GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
WASHINGTON, D.C. 20301

September 29, 1978

MEMORANDUM FOR GENERAL KALERGIS

SUBJECT: Comments of the Office of General Counsel with respect to the Report to the Secretary of Defense on the National Military Command Structure

Attached are two memoranda commenting on the Report as requested in the Memorandum of the Deputy Secretary of Defense dated July 13, 1978.

Deanne C. Siemer

Attachments

DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
WASHINGTON, D. C. 20301

July 24, 1978

MEMORANDUM FOR MS. SIEMER

SUBJECT: Report to the Secretary of Defense on the National Military Command Structure

I have some general observations and some specific comments with respect to this study.

Although we have made substantial progress toward "unification" and the streamlining of the command structure, a basic fear of a single chief of staff or of a "German style" general staff has been manifest in the Congress' attitude from the original National Security Act in 1947 through the 1958 amendments. And, although the military department secretaries were taken out of the chain of command by the President at the time he submitted the 1958 amendments, sentiment was still strong for three "independently administered" military departments. It is my own conviction that the Congress would rather accept a less efficient structure than to "merge the services." This attitude is manifest in the revised Declaration of Policy, Section 2 of the National Security Act enacted as part of the 1958 Defense Reorganization Act.1/

1/ 50 U.S.C. § 401 provides:

> In enacting this legislation, it is the intent of Congress to provide a comprehensive program for the future security of the United States; to provide for the establishment of integrated policies and procedures for the departments, agencies, and functions of the Government relating to the national security; to provide a Department of Defense, including the three military Departments of the Army, the Navy (including naval aviation and the United States Marine Corps), and the Air Force under the direction, authority, and control of the Secretary of Defense; to provide that each military department shall be separately organized under its own Secretary and shall function under the direction, authority, and control of the Secretary of Defense; to provide for their unified direction under civilian control of the Secretary of Defense but not to merge these departments or services; to provide for the establishment of unified or specified combatant commands, and a clear and direct line of command

[Footnote to be continued on next page.]

Notwithstanding the concerns expressed in the consideration of the 1958 Amendments, changes made there were substantial. The exercise of "command" was taken away from each of the service chiefs and in lieu thereof each was given "supervision."[2] At the same time the combatant forces were organized into unified and specified combatant commands and the chain of command was recognized as running from the President to the Secretary of Defense and thence to the combatant commands although it was recognized that the manner in which the President as Commander in Chief exercises command is a matter of Presidential determination rather than legislative concern.[3]

1/ [Continued from previous page.]

to such commands; to eliminate unnecessary duplication in the Department of Defense, and particularly in the field of research and engineering by vesting its overall direction and control in the Secretary of Defense; to provide more effective, efficient, and economical administration in the Department of Defense; to provide for the unified strategic direction of the combatant forces, for their operation under unified command, and for their integration into an efficient team of land, naval, and air forces but not to establish a single Chief of Staff over the armed forces nor an overall armed forces general staff.

2/ 10 U.S.C. § 3034(d)(4) provides:

(4) exercise supervision over such of the members and organizations of the Army as the Secretary of the Army determines. Such supervision shall be exercised in a manner consistent with the full operational command vested in unified or specified combatant commanders under section 124 of this title.

3/ House Report 1765, 85th Cong., 2d Sess. at page 24 contains the following language:

The necessity or wisdom of the President's decision to terminate the executive-agency system and to remove the Secretaries of the military departments from the chain of command between the Secretary of Defense and the unified commands is not of direct legislative concern. This is because the method by which the President exercises his command authority is largely one of Presidential determination. Legislation was not required to establish the chain of command desired by the President in 1953. By the same token, legislation is not needed for the President to disestablish that chain of command and institute a new one in 1958.

On page 34 of the Report, the proposal is made that the Chairman of the Joint Chiefs be formally delegated the overseeing and directing of the activities of the CINCs. Although the Chairman constitutionally and lawfully transmits the orders of the President to the CINCs, he is now prohibited under the 1949 Amendments from exercising command[4/] and a proposal to permit him to exercise command or to operate independently of the corporate body of the chiefs would be controversial. In relation to the 1958 Amendments, the House Committee on Armed Services continued to show concern over an independent and powerful chairman.[5/] If the

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4/ 10 U.S.C. § 142(c) provides as follows:

> (c) While holding office, the Chairman outranks all other officers of the armed forces. However, he may not exercise military command over the Joint Chiefs of Staff or any of the armed forces.

5/ House Report 1765, 85th Cong., 2d Sess. at page 25 contains the following language:

> Both the Joint Staff and the Chairman of the Joint Chiefs of Staff have in the past been viewed by many, including Members and committees of Congress, as prototype elements which might eventually be transformed into an Armed Forces general staff and a single chief of staff over all the Armed Forces. As an example of such apprehensions, the chairman of the House Committee on Executive Expenditures which considered the original National Security Act (H.R. 4214) in 1947 warned:
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> > The Joint Staff must in the future be carefully observed to prevent its possible development into a national general staff.
>
> With regard to the Chairman of the Joint Chiefs of Staff (an office which was created by the 1949 amendments to the National Security Act) former President Hoover (as head of the Hoover Commission testified:
>
> > Our recommendations were that there be an independent Chairman of the Joint Chiefs of Staff and that he was to serve only as a presiding officer and report decisions or disagreements to the Secretary of Defense. But that he was to have no decision powers and not vote, or any other authority. *** That

[Footnote to be continued on next page.]

system is working in the sense that the Chairman is in fact the eyes and ears of the Secretary of Defense and the President in relation to the CINCs the greater part of wisdom might be to avoid a formal delegation.

I see no legal objection to the proposals "That the Chairman supported by the CINCs, be given a formal role in resources allocation planning and decisions" (Report page 39) or that the Chairman be made a voting member of the DSARCs (Report page 68). There is a problem, however, of the demands upon his time and the strengthening of his position vis-a-vis the corporate body of the Joint Chiefs of Staff previously noted. However, since 1958 we have lived with the anomaly of the military departments retaining the responsibility for material support, training and personnel support, with the command line running directly from the President and the Secretary of Defense to the CINCs, and maybe it is time to face this anomaly.

As the Report frankly observes, the most controversial recommendation is that the President "consider the formation of a group of National Military Advisers" (Report page 70). The Report also accurately observes that this would require revision of the National Security Act (Report page 6).6/

5/ [Continued from previous page.]

> was our proposal, that the Chairman was nothing but a presiding officer. He has no powers to recommend or resolve. If there were differences of opinion, it is the responsibility of the civilian end of the Government to determine.

The foregoing statements were obviously accepted as authoritative at the time and sum up the intent of Congress in creating the office of the Chairman of the Joint Chiefs of Staff. They continue to reflect this committee's view of his position.

6/ 10 U.S.C. § 718 provides:

> Officers of the armed forces may be detailed for duty as assistants or personal aides to the Secretary of Defense. However, the Secretary may not establish a military staff other than that established by section 141(a) of this title.

The philosophy behind this provision in the original National Security Act is again articulated in the House Report on the Department of Defense Reorganization Act of 1958. In commenting upon the specific authority given to the service chiefs to delegate responsibilities to the vice chiefs, the Committee had this to say at page 33:

> Such delegations of authority and duties as the uniformed chiefs of services may from time to time choose to make will not, therefore, have the direct or indirect effect of separating them from their position as uniformed Chief of their respective service. Thus, the salient characteristic of the Joint Chiefs of Staff concept--unity of responsibility and authority is preserved. It is preserved by assuring that the Joint Chiefs of Staff members retain their full responsibility as Chiefs of their respective military services. This will make certain that when functioning as Joint Chiefs of Staff members, the service Chiefs will be fully informed as to the day to day problems, activities, and capabilities of their respective services. It is the knowledge of their services, gained in their role as a uniformed head of their service that, in the words of Gen. Maxwell Taylor, 'produces the experience and knowledge that is indispensable at the Joint Chiefs' table.

Now that the Report on the National Military Command Structure has been distributed, I expect we will get an up-to-date sounding of attitudes with respect to concentration of military authority, both from the military departments and the Hill.

L. Niederlehner
Deputy General Counsel