



DoD INSTRUCTION 5030.07

COORDINATION OF SIGNIFICANT LITIGATION AND OTHER MATTERS INVOLVING THE DEPARTMENT OF JUSTICE

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Approved by:	Caroline Krass, General Counsel of the Department of Defense

Purpose: In accordance with DoD Directive 5145.01, this issuance:

- Establishes policy, assigns responsibilities, and prescribes procedures for the coordination of significant legal issues handled by the Department of Justice, including:
 - Any request to the Department of Justice (Office of Legal Counsel) for guidance or any request for a formal opinion from the Department of Justice.
 - Significant litigation that falls under the purview of the Department of Justice.
- Prescribes procedures for Supreme Court submissions pursuant to Section 867a of Title 10, United States Code.
- Establishes the Significant Litigation Coordination Committee.

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SECTION 1: GENERAL ISSUANCE INFORMATION

1.1. APPLICABILITY.

a. This issuance applies to OSD, the Military Departments (including the Coast Guard at all times, including when it is a Service in the Department of Homeland Security by agreement with that Department), the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of Inspector General of the Department of Defense (IG DoD), the Defense Agencies, the DoD Field Activities, and all other organizational entities within DoD (referred to collectively in this issuance as the “DoD Components”).

b. This issuance does not apply to actions involving the coordination of remedies for fraud and corruption related to procurement activities authorized pursuant to DoD Instruction 7050.05.

c. Nothing in this issuance will infringe on the IG DoD’s statutory independence and authority in accordance with Chapter 4 of Title 5, United States Code, also known and referred to in this issuance as the “Inspector General Act of 1978,” as amended. In the event of any conflict between this issuance and the IG DoD’s statutory independence and authority, the Inspector General Act of 1978 takes precedence.

1.2. POLICY.

Ensure the Office of the General Counsel of the Department of Defense (DoD OGC) and other affected DoD Components are timely informed of significant litigation managed, or expected to be managed, by the Department of Justice.

SECTION 2: RESPONSIBILITIES

2.1. GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE.

As the chief legal officer of DoD, the General Counsel of the Department of Defense:

- a. Monitors compliance with this issuance and develops supporting guidance as necessary.
- b. Determines the DoD position on specific legal issues, coordinates among DoD Components, and resolves related disagreements within DoD.

2.2. DOD COMPONENT HEADS.

DoD Component heads should:

- a. Coordinate with DoD OGC and other affected DoD Components before submitting any request to the Department of Justice (Office of Legal Counsel) for guidance or any request for a formal opinion from the Department of Justice.
- b. Timely communicate to DoD OGC all litigation matters determined significant by applying the criteria in this issuance.
- c. Coordinate with DoD OGC any recommendation or other substantive communication with the Office of the Solicitor General (OSG) regarding any matter in which DoD has an interest, including motions, petitions, merits briefs, and *amicus curiae* briefs.
- d. Submit to DoD OGC timely updates of major developments (e.g., briefs filed, court rulings, settlement offers) in matters determined to be significant by applying the criteria in Paragraph 3.1.g.

SECTION 3: PROCEDURES FOR COORDINATION OF SIGNIFICANT LITIGATION INVOLVING DoD COMPONENTS

3.1. GENERAL.

a. To develop a DoD legal position in support of communications to the Department of Justice and the courts, DoD Components will communicate, cooperate, and coordinate with one another and DoD OGC in a timely manner.

b. Close coordination among DoD Components and DoD OGC best protects the interests of the United States, DoD, and DoD Components. In addition, alignment on significant legal issues provides an opportunity to preserve rights, remedies, and legal strategies that otherwise may be forfeited by unilateral, uncoordinated action.

c. Timely communication, cooperation, and coordination are critical when DoD Components or DoD OGC become aware of significant litigation managed, or expected to be managed, by the Department of Justice. DoD Components may accomplish timely communication of new significant litigation to DoD OGC by submitting an initial case report that contains all of the information referenced in Figure 1.

d. This issuance applies to significant litigation in any court in which DoD has an interest, including Federal district courts, appellate courts, the Supreme Court, and any other Federal court where the litigation is managed, or expected to be managed, by the Department of Justice.

Figure 1. Case Report

ARMY General Counsel (GC) _____ Judge Advocate General (JAG) _____ NAVY GC _____ JAG _____ AIR FORCE GC _____ JAG _____ Office of the Chairman Joint Chiefs of Staff (OCJCS) _____ DEFENSE AGENCY/FIELD ACTIVITY (Specify) _____	
CASE NAME AND CITATION:	
COURT LEVEL:	
REASON SIGNIFICANT:	
NAMED PLAINTIFFS AND DEFENDANTS (INCLUDING CAPACITY IN WHICH NAMED):	
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 _____

e. DoD Components will submit an initial case report containing all the information referenced in Figure 1 for all pending significant matters within 30 calendar days after publication of this issuance. Alternatively, DoD Components may provide DoD OGC with their internal case reports in place of this initial case report, provided these reports include all the information requested in Figure 1.

f. DoD Components will determine whether a matter is significant for purpose of this issuance by exercising sound judgment considering the criteria listed in Paragraph 3.1.g. and other appropriate considerations.

g. DoD Components will consider the existence of one or more of the criteria in Paragraphs 3.1.g.(1)-(7) as instructive in determining whether a particular matter is significant for the purpose of this issuance:

- (1) Whether a prominent national, State, or local public official, including senior military personnel, is a party, subject, or significant witness in the matter;
- (2) Likelihood of coverage in national news media;
- (3) Likelihood of congressional interest;
- (4) Size of the monetary value, liability, loss amount, or recovery at issue;
- (5) Significant implications for foreign relations;
- (6) Likelihood of precedential interpretation of a statute, treaty, or Executive order that could significantly impact more than one DoD Component; or
- (7) Novel theory of law that is likely to implicate important DoD interests.

h. DoD Components should resolve any doubt as to whether a case is significant for the purpose of this issuance by consulting with DoD OGC or defaulting to the determination that the case is significant and subject to the prescribed reporting and coordination requirements. In addition, at any time DoD OGC may designate in writing any case or category of cases as significant for purpose of this issuance.

i. In addition to the general coordination requirements in cases deemed significant in accordance with Paragraphs 3.1.g.(1)-(7), additional requirements apply to certain categories of cases described in Paragraphs 3.2., 3.3., and 3.4.

j. For cases impacting more than one DoD Component, if there is a dispute among DoD Components regarding issues requiring agreement in litigation (including the responsibility to pay litigation costs and attorneys' fees), DoD Components will use their best efforts to resolve that dispute informally through consultation and communication or other forms of mutually acceptable non-binding dispute resolution. Such disputes should be resolved at the lowest level possible. If the issue cannot be resolved, the DoD Component general counsel or the Judge Advocate General (JAG) should coordinate directly with the General Counsel of the Department of Defense.

3.2. LITIGATION IN WHICH THE SECRETARY OF DEFENSE OR ANOTHER SENIOR OFFICIAL OF THE OSD IS A PARTY IN A PERSONAL CAPACITY.

If the Secretary of Defense, or another senior official within OSD, is involved in an action in their personal capacity and the primary responsibility for supporting the Department of Justice is being discharged by a DoD Component, the General Counsel of the Department of Defense will be kept apprised of significant developments regardless of whether the DoD Component head or

others are also parties or whether the matter has been administratively delegated to the DoD Component.

3.3. APPEAL RECOMMENDATIONS INVOLVING SIGNIFICANT LITIGATION.

a. Appeal recommendations to DoD OGC on matters subject to this issuance should reflect balanced, independent judgment regarding the short- and long-term benefits and risks of an appeal and the strengths and weaknesses of potential appellate arguments. They should be measured and objective analyses and should not reflect one-sided advocacy. Effective appeal recommendations are written with a focus on the factors the Solicitor General (SG) considers when deciding whether to authorize an appeal.

b. Best practices to follow when drafting appeal recommendations include:

(1) Summarize only the most important factual and procedural background. If a declaration or other document plays a vital role, attach it rather than repeating its contents.

(2) Explain the practical impact of the adverse ruling. In the case of a preliminary injunction or other interim relief, explain how compliance pending a final judgment would affect the relevant organization and DoD.

(3) Clearly identify the issue(s) that would be raised on appeal. An appellate presentation should usually focus on one issue or a small number of issues, especially in cases involving petitions for rehearing *en banc* or *certiorari*.

(4) Outline the most persuasive legal argument(s) that would be presented on appeal with attention to controlling precedent and traditional tools of legal interpretation. A strong appeal recommendation helps the reader envision arguments that may prevail in the appellate court. Appeal recommendations should usually avoid cataloging the shortcomings of a lower court decision.

(5) Address whether the government clearly raised and preserved these arguments in the lower court(s).

(6) Acknowledge and objectively assess the strength of counterarguments.

(7) Fairly assess the odds of winning and losing on appeal in light of the composition and precedent of the court from which appellate relief would be sought.

(8) Honestly assess the risks of an unsuccessful appeal. Such risks may include the possibility of transforming a non-precedential district court opinion into a binding appellate precedent.

(9) Address whether the case is a favorable vehicle for an appeal, especially if it presents a legal issue of recurring importance.

(10) Avoid hyperbolic language.

3.4. ANY SUPREME COURT FILINGS WHERE DOD HAS AN INTEREST.

- a. Except as provided in Section 4 of this issuance, the procedures in Paragraphs 3.4.b.-e. apply to filings in the Supreme Court and recommendations regarding whether to seek *certiorari*.
- b. All Supreme Court filings, including motions, petitions for *certiorari*, briefs in opposition to *certiorari*, merits briefs, and *amicus curiae* briefs, must be coordinated with DoD OGC even if the case would not otherwise be considered significant.
- c. All recommendations to any office of the Department of Justice in favor of seeking *certiorari* must be coordinated in advance with DoD OGC. A DoD Component will ensure that its recommendation is provided to DoD OGC sufficiently in advance of the deadline for submission to the Department of Justice, and no fewer than 7 business days before that deadline, to permit full review.
- d. Recommendations against seeking *certiorari* must be coordinated with DoD OGC when a DoD Component, after coordination with other affected DoD Components as required by Paragraph 3.1., has reason to believe that another affected DoD Component or a component of the Department of Justice favors seeking *certiorari*.
- e. Recommendations against seeking *certiorari* that are not opposed by any affected DoD Component or by a component of the Department of Justice do not require coordination in advance with DoD OGC, provided the DoD Component previously advised DoD OGC of the case described by Paragraphs 3.1. and 3.4. If DoD OGC has not previously been advised about the case, components recommending against seeking *certiorari* must coordinate with DoD OGC sufficiently in advance of the deadline for submission to the Department of Justice to permit full review of the recommendation.

3.5. ESTABLISHMENT OF THE SIGNIFICANT LITIGATION COORDINATION COMMITTEE.

To facilitate coordination, collaboration, and discussion of significant cases and to reduce the administrative burden on DoD OGC and DoD Components, the Significant Litigation Coordination Committee is hereby established.

- a. The committee will be led by the Deputy General Counsel (Legal Counsel).
- b. It will consist of senior litigation attorneys and agency counsel of DoD OGC and DoD Components.
- c. The committee will facilitate timely communication and coordination of significant litigation and other matters of legal interest to DoD.
- d. It will convene monthly or as otherwise agreed by its representatives.
- e. A charter will be executed by the Deputy General Counsel (Legal Counsel) within 60 calendar days following the publication of this issuance.

SECTION 4: PROCEDURES REGARDING SUPREME COURT REVIEW OF COURT OF APPEALS FOR THE ARMED FORCES (CAAF) DECISIONS PURSUANT TO ARTICLE 67A OF CHAPTER 47 OF TITLE 10, UNITED STATES CODE

4.1. GOVERNMENT OPPOSITIONS TO DEFENSE PETITIONS FOR A WRIT OF *CERTIORARI*.

a. The procedures in Section 4 apply to all DoD Components and offices thereof, except for individual defense counsel or defense offices, and individual victims' counsel and victims' counsel offices.

b. All Supreme Court filings, or recommendations to OSG regarding such filings, in which DoD has an interest, including motions, petitions for *certiorari*, briefs in opposition to *certiorari*, merits briefs, and *amicus curiae* briefs, must be coordinated with DoD OGC.

c. Ordinarily, a brief in opposition to a defense petition for *certiorari* must be filed within 30 calendar days after the defense petition for *certiorari* is placed on the docket. On receipt of a defense petition for *certiorari* or an order from the Supreme Court to respond to such a petition, the concerned Military Department's Appellate Government Division (AGD) will immediately notify the JAG of the AGD's Military Department and, in cases involving covered offenses referred by an Office of Special Trial Counsel, the respective lead special trial counsel; the Director, Office of Litigation Counsel in DoD OGC; and the AGDs of the other Military Departments of the issue presented and the filing deadline.

d. Within 2 business days of service of process of the defense petition on the SG, the AGD concerned will notify the JAG concerned; the Director, Office of Litigation Counsel; and the AGDs of the other Military Departments of the concerned AGD's recommendation to file a brief in opposition or to waive the right to file a brief in opposition. Should one or more of the other Military Departments object to the concerned AGD's recommendation to file a brief in opposition or to waive the right to file a brief in opposition, that Military Department will notify the AGD concerned and the Director, Office of Litigation Counsel within the 4-day period prescribed in Paragraph 4.1.e. In the case of an objection, the General Counsel of the Department of Defense will make the final decision regarding the DoD recommendation to the OSG.

e. Within 4 business days of service of the defense petition, the AGD concerned will provide the OSG with a recommendation by telephone or electronic mail to file a brief in opposition to the petition or to waive the right to file a brief in opposition to the petition. Due to the limited response time, direct communication by the AGD with the OSG is authorized. If there is an objection in accordance with Paragraph 4.1.d., the AGD concerned will not provide the OSG with any recommendation until notified of the General Counsel of the Department of Defense's decision.

f. When the recommendation is to file a brief in opposition, the AGD concerned will draft a brief in opposition in coordination with the OSG. Unless otherwise instructed by the OSG, within 20 calendar days following service of the defense petition, the AGD concerned will provide the draft brief in opposition to the OSG; the Department of Justice Appellate Section, Criminal Division; the Director, Office of Litigation Counsel; and the AGDs of the other Military Departments.

4.2. GOVERNMENT PETITIONS FOR A WRIT OF *CERTIORARI*.

a. When the CAAF decides an issue or a case adversely to the U.S. Government, the AGD concerned will, when appropriate, file a petition for reconsideration that complies with the mandates and limitations of Rule 31 of the Rules of Practice and Procedure for the United States Court of Appeals for the Armed Forces.

(1) Whether or not a petition for reconsideration is filed, when the AGD concerned determines such action appropriate, the AGD concerned will notify the JAG concerned, and, in cases involving covered offenses, the lead special trial counsel concerned and the AGDs of the other Military Departments, in writing within 5 calendar days following publication of the CAAF decision of their intent to recommend that the U.S. Government petition for a writ of *certiorari*.

(2) Copies of the Court of Criminal Appeals (CCA) and CAAF decisions, along with copies of the CCA and CAAF briefs or a draft brief in support of the petition, will accompany the written recommendation to the JAG concerned to petition for *certiorari* with copies to the AGD of each Military Department.

b. When no U.S. Government briefs were submitted to the CAAF or CCA (e.g., waiver cases), the AGD concerned will file a petition for reconsideration stating the U.S. Government's position within 5 calendar days following publication of the CAAF decision. This petition will serve as the draft brief in support of the petition for *certiorari* submitted to the JAG concerned with copies to the AGDs of the other Military Departments.

c. Within 10 calendar days following publication of the CAAF decision or the CAAF decision on any petition for reconsideration, the AGDs of the other Military Departments will notify the AGD concerned by telephone or electronic mail of their concurrence with, or objection to, seeking a writ of *certiorari*.

d. Within 15 calendar days following publication of the CAAF decision, if the JAG concerned approves the recommendation to petition for *certiorari*, the JAG concerned will forward the recommendation in the format described in Figure 2, along with copies of the CCA and CAAF decisions and the CAAF brief or draft brief in support of the petition and the recommendations, if any, of the other Military Departments, to the Director, Office of Litigation Counsel. The General Counsel of the Department of Defense will approve or disapprove the recommendation to the SG.

e. Within 15 calendar days following publication of the CAAF decision, if the JAG concerned recommends against a petition for *certiorari*, the JAG concerned will forward the

recommendation to the Director, Office of Litigation Counsel. If any other Military Department objects to the recommendation, the JAG concerned will forward the comments of the objecting Military Department or departments along with the recommendation against a petition for *certiorari*.

f. On approval by the OSG, the AGD concerned will prepare a draft petition and forward it to the OSG, with a copy to the Department of Justice Appellate Section, Criminal Division. Copies of the draft petition will also be sent to the JAG concerned; the Director, Office of Litigation Counsel; and the AGDs of the other Military Departments.

4.3. BRIEF ON THE MERITS WITH GOVERNMENT AS PETITIONER.

a. Ordinarily, the petitioner's brief on the merits must be filed within 45 calendar days of the order granting the writ of *certiorari*. Accordingly, when the AGD concerned receives notice that the Supreme Court has granted *certiorari* in response to a U.S. Government petition, the AGD concerned will immediately notify the JAG concerned and, in cases involving covered offenses referred by an Office of Special Trial Counsel, the respective lead special trial counsel; the AGDs of the other Military Departments; and the Director, Office of Litigation Counsel. Within 12 calendar days following notification of the Supreme Court's grant of *certiorari*, the AGD concerned will coordinate with the OSG to provide assistance with preparation of the joint appendix for submission to the Supreme Court.

b. Within 21 calendar days following notification of the Supreme Court's grant of *certiorari*, the AGD concerned will forward a final draft of the petitioner's brief to the JAG concerned and, in cases involving covered offenses referred by an Office of Special Trial Counsel, the respective lead special trial counsel, with copies to the Director, Office of Litigation Counsel and the AGDs of the other Military Departments. All recommended modifications to the draft brief will be submitted to the AGD concerned within 3 calendar days after receipt of the draft brief. Any disagreements that cannot be resolved among the Military Departments will be submitted to the Director, Office of Litigation Counsel for decision.

Figure 2. Format for Draft Recommendation to the SG Regarding Petitions for *Certiorari*

<p><u>TIME LIMITS</u></p> <p>Indicate the date the petition for writ of <i>certiorari</i> must be filed with the Supreme Court.</p> <p><u>RECOMMENDATION</u></p> <p>State the recommendation for a petition for <i>certiorari</i>.</p> <p><u>QUESTION PRESENTED</u></p> <p>State the question presented as it would appear in an appellate brief.</p> <p><u>STATEMENT</u></p> <p>Give a brief statement of the pertinent facts. This should ordinarily be no more than a one-page statement of the basic facts of the case.</p> <p><u>DISCUSSION</u></p> <p>Give the reasoning supporting your recommendation. This section should be concise. The length will depend on the nature of the issues. Analysis of the following criteria should be included in the recommendation:</p> <ul style="list-style-type: none">a. How the results of this action materially affect the Military Service or DoD Component in particular and the operation and administration of DoD in general.b. Why, specifically, DoD and the Solicitor General should spend time and resources on this case.c. Why a change in the underlying statute, Manual for Courts-Martial provision, or regulation would not better serve the interests of DoD or the particular Military Service or DoD Component than Supreme Court review.
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c. Within 25 calendar days following notification of the Supreme Court's grant of *certiorari*, the AGD concerned will 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 will be sent to the JAG concerned; the Director, Office of Litigation Counsel; and the AGDs of the other Military Departments.

4.4. BRIEF ON THE MERITS WITH GOVERNMENT AS RESPONDENT.

a. When the AGD concerned is notified that the Supreme Court has granted *certiorari* in response to a defense petition, the AGD concerned will begin drafting the respondent's brief in coordination with the OSG.

b. Ordinarily, the respondent's brief on the merits must be filed within 30 calendar days after the brief for the petitioner is filed. Accordingly, within 15 calendar days following submission of the petitioner's brief, the AGD concerned will forward a draft respondent's brief to the JAG concerned and, in cases involving covered offenses referred by an Office of Special Trial Counsel, the respective lead special trial counsel, with copies to the Director, Office of Litigation Counsel and the AGDs of the other Military Departments. All recommended modifications or additions to the draft brief will be submitted to the AGD concerned within 3 calendar days after receipt of the draft respondent's brief. Any disagreements that cannot be resolved among the Military Departments will be submitted to the General Counsel of the Department of Defense for decision.

c. Within 20 calendar days following filing of the petitioner's brief, the AGD concerned will forward the final draft of the respondent's brief to the OSG for review, printing, and submission to the Supreme Court. Copies of the draft respondent's brief will be sent to the JAG concerned; the Director, Office of Litigation Counsel; and the AGDs of the other Military Departments.

4.5. ORAL ARGUMENT BEFORE THE SUPREME COURT.

a. Within 5 calendar days following filing of the respondent's brief, the AGD concerned will notify the JAG concerned; the Director, Office of Litigation Counsel; and the AGDs of the other Military Departments if it intends to request that the OSG authorize the AGD concerned to represent the U.S. Government in oral argument before the Supreme Court, pursuant to Section 870(b) of Title 10, United States Code. Should one or more of the other Military Departments object to the request, that objection will be forwarded to the Director, Office of Litigation Counsel within 2 calendar days, with copies provided to the AGDs of the other Military Departments.

b. Within 10 calendar days following filing of the respondent's brief, the AGD concerned will submit a written request to the OSG that the AGD concerned be authorized to represent the U.S. Government in oral argument before the Supreme Court.

GLOSSARY

G.1. ACRONYMS.

ACRONYM	MEANING
AGD	appellate government division
CAAF	Court of Appeals for the Armed Forces
CCA	Court of Criminal Appeals
DoD OGC	Office of the General Counsel of the Department of Defense
IG DoD	Inspector General of the Department of Defense
JAG	judge advocate general
OSG	Office of the Solicitor General
SG	solicitor general

G.2. DEFINITIONS.

These terms and their definitions are for the purpose of this issuance.

TERM	DEFINITION
<i>amicus curiae</i>	A non-party who acts as a “friend of the court” by bringing to the court’s attention relevant factual or legal information to aid the court in deciding a matter pending before it.
<i>certiorari</i>	The writ that the Supreme Court may issue in its discretion to a lower court, including the CAAF, to review its judgment for legal error where no appeal is available as a matter of right.
senior official	An official whose appointment requires the advice and consent of the Senate.

REFERENCES

- DoD Directive 5145.01, “General Counsel of the Department of Defense (GC DoD),”
December 2, 2013, as amended
- DoD Instruction 7050.05, “Coordination of Remedies for Fraud and Corruption Related to
Procurement Activities,” May 12, 2014, as amended
- Manual for Courts-Martial, United States, current edition
- United States Code, Title 5, Chapter 4 (also known as the “Inspector General Act of 1978,” as
amended)
- United States Code, Title 10
- United States Court of Appeals for the Armed Forces, “Rules of Practice and Procedure for the
United States Court of Appeals for the Armed Forces,” current edition