



GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-1600

JAN 20 2008


MEMORANDUM FOR SECRETARY OF THE ARMY
SECRETARY OF THE NAVY
SECRETARY OF THE AIR FORCE

SUBJECT: 3-Star Grade for the Military Department Judge Advocates General

Section 543 of the recently vetoed H.R. 1585 (National Defense Authorization Act for Fiscal Year 2008) would have amended 10 U.S.C. §§ 3037, 5148 and 8037 by providing that the Judge Advocates General of the Military Departments, while so serving, have the grade of lieutenant general or vice admiral, as appropriate (attached). If legislation similar to that contained in section 543 be enacted into law, it will present the following questions:

- (1) upon enactment of legislation similar to that set out in section 543, is the advancement of the incumbent Judge Advocates General to O-9 grade automatic;
- (2) if not, is Presidential appointment to the higher grade, with the advice and consent of the Senate, required; (3) or, is the President's appointment alone of the incumbent Judge Advocates General to that grade sufficient.

Because this is a matter of great significance involving the President's Constitutional appointment authority, I have asked the Department of Justice for its opinion with regard to the questions set out above. I wanted you to be aware of this issue but also want to advise you, should such legislation be enacted in the near future, not to take any unilateral action to advance an incumbent Judge Advocate General to 3-star grade. A copy of my letter to the Department of Justice is attached.


William J. Haynes II

Attachment





GENERAL COUNSEL

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-1600

JAN 20 2008

Steven G. Bradbury, Esquire
Principal Deputy Assistant Attorney General
Office of Legal Counsel
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Dear Mr. Bradbury:

This letter is a request pursuant to 28 C.F.R. § 0.25 for your office's opinion pertaining to the elevation of the incumbent Military Department Judge Advocates General to 3-star grade should the Congress pass, and the President enact into law, legislation that is similar to section 543 of the recently vetoed H.R. 1585 (National Defense Authorization Act for Fiscal Year 2008) (attached). Section 543 would have amended 10 U.S.C. §§ 3037, 5148 and 8037 by providing that the Judge Advocates General of the Military Departments, while so serving, have the grade of lieutenant general or vice admiral, as appropriate. Under sections 3037, 5148 and 8037, the President appoints the Judge Advocates General with the advice and consent of the Senate.

One of the three incumbent Judge Advocates General was appointed to his current grade (major general) under previous provisions of sections 3037, 5148 and 8037, which specified that if an officer who is so appointed holds a lower regular grade, he or she shall be appointed in the regular grade of major general, or in the case of the Navy, rear admiral. On January 6, 2006, Public Law 109-163 amended sections 3037, 5148 and 8037 to provide that a Judge Advocate General, while so serving, holds a grade no lower than major general, or in the case of the Navy, rear admiral. Two of the incumbent Judge Advocates General were appointed to their current grades (rear admiral and major general) under the current versions of the law.

The question presented is whether, upon enactment of legislation similar to that set out in section 543, the advancement of the incumbent Judge Advocates General to O-9 grade is automatic or whether Presidential appointment to the higher grade, with the advice and consent of the Senate, is required. One view is that because an incumbent Judge Advocate General has already been appointed to that position by the President with the advice and consent of the Senate, a grade prescribed for that position by a subsequent law automatically applies to the incumbent and no action by the President is required. Another view is that the grade of lieutenant general/vice admiral is an office that may only be filled by the President following Senate confirmation. An intermediate view is that because the Senate has already provided advice and consent to the President for the

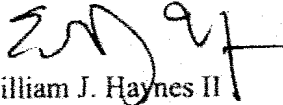


appointment as a Judge Advocate General, all that would be required for the incumbent Judge Advocates General to be a lieutenant general or vice admiral, would be the President's appointment of the incumbent Judge Advocates General to that grade.

This situation is further complicated by the January 2006 amendments to sections 3037, 5148 and 8037, which established the grades of the Judge Advocates General as no lower than major general, or in the case of the Navy, rear admiral. The legislation set out in section 543 would further amend sections 3037, 5148 and 8037 in a way that would require the Judge Advocates General to be lieutenant generals or vice admirals. In contrast, under the versions of sections 3037, 5148 and 8037 in effect when two of the incumbent Judge Advocates General were appointed, their grades were not automatic. Thus, with regard to these two incumbents, because a maximum grade is not specified, the President could have nominated them to the grade of lieutenant general/vice admiral or general/admiral and, following Senate confirmation, appointed them to that grade. Under the January 2006 amendments, the President also could have decided to appoint the third incumbent, following Senate confirmation, to a grade higher than major general. The President's decision not to do so may have some bearing on the issue at hand.

A member of my staff has informally discussed this matter with Ms. Rosemary Hart of your staff. We appreciate your assistance in this important matter.

Sincerely,



William J. Haynes II

Attachment:

As

cc:

Secretary of the Army
Secretary of the Navy
Secretary of the Air Force
General Counsel of the Department of the Army
General Counsel of the Department of the Navy
General Counsel of the Department of the Air Force
The Judge Advocate General of the Army
The Judge Advocate General of the Navy
The Judge Advocate General of the Air Force