

# IV. Structures, Roles, and Responsibilities

## *A. Inherently Governmental Function*

Current law and policy provide that most legal services performed for the Department of Defense are either inherently governmental or closely associated with inherently governmental functions.[57] When a Military Department or the

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[53] Pub. L. No. 108-375, § 574, 118 Stat. 1811 (2004).

[54] *Id.*, § 574(c)(2). *Compare* 10 U.S.C.S. § 8037(c)(2) (LEXIS 2005) *with* 10 U.S.C.S. § 3037(c)(2).

[55] H. REP. NO. 108-767, at 682 (2004).

[56] U.S. DEP'T OF AIR FORCE, SEC'Y OF THE AIR FORCE ORDER 111.5, FUNCTIONS AND DUTIES OF THE GENERAL COUNSEL AND THE JUDGE ADVOCATE GENERAL (July 14, 2005) [hereinafter SAFO 111.5].

[57] FEDERAL OFFICE OF MANAGEMENT AND BUDGET, CIRCULAR NO. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES, Attachment A (May 29, 2003), defines an inherently governmental function as one "that is so intimately related to the public interest as to mandate performance by Government personnel. These functions require the exercise of substantial discretion in applying Government authority and/or in making decisions for the Government."

Department of Defense seeks to contract for private sector legal services, a rigorous set of requirements must be met. These include a finding that DoD personnel are not available to perform these services; contract performance will be supervised by DoD personnel; and that the organizational conflict of interest laws are not violated. Even in instances meeting these touchstones for outsourcing, the relevant law requires that only government employees perform inherently governmental functions.[58]

As a practical matter, these rules reflect the fact that almost all legal support for the Defense establishment is provided "in-house," by government attorneys. It is the Panel's opinion that the Defense Department has been well-served by defining legal support, in the aggregate, as an inherently governmental function. In particular, the natural tendency of both civilian and uniformed leaders to view their legal advisors as the "sword and shield" needed to successfully carry out their duties supports the wisdom of requiring that core legal services be provided by government attorneys as a matter of sound public policy. In those unique situations where contracting for legal support has been found appropriate, the Panel agrees that such contracts should always be supervised by government attorneys to ensure there is stringent accountability for the legal advice provided to decision makers.

## B. Department of Defense General Counsel

DoD General Counsel is the chief legal officer of the Department of Defense and supervises the Office of the General Counsel and the Defense Legal Services Agency (DLSA). As part of his Department-wide duties, the General Counsel is "dual-hatted" as the Director of the DLSA, a DoD agency that provides legal advice and services for the Defense Agencies, DoD Field Activities, and other assigned organizations.

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[58] Federal Activities Inventory Reform Act of 1998, Pub. L. No. 105-270, 112 Stat. 2382, § 5(2)(b) (1998), 31 U.S.C.S. § 501, note; Pub. L. No. 108-375, 118 Stat. 1811, § 804 (2004) (adding 10 U.S.C. § 2383).

The DoD Office of General Counsel is composed of seven divisions, each headed by a Deputy General Counsel: International Affairs, Fiscal, Intelligence, Acquisitions & Logistics, Legal Counsel, Personnel & Health Policy, and Environment & Installations.

The charter and responsibilities for the DLSA are set forth in DoD Directive 5145.4, *Defense Legal Services Agency.* This directive establishes the DLSA as a separate agency of the Department of Defense, under the direction, control, and authority of the General Counsel. DLSA serves as the organizational conduit through which the legal staffs of the Defense Agencies[59] and Defense Field Activities[60] report to the DoD General Counsel.

There are a total of 550 attorneys currently assigned or reporting to the DoD General Counsel. This aggregate number includes 55 attorneys assigned directly to the Office of General Counsel, 80 attorneys assigned to headquarters functions at DLSA, and 380 attorneys assigned to the Defense Agencies and Field Activities. Eight judge advocates are detailed by the Military Departments to various offices of the General Counsel. Twenty-seven judge advocates are also assigned to the Office of Military Commissions,[61] a temporary body that does not reflect permanent manpower authorizations for DoD General Counsel.

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[59] These include such organizations as the Defense Advanced Research Projects Agency, Defense Commissary Agency, Defense Finance and Accounting Service, Defense Information Systems Agency, Defense Intelligence Agency, and Defense Logistics Agency.

[60] These include such organizations as the American Forces Information Service, Defense Prisoner of War/Missing Personnel Office, Defense Education Activity, Defense Human Resources Activity and the Tricare Management Activity.

[61] The Military Commissions were authorized by the President's Military Order of November 13, 2001, subject: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism. 66 Fed. Reg. 57831 (Nov. 16, 2001). Pursuant to this Order, the Commissions are responsible for the detention, treatment, and trial of certain non-United States citizens who are believed to be members of al Qaeda or to have aided or abetted, or conspired to commit acts of international terrorism. .

## C. Legal Counsel to the Chairman of the Joint Chiefs of Staff

Title 10 of the United States Code provides for an independently organized Joint Staff, operated under the authority, direction, and control of the Chairman, to support the Chairman in fulfillment of his statutory duties.[62] As with other elements of the Joint Staff, there is no separate statutory provision establishing legal support for the Chairman. The Office of the Chairman of the Joint Chiefs of Staff includes a legal element, designated as the "Office of Legal Counsel," which reports directly to the Chairman as a part of his personal staff. A legal advisor has been on the staff of the Chairman since General Omar Bradley became Chairman of the Joint Chiefs in 1949. The office combined the legal and legislative affairs function until 1990, when the Office of Legal Counsel became a separate element of the Chairman's staff.

The mission and responsibilities of the Office of Legal Counsel are defined by regulation and policy. Joint Staff Manual 5100.01B, *Organization and Functions of the Joint Staff*,[63] is the foundational document defining the role of Chairman's Legal Counsel. In particular, Enclosure B of this Manual includes Legal Counsel as one of the organizations comprising the "Office of the Chairman" (OCJCS). The stated mission of all the organizational elements within OCJCS, to include Legal Counsel, is to "provide support and assistance to the Chairman and Vice Chairman as directed."

The role of the Chairman's Legal Counsel is multi-faceted and uniquely positioned within the interconnecting web of legal organizations within the Defense Department. This attorney provides independent legal advice to the Chairman, while also serving as a liaison between the Unified commands' legal elements and the DoD General Counsel. The absence of a statutorily defined set of responsibilities for this legal

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[62] 10 U.S.C.S. § 155.

[63] 21 June 2001; Change 1, 9 Aug. 2002.

organization, while perhaps appropriate given the precisely defined statutory responsibilities of the Chairman it supports, requires that the Office of Legal Counsel carefully balance its independent advisory and broader liaison role.

In the view of the Office of Legal Counsel, it acts through and in support of the broad statutory responsibilities of the Chairman.[64] Thus, the Office of Legal Counsel views its role as ensuring that comments and concerns of the combatant commands related to legal issues are well represented and advocated through all levels of coordination; helping to provide oversight of legal services within the joint community; acting as a communication channel between the combatant commands' legal staffs and the DoD General Counsel; and routinely providing the DoD General Counsel with the joint perspective on legal issues. Historically, the Legal Counsel has represented the views of the Joint Staff in interagency legal meetings and typically attends such meetings in addition to representatives from the office of the DoD General Counsel.

The number and grade distribution of attorneys assigned to the Office of Legal Counsel are determined as part of the overall Joint Staff manning process. Pursuant to 10 U.S.C. § 155, the selection of officers for the Joint Staff is made by the Chairman from a list of officers submitted by the Military Departments. This statutory provision also requires that officers be selected by the Chairman in "approximately equal numbers" from each of the armed forces (other than the Coast Guard).

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[64] The Chairman's statutory responsibilities are set forth in 10 U.S.C.S. § 151 and § 153:

- Acts as the principal military adviser to the President, Secretary of Defense, and the National Security Council
- Acts as spokesman for the combatant commands, especially on operational matters
- Oversees the activities of the combatant commands
- Transmits communications between the President or the Secretary and the combatant commanders
- Provides guidance and direction to the combatant commanders on aspects of command and control for operations
- Arranges for military advice to be provided to all the offices of the Secretary of Defense
- Advises the Secretary on the priorities of requirements of the combatant commands.

Nine attorneys, all of whom are judge advocates, are currently assigned to the Office of Legal Counsel. All of the Military Departments are represented among these attorneys. The senior attorney in the Office of Legal Counsel is designated as "Legal Counsel to the Chairman." This position is authorized a grade of O-6 (captain for the Navy or colonel for the Army and Air Force). As with other aspects of the organization of the Office of Legal Counsel, the Chairman determines the grade designation through the Joint Staff personnel process.

## *D. Military Departments*

### 1. Statutory Structure

Goldwater-Nichols created the current statutory descriptions of the functions and responsibilities of the Military Department Secretaries and Service Chiefs.[65] The statute provides that the Secretaries of the Military Departments are responsible for, and have the authority necessary to conduct, all affairs of their Departments.[66] The Office of the Secretary of each Department has certain prescribed positions[67] and functions for which the Secretary is solely responsible.[68] The Department Secretaries are given broad discretion to assign, detail, and prescribe duties of military and civilian personnel in the Department; change the title of any office or activity not prescribed by law; and prescribe regulations to carry out secretarial functions, powers,

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[65] Pub. L. No. 99-433, 100 Stat. 992 (1986) (§§ 501 and 502 (Army), 511 and 512 (Navy), 521 522 (Air Force)).

[66] These include recruiting; organizing; supplying; equipping (including research and development); training; servicing; mobilizing; demobilizing; administering (including the morale and welfare of personnel); maintaining; construction, outfitting, and repair of military equipment; and construction, maintenance, and repair of buildings, structures, and utilities and the acquisition of real property. 10 U.S.C.S. §§ 3013, 5013, 8013.

[67] Generally, these include the Under Secretary; the Assistant Secretaries; the General Counsel; the Inspector General; and the Chief of Legislative Liaison or Affairs. 10 U.S.C.S. §§ 3014(b), 5014(b), 8014(b).

[68] These include acquisition, auditing, comptroller (including financial management), information management, inspector general, legislative affairs, and public affairs. 10 U.S.C.S. §§ 3014(c), 5014(c), 8014(c).

and duties.[69] The Secretary of each Department also has many responsibilities relating to military justice matters,[70] including the authority to convene general courts-martial.[71]

The Military Department General Counsels are members of the Office of their respective Department Secretary.[72] They are appointed from civilian life by the President, with the advice and consent of the Senate;[73] serve at Level IV of the Executive Schedule;[74] and are in the order of succession to the Secretaries.[75] The General Counsel performs such functions as the Secretary may prescribe; there are no other statutorily prescribed duties for this office.[76]

The Judge Advocates General and the Staff Judge Advocate to the Commandant of the Marine Corps are appointed by the President, with the advice and consent of the Senate.[77] TJAGs are appointed in the grade of major general or rear admiral, as appropriate, and the SJA to the CMC is appointed in the grade of brigadier general.[78] Statutory duties are described below.

### 2. Functions, Roles, and Responsibilities

The Military Department Secretary has the discretion to expand or contract the duties of the General Counsel or Judge Advocate General, as long as

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[69] 10 U.S.C.S. §§ 3013(g), 5013(g), 8013(g).
[70] *Id.* §§ 801-946.
[71] *Id.* § 822.
[72] *Id.* §§ 3014(b)(4), 5014(b)(3), 8014(b)(3).
[73] *Id.* §§ 3019(a), 5019(a), 8019(a).
[74] 5 U.S.C.S. § 5315.
[75] 10 U.S.C.S. §§ 3017, 5017, 8017.
[76] *Id.* §§ 3019(b), 5019(b), 8019(b).
[77] *Id.* §§ 3037(a) (Army), 5148(b) (Navy), 5046(a) (Marine Corps), 8037(a) (Air Force).
[78] *Id.*

doing so does not violate another provision of law.[79] Each of the Military Department Secretaries has created policy documents that assign specific functions to the General Counsels and the Judge Advocates General.[80] The numbers of military and civilian attorneys assigned to each Departmental organization are set out in Appendix A.

### a. Army

The statute establishing the position of Army General Counsel provides that the General Counsel "shall perform such functions as the Secretary of the Army may prescribe."[81] The Secretary of the Army has done so through general orders, regulations, and memoranda. The Army General Counsel is the chief legal officer of the Army,[82] and has responsibility for "providing professional guidance to all military and civilian attorneys of the Army on any legal question, policy, or procedure."[83] Among other duties, the Army General Counsel coordinates legal and policy advice at the Headquarters level; determines the Army position on any legal question or procedure; provides legal advice on acquisition, logistics, and technology programs; provides final Army legal clearance on all legislative proposals; establishes and administers Army policies concerning legal services; provides technical supervision over and professional guidance to all Army attorneys and legal offices; exercises the Secretary's oversight of

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[79] *Id.* §§ 3013, 5013, 8013.

[80] *See, e.g.*, Headquarters, Dep't of Army, Gen. Orders No. 26, Responsibility for Legal Services (15 May 1988) [hereinafter GO 26]; Headquarters, Dep't of Army, Gen. Orders No. 3, Assignment of Functions and Responsibilities Within Headquarters, Department of the Army (9 July 2002) [hereinafter GO 3]; U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 5430.27A, RESPONSIBILITY OF THE JUDGE ADVOCATE GENERAL FOR SUPERVISION OF CERTAIN LEGAL SERVICES (1 Dec. 1977) [hereinafter SECNAVINST 5430.27A,]; U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 5430.25D, THE GENERAL COUNSEL OF THE NAVY ASSIGNMENT OF RESPONSIBILITIES (1 Dec. 1977) [hereinafter SECNAVINST 5430.25D]; U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR 5430.7N, ASSIGNMENT OF RESPONSIBILITIES AND AUTHORITIES IN THE OFFICE OF THE SECRETARY OF THE NAVY (9 June 2005) [hereinafter SECNAVINST 5430.7N]; U.S. MARINE CORPS, ORDER P580016A, MARINE CORPS MANUAL FOR LEGAL ADMINISTRATION (31 Aug. 1999) [hereinafter MCO P5800.16A]; SAFO 111.5, *supra* note 56.

[81] 10 U.S.C.S. § 3019(b).

[82] GO 26, *supra* note 80. Unlike the DoD GC, who is designated the chief legal officer by statute (10 U.S.C. § 140), the Military Department General Counsels are designated the chief legal officer of their Department by their Secretary.

[83] GO 26, *supra* note 80.

intelligence activities; and serves as the point of contact for legal matters that might involve outside agencies.[84]

By statute, the Judge Advocate General is the legal advisor to the Secretary of the Army and all officers and agencies of the Department; directs judge advocates in the performance of their duties; and receives, revises, and has recorded proceedings of courts of inquiry and military commissions."[85] TJAG is also charged with various responsibilities under the Uniform Code of Military Justice,[86] as well as responsibilities for establishing and supervising a legal assistance program[87] and a claims program.[88] In addition, the Secretary, by general orders, regulations, and memoranda, has designated TJAG as the military legal advisor to the Secretary of the Army and all officers and agencies of the Department. TJAG provides legal advice directly to the Chief of Staff and Army Staff, and, in coordination with the General Counsel, to the Secretary and the Army Secretariat.[89] TJAG is also charged with "staff responsibility for providing legal services and for professional guidance to military attorneys of the Judge Advocate General's Corps and to civilian attorneys under his qualifying authority."[90] Additionally, TJAG serves as the principal legal advisor to the Secretary and Chief of Staff on matters of military justice.[91]

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[84] *Id.*.

[85] 10 U.S.C.S. § 3037(c).

[86] *Id.* §§ 801-946. Duties include making frequent inspections in the field; certifying and designating military trial judges for courts-martial; establishing and referring cases to the Service courts of criminal appeals; reviewing certain courts-martial; and detailing appellate counsel for the accused and for the government.

[87] *Id.* § 1044.

[88] *Id.* § 2733.

[89] GO 3, *supra* note 80. GO 3 sets out 20 specific responsibilities, including providing professional legal training for military and civilian attorneys under TJAG's qualifying authority; representing the Army's interests in certain litigation matters; and advising the Chief and Army Staff on environmental law, labor and civilian law, and operational deployment matters.

[90] GO 26, *supra* note 80.

[91] GO 3, *supra* note 80.

The Army also has attorneys assigned to the Army Materiel Command and the U.S. Army Corps of Engineers, who provide legal advice related to their commands' missions and report to the Command Counsel and Chief Counsel, respectively. Both the Command Counsel and Chief Counsel report to the General Counsel of the Army.

### b. Navy and Marine Corps

The statute establishing the position of General Counsel of the Department of the Navy provides that the General Counsel "shall perform such functions as the Secretary of the Navy may prescribe."[92] The Secretary of the Navy has done so through instructions, regulations, and memoranda. The General Counsel of the Department of the Navy is the chief legal officer of the Department of the Navy and provides or supervises the provision of legal advice and services to the headquarters on all matters affecting the Department.[93] The Counsel for the Commandant of the Marine Corps (CMC) serves as a member of the Department of the Navy's Office of the General Counsel.[94] Attorneys assigned to the Office of the General Counsel and the Commandant's Counsel's Office provide legal services at the headquarters and on-site at the location of the commands they serve.[95] The Office of the General Counsel provides legal services throughout the Navy in the areas of business and commercial law; real and personal property law; intellectual property law; fiscal law; environmental law; civilian personnel and labor law; ethics and standards of conduct; and Freedom of Information Act (FOIA) and Privacy Act law, including litigation in these areas. The General Counsel also assists the Secretary in the oversight of all Department intelligence activities and law enforcement matters.[96]

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[92] 10 U.S.C.S. § 5019(b).

[93] SECNAVINST 5430.7N, *supra* note 80.

[94] SECNAVINST 5430.25D, *supra* note 80.

[95] Navy Submission, *supra* note 10.

[96] SECNAVINST 5430.7N, *supra* note 80.

By statute, the Judge Advocate General is under the direction of the Secretary of the Navy performing duties that the Secretary assigns.[97] TJAG is also charged with various responsibilities under the Uniform Code of Military Justice, as well as responsibilities for boards for the examination of officers for promotion and retirement.[98] TJAG provides legal advice directly to the Chief of Naval Operations, and, in coordination with the General Counsel, to the Secretary. TJAG is also responsible for providing or supervising the provision of legal advice and related services other than the advice and services provided by the General Counsel.[99] TJAG provides legal and policy advice to the Secretary on military justice, administrative law, claims, operational and international law, and litigation involving these matters. [100] The SJA to CMC serves as legal advisor to the Commandant of the Marine Corps on military justice, administrative law, operational law, and legal assistance matters, and as the Director of the Judge Advocate Division, Headquarters Marine Corps. Navy and Marine judge advocates are responsible for delivering legal services to the Fleet and Fleet Marine Forces around the world, on land and at sea, in peacetime and in areas of active hostilities.[101] They are responsible for military justice; operational law; admiralty and maritime law; environmental law; administrative law, which includes military personnel law; standards of conduct and government ethics; FOIA and Privacy Act law; legal assistance; claims; national security and intelligence law, including litigation involving all of these areas.[102]

### c. Air Force

The Air Force General Counsel is the chief legal officer of the Department and is specifically responsible for matters of legal policy, including those

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[97] 10 U.S.C.S. § 5148(d).
[98] *Id.* §§ 801-946.
[99] SECNAVINST 5430.7N, *supra* note 80.
[100] *Id.*
[101] Navy Submission, *supra* note 10.
[102] *Id.*

involving significant legal precedent or threatening large financial consequences. The General Counsel is also responsible for communications with the Department of Defense, other agencies of the government, foreign countries, and international organizations (including major international agreements); acquisition, contracts, and research and development programs; and legal issues relating to senior officers and officials of the Air Force.[103] The General Counsel provides legal advice to the Secretary, Chief of Staff, Commanders of Major Commands, Program Executive Officers, and other senior officials of the Air Force and becomes involved in and directs resolution of litigation and administrative cases (except those that are subject to the statutory responsibility of TJAG).[104] Within the Headquarters, the General Counsel is responsible for and solely authorized to maintain staff dedicated to providing advice on legal aspects of the Air Force promotion process; intelligence; counter-intelligence; special access programs; ethics; budgetary and fiscal matters; legislative change proposals; standards of conduct; alternative dispute resolution; and the retention/supervision of outside legal counsel.[105]

TJAG is the legal advisor of the Secretary and of all officers and agencies of the Department of the Air Force.[106] TJAG is responsible for the effective and efficient provision of legal services to operational Air Force commands and units and for providing professional supervision over Air Force judge advocates.[107] Professional supervision includes recruiting, training, and certifying, as well as managing assignments and addressing manpower issues. The Air Force TJAG is charged with administration of the Uniform Code of Military Justice,[108] and has responsibilities for establishing and

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[103] SAFO 111.5, *supra* note 56.
[104] *Id.*
[105] *Id.*
[106] *Id.* (citing 10 USC § 8037).
[107] *See* 10 U.S.C.S. § 8037 (LEXIS 2005); SAFO 111.5, *supra* note 56.
[108] 10 U.S.C.S. §§ 801-946.

supervising a legal assistance program[109] and a claims program,[110] and for recording proceedings of courts of inquiry and military commissions.[111]

## V. The General Counsel - Judge Advocate General Relationship

The roles of the Judge Advocates General and the General Counsels of the Military Departments have been evolving from the earliest days of the Republic, when the Continental Army had a Judge Advocate General with no civilian counterpart, through the middle of the 20th century, with the introduction of General Counsels, to the present time. For some 50 years or more, there have been in each Department a General Counsel appointed from civilian life and a career military Judge Advocate General, with the former serving as the senior Department lawyer, but with the latter not being a reporting subordinate. Both are legal advisors to Department leadership, and both have responsibility for their respective organizations. Though properly concerned with the provision of legal services and application of the law throughout the Department, the General Counsel does not have executive authority over TJAG and the JAG Corps[112] and, in the two instances where such authority has been suggested, Congress has raised an objection. Conversely, while judge advocates are responsible for much of the legal work done away from Department headquarters (particularly in the Army and Air Force), TJAG is not the final authority for the Department, except in matters committed to TJAG by statute. Therefore, TJAG must ensure that matters of potential Secretarial interest or Departmental significance are elevated from the field to headquarters for coordination with the General Counsel and

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[109] *Id.* § 1044.

[110] *Id.* § 2733.

[111] *Id.* §§ 801-946; 2377(a); 8037.

[112] Unless otherwise noted, references to the JAG Corps include Marine judge advocates.

review by the Department leadership. Where the incumbent General Counsel and TJAG understand these roles and observe their limitations, tend to defer to one another in areas of relative expertise, and otherwise seek to collaborate, the relationship is productive, the job gets done, and the client—from private to Service Secretary—is well-served.

The current arrangement has worked well, although it has not always worked perfectly. Accordingly, and especially in light of recent legislation, the Panel does not perceive any need to reorganize the legal functions within the Military Departments or to restructure the current statutory relationship between the General Counsels and TJAGs. At the same time, the Panel believes that greater clarity as to the existing roles of these two legal officers, as well as attention to the circumstances most conducive to their success, would be beneficial in two ways. First, it would help avoid the dysfunction that unfortunately has characterized some General Counsel-TJAG relationships. Second, it would promote "a united, cohesive, interdependent, collegial, and seamless team."[113]

Before focusing on this topic in detail, it is helpful to review the history of these organizations.

### *A. Historical Context*

In 1775, the Continental Congress, at the request of General George Washington, established the position of The Judge Advocate General of the Army.[114] Since then, the Congress has, at various times over the last 230 years, created positions for uniformed Judge Advocates General in the Navy and Air Force, a Staff Judge Advocate to the Commandant of the Marine Corps,[115] and civilian General

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[113] The Honorable Togo D. West, Jr., former Secretary of Veterans Affairs, Secretary of the Army, DoD General Counsel, and General Counsel of the Department of the Navy, Transcript of June 15, 2005 Hearing, at 57.

[114] U.S. ARMY JUDGE ADVOCATE GENERAL'S SCHOOL, THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975 7 (U.S. Government Printing Office 1975).

[115] Unlike the position of Staff Judge Advocate to the Commandant, which was established by statute (Pub. L. No. 89-731, 80 Stat. 1160 (1966), as now codified at 10 U.S.C. § 5046 (2000)), the Counsel

Counsels in each of the Military Departments and the Department of Defense.[116] The statutory provisions differ in time of enactment and in their specific wording. Responsibilities assigned to General Counsels and TJAGs have changed over time, based variously on broad statutory language, the exigencies of the day, and Secretaries' prerogatives to organize their Departments.

Until the establishment of the General Counsel, the Judge Advocate General was, as a practical matter, the only legal advisor to Department leadership.[117] Accordingly, Congress first delineated the Army TJAG as "*the* legal adviser to the Secretary" in 1948.[118] With the creation of the Army General Counsel, first by regulation in 1950 and later by statute, the question of which office would have primacy was inevitable. Further complicating the discussion, in 2004 Congress described the Air Force TJAG as "*the* legal adviser to the Secretary of the Air Force,"[119] mirroring the language that has existed for the Army since 1948. The Panel does not view the recent use of the word "the" as Congressional designation of primacy, but rather as language that aligns the Air Force TJAG statutory provision with the longstanding Army provision. The Navy TJAG statutory provision contains no such language.[120]

The Army, Navy, and Air Force Secretaries, acting on their statutory authority,[121] have designated the General Counsel as the "chief legal officer," "principal legal advisor to the Secretary," or "final legal authority," respectively, while acknowledging the

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for the Commandant was established as a career civilian position by Secretary of the Navy Instruction in 1955. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 5430.25, OFFICE OF THE GENERAL COUNSEL FOR THE DEPARTMENT OF THE NAVY; LEGAL SERVICES IN THE FIELD OF BUSINESS AND COMMERCIAL LAW (2 Feb. 1955).

[116] Pub. L. No. 99-433, 100 Stat 992 (1986).

[117] Hon. Togo West, *supra* note 113, at 57.

[118] Selective Service Act of 1948, Pub. L. No. 80-759, § 249, 62 Stat. 604, 643 (1948) (emphasis added).

[119] *Compare* 10 U.S.C.S. § 8037 (LEXIS 2005) (emphasis added), *with id.* § 3037.

[120] *See id.* § 5148.

[121] *See id.* §§ 3013 (Army); 5013 (Navy); 8013 (Air Force).

authority of the Judge Advocate General in certain matters, such as military justice.[122] The DoD General Counsel, on the other hand, is designated as the chief legal officer of the Department of Defense by statute.[123]

Independent of these Secretarial actions, Congress has more recently created the positions of Military Department General Counsel by statute and subsequently elevated those positions, putting them on par with the Assistant Secretaries of the Military Departments.[124] Like other members of the Secretary's senior civilian staff, General Counsels are nominated by the President and confirmed by the Senate[125] and are now specifically included in the order of succession within their Military Departments and the Department of Defense.[126]

As discussed previously, when the Goldwater-Nichols Act created the statutory position of Military Department General Counsel, it did so with the understanding that there would be some overlap and duplication with respect to Departmental matters; this created a healthy tension between the positions of General Counsel and TJAG. However, the legislative history is barren on the details of how these two offices were to interact. The first indication of Congress' position on this issue came in the early 1990s.

> In April 1991, the Department of Defense's legislative package to authorize appropriations for fiscal years 1992 and 1993 included a provision to amend

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[122] Headquarters, Dep't of Army, Gen. Orders No. 8, Responsibility for Legal Services (1 Apr. 1975) (The General Counsel is "the chief legal officer of the Army" and responsible for "determining the Army's position on any legal question or legal procedure"); SECNAVINST 5430.25D, *supra* note 80 (The General Counsel is "the principal legal advisor to the Secretary."); DEP'T OF AIR FORCE, SEC'Y OF THE AIR FORCE ORDER 111.1 (24 May 1955) ("The General Counsel is the final legal authority on all matters arising within or referred to the Department of the Air Force except those relating to the administration of military justice and such other matters as may be assigned to the Judge Advocate General by Secretary of the Air Force Order.").

[123] 10 U.S.C.S. § 140(b).

[124] 5 U.S.C.S. § 5315.

[125] *See* 10 U.S.C. §§ 3019 (Army), 5019 (Navy), 8019 (Air Force) (LEXIS 2005).

[126] National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 902, 108 Stat. 2663, 2823 (1994).

the statutes creating the positions of the Military Department General Counsels "to make clear that the general counsels are the 'chief legal officers' of their respective departments."[127] Then-Secretary of Defense Cheney highlighted this provision in letters to Senate Armed Services Committee Chairman Sam Nunn and Ranking Minority Member John Warner.[128] This provision was not included in the House or Senate bills, nor, as a consequence, adopted. Within months, however, Deputy Secretary of Defense Atwood issued his March 1992 memorandum[129] that designated the Military Department General Counsels as the chief legal officers of their respective Departments and provided that their legal opinions would be controlling within their Departments.[130]

As noted previously, the Atwood Memorandum became the subject of controversy, perceived by some in the legal community as an attempt to subordinate military lawyers to the General Counsels. The implications of the memorandum were explored in some detail in conjunction with the July 1992 confirmation hearings of David Addington to be the DoD General Counsel. In response to questions during his confirmation hearing, Mr. Addington acknowledged that some questions were raised by the memorandum and that it could be subject to a broader interpretation than intended.[131] The questions also elicited from Mr. Addington answers that confirmed the independence

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[127] Letter from Terrence O'Donnell, General Counsel of the Department of Defense, to the Honorable Sam Nunn, Chairman, Committee on Armed Services, United States Senate (July 3, 1991).

[128] Letter from Dick Cheney, the Secretary of Defense, to the Honorable Sam Nunn, Chairman, Committee on Armed Services, United States Senate (June 13, 1991); Letter from Dick Cheney, the Secretary of Defense, to the Honorable John Warner, Ranking Republican, Committee on Armed Services, United States Senate (June 13, 1991).

[129] *See discussion supra* Section III.C.

[130] Atwood Memorandum, *supra* note 38. In addition, the Atwood Memorandum directed that the "civilian and military personnel performing legal duties ... under the Secretary ... shall be subject to the authority of the General Counsel ...." *Id.* The Atwood Memorandum also indicated that the Military Department General Counsels were "responsible to and subject to" the Military Department Secretaries *and* the DoD General Counsel, in his capacity as DoD's chief legal officer. *Id.*

[131] Addington Nomination Hearing and Advance Questions, *supra* note 42, at 302 ("Some questions were raised though that there could be by others, a broader interpretation and it has been asked that we just simplify it . . . to eliminate any confusion. Secretary Atwood said he would be happy to do that.").

of the Judge Advocates General as legal advisors to Department leadership. That litany of questions has been regularly repeated in the confirmation process of nominees for the DoD and Military Department General Counsel positions.

As a result of this interchange, Mr. Atwood issued a revised memorandum, dated August 14, 1992, which charged the Military Department Secretaries with ensuring that their General Counsels are designated the chief legal officers of their respective Departments; that the legal opinions of the General Counsels are the controlling legal opinions within their Department; and that the memorandum would be implemented in a manner consistent with statutes relating to TJAGs.[132]

When, in 2003, an Air Force SAFO created a similar concern of appearing to subject the Air Force TJAG to the executive authority of the Air Force General Counsel, Congress, in a Conference Report, directed the rescission of that SAFO[133] and then passed legislation expressly affirming the independence of the Service TJAG as a legal advisor to the Military Department Secretary and the Chief of Staff.[134]

The Panel concludes that the structure intended by Congress since the passage of the Goldwater-Nichols Act is one in which the General Counsel and TJAG each are independent legal advisors to Military Department leadership. However, the General Counsel is the senior advisor and therefore the advisor whose opinion is "final" at the Department level. On the other hand, the General Counsel cannot act in derogation of authority committed to TJAG by statute[135] and does not have executive authority over

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[132] August 14 Atwood Memorandum, *supra* note 43.

[133] *Supra* note 55.

[134] This same independence is preserved for judge advocates in the field with respect to legal advice to their commanders. *See* 10 U.S.C.S. §§ 3037(e)(2), 5148(e)(2), 5046(c)(2), 8037(f)(2) (LEXIS 2005).

[135] For example, the General Counsel is not the final authority in military justice matters committed to the TJAG by statute. In addition to responsibility for assigning, detailing, certifying and inspecting judge advocates (*see, e.g.,* 10 U.S.C.S. §§ 806 and 827), TJAG is responsible for review of certain general court-martial convictions and granting any appropriate relief under Article 69, UCMJ, and for acting upon requests for new trial under Article 73, UCMJ. *See* 10 U.S.C.S. §§ 869 and 873.

TJAG and the organizations and personnel for which TJAG is responsible. And the DoD General Counsel provides the "final" legal positions for the Department as a whole.

### *B. Balance Between Primacy and Independence*

The relationship between the General Counsel and TJAG may be viewed as a balance between the primacy of the General Counsel and the independence of TJAG. The former has found expression in the designation of the General Counsel as the "chief legal officer" and the notion of final legal authority or controlling legal opinions. As it relates to TJAG's role as a senior legal advisor to the civilian and military leadership, the question of TJAG's independence is addressed in the "Addington questions" posed to prospective appointees[136] and, more recently, was confirmed in provisions of the National Defense Authorization Act for FY 2005.[137] It is also reflected in certain statutory responsibilities assigned to TJAG, e.g., the administration of military justice. The Panel sees nothing in the two concepts that is inconsistent or otherwise incompatible with the effective performance of legal functions within the Military Departments. In fact, the Panel believes that the existence of both a civilian General Counsel and a military TJAG has been an excellent method of ensuring quality legal advice and services. In general, these attributes are held in equipoise rather effortlessly, as the General Counsel and TJAG see to the business of the Department. Where a General Counsel and TJAG have become embroiled in an unproductive effort to adjust their relative positions, the balance is lost. The Panel's hearings and review of historical materials tend to suggest that misconception by the incumbent in one or both of these positions as to their proper roles may lead to and then exacerbate the problem.

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[136] *See, e.g.,* Addington Nomination Hearing and Advance Questions, *supra* note 42; Advance Questions for Mr. Alberto J. Mora to be General Counsel of the Department of the Navy, Committee on Armed Services, U.S. Senate (2001).

[137] Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 574, 118 Stat. 1811, 1921-1924 (2004).

### 1. Primacy

In order to maintain balance, it is important to understand what the term "chief legal officer" means and what it does not mean.

On one level, the designation of chief legal officer as the issuer of "controlling legal opinions" is largely theoretical because disagreement between the General Counsel and TJAG on a matter of abstract legal interpretation or application of law to facts is rare.[138] Instead, it is more likely that any divergence of views would turn on factors that are outside the exclusive purview of either the General Counsel or TJAG. Policy implications, public reaction, effect on good order and discipline, programmatic consequences, and budgetary impacts are all legitimate and necessary considerations, but they are considerations over which neither the General Counsel nor TJAG has a claim of right to the exclusion of the other, nor, indeed, to the exclusion of other members of a Department headquarters. The Panel heard from senior Department officials who made clear that if there is a difference of legal opinion between the General Counsel and TJAG, they want to know that a difference exists and why.[139] They also rely on their military or civilian lawyer for more than just legal advice. In that regard, the Secretary and other officials are able to seek such advice and input as they see fit and view the determination of Department policy as an issue for the Secretary, not one for either legal counsel.

On a practical level, the designation of chief legal officer also has utility. For example:

- Externally, a Department should speak with one voice. Thus, in dealing with the Department of Justice, other federal, state and local agencies, or private parties on a legal matter, it is important to have identified the official who finally determines

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[138] *See, e.g.*, the Honorable Alberto J. Mora, General Counsel of the Department of the Navy, Transcript of May 18, 2005 Hearing, at 294.

[139] *See, e.g.*, the Honorable Dr. David S. C. Chu, Under Secretary of Defense for Personnel and Readiness, Transcript of June 1, 2005 Hearing, at 80.

its legal position and speaks for the Department. At times, TJAG may represent a Military Department in external discussions through agreement with the General Counsel—especially in those areas about which judge advocates have special expertise and experience. To be sure, there are also circumstances in which it is appropriate for TJAGs to give their independent views, such as when called upon by Congress or the DoD General Counsel to do so. As a general matter, the chief legal officer's role as the final legal authority regarding the Department's position with external entities serves a valid and useful purpose.

- Internally, Department personnel are entitled to rely on an authoritative opinion on a legal issue concerning the Department. Legal advice is sought and provided at all levels, and in many cases, from and by judge advocates, who frequently provide the definitive legal answers in the field. Only in exceptional cases do those issues require a Department-level resolution, and even then they may be resolved by TJAG or his staff. However, in those instances in which the General Counsel opines, that legal opinion is controlling and binding within the Department (but, again, not in derogation of authority committed to TJAG by statute).[140]

- The General Counsel can also play a constructive role in building a sense of community and common cause among the lawyers, uniformed and civilian, within the Department, and in promoting cooperation and efficiency across organizational lines. To be effective, however, this must be done with due deference to TJAG as the leader of the judge advocate segment of that community.

Some have asserted that the designation of the General Counsel as the chief legal officer merely implements the concept of civilian control of the

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[140] *See supra* note 135.

military. While the point has some merit, it only goes so far. Civilian control is constitutionally ensured by the commitment of shared authority over the military to the President and the Congress, as further implemented by the statutory direction and oversight exercised by the civilian Secretary of Defense and the civilian Military Department Secretaries. Accordingly, the General Counsel may be correctly viewed as an instrument of the Secretary's civilian control. The legislative history of Goldwater-Nichols underscores the General Counsel's role in civilian control, describing the "appointed civilian subordinates" of the Military Department Secretaries as "[c]ivilian control elements ... distributed throughout the DoD by way of a system of appointive civilian officials"[141] and referring specifically to the General Counsel as "a key assistant to the Secretary ..., particularly on sensitive matters directly related to civilian control of the military ...."[142] Thus, the Secretary may exercise his control over the Department by acting through the General Counsel, such as by generally or specifically assigning duties/tasks and delegating authority, and the Secretary's designation of the General Counsel as the chief legal officer is itself an exercise of such Secretarial control.

That the General Counsel has a role in civilian control of the military, however, does not mean that the civilian legal officer necessarily "controls" his military counterpart. The principle of civilian control itself does not require designation of the civilian as "chief legal officer," and neither a superior reporting relationship nor Department-wide executive authority is inherent in the General Counsel's role as an instrument of the Secretary's civilian control. Moreover, TJAG plays an important role with respect to civilian control. As a matter of historical practice, TJAG is often responsive to the Service Chief and staff (regardless of formal reporting relationship) and, as the senior military legal advisor, serves a role in reinforcing the principle of

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[141] S. REP. NO. 99-86, STAFF OF SENATE COMM. ON ARMED SERVICES, 99TH CONG., DEFENSE ORGANIZATION: THE NEED FOR CHANGE, at 27 (Comm. Print 1985).

[142] S. REP. NO. 99-280, at 69-70 (1986).

civilian control by giving timely and appropriate interpretation of the complex laws and regulations that govern the actions of military commanders.

In sum, the chief legal officer designation reflects the seniority of the General Counsel as a Presidentially appointed, Senate confirmed Executive Level IV official. It indicates the General Counsel's authority outside the Department and, in the infrequent instances where it is needed, the finality of the General Counsel's legal opinions within it. It connotes general responsibility and accountability for the legal function, subject to the Secretary's authority.[143] What it is not is a statement of executive authority over TJAG. It does not establish a reporting or rating relationship. It does not give the General Counsel license to direct TJAG in his views or to silence TJAG in expressing his views to the client. It cannot impinge on TJAG's quasi-judicial role in administering the military justice system.[144] It does not operate to diminish TJAG's role as "Senior and Managing Partner" of the Judge Advocate General's Corps,[145] nor can it interfere with the technical chain of communication and supervision between superior and subordinate SJAs and TJAG authorized by 10 U.S.C. § 806. Moreover, any attempt by a General Counsel to direct the actions of a field SJA's staff would run afoul of core military operating principles of unity of command and accountability.

In a functional relationship, General Counsels achieves the requisite balance between their seniority and accountability for legal services and respect for TJAGs' assigned responsibilities and other equities without invoking the chief legal officer designation.[146] In the Panel's view, the "art" of being a chief legal officer is often the

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[143] Testimony of Mr. Avon Williams, Principal Deputy General Counsel of the Army, Transcript of May 19, 2005 Hearing, at 259. The Panel expresses its deep regret and sadness over the death of Mr. Williams, who passed away on July 9, 2005. The Panel is grateful to him and his family for his contributions to the Army and our Nation.

[144] 10 U.S.C.S. §§ 801-946.

[145] *See, e.g., id.* §§ 3037(c)(2) and 8037(c)(2).

[146] *See, e.g.,* Hon. Alberto J. Mora, *supra* note 138; Hon. Togo D. West, *supra* note 113, at 70-72.

ability to reach consensus and advance the client's interests without resorting to any formal authority implied by such a title.

### 2. Independence

Ensuring the independence of the senior military legal advisor to the Secretary is as important as the concept of primacy or the chief legal officer designation. Although the Panel concludes that statutory references to "the legal adviser" in statutes creating the position of TJAG do not mean "exclusive,"[147] it is clear that TJAG holds a special relationship directly with the Secretary and the other officers and agencies of the Military Department. That relationship must not be undermined.

Independence carries with it the freedom to formulate views and to communicate those views to the Secretary, in the form and manner of the Secretary's choosing. Consistent with the principle that the Secretary has authority to organize his Department, it is also the Secretary's prerogative to specify how matters will be presented, including, if desired, coordination of legal matters with or through the General Counsel. While it makes sense to resolve differing views before presenting the issue to the client, where views of the law, facts, or consequences differ, the rigors of examination and discussion will facilitate better decision making. On matters of significance, TJAG retains the right to present his assessment to the Department decision maker. That said, independence is not a license to circumvent the staff process or act without the awareness of the General Counsel. Because the General Counsel may be legitimately concerned with the

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[147] The Panel does not view the phrase "the legal adviser" in 10 U.S.C.S. §§ 3037 and 8037 as a designation of TJAG as the sole legal advisor to the Secretary. A contrary conclusion would be inconsistent with Congressional intent as manifested by the provisions that charged the Secretaries with organizing their Departments, established the General Counsels of the Military Departments, elevated the General Counsels to Level IV of the Executive Schedule, and added them to the Order of Succession. Furthermore, the DoD and Military Departments' actions to designate the General Counsels as the chief legal officer are a pragmatic implementation of the Congressional provisions establishing the General Counsels and subjecting them to Secretarial authority. Finally, it is apparent that the Service TJAGs do not view the word "the" as imbuing them with exclusive authority to provide legal advice to the Secretary and the other officers and agencies of their Department.

effectiveness of the legal function throughout the Department, matters of potential Secretarial interest or Departmental significance should not be kept from General Counsel under the rubric of "independence," but should be brought forward. In short, independence coexists with the obligation to coordinate.

TJAG independence recognizes both the legal and practical perspectives that the TJAGs bring to Department-level issues. TJAG is the product of a long and successful military career, imbued with an understanding of military culture. TJAG brings this informed view to the discussion. This background can significantly advance the complete understanding of difficult issues, even if they are not exclusively legal in nature.

The concept of TJAG independence and access is not new. It has been part of the Military Departments' standard operating procedures for decades, embodied in the various Army General Orders, Secretary of the Navy Instructions, and Secretary of the Air Force Orders.[148] Nonetheless, in the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Congress explicitly prohibited interference with TJAGs' ability to give independent legal advice to the Military Department Secretaries.[149] This provision should assuage any concern that TJAGs' access to their respective Secretaries has been curtailed by establishment of the General Counsels and their designation as chief legal officers.

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[148] *See, e.g.*, GO 26, *supra* note 80; Headquarters, Dep't of Army, Gen. Orders No. 22, Responsibility for Legal Services, Department of the Army (14 Apr. 1971); GO 3, *supra* note 80; SECNAVINST 5430.27A, *supra* note 80; SECNAVINST 5430.25D, *supra* note 80; SECNAVINST 5430.7N, *supra* note 80; MCO P5800.16A, *supra* note 80; SAFO 111.5, *supra* note 56 (this language first appeared in SAFO 111.5 dated 24 May 1955).

[149] Pub. L. No. 108-375, § 574, 118 Stat. 1811, 1921-1924 (2004) (codified at 10 U.S.C.S. §§ 3037(e) (Army), 5148(e) (Navy), 5046(c) (Marine Corps), 8037(f) (Air Force)).

## *C. Fostering a Productive Relationship*

### 1. Collaboration, Communication, and Transparency

The first circumstance identified by the Panel as fostering a productive relationship between General Counsels and TJAGs is also the most obvious—a shared willingness to collaborate. While the Panel finds it overly simplistic to attribute past problems entirely to "personality conflicts," as some observers have suggested, it also recognizes that no organization can be made "personality proof." Thus, success in the General Counsel-TJAG relationship turns in the first instance on the willingness of incumbents to avoid self-aggrandizement and to work together on the business of the Department.

Hallmarks of success include frequent communication and complete transparency. Witnesses who appeared before the Panel, regardless of past or current position, universally cited communication and transparency as keys to a successful relationship. Where these attributes were in place and working, there were no reported instances in which serious "turf battles" developed, or a General Counsel-TJAG relationship faltered. Even in those areas where one or the other might claim a superior expertise or specific responsibility, communication on matters of mutual interest can only serve to enhance the quality of legal advice given. For example, while TJAG has statutory responsibilities in the area of military justice, if the Secretary is required to take action under the UCMJ, then it is appropriate for TJAG to coordinate with the General Counsel. Likewise, the General Counsel should coordinate with TJAG regarding issues for which the General Counsel is primarily responsible and that impact operations for which judge advocates are the advising lawyers.

### 2. Role of the Judge Advocate General's Schools

Each Military Department operates a school for the basic and continuing instruction of judge advocates.[150] These schools enroll civilian law school graduates who have been admitted to a state bar and commissioned as judge advocates in their respective Services.[151] All of the schools provide extensive initial training in military legal practice, including the military justice system. The schools also provide advanced instruction to both civilian and military attorneys in a wide variety of criminal and civil law specialties. The Army's Legal Center and School is accredited by the American Bar Association and is therefore able to grant a Master of Laws Degree in Military Law.

The JAG Schools are a microcosm of the culture of the JAG organizations. They play a pivotal role in the development of judge advocates at each stage of their careers, starting with the JAG basic courses and continuing with career legal education courses and specialized legal education. The Panel has been advised that civilian and military attorneys assigned to the respective Offices of the General Counsel have acted as guest instructors and panel members for courses at all of the JAG Schools. Each Service JAG School has also invited their General Counsels to address various judge advocate legal conferences. In addition, the Air Force JAG Corps has invited the Air Force General Counsel to address classes of new judge advocates when they travel to the Pentagon for orientation.

These are all examples of mutually productive interaction between the GC and JAG organizations. The Military Departments should not overlook the opportunity to make greater use of their JAG Schools to foster a better understanding of the respective

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[150] These schools also provide training for civilian attorneys, paralegals, and other legal support personnel.

[151] A small number of already commissioned officers from the Funded Legal Education Program are enrolled into Service basic legal education courses pending release of results of students' bar examinations.

roles of JAG organizations and Military Department General Counsels. In particular, it would be productive for the JAG Schools to regularly invite their General Counsels to provide their perspective to students, especially those attending basic and career judge advocate courses. It is important that judge advocates understand early in their careers both elements of the team that tackles their Department's legal issues.

Likewise, while recognizing the demands on their schedules, the Panel believes it would be fruitful for General Counsels to accept such invitations whenever possible. This interaction will afford the General Counsels an opportunity to observe first hand the unique skills and strengths judge advocates bring to the practice of law within the Department of Defense.

### *D. Assigning Areas of Practice*

Some witnesses suggested that relationships and responsibilities could be clarified by assigning the lead in certain areas to either the General Counsel or TJAG. While there may be some utility in doing so, the Panel notes that such organizational detail is the prerogative of the Service Secretary, within the limits set by Congress and the Secretary of Defense. The Panel believes it is preferable to settle on a working understanding of which legal officer or organization has the expertise, resources, and equities, and to invite the other legal officer or organization to defer.

The Services have unique histories and are structured differently. Their legal services organizations have evolved to best support their varied Service missions. For example, within the Department of the Navy, there has been greater reliance on a general division of labor between the General Counsel and TJAG organizations, with the former tending to handle the legal work of the "shore establishment" or business side of the Navy and Marine Corps (*e.g.,* acquisition, installations, labor) and the latter developing the core competencies required by the "fleet" or forces forward deployed (*e.g.,* military justice, law of armed conflict). The Army and Air Force have adopted a different model, with smaller General Counsel organizations situated principally within the Secretariats and with TJAG responsible for providing legal services to a broad range of clients in field

commands. Each of the Services has been well-served by its respective model. The Panel finds that it would be unwise to impose the same division of responsibilities across the Services in light of their diverse organizational structures and missions.[152]

Within a given Department, however, conflict may be minimized by determining lead responsibility for matters as they arise, absent the need for a specific judgment in the particular instance. Lead responsibility, however, should not be confused with sole responsibility.

The Panel also heard a good deal of testimony concerning the area of practice loosely denominated as "operational law," an area in which the Judge Advocate General organizations have frequently asserted primacy. According to Army Field Manual 27-100:

> *Operational Law* is that body of domestic, foreign, and international law that directly affects the conduct of operations. The *practice of Operational Law* consists of legal services that *directly* affect the *command and control* and *sustainment* of an operation. Thus, Operational Law consists of the command and control and sustainment functions of legal support to operations. Support functions are an integral part of legal support to operations; however, they are treated separately ....[153]

The Panel notes that military operations, in general, are within the purview of the combatant commands, the Joint Staff, and OSD. Operational law issues are generally resolved at the combatant command level by staff judge advocates, sometimes with the

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[152] This has also been the conclusion of some senior Department of Defense officials. *See, e.g.*, Hon. Dr. Chu, *supra* note 139, at 70-72 ("I would acknowledge I am not a big fan of one size fitting all .... I would be a little cautious about insisting everybody look the same.").

[153] U.S. DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS (1 Mar. 2000) (italics in original).

assistance of lawyers in higher headquarters. Every commander who testified stressed the importance, indeed the criticality, of having the SJA at his side as part of his leadership team during contingency operations. That said, current operations in Iraq and Afghanistan have confirmed that operational law is not an area of practice exclusive to uniformed lawyers. Much of what happens in modern military operations, including the use of civilian contractors, is affected, indeed constrained, by international agreements, general principles of international law, fiscal and other statutory constraints, and policies established at the DoD or national level. In practice, the application of these constraints at the operational level is the responsibility of judge advocates at the various commands. Nonetheless, the General Counsels may have a significant role in these areas, especially if the issue is one that involves the Military Department Secretaries or falls within areas of practice in which the Office of the General Counsel maintains legal expertise. Therefore, even in the area of operational law where practical expertise is chiefly resident in judge advocates, it is difficult to establish bright lines of responsibility.

# VI. Professional Supervision and Development of Civilian Attorneys

## *A. Professional Supervision*

Professional supervision, as distinguished from rating authority or command relationship, means oversight of the qualifications, competency, and ethical requirements of subordinates by a supervisory attorney.

Both state and federal law provide the authority for the supervision of DoD attorneys. States oversee the legal profession. To be designated as a judge advocate or to be employed as a civilian attorney, a lawyer must be a member in good standing with the attorney's licensing state and must comply with its standards of professional conduct. Most states have adopted some form of the American Bar Association Model Rules of Professional Conduct. Model Rule 5.1, Responsibilities of Supervisory Lawyers,

imposes an obligation on lawyers to ensure subordinate lawyers are adequately trained and are fulfilling their responsibilities to their clients in accordance with the ethics rules.

Each of the Military Departments has also designated a "qualifying authority" that must certify the professional qualifications of attorneys hired by the Department. Once initial certifications have been made, continuing responsibility for ensuring attorney compliance with the rules of professional responsibility generally lies with the qualifying authority and the supervisory chain.

### B. Professional Development

Comprehensive and effective programs for the professional development of career attorneys in the Department of Defense, both uniformed and civilian, are critical to ensuring the Department receives quality legal services. Each of the Military Departments has a robust system for the professional development of judge advocates, with appropriate educational and training opportunities tailored to each phase of their careers. Historically, professional development programs for civilian attorneys, with few exceptions, have not been as comprehensive or well-structured. As a general rule, the smaller the pool of civilian attorneys covered by a career program, the more difficult it has been to offer significant career-broadening opportunities.[154]

This imbalance in professional development opportunities would appear to flow from the distinctly different leadership and management programs that have traditionally been applied to judge advocates and career civil service attorneys. In the course of their careers, judge advocates are expected to succeed in a variety of legal disciplines across a spectrum of command levels, from small, forward-deployed units to the most senior

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[154] The testimony and submissions indicate that the Department of the Navy Office of the General Counsel (641 attorneys), Army Materiel Command (210 attorneys), and U.S. Army Corps of Engineers (380 attorneys), have been effective in leveraging the opportunities created by having sufficiently large organizations, working in numerous areas of practice, to build meaningful career development programs for their predominantly civilian attorney workforce.

headquarters offices in the Pentagon. Judge advocates are also members of their Service's officer corps, and their career development includes professional military education.

By contrast, the civilian attorneys in the Military Departments, like civil servants in other career fields, are traditionally hired to perform a specific job at a specific location. While this practice is now in the process of changing,[155] the vast majority of civilian attorneys have not been expected to sign mobility agreements. As such, and unlike the judge advocates with whom they serve, civilian attorneys are generally not required to change their duties or geographic location at the discretion of the Military Departments. Career development has largely been viewed as the personal responsibility of each civilian attorney.

In addition, the personnel system governing civilian attorneys has provided supervisors less flexibility in back-filling vacancies created by employees participating in lengthy career broadening or educational opportunities, than exists for judge advocates. This has acted as a practical disincentive to providing such opportunities to civilian attorneys on a widespread basis.

While these facts explain the practical reasons why the Military Departments have devoted far more time and resources to judge advocate development, the existing imbalance is not in the best interests of the Department of Defense. It appears this professional development deficiency is now widely recognized. From the submissions received by the Panel, it is clear that all of the Military Departments are now either

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[155] In 2003, Congress granted the Department of Defense the authority to establish a new civilian personnel management system to better support its mission. DoD is now in the process of implementing that authority through a comprehensive restructuring of civil service personnel rules designated the "National Security Personnel System" (NSPS). One of the stated objectives for NSPS is to provide organizations "more flexibility to assign employees new or different work." *See* Fact Sheet, Department of Defense National Security Personnel System – Proposed Regulations (Feb. 10, 2005), *available at* http://www.cpms.osd.mil/nsps/PDF/FactSheet-ProposedNSPSReg-2-10-05.pdf (describing National Security Personnel System, 70 Fed. Reg. 7552 (proposed Feb. 14, 2005) (to be codified at 5 C.F.R. p. 9901)).

strengthening programs for civilian attorney development or creating Department-wide programs where none existed in the past.

The Panel applauds these efforts to bring a systematic approach to the professional development of career civil service attorneys. A more energetic system of civilian attorney career development, while valuable in and of itself, should also provide the collateral benefits of greater retention rates and a stronger shared frame of reference with uniformed attorneys.

Appendix D of this Report contains a more detailed discussion of the professional supervision and development of attorneys in the Military Departments and Department of Defense, including those attorneys assigned to Unified Commands.

# VII. Legal Support for the Joint Commands

## *A. Command Doctrine for Joint Operations*

Unified and Specified commands are designated by the President, through the Secretary of Defense.[156] There are nine Unified Commands: Central Command, European Command, Joint Forces Command, Pacific Command, Northern Command, Southern Command, Special Operations Command, Strategic Command, and Transportation Command. Unified commands are composed of forces from two or more Military Departments and have broad and continuing missions. Five of these commands have responsibility for war plans and operations in specified areas of the world, known as areas of responsibility (AORs). Unified commands all exercise command authority independent of the Military Departments. Unified commanders have full authority to organize and deploy the forces assigned to them as the commander determines is

[156] There are currently no Specified commands, but the option to create such commands still exists.

necessary to accomplish assigned missions. For ease of reference, all of these organizations are collectively referred to in this Report as "joint commands."

Joint operations take place in overlapping contexts that involve both the joint commanders and Military Departments. Operational direction, joint training, and strategy fall under the joint commander. Day-to-day administration, discipline, and personnel actions are generally the province of the Military Departments. Since Goldwater-Nichols, all forces not assigned to carry out certain functions of the Secretary of a Military Department[157] or assigned to multinational peacekeeping organizations are assigned to one of the Unified Commands.[158] The degree to which joint command or Military Department authority predominates depends on the particular mission of individual units.

## B. Legal Services in the Joint Environment

Military and civilian attorneys serve at many levels of the joint forces organizations, just as they do within the Service hierarchy. While the structure of these joint commands varies, they generally have a single joint forces commander, with an organic staff. The typical joint command headquarters legal staff includes six to nine attorneys. Northern Command, which is now responsible for the deployment of forces within the United States, is a notable exception with 16 assigned attorneys.[159] The legal staffs of the joint commands include active duty, National Guard, and Reserve judge advocates and DoD civilians.

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[157] These functions are enumerated at 10 U.S.C.S. §§ 3013(b), 5013(b), 8013(b). *See id.* § 162.

[158] *Id.* § 162.

[159] The Panel notes the particularly intricate legal and policy requirements that must be taken into account in Homeland Security operations. One of NORTHCOM's missions is to provide military support to civil authorities as directed by the President or Secretary of Defense. Military operations conducted within the United States must comply with a variety of statutes intended to protect the constitutional rights of U.S. persons and ensure civilian control of the government. Statutes, such as the Posse Comitatus Act and Insurrection Act, place particular limits on the use of military forces within the borders of the U.S. to

The joint commander's staff judge advocate is the focal point for all legal issues within the command. On the rare occasions that attorneys outside the command provide advice directly to field commanders, those attorneys are expected to ensure coordination with the servicing staff judge advocate office to promote consistency and a complete understanding of the legal environment.

## C. Formal and Informal Reachback

A staff judge advocate within the joint command can seek specialized advice or additional resources to address legal issues arising in the AOR by tapping into various sources of legal support in theater, at intermediate and higher Service headquarters, and at the DoD level. This "reachback" can occur formally or informally. Formal reachback involves the more step-wise process of forwarding an issue up the chain of command to reach a definitive and authoritative resolution. Informal reachback, by contrast, relies on the experience, expertise, and advice of sources outside the traditional chain of command. In both cases, the objective is to provide the staff judge advocate with a timely, accurate, and useful response to the legal question raised.

### 1. Formal Reachback

Formal reachback, with its reliance on command channels, draws heavily from joint and Service doctrine to establish lines of authority.[160]

Formal reachback regarding operational issues generally remains within the joint chain of command leading to resolution, if necessary, at the DoD level. At the DoD level, the General Counsel, often in coordination with the Legal Counsel to the Chairman

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enforce the law. Furthermore, DoD Directives impose policy restrictions on the use of military forces for domestic operations.

[160] Air Force Brig Gen Eric J. Rosborg, Special Assistant to the Vice Chief for Warfighting Headquarters Implementation, discussed how the distinction between operational and non-operational issues often affects whether a commander seeks out joint or Service legal support. Transcript of June 2, 2005 Hearing, at 69.

of the Joint Chiefs of Staff, will provide the definitive and authoritative resolution of the issues presented. Where a question implicates Service-specific information or doctrine, such as whether the joint commander may employ a weapons system or reconnaissance asset in a particular fashion, the Legal Counsel or DoD General Counsel may refer these issues to the Military Departments for Service-specific positions.[161]

For issues outside the operational arena, formal reachback remains within the joint command until it reaches the senior Service commander level and then flows along Service channels. For example, a request for reassignment based upon an assertion of conscientious objector status is an administrative personnel matter that would be governed by Service-specific rules. Legal advice pertaining to such a request would start with the local joint commander's staff judge advocate and flow through joint channels to the senior commander from that Service. From there, the issue would be forwarded back to the major command within the Service, and, if necessary, to Military Department headquarters.

While somewhat regimented and potentially cumbersome, the formal reachback process serves important interests for the relatively small number of issues that require such coordination. First, it ensures that issues with potentially wide-ranging consequences are vetted by the chain of command that will have to implement and defend the decision. Second, the resolution provides the operational commander with authoritative resolution upon which he can rely, knowing that the resolution of the issue comports with the law and applicable national, Department, Service, or command objectives.

Ultimately, it is the DoD General Counsel who is responsible for providing guidance and resolution when legal issues are elevated above the Unified command level. The Secretary of Defense, through the publication of DoD Directive 5145.1, *General*

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[161] Navy Captain [hereinafter CAPT] Hal H. Dronberger, Legal Counsel to the Chairman of the Joint Chiefs of Staff, Transcript of June 2, 2005 Hearing, at 102.

*Counsel of the Department of Defense*,[162] has given the General Counsel broad legal policy and oversight responsibilities for all of the DoD components, along with the authority to issue "instructions to the Combatant Commands" through the Chairman of the Joint Chiefs of Staff. The Chairman's Legal Counsel plays a pivotal role in facilitating reachback legal support for the joint commands, to include acting as a liaison between the DoD General Counsel and those commands.

The Panel has been advised that the DoD General Counsel and the Chairman's Legal Counsel meet daily to discuss key legal issues, including those raised by or affecting the Unified commands.[163] Each of the seven Deputy General Counsels, and the lawyers in their offices, also meet frequently with their counterparts in the Office of the Chairman's Legal Counsel and the Military Departments.

Lawyers from both the Office of Legal Counsel to the Chairman and DoD General Counsel are members of their respective crisis action teams.[164] When fully activated, legal representatives are assigned to both teams, which are manned 24 hours-a-day, seven days-a-week. These crisis action teams and their respective lawyers work closely together to ensure that legal issues are resolved expeditiously.[165] The crisis action team process provides the Unified commands and their lawyers with another method of seeking legal support during a crisis. These crisis action teams provide the advantages of rapid coordination and resolution of issues and determination of a definitive legal position upon which the joint commander in the field can rely. But they require the dedication of resources that may not always be readily available, particularly over a sustained period of time.

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[162] DoD DIR. 5145.1, *supra* note 21, sec. 5.

[163] The Honorable William J. Haynes II, General Counsel of the Dep't of Defense, Transcript of June 1, 2005 Hearing, at 116.

[164] During a crisis, both the Joint Staff and the Office of the Secretary of Defense may activate crisis action teams.

[165] *See generally* Mr. Daniel J. Dell'Orto, Principal Deputy General Counsel of the Dep't of Defense, Transcript of June 28, 2005 Hearing, at 36-38; CAPT Dronberger, *supra* note 161, at 98-101.

### 2. Informal Reachback

For those issues that do not require formal coordination, informal reachback provides a flexible and responsive alternative. Even routine legal issues may require more expertise or manpower than is locally available to SJAs of deployed units.

Unlike formal reachback where the final legal position is established at higher headquarters, informal reachback assists field attorneys in formulating their legal advice. The input they receive informs their advice, but they are not bound by the advice or interpretation offered. Thus, judge advocates in the field remain responsible and accountable for the accuracy of their advice.

From a process standpoint, informal reachback describes a common-sense approach of reaching out to experts or associates who have experience in the required area. Personal associates, mentors, and acquaintances who are subject matter experts can provide advice on a wide range of issues.[166] Attorneys can quickly resolve a particular question, while familiarizing themselves with the relevant law so that they can spot and resolve similar issues in the future.[167]

Another source for informal reachback is a Service-sponsored center of excellence that serves as a clearinghouse for the most current understanding of legal issues. Because the Services sponsor and staff these centers as full-time activities, the lawyers assigned to them typically have a substantial background in the center's specialty and can provide timely support to judge advocates in the field.

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[166] USMC BGen John F. Kelly, Legislative Assistant to the Commandant, described his JAGs' use of this process and specifically noted the benefit of reducing the number of people deployed to dangerous locations. Transcript of June 1, 2005 Hearing, at 199-213.

[167] Witness testimony demonstrated that the legal community in DoD and the Military Departments respond to questions from lawyers in the field in a timely and efficient manner. For example, Mr. Robert Hogue, Counsel for the Commandant of the Marine Corps, testified that if a call comes in from the field for advice on matters that are not necessarily within the purview of his office, they will still take the issue, contact the appropriate office(s) at Headquarters, and coordinate a response. This process is transparent to the field attorney asking the question. Transcript of May 19, 2005 Hearing, at 6, 16.

The Army has taken this approach in its Center for Law and Military Operations, known as CLAMO.[168] Although CLAMO falls outside the joint command structure, the Army, Marine Corps, and Coast Guard have assigned attorneys to the Center full-time. In addition to these active duty military officers, lawyers from the National Guard, the State Department, and two foreign countries provide interagency and coalition capability. This approach gives CLAMO attorneys substantial expertise and the ability to collect and analyze legal issues that arise during all phases of military operations; disseminate this and other operational information through publications, instruction, training, and databases accessible to operational forces worldwide; respond to field judge advocates' requests for assistance; integrate lessons learned from operations and combat training centers into emerging doctrine and into training curricula; and sponsor operational law conferences and symposia. As a repository of lessons learned, CLAMO is particularly well-suited to provide accurate and useful advice based on past experiences. While CLAMO is not itself a source of authoritative opinions, it knows what authoritative opinions have been rendered and can direct field attorneys to those opinions or to the office with authority over the issue.

### 3. Limitations

From the testimony presented before the Panel, commanders and legal staffs in joint commands use both forms of reachback. In response to a question regarding which of the available reachback channels would be appropriate, the DoD General Counsel responded:

> I would suggest that one shouldn't look at it as a choice among exclusive options but, rather, ought to take those multiple channels as opportunities to get more help .... So with multiple channels, I think you can, in a timely way, reach back through two or three ... different channels ... through the

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[168] CLAMO was established at the direction of the Honorable John O. Marsh, Jr., then Secretary of the Army and currently this Panel's Co-Chairman.

> Joint channel, through the Army channel, through the Air Force channel .... Now if there is a dispute, where do you go? At that point, I think you have to go ... up to the combatant commander's SJA and then up through the Joint Staff to the [DoD] General Counsel's office for a definitive answer.[169]

In the same vein, the present Chairman's Legal Counsel described how this reachback process works in practice when issues from the joint commands reach the Pentagon legal community:

> [The offices of Legal Counsel and General Counsel] can reach a coordinated response in a relatively short timeframe, if it's necessary. So, my view on how this should be handled, [field attorneys] ought to go up through the operational chain of command, which means that CENTCOM also needs to be informed, because individual answers to an individual unit [do] not ensure consistency across the board .... I do understand the reachback to the Services, I do understand that they have expertise ... there isn't an issue that I can think of, that we've dealt with over the past year and a half, where I have not tried to also bring in, in every instance, the Service reps.[170]

There are two important points here. First, there is a cornucopia of options available to field commands for getting legal assistance. Formal reachback through Service or joint chains of command or to a crisis action team will yield a vetted and authoritative legal determination, but it takes time. Informal reachback works in most cases to provide timely and accurate assistance to the judge advocate in the field. However, because there is not a definitive process for coordinating advice based on informal reachback, such advice may not be uniform or authoritative.

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[169] Hon. William J. Haynes II, *supra* note 163, at 110-111.

[170] CAPT Dronberger, *supra* note 161, at 87-88.

## *D. Improving Reachback*

It is apparent to the Panel that since the attacks of September 11, 2001, there has been a significant increase not only in the number and complexity of legal issues arising in the joint commands, but also in the speed with which those issues must be addressed. In this regard, the DoD Principal Deputy General Counsel commented on the increasing need for fast, responsive, authoritative answers to complicated legal issues arising out of combat operations, along with the challenge of quickly assembling and maintaining a sufficient pool of attorneys to meet those requirements. The crisis action team meets that need to a considerable degree.

> I think the ability to task is a significant deficiency right now, probably both for Chairman's Legal and for our office, as well, because again these issues come up in such novel ways these days, and because you have to get those answers out pretty quickly, you've got to be able to provide a center of mass of attorneys that can answer those questions pretty quickly .... So I think it would be helpful both for the Department of Defense General Counsel and probably Chairman's Legal to have some ability ... to task to build a crisis action cell, or a group of attorneys to deal with these crises as they erupt.[171]

Staffing for crisis action teams and other forms of augmentation to the DoD General Counsel or Legal Counsel become more difficult as a crisis grows longer. The Panel believes that there will continue to be an increasing demand for legal services created by the ambiguities of the current war-fighting environment and that this will continue to drive a need for authoritative reachback resources. Although tasking authority may be necessary to meet these needs, the Panel is aware that the issue of

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[171] Mr. Dell'Orto, *supra* note 165, at 42.

providing DoD General Counsel with formal tasking authority to "draft" attorneys from the Military Departments has generated Congressional concern in the past.[172]

Operational commanders stressed the importance of having legal advisors deployed forward, with first-hand knowledge of the command environment.[173] On the other hand, commanders also noted that some legal issues arising in the AOR require coordination outside of DoD—for example with the State Department or Department of Justice—and this is often more easily accomplished by reaching back to joint command headquarters or to the Pentagon. Finding the proper balance between staffing of forward-deployed legal offices and reachback resources will not be easy.

The Panel, noting the increased need for legal advice and resources at all levels, believes there is merit to further analysis of the existing resources, procedures, and authorities for addressing legal issues raised by forward-deployed units during contingency operations. The Panel recommends that the Secretary of Defense undertake a review of the present and future organizational, staffing, and coordination requirements for providing authoritative and responsive legal advice to joint commanders at all levels through forward-deployed legal offices and through reachback.

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[172] In the 1992 confirmation process for David Addington to be the DoD General Counsel, the nominee provided the following response when asked whether he believed the Atwood Memorandum provided the DoD General Counsel with authority to direct a Military Department to reassign personnel: "I am not aware of any authority for the DoD General Counsel to direct a personnel management action with respect to a particular individual or group of individuals within a military department, nor do I believe that such authority would be necessary or desirable for the DoD General Counsel." Addington Nomination Hearing and Advance Questions, *supra* note 42, at 325.

[173] "That individual JA could not have been on the end of an e-mail string, or on the end of a phone line from somewhere else. He needed to be standing next to me 18 hours-a-day, understanding the environment, and understanding my objectives with respect to the conduct of the air operation out of the base I was at." Brig Gen Rosborg, *supra* note 160, at 38; "I wanted my lawyers, my military lawyers, to be with me all the time just so they could see the richness, and the depth, and the complexity of what these young pilots were facing, and the young Marines, and Special Forces that I had to push in, that we couldn't conceivably give them every single rule with clarity...." VADM Morgan, *supra* note 3, at 29.

# VIII. Enhancing the Effectiveness of Legal Support

It is clear to this Panel, from the testimony and written submissions, that civilian and military lawyers are integral to the mission of DoD. Attorneys are providing critical and time-sensitive advice to operational commanders and staff. The legal practice areas in DoD and the Military Departments have become far more demanding and complicated, requiring greater resources and expertise for lawyers to continue delivering high quality services. It is also clear from the commanders who testified that legal advice is essential to effective combat operations in the current environment—legal advice is now part of the "tooth," not the "tail."

It is also very clear from testimony that civilian and military lawyers are most effective when engaged early in a process and made a part of the organization's senior management team. At the Military Department headquarters level, this team includes the Assistant Secretaries and Deputy Chiefs of Staff, who share common attributes of appointment and grade reflective of the breadth and importance of their responsibilities. The General Counsels and Judge Advocates General have responsibilities commensurate with that level of leadership. To recognize these responsibilities and to reflect the importance of the rule of law, the Panel sees great merit in maintaining the positions of the General Counsels as Presidentially appointed, Senate confirmed officials, and in elevating the grades of the Judge Advocates General and the Staff Judge Advocate to the Commandant.

## *A. Presidential Appointment and Senate Confirmation of General Counsel*

As previously described, the General Counsel of the Department of Defense has been a Senate confirmed (PAS) position since 1953, and the Military Department General Counsels have been PAS officials since 1988. The status of General Counsels as PAS officials reflects the responsibility and accountability inherent in their positions and enhances the delivery of legal services to DoD and the Military

Departments. As PAS officials, the General Counsels are on equal footing with the Assistant Secretaries and PAS officials elsewhere in the executive branch, and they are able to participate in the formulation of policy and legal affairs early in the process when it is most effective. In addition, PAS status provides the Senate with a role in the appointment of an important member of the DoD and the Military Departments leadership team.[174] Conversely, elimination of PAS status for General Counsels would downgrade the entire legal community and would be seriously detrimental to the effective performance of the legal function.

### *B. Elevation in Grade of The Judge Advocates General and Staff Judge Advocate to the Commandant of the Marine Corps*

Under current law, the Judge Advocates General for the Army, Navy, and Air Force serve as two-star general or flag officers.[175] The SJA to the Commandant of the Marine Corps serves as a one-star general officer.[176] During the deliberations for the Department of Defense Authorization Act for Fiscal Year 2005, the Senate proposed legislation to elevate the grade of the Judge Advocates General of the Army, Navy and Air Force to serve as three-star general or flag officers.[177] The proposed legislation did not address the grade of the SJA to the Commandant.

TJAGs and the SJA are selected using the promotion board procedures generally prescribed under 10 U.S.C. §§ 611 and 612. The proposed legislation would have

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[174] The importance of designating the General Counsel as a PAS position was underscored by the Honorable Craig King, former General Counsel of the Department of the Navy, who testified that having Senate confirmation put him in a position to identify and address legal issues early in the process and "enabled me to help structure solutions and actions in ways that prevented problems, took account of legal authorities, and [was] much more healthy for the Department ...." Transcript of June 15, 2005 Hearing, at 286.

[175] 10 U.S.C.S. §§ 3037(a) (Army), 5148(b) (Navy), 8037(a) (Air Force).

[176] *Id.* § 5046(a).

[177] Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 915(a)(2)(A) (Army), 915(a)(2)(B) (Navy), 915(a)(2)(c) (Air Force) (2004).

retained these procedures, even though other three-star flag or general officers are selected in accordance with 10 U.S.C. § 601. Section 601 positions are designated as "positions of importance and responsibility," and a selection board process is not used.[178] Officers being considered for such positions are selected by the Military Department leadership and recommended to the Secretary of Defense for nomination by the President to the Senate for advice and consent.

On September 20, 2004, the Secretary of Defense conveyed his opposition to § 915 of S. 2401.[179] The Secretary of Defense proposed studying the relationship between legal elements of each Service and reporting the findings to Congress.[180]

On May 19, 2005, the Senate reintroduced the grade elevation proposal as § 505 of the Fiscal Year 2006 Department of Defense Authorization Act.[181] The Senate Armed Services Committee (SASC) explained that this provision was necessary because "[t]he greatly increased operations tempo of the Armed Forces has resulted in an increase in the need for legal advice from uniformed judge advocates in such areas as operational law, international law, the law governing occupied territory, the Geneva Conventions, and related matters."[182] The SJA to the Commandant was not mentioned in either the proposed legislation or the Senate Report. On July 21, 2005, the Office of Management

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[178] 10 U.S.C.S. § 601.

[179] Letter from the Honorable Donald Rumsfeld, Secretary of Defense, to the Honorable Duncan Hunter, Chairman, Committee on Armed Services, U.S. House of Representatives (Sept. 20, 2004).

[180] In the final legislation, Congress included a provision creating an independent panel to study the relationships of the legal elements of each Service. *See* Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 574, 118 Stat. 1811, 1921-1924 (2004).

[181] National Defense Authorization Act for Fiscal Year 2006, S. 1042, 109th Cong. (2005).

[182] S. REP. NO. 109-69, at 310 (2005). The House of Representatives version of the National Defense Authorization Act for Fiscal Year 2006, H.R. 1815, 109th Cong. (2005) does not contain any provision similar to the Senate one relating to the grades of TJAGs.

and Budget (OMB) submitted its Statement of Administration Policy regarding S. 1042, opposing § 505.[183]

During its hearings and in written correspondence, the Panel received testimony and views on the proposed elevation in grade of TJAGs. Two different views emerged. The first and majority view supported the proposed elevation in grade primarily on the grounds that it would provide TJAGs with better access and visibility to senior decision makers in the Department of Defense and their respective Military Departments. Most witnesses agreed that it is very important to engage lawyers early in any management or command process. Consequently, it is important to put the TJAGs on an equal footing with the Deputy Chiefs of Staff and Deputy Chiefs of Naval Operations, who are three-star officers and have a "seat at the table" during deliberations on critical issues. This is the same rationale provided by Congress when elevating the General Counsels to PAS Level IV, i.e., to establish equivalency between the General Counsels and the Service Assistant Secretaries.[184] Several witnesses, including current and former Service Secretaries, General Counsels, TJAGs, and clients, favored elevating the TJAGs to three stars to enhance the delivery of legal services.[185]

The Panel notes that notwithstanding the significant increase in the importance and complexity of legal issues over the years, the grade of the Army and Navy TJAGs

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[183] OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMIN. POLICY: S. 1042 – NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2006 (July 21, 2005), *available at* http://www.whitehouse.gov/omb/legislative/sap/109-1/s1042sap-s.pdf.

[184] *See supra* discussion, Section VIII.A.

[185] *See, e.g.,* Hon. Dr. Roche, *supra* note 48, at 52; the Honorable Les Brownlee, former Acting Secretary of the Army, Transcript of June 15, 2005 Hearing, p. 177; MG Romig, *supra* note 4, at 235-241; Navy Rear Admiral (Retired) Donald J. Guter, Transcript of June 15, 2005 Hearing, at 256-57; USMC BGen (Retired) Joseph Composto, Transcript of June 15, 2005 Hearing, at 264; Mr. Williams, *supra* note 143, at 240-241; Air Force Lieutenant General [hereinafter Lt Gen] Steven Polk, Inspector General, Transcript of June 1, 2005 Hearing, at 171; *see also* Mr. Eugene Fidell, National Institute for Military Justice, Transcript of June 28, 2005 Hearing, at 170; Dean Richard Rosen, Center for Military Law and Policy, Texas Tech University School of Law, Transcript of June 28, 2005 Hearing, at 181.

has remained two stars since 1918.[186] As one senior witness stated, "it could be that the time has come."[187]

The opposing view is that elevation could add pressure to increase grades authorized for other positions and, in any event, is not necessary to assure access. This view was further based upon concerns that elevating the grade would require redistribution of three-star general or flag or officer billets. Most witnesses testified that, in the event Congress elevates the grade of TJAGs to three stars, it should exempt these positions from existing limitations on number and distribution of three-star authorizations.[188]

On balance, the Panel believes that elevating TJAGs to three stars, making them equivalent in rank to the other primary advisors to the senior leadership, would impact the delivery of legal services in the Department of Defense positively. The Panel further believes the most valid objection to the elevation in grade can be addressed, as pending legislation proposes, by exempting TJAG positions from existing limitations on the number and distribution of general and flag officers. Moreover, the Panel does not believe that it would be appropriate to select the officer nominated to be a three-star TJAG using the provisions of 10 U.S.C. § 611. Instead, TJAGs should be selected in accordance with 10 U.S.C. § 601, in the same manner as other three-star officers are selected. Finally, the Panel notes that the grade of the Marine Corps SJA was not addressed in S. 1042, § 505. The Panel believes the rationale to support elevation in grade of TJAGs is also applicable to the SJA to the Commandant.

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[186] The Army TJAG became a major general in 1917 (Act of Oct. 6, 1917), and the Navy TJAG was given the equivalent rank the following year. The Appropriations Act of July 1, 1918, 40 Stat. 717 (1918).

[187] Lt Gen Polk, *supra* note 185, at 173.

[188] GEN Cody, *supra* note 3, at 251. The Panel notes that the proposed legislation would exclude TJAGs from these limitations. National Defense Authorization Act for Fiscal Year 2006, S. 1042, § 505(d), 109th Cong. (2005).

# IX. Findings and Recommendations

Below are specific findings and recommendations based upon the Panel's consideration of all testimony and written submissions:

## Findings

1. The provision of legal advice in the Department of Defense and Military Departments is inherently governmental or closely associated with inherently governmental functions, and the Defense Department has been well-served by categorizing legal support, in the aggregate, as inherently governmental.

2. The current statutory structure for the provision of legal services in the Department of Defense is sufficient and works well.

3. Subject to the authority, direction, and control of the Secretary of Defense, the Secretaries of the Military Departments have the statutory authority and responsibility to organize their Departments. This authority is not unlimited.

4. The Secretaries of the Military Departments have the authority to designate the General Counsels as the chief legal officers of their Departments.

5. The designation of chief legal officer is one of seniority, general accountability, and responsibility, not executive authority over TJAG and the JAG Corps, and has practical utility.

6. The ability of the Judge Advocates General and judge advocates in the field to give independent, professional legal advice is adequately provided for by existing law.

7. The Secretaries of the Military Departments have the authority to ensure that the legal opinions of the General Counsels are the controlling legal opinions of their respective Military Departments. However, the General Counsel cannot act in derogation of authority committed to TJAG by statute.

8. The Goldwater-Nichols Act acknowledged that some overlap and duplication with respect to Departmental legal matters would exist, creating a healthy tension between the positions of General Counsel and TJAG.

9. The General Counsel and the Judge Advocate General each are intended to be independent legal advisors to Military Department leadership, with the General Counsel being the senior legal advisor and the Judge Advocate General having a right of access to the Department leadership.

10. A successful General Counsel-Judge Advocate General relationship turns on their willingness to work together cooperatively, communicate frequently, and operate in a transparent manner on the business of the Department.

11. Forcing adoption of one model for the delivery of legal services across all of the Military Departments is unnecessary, would ignore important historical differences in the structures of the Departments, and would inappropriately limit the Secretaries' discretion to organize their Departments as they see fit.

12. The rule of law has become an increasingly important factor in current military operations. Civilian and military attorneys are called upon for legal advice on complex and novel operational issues in support of forward-deployed forces where time is of the essence. These demands present difficult challenges for the delivery of legal services worldwide, including to the Unified Commands.

13. Deployed judge advocates have proven indispensable to commanders on today's battlefields. Deployed commanders consider their judge advocates as essential members of the command team.

14. While the Military Departments have demonstrated the ability to adapt their forward-deployed legal teams to rapidly changing requirements, the ad hoc nature of informal reachback support is potentially problematic.

15. Elevation of the Judge Advocates General to three-star grade would improve the delivery of legal services and would appropriately make them equivalent in rank to the other primary advisors to senior commanders. If these positions are elevated, they should be excluded from statutory limits on the number and distribution of three-star authorizations, and officers should be appointed according to procedures that are consistent with those currently prescribed for the selection of other three-star officers under 10 U.S.C. § 601. If the Judge Advocates General are elevated in grade, the Staff Judge Advocate to the Commandant should be elevated to the grade of major general.

16. The current statutory requirement that the General Counsels of Department of Defense and the Military Departments hold office as Presidentially appointed, Senate

confirmed officials is of great value for the credible and effective delivery of legal services, especially in conveying legal positions to agencies outside the Department of Defense.

## Recommendations

1. No Congressional action further defining roles and responsibilities of the General Counsels and the Judge Advocates General is necessary to ensure the continued effective provision of legal services throughout the Military Departments. However, the Department of Defense and Congress may wish to consider raising the Judge Advocates General to three-star grade for the reasons and in the manner discussed in this Report.[189]

2. The Panel strongly supports retaining PAS status for the General Counsel positions throughout the Department of Defense.

3. The Secretaries of the Military Departments should strongly encourage the growth of collaborative, collegial relationships between the General Counsels and the Judge Advocates General. An inclusive staffing process on major legal and policy decisions; joint ventures such as attorney exchanges and training; and other such endeavors will strengthen both the General Counsel and Judge Advocate General organizations and the Departments they serve.

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[189] This includes elevating the SJA to the Commandant to major general.

4. Because of the increasing importance of timely and authoritative legal advice in today's operational environment and the increasing use of reachback by forward-deployed judge advocates, the Secretary of Defense should undertake a review of the present and future organizational, staffing, and coordination requirements for providing legal advice in the field and through reachback.

5. Because long-term professional development of civilian attorneys is essential to the quality of legal services, all legal elements should ensure that they have a robust program for civilian attorney professional development.

The Panel believes that its findings and recommendations, taken as a whole, will lead to improvement in the already outstanding legal services provided throughout the Department of Defense. Cooperation, communication, and transparency among all members of the Defense legal community are key to serving the Departments and the soldiers, sailors, airmen, and Marines who depend on the legal advice provided by civilian and military attorneys worldwide.

# Appendix A
# Summary of Number of Attorneys by Military Department

| | Department of the Army | Department of the Air Force | Department of the Navy | |
|---|---|---|---|---|
| | | | Navy | Marine Corps |
| **Office of the General Counsel** | **Total: 32** | **Total: 82** | **Total: 587** | **Total: 54** |
| Political Appointees | 2 | 2 | 2 | |
| Career Civilian | 20 | 71 (includes 17 real estate attorneys not located at HQ) | 564 | 54 |
| Active Duty | 10 (6 JAGC/4 Honors) | 9 (7 JAGC/2 Honors) | 21 | |
| **Army Materiel Command (AMC)** | **Total: 240** | | | |
| Career Civilian | 210 | | | |
| Active Duty | 30 | | | |
| **U.S. Army Corps of Engineers (USACE)** | **Total: 380** | | | |
| Career Civilian | 380 | | | |
| **The Judge Advocate General** | **Total: 5,026** | **Total: 2,526** | **Total: 1,274** | **Total: 836** |
| Active Duty | 1,609 | 1,288 | 773 | 416 |
| Career Civilian | 489 | 325 | 36 | 5 |
| Reserve Component | 2,311 | 648 | 465 | 415 |
| National Guard | 617 | 265 | | |

Sources: Services' Submissions as of May 2005.

# Appendix B

## Secretarial and General Counsel Statutory Responsibilities and Authority

| Army | Navy | Air Force |
|---|---|---|
| **10 USCS § 3013. Secretary of the Army**<br>(a)<br>(1) There is a Secretary of the Army, appointed from civilian life by the President, by and with the advice and consent of the Senate. The Secretary is the head of the Department of the Army.<br>(2) A person may not be appointed as Secretary of the Army within five years after relief from active duty as a commissioned officer of a regular component of an armed force. | **10 USCS § 5013. Secretary of the Navy**<br>(a)<br>(1) There is a Secretary of the Navy, appointed from civilian life by the President, by and with the advice and consent of the Senate. The Secretary is the head of the Department of the Navy.<br>(2) A person may not be appointed as Secretary of the Navy within five years after relief from active duty as a commissioned officer of a regular component of an armed force. | **10 USCS § 8013. Secretary of the Air Force**<br>(a)<br>(1) There is a Secretary of the Air Force, appointed from civilian life by the President, by and with the advice and consent of the Senate. The Secretary is the head of the Department of the Air Force.<br>(2) A person may not be appointed as Secretary of the Air Force within five years after relief from active duty as a commissioned officer of a regular component of an armed force. |

| Army | Navy | Air Force |
|---|---|---|
| **10 USCS § 3013. Secretary of the Army (cont.)**<br>(b) Subject to the authority, direction, and control of the Secretary of Defense and subject to the provisions of chapter 6 of this title, the Secretary of the Army is responsible for, and has the authority necessary to conduct, all affairs of the Department of the Army, including the following functions:<br>(1) Recruiting.<br>(2) Organizing.<br>(3) Supplying.<br>(4) Equipping (including research and development).<br>(5) Training.<br>(6) Servicing.<br>(7) Mobilizing.<br>(8) Demobilizing.<br>(9) Administering (including the morale and welfare of personnel).<br>(10) Maintaining.<br>(11) The construction, outfitting, and repair of military equipment.<br>(12) The construction, maintenance, and repair of buildings, structures, and utilities and the acquisition of real property and interests in real property necessary to carry out the responsibilities specified in this section. | **10 USCS § 5013. Secretary of the Navy (cont.)**<br>(b) Subject to the authority, direction, and control of the Secretary of Defense and subject to the provisions of chapter 6 of this title, the Secretary of the Navy is responsible for, and has the authority necessary to conduct, all affairs of the Department of the Navy, including the following functions:<br>(1) Recruiting.<br>(2) Organizing.<br>(3) Supplying.<br>(4) Equipping (including research and development).<br>(5) Training.<br>(6) Servicing.<br>(7) Mobilizing.<br>(8) Demobilizing.<br>(9) Administering (including the morale and welfare of personnel).<br>(10) Maintaining.<br>(11) The construction, outfitting, and repair of military equipment.<br>(12) The construction, maintenance, and repair of buildings, structures, and utilities and the acquisition of real property and interests in real property necessary to carry out the responsibilities specified in this section. | **10 USCS § 8013. Secretary of the Air Force (cont.)**<br>(b) Subject to the authority, direction, and control of the Secretary of Defense and subject to the provisions of chapter 6 of this title, the Secretary of the Air Force is responsible for, and has the authority necessary to conduct, all affairs of the Department of the Air Force, including the following functions:<br>(1) Recruiting.<br>(2) Organizing.<br>(3) Supplying.<br>(4) Equipping (including research and development).<br>(5) Training.<br>(6) Servicing.<br>(7) Mobilizing.<br>(8) Demobilizing.<br>(9) Administering (including the morale and welfare of personnel).<br>(10) Maintaining.<br>(11) The construction, outfitting, and repair of military equipment.<br>(12) The construction, maintenance, and repair of buildings, structures, and utilities and the acquisition of real property and interests in real property necessary to carry out the responsibilities specified in this section. |

| Army | Navy | Air Force |
|---|---|---|
| **10 USCS § 3013. Secretary of the Army (cont.)**<br>(c) Subject to the authority, direction, and control of the Secretary of Defense, the Secretary of the Army is also responsible to the Secretary of Defense for--<br>(1) the functioning and efficiency of the Department of the Army;<br>(2) the formulation of policies and programs by the Department of the Army that are fully consistent with national security objectives and policies established by the President or the Secretary of Defense;<br>(3) the effective and timely implementation of policy, program, and budget decisions and instructions of the President or the Secretary of Defense relating to the functions of the Department of the Army;<br>(4) carrying out the functions of the Department of the Army so as to fulfill the current and future operational requirements of the unified and specified combatant commands;<br>(5) effective cooperation and coordination between the Department of the Army and the other military departments and agencies of the Department of Defense to provide for more effective, efficient, and economical administration and to eliminate duplication;<br>(6) the presentation and justification of the positions of the Department of the Army on the plans, programs, and policies of the Department of Defense; and<br>(7) the effective supervision and control of the intelligence activities of the Department of the Army.<br><br>(d) The Secretary of the Army is also responsible for such other activities as may be prescribed by law or by the President or Secretary of Defense. | **10 USCS § 5013. Secretary of the Navy (cont.)**<br>(c) Subject to the authority, direction, and control of the Secretary of Defense, the Secretary of the Navy is also responsible to the Secretary of Defense for--<br>(1) the functioning and efficiency of the Department of the Navy;<br>(2) the formulation of policies and programs by the Department of the Navy that are fully consistent with national security objectives and policies established by the President or the Secretary of Defense;<br>(3) the effective and timely implementation of policy, program, and budget decisions and instructions of the President or the Secretary of Defense relating to the functions of the Department of the Navy;<br>(4) carrying out the functions of the Department of the Navy so as to fulfill the current and future operational requirements of the unified and specified combatant commands;<br>(5) effective cooperation and coordination between the Department of the Navy and the other military departments and agencies of the Department of Defense to provide for more effective, efficient, and economical administration and to eliminate duplication;<br>(6) the presentation and justification of the positions of the Department of the Navy on the plans, programs, and policies of the Department of Defense; and<br>(7) the effective supervision and control of the intelligence activities of the Department of the Navy.<br><br>(d) The Secretary of the Navy is also responsible for such other activities as may be prescribed by law or by the President or Secretary of Defense | **10 USCS § 8013. Secretary of the Air Force (cont.)**<br>(c) Subject to the authority, direction, and control of the Secretary of Defense, the Secretary of the Air Force is also responsible to the Secretary of Defense for--<br>(1) the functioning and efficiency of the Department of the Air Force;<br>(2) the formulation of policies and programs by the Department of the Air Force that are fully consistent with national security objectives and policies established by the President or the Secretary of Defense;<br>(3) the effective and timely implementation of policy, program, and budget decisions and instructions of the President or the Secretary of Defense relating to the functions of the Department of the Air Force;<br>(4) carrying out the functions of the Department of the Air Force so as to fulfill the current and future operational requirements of the unified and specified combatant commands;<br>(5) effective cooperation and coordination between the Department of the Air Force and the other military departments and agencies of the Department of Defense to provide for more effective, efficient, and economical administration and to eliminate duplication;<br>(6) the presentation and justification of the positions of the Department of the Air Force on the plans, programs, and policies of the Department of Defense; and<br>(7) the effective supervision and control of the intelligence activities of the Department of the Air Force.<br><br>(d) The Secretary of the Air Force is also responsible for such other activities as may be prescribed by law or by the President or Secretary of Defense. |

| Army | Navy | Air Force |
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| **10 USCS § 3013. Secretary of the Army (cont.)**<br>(e) After first informing the Secretary of Defense, the Secretary of the Army may make such recommendations to Congress relating to the Department of Defense as he considers appropriate.<br><br>(f) The Secretary of the Army may assign such of his functions, powers, and duties as he considers appropriate to the Under Secretary of the Army and to the Assistant Secretaries of the Army. Officers of the Army shall, as directed by the Secretary, report on any matter to the Secretary, the Under Secretary, or any Assistant Secretary.<br>(g) The Secretary of the Army may--<br>(1) assign, detail, and prescribe the duties of members of the Army and civilian personnel of the Department of the Army;<br>(2) change the title of any officer or activity of the Department of the Army not prescribed by law; and<br>(3) prescribe regulations to carry out his functions, powers, and duties under this title. | **10 USCS § 5013. Secretary of the Navy (cont.)**<br>(e) After first informing the Secretary of Defense, the Secretary of the Navy may make such recommendations to Congress relating to the Department of Defense as he considers appropriate.<br><br>(f) The Secretary of the Navy may assign such of his functions, powers, and duties as he considers appropriate to the Under Secretary of the Navy and to the Assistant Secretaries of the Navy. Officers of the Navy and the Marine Corps shall, as directed by the Secretary, report on any matter to the Secretary, the Under Secretary, or any Assistant Secretary.<br>(g) The Secretary of the Navy may--<br>(1) assign, detail, and prescribe the duties of members of the Navy and Marine Corps and civilian personnel of the Department of the Navy;<br>(2) change the title of any officer or activity of the Department of the Navy not prescribed by law; and<br>(3) prescribe regulations to carry out his functions, powers, and duties under this title]. | **10 USCS § 8013. Secretary of the Air Force (cont.)**<br>(e) After first informing the Secretary of Defense, the Secretary of the Air Force may make such recommendations to Congress relating to the Department of Defense as he considers appropriate.<br><br>(f) The Secretary of the Air Force may assign such of his functions, powers, and duties as he considers appropriate to the Under Secretary of the Air Force and to the Assistant Secretaries of the Air Force. Officers of the Air Force shall, as directed by the Secretary, report on any matter to the Secretary, the Under Secretary, or any Assistant Secretary.<br>(g) The Secretary of the Air Force may--<br>(1) assign, detail, and prescribe the duties of members of the Air Force and civilian personnel of the Department of the Air Force;<br>(2) change the title of any officer or activity of the Department of the Air Force not prescribed by law; and<br>(3) prescribe regulations to carry out his functions, powers, and duties under this title. |

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| **10 USCS § 3014. Office of the Secretary of the Army**<br><br>(a) There is in the Department of the Army an Office of the Secretary of the Army. The function of the Office is to assist the Secretary of the Army in carrying out his responsibilities.<br>(b) The Office of the Secretary of the Army is composed of the following:<br>(1) The Under Secretary of the Army.<br>(2) The Assistant Secretaries of the Army.<br>(3) The Administrative Assistant to the Secretary of the Army.<br>(4) The General Counsel of the Department of the Army.<br>(5) The Inspector General of the Army.<br>(6) The Chief of Legislative Liaison.<br>(7) The Army Reserve Forces Policy Committee.<br>(8) Such other offices and officials as may be established by law or as the Secretary of the Army may establish or designate.<br>(c)<br>(1) The Office of the Secretary of the Army shall have sole responsibility within the Office of the Secretary and the Army Staff for the following functions:<br>(A) Acquisition.<br>(B) Auditing.<br>(C) Comptroller (including financial management).<br>(D) Information management.<br>(E) Inspector General.<br>(F) Legislative affairs.<br>(G) Public affairs. | **10 USCS § 5014. Office of the Secretary of the Navy**<br><br>(a) There is in the Department of the Navy an Office of the Secretary of the Navy. The function of the Office is to assist the Secretary of the Navy in carrying out his responsibilities.<br>(b) The Office of the Secretary of the Navy is composed of the following:<br>(1) The Under Secretary of the Navy.<br>(2) The Assistant Secretaries of the Navy.<br>(3) The General Counsel of the Department of the Navy<br>(4) The Judge Advocate General of the Navy.<br>(5) The Naval Inspector General.<br>(6) The Chief of Legislative Affairs.<br>(7) The Chief of Naval Research.<br>(8) Such other offices and officials as may be established by law or as the Secretary of the Navy may establish or designate.<br><br>(c)<br>(1) The Office of the Secretary of the Navy shall have sole responsibility within the Office of the Secretary of the Navy, the Office of the Chief of Naval Operations, and the Headquarters, Marine Corps, for the following functions:<br>(A) Acquisition.<br>(B) Auditing.<br>(C) Comptroller (including financial management).<br>(D) Information management.<br>(E) Inspector General.<br>(F) Legislative affairs.<br>(G) Public affairs. | **10 USCS § 8014. Office of the Secretary of the Air Force**<br>(a) There is in the Department of the Air Force an Office of the Secretary of the Air Force. The function of the Office is to assist the Secretary of the Air Force in carrying out his responsibilities.<br>(b) The Office of the Secretary of the Air Force is composed of the following:<br>(1) The Under Secretary of the Air Force.<br>(2) The Assistant Secretaries of the Air Force.<br>(3) The General Counsel of the Department of the Air Force.<br>(4) The Inspector General of the Air Force.<br>(5) The Chief of Legislative Liaison.<br>(6) The Air Reserve Forces Policy Committee.<br>(7) Such other offices and officials as may be established by law or as the Secretary of the Air Force may establish or designate.<br><br>(c)<br>(1) The Office of the Secretary of the Air Force shall have sole responsibility within the Office of the Secretary and the Air Staff for the following functions:<br>(A) Acquisition.<br>(B) Auditing.<br>(C) Comptroller (including financial management).<br>(D) Information management.<br>(E) Inspector General.<br>(F) Legislative affairs.<br>(G) Public affairs. |

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| **§ 3014. Office of the Secretary of the Army (cont.)**<br>(2) The Secretary of the Army shall establish or designate a single office or other entity within the Office of the Secretary of the Army to conduct each function specified in paragraph (1). No office or other entity may be established or designated within the Army Staff to conduct any of the functions specified in paragraph (1). | **§ 5014. Office of the Secretary of the Navy (cont.)**<br>(2) The Secretary of the Navy shall establish or designate a single office or other entity within the Office of the Secretary of the Navy to conduct each function specified in paragraph (1). No office or other entity may be established or designated within the Office of the Chief of Naval Operations or the Headquarters, Marine Corps, to conduct any of the functions specified in paragraph (1). | **§ 8014. Office of the Secretary of the Air Force (cont.)**<br>(2) The Secretary of the Air Force shall establish or designate a single office or other entity within the Office of the Secretary of the Air Force to conduct each function specified in paragraph (1). No office or other entity may be established or designated within the Air Staff to conduct any of the functions specified in paragraph (1). |
| (3) The Secretary shall prescribe the relationship of each office or other entity established or designated under paragraph (2) to the Chief of Staff and to the Army Staff and shall ensure that each such office or entity provides the Chief of Staff such staff support as the Chief of Staff considers necessary to perform his duties and responsibilities. | (3) The Secretary shall--<br>(A) prescribe the relationship of each office or other entity established or designated under paragraph (2)--<br>(i) to the Chief of Naval Operations and the Office of the Chief of Naval Operations; and<br>(ii) to the Commandant of the Marine Corps and the Headquarters, Marine Corps; and<br>(B) ensure that each such office or entity provides the Chief of Naval Operations and the Commandant of the Marine Corps such staff support as each considers necessary to perform his duties and responsibilities. | (3) The Secretary shall prescribe the relationship of each office or other entity established or designated under paragraph (2) to the Chief of Staff and to the Air Staff and shall ensure that each such office or entity provides the Chief of Staff such staff support as the Chief of Staff considers necessary to perform his duties and responsibilities. |
| (4) The vesting in the Office of the Secretary of the Army of the responsibility for the conduct of a function specified in paragraph (1) does not preclude other elements of the executive part of the Department of the Army (including the Army Staff) from providing advice or assistance to the Chief of Staff or otherwise participating in that function within the executive part of the Department under the direction of the office assigned responsibility for that function in the Office of the Secretary of the Army. | (4) The vesting in the Office of the Secretary of the Navy of the responsibility for the conduct of a function specified in paragraph (1) does not preclude other elements of the executive part of the Department of the Navy (including the Office of the Chief of Naval Operations and the Headquarters, Marine Corps) from providing advice or assistance to the Chief of Naval Operations and the Commandant of the Marine Corps or otherwise participating in that function within the executive part of the Department under the direction of the office assigned responsibility for that function in the Office of the Secretary of the Navy. | (4) The vesting in the Office of the Secretary of the Air Force of the responsibility for the conduct of a function specified in paragraph (1) does not preclude other elements of the executive part of the Department of the Air Force (including the Air Staff) from providing advice or assistance to the Chief of Staff or otherwise participating in that function within the executive part of the Department under the direction of the office assigned responsibility for that function in the Office of the Secretary of the Air Force. |

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| **§ 3014. Office of the Secretary of the Army (cont.)**<br>(5) The head of the office or other entity established or designated by the Secretary to conduct the auditing function shall have at least five years of professional experience in accounting or auditing. The position shall be considered to be a career reserved position as defined in section 3132(a) (8) of title 5. | **§ 5014. Office of the Secretary of the Navy (cont.)**<br>(5) (A) The head of the office or other entity established or designated by the Secretary to conduct the auditing function shall have at least five years of professional experience in accounting or auditing. The position shall be considered to be a career reserved position as defined in section 3132(a)(8) of title 5.<br>(B) The position of regional director within such office or entity, and any other position within such office or entity the primary responsibilities of which are to carry out supervisory functions, may not be held by a member of the armed forces on active duty. | **§ 8014. Office of the Secretary of the Air Force (cont.)**<br>(5) The head of the office or other entity established or designated by the Secretary to conduct the auditing function shall have at least five years of professional experience in accounting or auditing. The position shall be considered to be a career reserved position as defined in section 3132(a)(8) of title 5. |
| (d) (1) Subject to paragraph (2), the Office of the Secretary of the Army shall have sole responsibility within the Office of the Secretary and the Army Staff for the function of research and development. | (d) (1) Subject to paragraph (2), the Office of the Secretary of the Navy shall have sole responsibility within the Office of the Secretary of the Navy, the Office of the Chief of Naval Operations, and the Headquarters, Marine Corps, for the function of research and development. | (d) (1) Subject to paragraph (2), the Office of the Secretary of the Air Force shall have sole responsibility within the Office of the Secretary and the Air Staff for the function of research and development. |
| (2) The Secretary of the Army may assign to the Army Staff responsibility for those aspects of the function of research and development that relate to military requirements and test and evaluation. | (2) The Secretary of the Navy may assign to the Office of the Chief of Naval Operations and the Headquarters, Marine Corps, responsibility for those aspects of the function of research and development relating to military requirements and test and evaluation. | (2) The Secretary of the Air Force may assign to the Air Staff responsibility for those aspects of the function of research and development that relate to military requirements and test and evaluation. |
| (3) The Secretary shall establish or designate a single office or other entity within the Office of the Secretary of the Army to conduct the function specified in paragraph (1). | (3) The Secretary shall establish or designate a single office or other entity within the Office of the Secretary of the Navy to conduct the function specified in paragraph (1). | (3) The Secretary shall establish or designate a single office or other entity within the Office of the Secretary of the Air Force to conduct the function specified in paragraph (1). |

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| **§ 3014. Office of the Secretary of the Army (cont.)**<br>(4) The Secretary shall prescribe the relationship of the office or other entity established or designated under paragraph (3) to the Chief of Staff of the Army and to the Army Staff and shall ensure that each such office or entity provides the Chief of Staff such staff support as the Chief of Staff considers necessary to perform his duties and responsibilities. | **§ 5014. Office of the Secretary of the Navy (cont.)**<br>(4) The Secretary shall--<br>(A) prescribe the relationship of the office or other entity established or designated under paragraph (3)--<br>(i) to the Chief of Naval Operations and the Office of the Chief of Naval Operations; and<br>(ii) to the Commandant of the Marine Corps and the Headquarters, Marine Corps; and<br>(B) ensure that each such office or entity provides the Chief of Naval Operations and the Commandant of the Marine Corps such staff support as each considers necessary to perform his duties and responsibilities. | **§ 8014. Office of the Secretary of the Air Force (cont.)**<br>(4) The Secretary shall prescribe the relationship of the office or other entity established or designated under paragraph (3) to the Chief of Staff of the Air Force and to the Air Staff and shall ensure that each such office or entity provides the Chief of Staff such staff support as the Chief of Staff considers necessary to perform his duties and responsibilities |
| (e) The Secretary of the Army shall ensure that the Office of the Secretary of the Army and the Army Staff do not duplicate specific functions for which the Secretary has assigned responsibility to the other. | (e) The Secretary of the Navy shall ensure that the Office of the Secretary of the Navy, the Office of the Chief of Naval Operations, and the Headquarters, Marine Corps, do not duplicate specific functions for which the Secretary has assigned responsibility to another of such offices. | . (e) The Secretary of the Air Force shall ensure that the Office of the Secretary of the Air Force and the Air Staff do not duplicate specific functions for which the Secretary has assigned responsibility to the other. |

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| **§ 3014. Office of the Secretary of the Army (cont.)**<br>(f)<br>(1) The total number of members of the armed forces and civilian employees of the Department of the Army assigned or detailed to permanent duty in the Office of the Secretary of the Army and on the Army Staff may not exceed 3,105.<br>(2) Not more than 1,865 officers of the Army on the active-duty list may be assigned or detailed to permanent duty in the Office of the Secretary of the Army and on the Army Staff.<br>(3) The total number of general officers assigned or detailed to permanent duty in the Office of the Secretary of the Army and on the Army Staff may not exceed 67.<br>(4) The limitations in paragraphs (1), (2), and (3) do not apply in time of war or during a national emergency declared by the President or Congress. The limitation in paragraph (2) does not apply whenever the President determines that it is in the national interest to increase the number of officers assigned or detailed to permanent duty in the Office of the Secretary of the Army or on the Army Staff. | **§ 5014. Office of the Secretary of the Navy (cont.)**<br>(f)<br>(1) The total number of members of the armed forces and civilian employees of the Department of the Navy assigned or detailed to permanent duty in the Office of the Secretary of the Navy, the Office of Chief of Naval Operations, and the Headquarters, Marine Corps, may not exceed 2,866.<br>(2) Not more than 1,720 officers of the Navy and Marine Corps on the active-duty list may be assigned or detailed to permanent duty in the Office of the Secretary of the Navy, the Office of the Chief of Naval Operations, and the Headquarters, Marine Corps.<br>(3) The total number of general and flag officers assigned or detailed to permanent duty in the Office of the Secretary of the Navy, the Office of the Chief of Naval Operations, and the Headquarters, Marine Corps, may not exceed 74.<br>(4) The limitations in paragraphs (1), (2), and (3) do not apply in time of war or during a national emergency declared by the President or Congress. The limitation in paragraph (2) does not apply whenever the President determines that it is in the national interest to increase the number of officers assigned or detailed to permanent duty in the Office of the Secretary of the Navy, the Office of the Chief of Naval Operations, or the Headquarters, Marine Corps. | **§ 8014. Office of the Secretary of the Air Force (cont.)**<br>(f)<br>(1) The total number of members of the armed forces and civilian employees of the Department of the Air Force assigned or detailed to permanent duty in the Office of the Secretary of the Air Force and on the Air Staff may not exceed 2,639.<br>(2) Not more than 1,585 officers of the Air Force on the active-duty list may be assigned or detailed to permanent duty in the Office of the Secretary of the Air Force and on the Air Staff.<br>(3) The total number of general officers assigned or detailed to permanent duty in the Office of the Secretary of the Air Force and on the Air Staff may not exceed 60.<br>(4) The limitations in paragraph (1), (2), and (3) do not apply in time of war or during a national emergency declared by the President or Congress. The limitation in paragraph (2) does not apply whenever the President determines that it is in the national interest to increase the number of officers assigned or detailed to permanent duty in the Office of the Secretary of the Air Force or on the Air Staff. |

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| **10 USCS § 3017. Secretary of the Army: successors to duties**<br><br>If the Secretary of the Army dies, resigns, is removed from office, is absent, or is disabled, the person who is highest on the following list, and who is not absent or disabled, shall perform the duties of the Secretary until the President, under section 3347 of title 5, directs another person to perform those duties or until the absence or disability ceases:<br>(1) The Under Secretary of the Army.<br>(2) The Assistant Secretaries of the Army, in the order prescribed by the Secretary of the Army and approved by the Secretary of Defense.<br>(3) The General Counsel of the Department of the Army. [*added by Pub. L. No. 103-337, § 902(a), 108 Stat. 2823, Oct. 5, 1994*]<br>(4) The Chief of Staff. | **10 USCS § 5017. Secretary of the Navy: successors to duties**<br><br>If the Secretary of the Navy dies, resigns, is removed from office, is absent, or is disabled, the person who is highest on the following list, and who is not absent or disabled, shall perform the duties of the Secretary until the President, under section 3347 of title 5, directs another person to perform those duties or until the absence or disability ceases:<br>(1) The Under Secretary of the Navy.<br>(2) The Assistant Secretaries of the Navy, in the order prescribed by the Secretary of the Navy and approved by the Secretary of Defense.<br>(3) The General Counsel of the Department of the Navy. [*added by Pub. L. No. 103-337, § 902(a), 108 Stat. 2823, Oct. 5, 1994*]<br>(4) The Chief of Naval Operations.<br>(5) The Commandant of the Marine Corps. | **10 USCS § 8017. Secretary of the Air Force: successors to duties**<br><br>If the Secretary of the Air Force dies, resigns, is removed from office, is absent, or is disabled, the person who is highest on the following list, and who is not absent or disabled, shall perform the duties of the Secretary until the President, under section 3347 of title 5, directs another person to perform those duties or until the absence or disability ceases:<br>(1) The Under Secretary of the Air Force.<br>(2) The Assistant Secretaries of the Air Force, in the order prescribed by the Secretary of the Air Force and approved by the Secretary of Defense.<br>(3) The General Counsel of the Department of the Air Force. [*added by Pub. L. No. 103-337, § 902(a), 108 Stat. 2823, Oct. 5, 1994*]<br>(4) The Chief of Staff. |
| **10 USCS § 3019. General Counsel**<br><br>(a) There is a General Counsel of the Department of the Army, appointed from civilian life by the President, by and with the advice and consent of the Senate.<br><br>(b) The General Counsel shall perform such functions as the Secretary of the Army may prescribe. | **10 USCS § 5019. General Counsel**<br><br>(a) There is a General Counsel of the Department of the Navy, appointed from civilian life by the President, by and with the advice and consent of the Senate.<br><br>(b) The General Counsel shall perform such functions as the Secretary of the Navy may prescribe. | **10 USCS § 8019. General Counsel**<br><br>(a) There is a General Counsel of the Department of the Air Force, appointed from civilian life by the President, by and with the advice and consent of the Senate.<br><br>(b) The General Counsel shall perform such functions as the Secretary of the Air Force may prescribe. |

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| **5 USCS § 5315. Positions at level IV**<br><br>Level IV of the Executive Schedule applies to the following positions, for which the annual rate of basic pay shall be the rate determined with respect to such level under chapter 11 of title 2, as adjusted by section 5318 of this title:<br>. . . .<br>Under Secretary of the Army.<br>. . . .<br>Assistant Secretaries of the Army (5).<br>. . . .<br>General Counsel of the Department of the Army.<br>[*added by Pub. L. No. 102-190, § 903(a)(1), 105 Stat. 1450, 1451, 1586, Dec. 5, 1991*] | **5 USCS § 5315. Positions at level IV**<br><br>Level IV of the Executive Schedule applies to the following positions, for which the annual rate of basic pay shall be the rate determined with respect to such level under chapter 11 of title 2, as adjusted by section 5318 of this title:<br>. . . .<br>Under Secretary of the Navy.<br>. . . .<br>Assistant Secretaries of the Navy (4).<br>. . . .<br>General Counsel of the Department of the Navy. [*added by Pub. L. No. 102-190, § 903(a)(1), 105 Stat. 1450, 1451, 1586, Dec. 5, 1991*] | **5 USCS § 5315. Positions at level IV**<br><br>Level IV of the Executive Schedule applies to the following positions, for which the annual rate of basic pay shall be the rate determined with respect to such level under chapter 11 of title 2, as adjusted by section 5318 of this title:<br>. . . .<br>Under Secretary of the Air Force.<br>. . . .<br>Assistant Secretaries of the Air Force (4).<br>. . . .<br>General Counsel of the Department of the Air Force.<br>[*added by Pub. L. No. 102-190, § 903(a)(1), 105 Stat. 1450, 1451, 1586, Dec. 5, 1991*] |

# Appendix C

## Chiefs of Staff and Judge Advocate General Statutory Responsibilities and Authority

| Army | Navy | Marine Corps | Air Force |
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| **10 USCS § 3031. The Army Staff: function; composition** | **10 USCS § 5031. Office of the Chief of Naval Operations: function; composition** | **10 USCS § 5041. Headquarters, Marine Corps: function; composition** | **10 USCS § 8031. The Air Staff: function; composition** |
| (a) There is in the executive part of the Department of the Army an Army Staff. The function of the Army Staff is to assist the Secretary of the Army in carrying out his responsibilities | (a) There is in the executive part of the Department of the Navy an Office of the Chief of Naval Operations. The function of the Office of the Chief of Naval Operations is to assist the Secretary of the Navy in carrying out his responsibilities. | (a) There is in the executive part of the Department of the Navy a Headquarters, Marine Corps. The function of the Headquarters, Marine Corps, is to assist the Secretary of the Navy in carrying out his responsibilities. | (a) There is in the executive part of the Department of the Air Force an Air Staff. The function of the Air Staff is to assist the Secretary of the Air Force in carrying out his responsibilities. |

| Army | Navy | Marine Corps | Air Force |
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| **10 USCS § 3031. The Army Staff: function; composition (cont)** | **10 USCS § 5031. Office of the Chief of Naval Operations: function; composition (cont)** | **10 USCS § 5041. Headquarters, Marine Corps: function; composition (cont)** | **10 USCS § 8031. The Air Staff: function; composition (cont)** |
| (b) The Army Staff is composed of the following:<br>(1) The Chief of Staff.<br>(2) The Vice Chief of Staff.<br>(3) The Deputy Chiefs of Staff.<br>(4) The Assistant Chiefs of Staff.<br>(5) The Chief of Engineers.<br>(6) The Surgeon General of the Army.<br>(7) The Judge Advocate General of the Army.<br>(8) The Chief of Chaplains of the Army.<br>(9) The Chief of Army Reserve.<br>(10) Other members of the Army assigned or detailed to the Army Staff.<br>(11) Civilian employees of the Department of the Army assigned or detailed to the Army Staff. | (b) The Office of the Chief of Naval Operations is composed of the following:<br>(1) The Chief of Naval Operations.<br>(2) The Vice Chief of Naval Operations.<br>(3) The Deputy Chiefs of Naval Operations.<br>(4) The Assistant Chiefs of Naval Operations.<br>(5) The Surgeon General of the Navy.<br>(6) The Chief of Naval Personnel.<br>(7) The Chief of Chaplains of the Navy.<br>(8) Other members of the Navy and Marine Corps assigned or detailed to the Office of the Chief of Naval Operations.<br>(9) Civilian employees in the Department of the Navy assigned or detailed to the Office of the Chief of Naval Operations. | (b) The Headquarters, Marine Corps, is composed of the following:<br>(1) The Commandant of the Marine Corps.<br>(2) The Assistant Commandant of the Marine Corps.<br>(3) The Deputy Commandants.<br>(4) Other members of the Navy and Marine Corps assigned or detailed to the Headquarters, Marine Corps.<br>(5) Civilian employees in the Department of the Navy assigned or detailed to the Headquarters, Marine Corps.<br>(6), (7) [Redesignated] | (b) The Air Staff is composed of the following:<br>(1) The Chief of Staff.<br>(2) The Vice Chief of Staff.<br>(3) The Deputy Chiefs of Staff.<br>(4) The Assistant Chiefs of Staff.<br>(5) The Surgeon General of the Air Force.<br>(6) The Judge Advocate General of the Air Force.<br>(7) The Chief of the Air Force Reserve.<br>(8) Other members of the Air Force assigned or detailed to the Air Staff.<br>(9) Civilian employees in the Department of the Air Force assigned or detailed to the Air Staff. |
| (c) Except as otherwise specifically prescribed by law, the Army Staff shall be organized in such manner, and its members shall perform such duties and have such titles, as the Secretary may prescribe. | (c) Except as otherwise specifically prescribed by law, the Office of the Chief of Naval Operations shall be organized in such manner, and its members shall perform such duties and have such titles, as the Secretary may prescribe. | (c) Except as otherwise specifically prescribed by law, the Headquarters, Marine Corps, shall be organized in such manner, and its members shall perform such duties and have such titles, as the Secretary may prescribe. | (c) Except as otherwise specifically prescribed by law, the Air Staff shall be organized in such manner, and its members shall perform such duties and have such titles, as the Secretary may prescribe. |

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| **10 USCS § 3033. Chief of Staff**<br><br>(a) (1) There is a Chief of Staff of the Army, appointed for a period of four years by the President, by and with the advice and consent of the Senate, from the general officers of the Army. 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.<br>(2) The President may appoint an officer as Chief of Staff only if--<br>(A) the officer has had significant experience in joint duty assignments; and<br>(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 general officer.<br>(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. | **10 USCS § 5033. Chief of Naval Operations**<br><br>(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 the flag officers of the Navy. 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.<br>(2) The President may appoint an officer as the Chief of Naval Operations only if--<br>(A) the officer has had significant experience in joint duty assignments; and<br>(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.<br>(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. | **10 USCS § 5043. Commandant of the Marine Corps**<br><br>(a) (1) There is a Commandant of the Marine Corps, appointed by the President, by and with the advice and consent of the Senate. The Commandant shall be appointed for a term of four years from the general officers of the Marine Corps. 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.<br>(2) The President may appoint an officer as Commandant of the Marine Corps only if--<br>(A) the officer has had significant experience in joint duty assignments; and<br>(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 general officer.<br>(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. | **10 USCS § 8033. Chief of Staff**<br><br>(a) (1) There is a Chief of Staff of the Air Force, appointed for a period of four years by the President, by and with the advice and consent of the Senate, from the general officers of the Air Force. 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.<br>(2) The President may appoint an officer as Chief of Staff only if--<br>(A) the officer has had significant experience in joint duty assignments; and<br>(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 general officer.<br>(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. |

| Army | Navy | Marine Corps | Air Force |
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| **10 USCS § 3033. Chief of Staff (cont.)** | **10 USCS § 5033. Chief of Naval Operations (cont.)** | **10 USCS § 5043. Commandant of the Marine Corps (cont.)** | **10 USCS § 8033. Chief of Staff (cont.)** |
| (b) The Chief of Staff, while so serving, has the grade of general without vacating his permanent grade. | (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. | (b) The Commandant of the Marine Corps, while so serving, has the grade of general without vacating his permanent grade.<br><br>(c) [Repealed] | (b) The Chief of Staff, while so serving, has the grade of general without vacating his permanent grade. |
| (c) Except as otherwise prescribed by law and subject to section 3013(f) of this title, the Chief of Staff performs his duties under the authority, direction, and control of the Secretary of the Army and is directly responsible to the Secretary. | (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) Except as otherwise prescribed by law and subject to section 5013(f) of this title, the Commandant performs his duties under the authority, direction, and control of the Secretary of the Navy and is directly responsible to the Secretary. | (c) Except as otherwise prescribed by law and subject to section 8013(f) of this title, the Chief of Staff performs his duties under the authority, direction, and control of the Secretary of the Air Force and is directly responsible to the Secretary. |

| Army | Navy | Marine Corps | Air Force |
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| **10 USCS § 3033. Chief of Staff (cont.)**<br>(d) Subject to the authority, direction, and control of the Secretary of the Army, the Chief of Staff shall--<br>(1) preside over the Army Staff;<br>(2) transmit the plans and recommendations of the Army Staff to the Secretary and advise the Secretary with regard to such plans and recommendations;<br>(3) after approval of the plans or recommendations of the Army Staff by the Secretary, act as the agent of the Secretary in carrying them into effect;<br>(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 Army as the Secretary determines; | **10 USCS § 5033. Chief of Naval Operations (cont.)**<br>(d) Subject to the authority, direction, and control of the Secretary of the Navy, the Chief of Naval Operations shall--<br>(1) preside over the Office of the Chief of Naval Operations;<br>(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;<br>(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;<br>(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; | **10 USCS § 5043. Commandant of the Marine Corps (cont.)**<br>(e) Subject to the authority, direction, and control of the Secretary of the Navy, the Commandant shall--<br>(1) preside over the Headquarters, Marine Corps;<br>(2) transmit the plans and recommendations of the Headquarters, Marine Corps, to the Secretary and advise the Secretary with regard to such plans and recommendations;<br>(3) after approval of the plans or recommendations of the Headquarters, Marine Corps, by the Secretary, act as the agent of the Secretary in carrying them into effect;<br>(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 Marine Corps and the Navy as the Secretary determines; | **10 USCS § 8033. Chief of Staff (cont.)**<br>(d) Subject to the authority, direction, and control of the Secretary of the Air Force, the Chief of Staff shall--<br>(1) preside over the Air Staff;<br>(2) transmit the plans and recommendations of the Air Staff to the Secretary and advise the Secretary with regard to such plans and recommendations;<br>(3) after approval of the plans or recommendations of the Air Staff by the Secretary, act as the agent of the Secretary in carrying them into effect;<br>(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 Air Force as the Secretary determines; |

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| **10 USCS § 3033. Chief of Staff (cont.)**<br>(d) (cont.)<br><br>(5) perform the duties prescribed for him by section 171 of this title and other provisions of law; and<br>(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 Army.<br><br>(e) (1) The Chief of Staff shall also perform the duties prescribed for him as a member of the Joint Chiefs of Staff under section 151 of this title. | **10 USCS § 5033. Chief of Naval Operations (cont.)**<br>(d) (cont.)<br><br>(5) perform the duties prescribed for him by section 171 of this title and other provisions of law; and<br>(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.<br><br>(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. | **10 USCS § 5043. Commandant of the Marine Corps (cont.)**<br>(e) (cont.)<br><br>(5) perform the duties prescribed for him by section 171 of this title and other provisions of law; and<br>(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.<br><br>(f) (1) The Commandant shall also perform the duties prescribed for him as a member of the Joint Chiefs of Staff under section 151 of this title. | **10 USCS § 8033. Chief of Staff (cont.)**<br>(d) (cont.)<br><br>(5) perform the duties prescribed for him by section 171 of this title and other provisions of law; and<br>(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 Air Force.<br><br>(e) (1) The Chief of Staff shall also perform the duties prescribed for him as a member of the Joint Chiefs of Staff under section 151 of this title. |

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| **10 USCS § 3033. Chief of Staff (cont.)**<br>(e) (cont.)<br><br>(2) To the extent that such action does not impair the independence of the Chief of Staff in the performance of his duties as a member of the Joint Chiefs of Staff, the Chief of Staff shall inform the Secretary regarding military advice rendered by members of the Joint Chiefs of Staff on matters affecting the Department of the Army.<br>(3) Subject to the authority, direction, and control of the Secretary of Defense, the Chief of Staff shall keep the Secretary of the Army fully informed of significant military operations affecting the duties and responsibilities of the Secretary. | **10 USCS § 5033. Chief of Naval Operations (cont.)**<br>(e) (cont.)<br><br>(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.<br>(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. | **10 USCS § 5043. Commandant of the Marine Corps (cont.)**<br>(f) (cont)<br><br>(2) To the extent that such action does not impair the independence of the Commandant in the performance of his duties as a member of the Joint Chiefs of Staff, the Commandant shall inform the Secretary regarding military advice rendered by members of the Joint Chiefs of Staff on matters affecting the Department of the Navy.<br>(3) Subject to the authority, direction, and control of the Secretary of Defense, the Commandant shall keep the Secretary of the Navy fully informed of significant military operations affecting the duties and responsibilities of the Secretary. | **10 USCS § 8033. Chief of Staff (cont.)**<br>(e) (cont.)<br><br>(2) To the extent that such action does not impair the independence of the Chief of Staff in the performance of his duties as a member of the Joint Chiefs of Staff, the Chief of Staff shall inform the Secretary regarding military advice rendered by members of the Joint Chiefs of Staff on matters affecting the Department of the Air Force.<br>(3) Subject to the authority, direction, and control of the Secretary of Defense, the Chief of Staff shall keep the Secretary of the Air Force fully informed of significant military operations affecting the duties and responsibilities of the Secretary. |

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| **10 USCS § 3037. Judge Advocate General, Assistant Judge Advocate General, and general officers of Judge Advocate General's Corps: appointment; duties** | **10 USCS § 5148. Judge Advocate General's Corps: Office of the Judge Advocate General; Judge Advocate General; appointment, term, emoluments, duties** | **10 USCS § 5046. Staff Judge Advocate to the Commandant of the Marine Corps** | **10 USCS § 8037. Judge Advocate General, Deputy Judge Advocate General: appointment; duties** |
| (a) The President, by and with the advice and consent of the Senate, shall appoint the Judge Advocate General, the Assistant Judge Advocate General, and general officers of the Judge Advocate General's Corps, from officers of the Judge Advocate General's Corps who are recommended by the Secretary of the Army. The term of office of the Judge Advocate General and the Assistant Judge Advocate General is four years. If an officer who is so appointed holds a lower regular grade, he shall be appointed in the regular grade of major general.<br>*[National Defense Authorization Act for Fiscal Year 2006, S. 1042, § 505, proposes striking the last sentence and inserting the following new sentence: 'The Judge Advocate General, while so serving, has the grade of lieutenant general {or vice admiral}.' and excludes TJAGs from the limitation on the number of general and flag officers IAW 10 USC § 525(b).]* | (a) The Judge Advocate General's Corps is a Staff Corps of the Navy, and shall be organized in accordance with regulations prescribed by the Secretary of the Navy.<br><br>(b) There is in the executive part of the Department of the Navy the Office of the Judge Advocate General of the Navy. The Judge Advocate General shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. He shall be appointed from judge advocates of the Navy or the Marine Corps who are members of the bar of a Federal court or the highest court of a State or Territory and who have had at least eight years of experience in legal duties as commissioned officers. If an officer appointed as the Judge Advocate General holds a lower regular grade, the officer shall be appointed in the regular grade of rear admiral or major general, as appropriate. | (a) An officer of the Marine Corps who is a judge advocate and a member of the bar of a Federal court or the highest court of a State or territory and who has had at least eight years of experience in legal duties as a commissioned officer may be detailed as Staff Judge Advocate to the Commandant of the Marine Corps. If an officer appointed as the Staff Judge Advocate to the Commandant of the Marine Corps holds a lower regular grade, the officer shall be appointed in the regular grade of brigadier general. | (a) There is a Judge Advocate General in the Air Force, who is appointed by the President, by and with the advice and consent of the Senate, from officers of the Air Force. The term of office is four years. An appointee who holds a lower regular grade shall be appointed in the regular grade of major general.<br>*[National Defense Authorization Act for Fiscal Year 2006, S. 1042, § 505, proposes striking the last sentence and inserting the following new sentence: 'The Judge Advocate General, while so serving, has the grade of lieutenant general {or vice admiral}.' and excludes TJAGs from the limitation on the number of general and flag officers IAW 10 USC § 525(b).]* |

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| **10 USCS § 3037. (cont.)**<br>(b) The Judge Advocate General shall be appointed from those officers who at the time of appointment are members of the bar of a Federal court or the highest court of a State or Territory, and who have had at least eight years of experience in legal duties as commissioned officers.<br><br>(c) The Judge Advocate General, in addition to other duties prescribed by law--<br>(1) is the legal adviser of the Secretary of the Army and of all officers and agencies of the Department of the Army;<br>(2) shall direct the members of the Judge Advocate General's Corps in the performance of their duties; and<br>(3) shall receive, revise, and have recorded the proceedings of courts of inquiry and military commissions. | **10 USCS § 5148. (cont.)**<br>*[National Defense Authorization Act for Fiscal Year 2006, S. 1042, § 505, proposes striking the last sentence and inserting the following new sentence: 'The Judge Advocate General, while so serving, has the grade of lieutenant general {or vice admiral}.' and excludes TJAGs from the limitation on the number of general and flag officers IAW 10 USC § 525(b).]* | | **10 USCS § 8037. (cont.)**<br>(b) The Judge Advocate General of the Air Force shall be appointed from those officers who at the time of appointment are members of the bar of a Federal court or the highest court of a State or Territory, and who have had at least eight years of experience in legal duties as commissioned officers.<br><br>(c) The Judge Advocate General, in addition to other duties prescribed by law--<br>(1) is the legal adviser of the Secretary of the Air Force and of all officers and agencies of the Department of the Air Force; [*added by Pub. L. No. 108-375, § 574(c), 118 Stat. 1922, Oct. 5, 1994*]<br>(2) shall direct the officers of the Air Force designated as judge advocates in the performance of their duties; [*added by Pub. L. No. 108-375, § 574(c), 118 Stat. 1922, Oct. 5, 1994*] and<br>(3) shall receive, revise, and have recorded the proceedings of courts of inquiry and military commissions. |

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| | | | **10 USCS § 8037. (cont.)**<br><br>(d) (1) There is a Deputy Judge Advocate General in the Air Force, who is appointed by the President, by and with the advice and consent of the Senate, from officers of the Air Force who have the qualifications prescribed in subsection (b) for the Judge Advocate General. The term of office of the Deputy Judge Advocate General is four years. An officer appointed as Deputy Judge Advocate General who holds a lower regular grade shall be appointed in the regular grade of major general.<br>(2) When there is a vacancy in the office of the Judge Advocate General, or during the absence or disability of the Judge Advocate General, the Deputy Judge Advocate General shall perform the duties of the Judge Advocate General until a successor is appointed or the absence or disability ceases.<br>(3) When paragraph (2) cannot be complied with because of the absence or disability of the Deputy Judge Advocate General, the heads of the major divisions of the Office of the Judge Advocate General, in the order directed by the Secretary of the Air Force, shall perform the duties of the Judge Advocate General, unless otherwise directed by the President. |

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| **10 USCS § 3037. (cont.)**<br>(d) Under regulations prescribed by the Secretary of Defense, the Secretary of the Army, in selecting an officer for recommendation to the President under subsection (a) for appointment as the Judge Advocate General or Assistant Judge Advocate General, shall ensure that the officer selected is recommended by a board of officers that, insofar as practicable, is subject to the procedures applicable to selection boards convened under chapter 36 of this title.<br>[*added by Pub. L. No. 103-337, § 504(c), 108 Stat. 2751, Oct. 5, 1994*] | **10 USCS § 5148. (cont.)**<br>(c) Under regulations prescribed by the Secretary of Defense, the Secretary of the Navy, in selecting an officer for recommendation to the President for appointment as the Judge Advocate General, shall ensure that the officer selected is recommended by a board of officers that, insofar as practicable, is subject to the procedures applicable to selection boards convened under chapter 36 of this title.<br>(d) The Judge Advocate General of the Navy, under the direction of the Secretary of the Navy, shall--<br>(1) perform duties relating to legal matters arising in the Department of the Navy as may be assigned to him;<br>(2) perform the functions and duties and exercise the powers prescribed for the Judge Advocate General in chapter 47 of this title;<br>(3) receive, revise, and have recorded the proceedings of boards for the examination of officers of the naval service for promotion and retirement; and<br>(4) perform such other duties as may be assigned to him. | **10 USCS § 5046. (cont.)**<br>(b) Under regulations prescribed by the Secretary of Defense, the Secretary of the Navy, in selecting an officer for recommendation to the President for appointment as the Staff Judge Advocate to the Commandant of the Marine Corps, shall ensure that the officer selected is recommended by a board of officers that, insofar as practicable, is subject to the procedures applicable to selection boards convened under chapter 36 of this title.<br>[*added by Pub. L. No. 103-337, § 504(c), 108 Stat. 2751, Oct. 5, 1994*] | **10 USCS § 8037. (cont.)**<br>(e) Under regulations prescribed by the Secretary of Defense, the Secretary of the Air Force, in selecting an officer for recommendation to the President under subsection (a) for appointment as the Judge Advocate General or under subsection (d) for appointment as the Deputy Judge Advocate General, shall ensure that the officer selected is recommended by a board of officers that, insofar as practicable, is subject to the procedures applicable to selection boards convened under chapter 36 of this title.<br>[*added by Pub. L. No. 103-337, § 504(c), 108 Stat. 2751, Oct. 5, 1994*] |

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| **10 USCS § 3037. (cont.)** | **10 USCS § 5148. (cont.)** | **10 USCS § 5046. (cont.)** | **10 USCS § 8037. (cont.)** |
| (e) No officer or employee of the Department of Defense may interfere with--<br>(1) the ability of the Judge Advocate General to give independent legal advice to the Secretary of the Army or the Chief of Staff of the Army; or<br>(2) the ability of judge advocates of the Army assigned or attached to, or performing duty with, military units to give independent legal advice to commanders.<br>[*added by Pub. L. No.. 108-375, § 574(c), 118 Stat. 1922, Oct. 28, 2004*] | (e) No officer or employee of the Department of Defense may interfere with--<br>(1) the ability of the Judge Advocate General to give independent legal advice to the Secretary of the Navy or the Chief of Naval Operations; or<br>(2) the ability of judge advocates of the Navy assigned or attached to, or performing duty with, military units to give independent legal advice to commanders.<br>[*added by Pub. L. No. 108-375, § 574(c), 118 Stat. 1922, Oct. 28, 2004*] | (c) No officer or employee of the Department of Defense may interfere with--<br>(1) the ability of the Staff Judge Advocate to the Commandant of the Marine Corps to give independent legal advice to the Commandant of the Marine Corps; or<br>(2) the ability of judge advocates of the Marine Corps assigned or attached to, or performing duty with, military units to give independent legal advice to commanders.<br>[*added by Pub. L. No. 108-375, § 574(c), 118 Stat. 1922, Oct. 28, 2004*] | (f) No officer or employee of the Department of Defense may interfere with--<br>(1) the ability of the Judge Advocate General to give independent legal advice to the Secretary of the Air Force or the Chief of Staff of the Air Force; or<br>(2) the ability of officers of the Air Force who are designated as judge advocates who are assigned or attached to, or performing duty with, military units to give independent legal advice to commanders.<br>[*added by Pub. L. No. 108-375, § 574(c), 118 Stat. 1922, Oct. 28, 2004*] |

# Appendix D
# Professional Supervision and Development of Attorneys Across the Department of Defense

## Professional Supervision

### *A. Department of the Army*

#### 1. Professional Supervision by the Army Office of General Counsel (OGC)

The General Counsel (GC) has the authority to evaluate the qualifications of persons recommended for appointment, transfer, assignment, or promotion as civilian attorneys within the Department. The GC has retained qualifying authority for all attorney positions in the Office of the Secretary of the Army, including its Field Operating Activities, and for SES attorney positions Army-wide. The GC has re-delegated his qualifying authority for GS-15 attorneys and below and law clerk trainees to the Army Material Command (AMC) Command Counsel and to the U. S. Army Corps of Engineers (USACE) Chief Counsel for their respective commands and to the TJAG for all other elements of the Department. TJAG, the Command Counsel, and the Chief Counsel approve the professional qualifications of all civilian attorneys in the grade of GS-15 and below within their organizations. OGC is notified of these decisions.

OGC's participation in the annual performance evaluations of the civilian heads of legal offices subordinate to them also affords oversight of the delivery of legal services throughout the Army. The GC and other heads of legal offices have been placed in the performance evaluation rating chains of those civilian heads of legal offices directly subordinate to them. For example, the Army GC is considered the next higher legal officer of both the Command Counsel, AMC, and the Chief Counsel, USACE and the GC

serves as the intermediate rater for both attorneys. In turn, the Command Counsel, AMC, and Chief Counsel, USACE, are in the rating chains for their subordinate heads of legal offices. This rating scheme is continued down to the lowest activity and installation level of legal offices.

### 2. Professional Supervision by the Judge Advocate General

TJAG is responsible for recruiting, training, assigning, and directing military officers of the JAG Corps. Additionally, TJAG is the qualifying authority for certain DA civilian attorneys. Although the civilian and military attorneys directly under the qualifying authority of TJAG are located in commands and agencies world-wide, personnel management of both military and civilian attorneys is administered by one consolidated personnel office.

TJAG established the Civilian Attorney Management Program to address all aspects of civilian attorney hiring and career progression for DA civilian attorneys under his qualifying authority. All recruitment actions for civilian attorney vacancies are initiated by local command Civilian Personnel Advisory Centers and vacancies are filled using procedures published in Army regulations. Selecting officials are required to forward the tentative selection to the Chief, Personnel, Plans and Training Office at the Office of The Judge Advocate General. TJAG is the qualifying authority for all selections.

TJAG also exercises oversight responsibility and provides technical assistance and professional guidance to all Judge Advocates and civilian attorneys under his qualifying authority. Oversight and technical assistance are normally exercised through technical channels that follow command lines. Military and civilian attorneys are accountable for their legal performance through these same technical channels. Accountability is maintained through the establishment of a professional Standards of Conduct system and compliance is required of all military and civilian attorneys.

### 3. Army Material Command and U. S. Army Corps of Engineers

The AMC Command Counsel, as qualifying authority and manager of AMC's formal civilian attorney career program, is the approving official for all personnel actions taken in favor of or against AMC attorneys. The AMC Standing Committee on Professional Responsibility is a management tool that allows the organization to inquire into allegations of professional misconduct made against AMC attorneys. Allegations that are substantiated may be referred to state bar associations or supervisors for the consideration of disciplinary action.

The USACE Chief Counsel is the qualifying authority for all USACE civilian attorneys. As such, the Chief Counsel has the authority, without power of redelegation, to approve the qualifications of all persons recommended for appointment, transfer, reassignment, or promotion to positions as civilian attorneys and law clerks. This authority covers all USACE attorney positions in grades GS-15 and below, regardless of location. Division/Regional and District Counsels are selected and appointed by the Chief Counsel after consultation with the appropriate Commander(s) or Director(s).

The USACE Chief Counsel exercises tiered supervision and oversight of all legal offices throughout the USACE. Each USACE legal office is held accountable to the Command Counsel for the quality and timeliness of work products and for the professionalism of attorneys. All USACE attorneys are both rated and senior rated by attorneys. Commanders and directors for whom the heads of USACE legal offices serve as senior legal advisors have the non-delegable option to serve as their attorney's intermediate rater or to provide letter input to the attorney's performance evaluation. The Deputy Chief Counsel serves as the first-line supervisor of all Division/Regional Counsels and Center Counsels. Division/Regional Counsels are the first-line supervisors of Division/Regional staff attorneys and the District Counsels within their Division/Region. District Counsels perform the first-line supervisory function for

District-level staff attorneys under the overall management of their respective Division/Regional Counsels.

Any allegation of professional misconduct by a USACE attorney is reported immediately to the Deputy Chief Counsel through the appropriate Division Counsel, as applicable. The Deputy Chief Counsel is charged with investigating the allegation and making appropriate disposition recommendations to the Chief Counsel.

## *B. Department of the Navy*

### 1. Professional supervision by the Navy Office of the General Counsel

Navy OGC includes the vast majority of civilian attorneys practicing within the Department, including civilian attorneys working in the office of the Counsel for the Commandant of the Marine Corps. Navy OGC exercises qualifying authority responsibility over all civilian attorneys within the Department, except where delegated. The Deputy General Counsel acts as Community Leader for all civilian attorneys within the Department,. The GC evaluates or supervises the evaluation of all attorneys, uniformed and civilian, within OGC. The GC does not supervise non-OGC civilian attorneys supporting Navy TJAG or the Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC). Navy TJAG or SJA to CMC, as the case may be, supervise the attorneys practicing under their cognizance.

### 2. Professional Supervision by the Judge Advocate General

The Navy TJAG has primary responsibility for ensuring ethical and professional practice of law by Judge Advocates and other covered attorneys. This supervision extends to both active duty and reserve judge advocates in both the Navy and Marine Corps as well as civilian attorneys and uniformed attorneys from other Services when they practice under cognizance of TJAG.

### 3. Professional Supervision by the SJA to CMC

The SJA to CMC has direct supervisory authority over all active and reserve judge advocates and civilian attorneys assigned to the Marine Corps Judge Advocate Division. The SJA to CMC serves as the occupational sponsor for all active duty Marine Corps judge advocates and advises the Deputy Commandant, Manpower and Reserve Affairs, regarding which Marine Corps judge advocates are best suited to fill particular billets. The SJA to CMC serves as Rules Counsel for matters of professional ethics involving Marine Corps judge advocates or civilian attorneys under his cognizance and reports to the Navy TJAG with regard to oversight of professional responsibility matters in the Marine Corps.

## *C. Department of the Air Force*

### 1. Professional Supervision of Civilian Attorneys by GC and TJAG

The General Counsel and Judge Advocate General are each responsible for the professional supervision of attorneys employed by or deemed members of their respective organizations. However, the initial determination that a civilian attorney candidate is professionally qualified is made for both the General Counsel and the Judge Advocate General Corps by the Air Force Civilian Attorney Qualifying Committee (AFCAQC).

The AFCAQC was established jointly by the General Counsel and the Judge Advocate General to define and manage policies appropriate for the effective administration of Air Force civilian attorneys. While the initial steps of the selection process for civilian attorneys are decentralized and conducted by the local command or organization proposing to hire a civilian attorney, the AFCAQC, in its role of "Qualifying Authority" must determine that a candidate meets the requirements for a given position before the appointment is approved. By regulation, qualifying authority for all GS-14 and 15 hiring and promotion actions within the Air Force, all hiring actions proposing to

use accelerated procedures, and all promotions of attorneys with less than one year in grade have been reserved to the AFCAQC. Approval authority for hiring GS-13 and below civilian attorneys has been delegated to Major Command or Field Operating Activity Staff Judge Advocates, Directors or equivalents. Local selection committees must include at least one attorney representative.

The AFCAQC has traditionally been composed of two representatives of the General Counsel and one from the Judge Advocate General Corps, all of whom are required to be civilian attorneys. All members of the AFCAQC are appointed by the Secretary of the Air Force. At the request of the General Counsel, Judge Advocate General, or on its own initiative, the AFCAQC provides advice and makes recommendations concerning any aspect of the civilian attorney workforce.

### 2. Professional Supervision of Judge Advocates by TJAG

The Air Force TJAG exercises professional supervision of the JAG Corps[190] by ensuring members of the Corps are properly trained, perform their duties in a proficient manner, and comply with the ethical standards they are required to meet. TJAG's professional responsibility program sets out the policies and standards the attorneys are required to meet and an Ethics Advisory Counsel serves as an independent resource for attorneys who have ethics questions. The program also sets out procedures to investigate and evaluate allegations of rules violations and impose sanctions if necessary. In the event there has been an allegation of a violation of a rule, the complaint will be referred to the Major Command Staff Judge Advocate, who may refer the allegation to TJAG. TJAG may withdraw the member's judge advocate designation and/or notify the member's state licensing authority of the findings under the professional responsibility program.

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[190] In the Air Force, the term "JAG Corps" includes military judge advocates, civilian attorneys, paralegals, and administrative staff supporting TJAG functions.

In the Air Force, the term JAG Corps includes both military judge advocates and Air Force civilian attorneys supporting TJAG functions. There are approximately 260 JAG Corps civilian lawyers who work for commanders in the field. Like their active duty counterparts, these civilian attorneys report through the chain of command to local and major command commanders. They are under the professional supervision of, but do not report to, TJAG. There are approximately 40 JAG Corps civilian attorneys in the Washington, D.C. area who directly or indirectly support headquarters JAG functions.

### *D. Department of Defense Attorneys at Joint Commands*

Civilian attorney positions at a joint command belong to the Military Department that is designated as the executive agent for that command. Pursuant to DOD Directive 5100.3, the supporting military Departments "program and budget to fund, without reimbursement, the administrative and logistic support required by the supported joint headquarters to perform their assigned missions effectively." For example, the Army is the executive agent for U.S. European Command (EUCOM). Civilian attorneys assigned to this command are Army employees. The Army TJAG is the qualifying authority for these civilian attorneys. The Army TJAG is also responsible for ensuring general compliance with the rules of professional conduct for lawyers by personnel under their qualifying authority. Therefore, an ethics complaint against a civilian attorney in a joint command for which the Army is executive agent would be sent to the Office of the Army JAG, Standards of Conduct Office. In this example, although the Army employs, funds and acts as qualifying authority for civilian attorneys at EUCOM, these civilian attorneys work for and report to the EUCOM Staff Judge Advocate on a daily basis.

## Professional Development

### *A. Department of the Army*

The Army has three training plans for its civilian attorneys. The Judge Advocate General, Army Materiel Command, and U.S. Army Corps of Engineers each have

programs tailored to meet the needs of their clients and to professionally develop their civilian attorneys.

### 1. The Judge Advocate General

TJAG developed the Civilian Attorney Management Master Training Plan in 1996. This plan mirrors the Army's program for the development of Judge Advocates throughout their careers. The plan includes attendance at schools and completion of courses to further an attorney's training and experience. The primary course, called the Judge Advocate Officer's Basic Course, provides a basic orientation of the legal areas in which an Army attorney operates. Topics covered include personnel law, legal basis of command, claims, legal assistance, criminal law, federal contract and fiscal law, and the Law of War and Status of Forces Agreements. The Judge Advocate Officer Graduate Course, accredited by the American Bar Association, prepares experienced attorneys for supervisory duties and other positions of increased responsibility. Students who pass the course receive a Master of Laws in Military Law. This program is for mid-level attorneys.

Civilian attorneys frequently attend continuing legal education (CLE) courses at the Army Legal Center and School in Charlottesville, Virginia. The courses range from a basic overview of a legal area to detailed updates in particular areas of the law. Civilian attorneys in the Army can also attend the Legal Education Institute through the Department of Justice. The Institute has courses in negotiation techniques, ethics, legal writing, and computer assisted legal research. Civilian attorneys can also attend a Management Staff College at Fort Belvoir. This 14-week course is designed to instruct Army leaders in functional relationships, philosophies, and systems relevant to the Total Army with emphasis on the sustainment base. Civilian attorneys can also attend senior Service colleges. These include the Army War College focuses on the role of land power; the National War College focuses on national security strategy; and the Industrial College of the Armed Forces focuses on the resource component of national power.

### 2. Army Materiel Command

AMC's professional development focuses on each attorney's individual development plan and includes many types of formal and informal training. These include supervisory, management, and business training, on and off-duty courses and developmental activities. AMC established a standing committee on training that serves as a clearinghouse for information on training opportunities and related matters. An important component of AMC training is its CLE program, which focuses on licensing requirements, as well as professional growth in specific legal subjects and issues. For familiarization and training purposes, attorneys and patent advisors may be rotated within their current office or between other AMC legal offices. Attorneys may also be temporarily detailed to non-legal positions to widen their breadth of experience. A goal of forty hours of professional training per individual per year has been established for each attorney.

### 3. The U.S. Army Corps of Engineers

The USACE established a comprehensive attorney career development program for all Corps attorneys to implement the Chief Counsel's national law firm initiative. The Chief Counsel's Total Attorney Career Development Program (TACDP) is a formal integrated career development and management program and is open to all Corps attorneys. There are two levels in the TACDP. The first level is basic legal and leadership development. This includes training in core legal areas and should be completed by all entry-level attorneys, including law clerks who transition to attorney positions. Level 2 is an advanced training and development program to prepare mid-level attorneys for supervisory positions.

## *B. Department of the Navy*

### 1. Office of the General Counsel

Career development within the Office of General Counsel (OGC) of the Department of the Navy begins with new attorney orientation. Every January, attorneys at all levels, who have joined OGC within the past calendar year, attend a program that introduces new attorneys to the General Counsel's organization, history, and mission. These attorneys meet OGC's senior leadership and learn the expectations of those leaders and how OGC supports the Department's overall mission. Attendees also learn what resources and opportunities are available to them. OGC sponsors formal leadership and supervisory skills programs every March. This training is required for all OGC supervisors.

The Harvey J. Wilcox Fellowship provides mid-level OGC attorneys with an opportunity to spend one year in the Central Office. The Fellow rotates through each Associate and Assistant GC's office, in addition to a rotation with the Counsel for the Commandant of the Marine Corps. The OGC Shadow Program selects four OGC attorneys each year to "shadow" the GC for a week. This program provides the attorneys with a better understanding of the OGC organization and the functions and responsibilities of these positions. OGC also offers a formal internship program to its attorneys. The OGC Internship Program provides OGC attorneys with opportunities to broaden their knowledge base within specific practice areas and satisfies the Department's needs through short and long-term rotations. OGC attorneys also have the opportunity to take rotational assignments at other DoD facilities or federal agencies. In the past, these assignments have included the Office of the Secretary of Defense International Law Office, the Department of Justice, and the White House.

OGC sponsors a pilot Major System Acquisition training course for attorneys through the Defense Acquisition University. The focus of this course is on the legal aspects of acquiring DoD major systems. They sponsor two seminars each year. The

spring conference focuses on major Department and OGC policy changes. The fall conference focuses on issues that interest attorneys practicing at field offices. OGC also offers numerous training courses in its substantive practice areas, and several offices provide formal training programs. The Assistant General Counsels for Financial Management, Manpower and Reserve Affairs, and Litigation each provide training in their areas of expertise. OGC offices also conduct training sessions for their attorneys. Topics include issues specific to that office, as well as updates on substantive areas of the law and broader process and policy issues facing OGC.

The Executive Steering Group (ESG) provides executive direction to OGC. The ESG is currently conducting a review of OGC's training curriculum and training programs and reviewing the core skills and competencies that all OGC attorneys need to successfully perform their duties as it establishes communities of practice.

### 2. The Judge Advocate General

The Navy judge advocate community includes 36 civilian attorneys. These attorneys are hired for their expertise in the provision of general legal assistance, so they are not initially trained in the same way as new judge advocates. Shortly after being hired they do attend the General Legal Assistance Course at the Army Judge Advocate General's Legal Center and School. CLE becomes an important component of their training throughout their career. CLE could include classes at the Naval Justice School, or local legal training in the states where they are licensed. In addition to this formalized classroom training, civilian attorneys routinely receive electronically-distributed Legal Assistance Program Advisories and Immigration Advisories. These documents are practice notes and updates on relevant areas of legal assistance law and immigration law, including consumer protection, estate planning, tax law, family law, and citizenship matters. Regular training also takes place within individual legal assistance offices. This training focuses on important areas of local practice. There is no Navy-wide professional development plan for civilian legal assistance attorneys practicing under the cognizance of Navy TJAG. Instead, each NLSO commanding officer has discretion to tailor civilian

training plans specifically for the needs of each attorney. All civilian attorneys are required to complete the newly created Professional Responsibility Training Module, an interactive on-line course that covers the Navy's Rules of Professional conduct.

#### 3. United States Marine Corps

The Marine Corps judge advocate legal community has five civilian attorneys hired for their expertise in specific areas of the law. These five attorneys work in the fields of legal assistance, operational law, and administrative and civil law. The Marine Corps does not have a formal training program for these five attorneys. However, they are required to complete the Professional Responsibility Training Module and they regularly attend CLE that complements their areas of practice.

### *C. Department of the Air Force*

Secretary of Air Force Order 111.5, *Functions and Duties of the General Counsel and the Judge Advocate General*, July 14, 2005, provides that the General Counsel is responsible for oversight of the professional and career development of civilian attorneys,[191] including the development of a civilian attorney career program. The Air Force is currently working to establish a comprehensive career program for all civilian attorneys. The program will focus on appropriate professional and leadership training, temporary career broadening assignments, and the identification and referral of qualified applicants for attorney vacancies.

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[191] While the GC has been given oversight authority for the professional and career development of civilian attorneys, the Panel notes the July 14, 2005 SAFO affirms that TJAG has responsibility for the professional supervision of members of the JAG Corps. As this SAFO also directs both GC and TJAG to jointly develop operating instructions to implement the Order across their overlapping policy domains, the Panel anticipates any overlap between the professional supervision authority of the TJAG and the oversight responsibility of the GC for civilian attorney development will be addressed in those operating instructions. Nevertheless, to the degree there is any question of Secretarial intent for the basic organizational structure for a civilian attorney development program, they appeared to have been largely resolved by the Acting Secretary's approval of the July 28, 2005 Memorandum addressing these basic questions.

On July 28, 2005, the Acting Secretary of the Air Force approved the foundational elements for a professional development program applicable to all Air Force civilian attorneys.[192] This memorandum directs that the Civilian Attorney Career Program be administered consistent with overarching Air Force directives on civilian employee development. Under the Air Force's Total Force Management concept, every civilian employee is part of an identified career field. The objective of the Total Force concept is to manage the professional development of Air Force military members and civilian employees holistically.

The July 28, 2005 memorandum sets forth the basic elements and organizational guidance for the program:

- A full-time career field manager who will work in conjunction with the Air Force Personnel Center, the General Counsel, and the Judge Advocate General.
- Individual assistance to civilian attorneys in identifying and applying for professional development and leadership opportunities.
- Establishment of temporary and permanent change of station career broadening assignments.
- Centralized funding to pay for professional development training and career broadening assignments.
- Notification to Air Force civilian attorneys of vacancies for which they may be qualified and the referral of such candidates to local hiring authorities.

While the Civilian Attorney Career Program will include accession, development, advancement, and sustainment of civilian attorneys, the memorandum advises that the

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[192] Memorandum, Mary L. Walker, General Counsel, to Acting Secretary of the Air Force, subject: Air Force Civilian Attorney Career Program (July 28, 2005).

program will not alter the functional supervision of civilian attorneys. Lastly, the Air Force Civilian Attorney Qualifying Committee will provide policy guidance for the program. As previously discussed, the members of this committee are all civilian attorneys appointed by the Secretary of the Air Force from both the Office of the General Counsel and the JAG Corps.

### 1. Office of General Counsel

Currently, within OGC, there are five-year training and development plans for each division. These plans are tailored so that individual attorneys in a division receive training that complements their areas of practice and their experience level. OGC has identified basic courses to which all attorneys should be exposed. They include contract law, fiscal law, and the Freedom of Information and Privacy Acts. More specialized legal training, such as advanced environmental or labor law, is included in the plans for more senior attorneys. In addition to professional legal education, OGC attorneys can take advantage of opportunities for sponsored leadership and professional military education. Those opportunities include the Industrial College of the Armed Forces, Air Force Air Command and Staff College, the Kennedy School of Government, and the Federal Executive Institute. The new Civilian Attorney Career Program will include similar opportunities for career broadening, advanced education, and internships at headquarters.

### 2. Judge Advocate General's Corps

Air Force JAG Corps civilian attorneys regularly attend continuing legal education (CLE) courses at the JAG schools of all three Military Departments. The civilian attorneys who attend these courses study contract law and litigation, fiscal law, ethics, labor law, and environmental law. Approximately 200 civilian attorneys travel every year to CLE courses. In addition to in-residence courses, two or three courses each year are broadcast to bases via satellite. Additionally, JAG Corps civilian attorneys are

eligible to participate in the same sponsored leadership and professional military education opportunities mentioned with regard to OGC attorneys above.

### *D. Department of Defense Office of the General Counsel (DoDGC)*

Civilian attorneys in the DoDGC attend legal and leadership training hosted by federal and state bar associations, the Department of Justice, Office of Personnel Management, and specialty bar groups. DoDGC civilian attorneys participate in the JAG schools of all the Military Departments as attendees, lecturers, guest speakers, and panel members. Additionally, DoDGC provides internships and developmental training for civilian attorneys in international affairs, intelligence, environmental law, personnel and health policy, and standards of conduct.

# Appendix E
# Statutory Basis and Charter

## A. *Statute*[193]

(d) INDEPENDENT REVIEW.—(1) The Secretary of Defense shall establish an independent panel of outside experts to conduct a study and review of the relationships between the legal elements of each of the military departments and to prepare a report setting forth the panel's recommendations as to statutory, regulatory, and policy changes that the panel considers to be desirable to improve the effectiveness of those relationships and to enhance the legal support provided to the leadership of each military department and each of the Armed Forces.

(2) The panel shall be composed of seven members, appointed by the Secretary of Defense from among private United States citizens who have substantial expertise in military law and the organization and functioning of the military departments. No more than one member of the panel may have served as the Judge Advocate General of an Armed Force, and no more than one member of the panel may have served as the General Counsel of a military department.

(3) The Secretary of Defense shall designate the chairman of the panel from among the members of the panel other than a member who has served as a Judge Advocate General or as a military department General Counsel.

(4) Members shall be appointed for the life of the panel. Any vacancy in the panel shall be filled in the same manner as the original appointment.

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[193] Pub. L. No. 108–375, § 574(d), 118 Stat. 1923 (2004).

(5) The panel shall meet at the call of the chairman.

(6) All original appointments to the panel shall be made by January 15, 2005. The chairman shall convene the first meeting of the panel not later than February 1, 2005.

(7) In carrying out the study and review required by paragraph (1), the panel shall—

(A) review the history of relationships between the uniformed and civilian legal elements of each of the Armed Forces;

(B) analyze the division of duties and responsibilities between those elements in each of the Armed Forces;

(C) review the situation with respect to civilian attorneys outside the offices of the service general counsels and their relationships to the Judge Advocates General and the General Counsels;

(D) consider whether the ability of judge advocates to give independent, professional legal advice to their service staffs and to commanders at all levels in the field is adequately provided for by policy and law; and

(E) consider whether the Judge Advocates General and General Counsels possess the necessary authority to exercise professional supervision over judge advocates, civilian attorneys, and other legal personnel practicing under their cognizance in the performance of their duties.

(8) Not later than April 15, 2005, the panel shall submit a report on the study and review required by paragraph (1) to the Secretary of Defense. The report shall include the findings and conclusions of the panel as a result of the study and review, together with any recommendations for legislative or administrative action that the panel considers appropriate. The Secretary of Defense shall transmit the report, together with any comments the Secretary wishes to provide, to the Committees on Armed Services of the Senate and House of Representatives not later than May 1, 2005.

(9) In this section, the term ''Armed Forces'' does not include the Coast Guard.

## *B. Charter*

### INDEPENDENT REVIEW PANEL TO STUDY THE RELATIONSHIPS BETWEEN MILITARY DEPARTMENT GENERAL COUNSELS AND JUDGE ADVOCATES GENERAL

**A. Official Designation:**

The Panel's official designation is the Independent Review Panel to Study the Relationships between Military Department General Counsels and Judge Advocates General.

**B. Scope and Objectives:**

Pursuant to Section 574 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, the Panel will conduct a study and review of the relationships between the legal elements of each of the Military Departments and prepare a report setting forth the Panel's recommendations as to statutory, regulatory and policy changes that the Panel considers to be desirable to improve the effectiveness of those relationships and to enhance the legal support provided to the leadership of each Military Department and each of the Armed Forces in the Department of Defense. References in the Charter to the General Counsels and the Judge Advocates General of the Military Departments include, with regard to the Marine Corps, the Counsel to the Commandant of the Marine Corps and the Staff Judge Advocate to the Commandant of the Marine Corps.

**C. Duration:**

The Panel shall terminate upon completion of its functions as described in section 574 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005.

**D. Official or Sponsoring Proponent to Whom the Panel Reports:**

The Panel reports to the Secretary of Defense.

**E. Support Agency:**

The Panel will receive administrative and related support primarily from Washington Headquarters Services (WHS). WHS will assist the Panel in designating and hiring no more than five special government employees who will serve as special advisors to the Panel.

**F. Duties and Responsibilities:**

The Panel will:

(1) Review the history of relationships between the uniformed and civilian legal elements of each of the DoD Armed Forces (including the Reserve Components);

(2) Analyze the division of duties and responsibilities between those elements in each of the DoD Armed Forces;

(3) Review the situation with respect to civilian attorneys in the Military Departments outside the offices of the Military Department General Counsels and their relationships to the Judge Advocates General and the Military Department General Counsels;

(4) Consider whether the ability of judge advocates to give independent, professional legal advice to their service staffs and to commanders at all levels in the field is adequately provided for by policy and law;

(5) Consider whether the Judge Advocates General and General Counsels of the Military Departments possess the necessary authority to exercise professional supervision over judge advocates, civilian attorneys, and other legal personnel practicing under their cognizance in the performance of their duties;

(6) Address other related issues considered appropriate; and

(7) By April 1, 2005, submit a report that sets forth the findings and conclusions of the panel as a result of the study and review, together with any recommendations for legislative or administrative action that the panel considers appropriate.

**G. Estimated Annual Operating Costs and Person-Years:**

The estimated annual operating costs are $4,000,000 (including contractor support). Federal employees will support the Advisory Panel indirectly on a part-time basis, estimated at 2 person-years annually.

**H. Number of Meetings:**

The Advisory Panel will meet as determined by the Chairman, with the first meeting taking place not later than February 1, 2005.

**I. Organization:**

Washington Headquarters Services will establish such operating procedures as are required to support the Panel, consistent with the Federal Advisory Committee Act, as amended.

**J. Date of Termination:** The Panel shall terminate upon completion of its functions as described in section 574 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005.

**K. Date Charter Is Filed:** December 22, 2004