



Department of Defense INSTRUCTION

NUMBER 5030.7

August 22, 1988

GC, DoD

SUBJECT: Coordination of Significant Litigation and Other Matters Involving the
Department of Justice

- References:
- (a) DoD Instruction 5030.7, "Coordination of Requests for Action by the Attorney General of the United States and of Significant Litigation," December 2, 1983 (hereby canceled)
 - (b) General Counsel Memorandum, "Supreme Court Review of Decisions from the Court of Military Appeals," July 26, 1984 (hereby canceled)
 - (c) General Counsel Memorandum, "Implementation of DoD Instruction 5030.7, "Coordination of Requests for Action by the Attorney General of the United States and of Significant Litigation, October 5, 1987 (hereby canceled)
 - (d) Article 67(h)(1), "Uniform Code of Military Justice," Title 10 United States Code §867(h)(1)
 - (e) [DoD Directive 7050.5](#), "Coordination of Remedies for Fraud and Corruption Related to Procurement Activities," June 28, 1985
 - (f) United States Court of Military Appeals, Rules of Practice and Procedure, Rule 32

1. REISSUANCE AND PURPOSE

This Instruction:

- 1.1. Reissues reference (a), replaces reference (b), and cancels reference (c).
- 1.2. Updates the requirement for coordination of requests to the Department of Justice (including the Attorney General) for formal opinions; and prescribes procedures for coordinating DoD civil and criminal actions that are being litigated or

that may be litigated by the Department of Justice.

2. APPLICABILITY AND SCOPE

This Instruction:

2.1. Applies to the Office of the Secretary of Defense, the Military Departments, the Organization of the Joint Chiefs of Staff (OJCS), the Unified and Specified Commands, and the Defense Agencies (hereafter referred to collectively as "DoD Components").

2.2. May be supplemented by other appropriate procedures.

2.3. Neither precludes informal arrangements between DoD Components to coordinate activities affecting their civil and criminal litigation nor changes existing arrangements for direct contact between DoD Components and the Department of Justice.

2.4. This Instruction does not apply to actions involving the coordination of remedies for fraud and corruption related to procurement activities authorized pursuant to DoD Directive 7050.5 (reference (e)) or future reissuances or revisions of the same.

3. POLICY

It is DoD policy to coordinate internally requests to the Department of Justice for formal opinions and civil and criminal matters significantly affecting the Department of Defense but under the purview of the Department of Justice.

4. RESPONSIBILITIES

4.1. The General Counsel, Department of Defense, shall monitor compliance with this Instruction.

4.2. Heads of DoD Components shall comply with this Instruction.

4.3. The General Counsels of the Military Departments, the Judge Advocates General of the Military Departments, and the General Counsels of the Defense Agencies shall propose changes to this Instruction as necessary through channels to the GC, DoD.

5. PROCEDURES

5.1. Formal Opinions. Requests to the Department of Justice (including the Attorney General) for formal opinions shall be submitted for coordination by the requesting DoD Component to the other DoD Components, as provided in this Instruction, and to the General Counsel, Department of Defense (GC, DoD).

5.2. Civil and Criminal Litigation Involving DoD Components

5.2.1. General. DoD Components shall maintain liaison with each other and with the GC, DoD, for mutual information and advice concerning all significant court actions conducted by the Department of Justice at the trial or appellate stage that may affect materially the administration of more than the litigating DoD Component or the legal basis of an activity of the Department of Defense.

5.2.2. Criminal Cases Before the Supreme Court. DoD Components shall coordinate briefs, correspondence, and other communications regarding cases before the Supreme Court pursuant to Article 67(h)(1), Uniform Code of Military Justice (reference (d)), as prescribed in enclosures E2. and E3.

5.2.3. Civil Cases Before the Supreme Court. In cases before the Supreme Court not covered by paragraph 5.2.2., above, all recommendations to any office of the Department of Justice that certiorari be sought shall be coordinated with the GC, DoD, prior to dispatch. The litigating DoD Component shall ensure that its recommendation is provided to the GC, DoD, sufficiently in advance of the date due to permit full review. Recommendations that certiorari not be sought shall be coordinated with the GC, DoD, when the litigating DoD Component, after coordination with other affected DoD Components as required by paragraph 5.2.1., above, has reason to believe that another affected DoD Component or a component of the Department of Justice favors seeking certiorari. Recommendations against seeking certiorari that are not opposed by any affected DoD Component or component of the Department of Justice do not require coordination with the GC, DoD, prior to dispatch. This does not relieve the litigating DoD Component of the obligation to advise the GC, DoD, of all significant cases under paragraph 5.2.1., above, and of significant developments in cases covered by subsection 5.3., below. All briefs and significant correspondence regarding cases pending in the Supreme Court shall be coordinated with the GC, DoD, prior to dispatch outside the Department of Defense. The litigating DoD Component shall ensure that such briefs and correspondence are provided to the GC, DoD, sufficiently

in advance of the date due to permit full review.

5.2.4. Other Court Actions. A DoD Component offering recommendations to the Department of Justice concerning other court actions not governed by other specific regulatory provisions, such as appeals from the Federal Labor Relations Authority, shall determine whether the issues involved are significant enough to bring to the attention of the other DoD Components and the GC, DoD. In such cases, the DoD Component concerned promptly shall inform the other DoD Components, as provided in this Instruction, and the GC, DoD. For this purpose, the following criteria are established:

5.2.4.1. Will the results of the action affect materially the operation and administration of the Department of Defense?

5.2.4.2. Will the results of the action affect materially the rights or benefits of personnel of more than one DoD Component?

5.2.4.3. Does the litigation affect materially the ownership of federal property under the jurisdiction of more than one DoD Component?

5.2.4.4. Is a statute, a treaty, or an Executive Order with a significant impact on more than one DoD Component being interpreted?

5.2.4.5. Is a new or significant principle of law involved?

5.3. Litigation in Which the Secretary of Defense or Another Senior Official Is a Party. If the Secretary of Defense or another senior official in the Office of the Secretary of Defense is a party in an action in his or her personal capacity, and primary responsibility for supporting the Department of Justice is being discharged by a DoD Component, the GC, DoD, shall be kept advised of significant developments, whether or not the Head of a DoD Component or others are also parties.

6. INFORMATION REQUIREMENTS

6.1. Case Reports. For every case determined under subsection 5.2., above, to be a significant action that either is defended by the Department of Justice or is referred to the Department of Justice for possible court action, a case report in the format prescribed at enclosure E1. or containing all of the information required by enclosure E1. shall be submitted to the GC, DoD, by the concerned DoD Component when the case is instituted or referred. The concerned DoD Component shall update

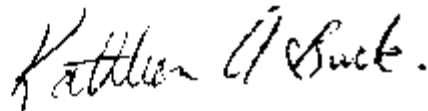
the case report as necessary. Significant actions that have been otherwise reported to the GC, DoD, need not be included in a case report.

6.2. Reports on New Significant Issues. DoD Components shall submit to the GC, DoD, timely reports on all new significant legal issues that may affect materially the administration of more than one DoD Component, or the legal basis of a DoD operation, or that may attract widespread publicity.

6.3. The information requirements prescribed herein have been assigned Report Control Symbol DD-GC(AR)1633.

7. EFFECTIVE DATE AND IMPLEMENTATION

This Instruction is effective immediately. Forward one copy of implementing documents to the General Counsel, Department of Defense, within 120 days.



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Enclosures - 3

1. Case Report
2. Department of Defense Procedures for Submissions to the Supreme Court Under Article 67(h)(1), Uniform Code of Military Justice
3. Format for Draft Letters to the Solicitor General Recommending Petitions for Certiorari

E1. ENCLOSURE 1

CASE REPORT

CASE REPORT

ARMY GC _____ JAG _____
NAVY GC _____ JAG _____
AIR FORCE GC _____ JAG _____
OJCS _____
DEFENSE AGENCY (Specify) _____

CASE NAME AND CITATION:

COURT LEVEL:

NAMED PLAINTIFFS AND DEFENDANTS:

TYPE OF ACTION AND SUBJECT MATTER
(SUCH AS TORT, CONTRACT, OR PERSONNEL):

DATE FILED:

SUMMARY (INCLUDING RELIEF SOUGHT):

STATUS OF THE CASE (DATE EACH ENTRY):

DO NOT MARK ORIGINAL BELOW THIS LINE. RETAIN ORIGINAL IN ACTION FILE.

NEW CASE _____

FINAL REPORT _____

UPDATED REPORT _____

DATE _____

E2. ENCLOSURE 2

Department of Defense Procedures for Submissions to the Supreme Court Under Article 67(h)(1), Uniform Code of Military Justice (reference (d))¹

1. Oppositions to Defense Petitions for Writs of Certiorari (30 days)

a. Upon receipt of a defense petition for certiorari, the Appellate Government Division (AGD) concerned shall immediately notify the Judge Advocate General (JAG), the Office of General Counsel, Department of Defense (OGC, DoD), and the Appellate Government Divisions of the other Military Services of the issue presented and the filing deadline.

b. On or before the second business day following service of the defense petition on the Solicitor General (SG) (service of the defense petition), the AGD concerned shall notify JAG, OGC, and the Appellate Government Divisions of the other Military Services of the AGD's recommendation to oppose or to waive opposition. Should one or more of the other Services object to the AGD's recommendation to waive or oppose, that Service shall so notify the AGD and the OGC within the 3-day period prescribed in paragraph 1.c., below. In the case of an objection, the final decision regarding the DoD recommendation to the SG shall be made by the OGC.

c. On or before the third business day following service of the defense petition, the AGD concerned shall provide the Office of the Solicitor General (OSG)² with an oral recommendation to waive opposition or to oppose the petition. If there has been an objection under paragraph 1.b., above, the AGD concerned shall not provide the OSG with any recommendation until notified of the OGC's decision.

d. When opposition is recommended, a draft brief in opposition shall be written after consultation with the OSG. On or before the 20th calendar day following service of the defense petition, the AGD concerned shall provide the OSG; the Appellate Section, Criminal Division, Department of Justice; OGC; and the Appellate Government Divisions of the other Military Services with a draft brief in opposition.

¹ Even though the Coast Guard falls under the Department of Transportation, copies of all certiorari-related correspondence shall be submitted to the Coast Guard AGD as a matter of comity and to encourage inter-department communication and cooperation. In addition, the Coast Guard AGD may desire to file briefs amicus curiae in a given case.

² Direct communication with the OSG is required due to the limited response time.

2. Government Petitions for Writ of Certiorari (60 days)

a. When the Court of Military Appeals (CMA) decides an issue or a case adversely to the Government, the AGD concerned shall, in an appropriate case, file a petition for reconsideration.³ Whether or not a petition for reconsideration is filed, on or before the fifth calendar day following publication of the CMA decision, the AGD concerned shall notify the JAG and the Appellate Government Divisions of the other Military Services in writing of its intent to recommend that the Government petition for a writ of certiorari. Copies of the Court of Military Review (CMR) and CMA decisions, along with copies of the CMR and CMA briefs (or a draft brief in support of the petition), shall accompany the written recommendation to the JAG concerned to petition for certiorari, with copies to each Military Service.⁴

b. On or before the 10th calendar day following publication of the CMA decision, the Appellate Government Divisions of the other Military Services shall notify the AGD concerned by telephone of their concurrence with, or objection to, seeking a writ of certiorari.

c. On or before the 15th calendar day following publication of the CMA decision, if the JAG concerned approves the recommendation to petition for certiorari, the JAG concerned shall forward the recommendation to the OGC, in the format contained in enclosure E3., along with copies of the CMR and CMA decisions and the CMA brief or draft brief in support of the petition and the recommendations, if any, of the other Military Services. The OGC shall approve or disapprove the recommendation to the SG. When the JAG concerned elects not to recommend in favor of a petition for certiorari, and at least one of the other Military Services objects, the JAG concerned shall forward the negative recommendation to the OGC, along with the comments of the objecting Service(s). If no other Service objects to the recommendation not to seek certiorari, the OGC will be informed verbally.

³ Petitions for reconsideration at the CMA must direct the Court's attention "with particularly [to] the points of law or fact which, in the opinion of the party seeking reconsideration, the Court has overlooked or misapprehended Petitions are not to contain merely a restatement of arguments already presented." United States Court of Military Appeals, Rules of Practice and Procedure, Rule 32 (reference (f)) (emphasis added).

⁴ Where no Government briefs were submitted at CMA or CMR (waiver cases), the AGD concerned shall file a petition for reconsideration stating the Government position. This petition shall serve as the draft brief in support of the petition for certiorari submitted to the JAG concerned (with copies to the other Military Services) by the fifth calendar day following publication of the CMA decision.

d. Upon approval by the OSG, the AGD concerned shall prepare a draft petition and forward it to the OSG, with a copy to the Appellate Section, Criminal Division, Department of Justice. Copies of the draft petition shall be sent to the OGC, JAG, and the AGD of each other Military Service.

3. Final Brief with Government as Petitioner (45 days)

a. When the AGD concerned receives notice that the Supreme Court has granted certiorari in response to a Government petition, the AGD concerned shall immediately notify the JAG, the Appellate Government Divisions of the other Military Services, and the OGC. On or before the 12th calendar day following notification of the Supreme Court's grant of certiorari, the AGD concerned shall forward the required joint appendix to the OSG for review and submission to the Supreme Court.

b. On or before the 21st calendar day following notification of the Supreme Court's grant of certiorari, the AGD concerned shall forward a final draft of petitioner's brief to the JAG, with copies to the OGC and the Appellate Government Divisions of the other Military Services. All recommended modifications to the draft brief shall be submitted to the AGD concerned within 72 hours after receipt of the draft brief. Any disagreements that cannot be resolved among the Military Departments shall be submitted to the OGC for decision.

c. On or before the 25th calendar day following notification of the Supreme Court's grant of certiorari, the AGD concerned shall forward the final draft of petitioner's brief to the OSG for review, printing, and submission to the Supreme Court. Copies of the draft brief shall be sent to the OGC, JAG, and the Appellate Government Divisions of the other Military Services.

4. Final Brief with Government as Respondent (30 days)

a. When the AGD concerned is notified that the Supreme Court has granted certiorari in response to a defense petition, the AGD concerned shall begin drafting its respondent's brief.

b. On or before the 15th calendar day following submission of the petitioner's brief, the AGD concerned shall forward a draft respondent's brief to the JAG, with copies to the OGC and the Appellate Government Divisions of the other Military Services. All recommended modifications or additions to the draft brief shall be

submitted to the AGD concerned within 72 hours after receipt of the draft respondent's brief. Any disagreements that cannot be resolved among the Military Departments shall be submitted to the OGC.

c. On or before the 20th calendar day following filing of the petitioner's brief, the AGD concerned shall forward the final draft of respondent's brief to the OSG for review, printing, and submission to the Supreme Court. Copies of the draft respondent's brief shall be sent to the OGC, JAG, and the Appellate Government Divisions of the other Military Services.

5. Oral Argument before the Supreme Court

a. On or before the fifth day following filing of the respondent's brief, the AGD concerned shall notify the JAG, OGC, and the AGD of each other Military Service of its intent to request that the OSG authorize the AGD concerned to represent the Government in oral argument before the Supreme Court, as authorized by 10 U.S.C. §870(b) (reference (d)). Should one or more of the other Military Services object to the request, that objection shall be forwarded to the OGC within 48 hours, with copies provided to the Appellate Government Divisions of the other Military Services.

b. On or before the 10th day following filing of the respondent's brief, the AGD concerned shall submit a written request to the OSG that the AGD concerned be authorized to represent the Government in oral argument before the Supreme Court.

E3. ENCLOSURE 3

Format for Draft Letters to the Solicitor General Recommending Petitions for Certiorari

TIME LIMITS

Indicate date the petition for writ of certiorari or opposition must be filed with the Supreme Court (ordinarily 30 days from the Court of Military Appeals decision in the case of a brief in opposition to a petition; 60 days when the Government is seeking certiorari).

RECOMMENDATION

State the recommendation for a petition for certiorari.

QUESTION PRESENTED

State the question presented as it would appear in an appellate brief.

STATEMENT

Give a brief statement of the pertinent facts. This ordinarily should be no more than a one-page statement of the basic facts in the case.

DISCUSSION

Give the reasoning supporting your recommendation. Ordinarily, this section of the memorandum should be concise. The length, of course, will depend upon the nature of the problem. Included in your recommendation should be an analysis of the following criteria:

- a. How the results of this action materially affect your Military Service in particular, and the operation and administration of the Department of Defense in general;
- b. Why, specifically, the Department of Defense and the Solicitor General should expend time and resources on this case; and
- c. Why a change in the underlying statute, Manual for Courts-Martial provision or regulation (rather than Supreme Court review) would not better serve the interests of the Department of Defense or your particular Service.