



GENERAL COUNSEL OF THE DEPARTMENT OF THE ARMY
104 ARMY PENTAGON
WASHINGTON DC 20310-0104



5 MAY 2003

MEMORANDUM FOR

THE JUDGE ADVOCATE GENERAL
CHIEF COUNSEL, US ARMY CORPS OF ENGINEERS
COMMAND COUNSEL, ARMY MATERIEL COMMAND

SUBJECT: Legal Opinion - Legal Function as an Inherently Governmental Function

As Chief Legal Officer of the Department of the Army, (10 USC § 3019) I am issuing this formal legal opinion. I have concluded that, as a matter of law, the function of providing legal advice to government decision makers in the Department of the Army is Inherently Governmental in nature.

This legal conclusion is based on a series of statutes, regulations and written opinions holding that the rendering of legal advice to government officials is a unique government function. A significant line of Department of Justice opinions stands for three clear propositions: First, absent a *specific* Congressional statement to the contrary, US law provides only Government lawyers may provide legal advice to Government officials. Second, only Government lawyers may process administrative claims pending before any agency. Third, only Government lawyers may litigate on behalf of the United States.

An opinion issued by (then) Assistant Attorney General Antonin Scalia to the General Counsel of the Department of Defense, dated March 26, 1975, addressed the specific issue of whether the Department of the Navy could hire outside counsel to assist in processing contract claims pending with the Department. The Office of Legal Counsel (OLC) concluded that the Navy had no such authority. The opinion noted the language of 28 USC § 514:

When the head of an executive department or agency is of the opinion that the interests of the United States require the service of counsel on the examination of any witness concerning any claim, or on the legal investigation of any claim, pending in the department or agency, he shall notify the Attorney General, giving all facts necessary to enable him to furnish proper professional service in attending the examination or making the investigation and the Attorney General shall provide for the service.

The opinion added that this applied not just to a narrow interpretation of the word "claim" relating to pending litigation, but to administrative proceedings pending in the several departments." The opinion concluded that if a matter exceeded the capability of

the Navy General Counsel, the solution was to refer the matter to the Attorney General, who alone has the authority to hire outside counsel.

The 1975 opinion was cited extensively in a later OLC opinion related to the provision of litigation support services. That opinion from (then) Assistant Attorney General Theodore Olson notes that the law "...forbids the employment of outside counsel by executive agencies for litigation involving the United States unless Congress has provided otherwise, requiring instead that the matter be referred to the Department of Justice." 6 Op. O.L.C. 47, 52 (1982). The opinion continues, noting that, although the language of 5 USC §3106 "appears to limit the prohibition of payment to outside counsel for litigation, and litigation related matters...the prohibition should be broadly interpreted to preclude payments to non-agency or non-Justice Department attorneys for (legal) *advisory functions* as well." *Id.* (Emphasis added).

The remaining opinion (unpublished) was issued in response to an unnamed agency's question to the DOJ OLC whether the agency had any authority to hire outside counsel for the purpose of providing advice in a particular matter. The opinion concluded that the agency was clearly prohibited from hiring outside counsel to provide such advice. The opinion noted the agency could hire an outside consultant, who was also a lawyer, who could repeat previous government legal advice as part of a consulting report. That consultant could not, however, render novel legal advice, but could assist the agency in operating within those laws as previously interpreted by Government attorneys.

I find that the OLC opinions and the statutes they interpret are broad and unambiguous in their conclusions. The opinions have carefully distinguished the provision of authoritative and precedent setting legal advice from the summarization of legal advice, previously given by Government lawyers, in reports by outside consultants. Thus a consultant may report on previously issued advice, but is barred from providing authoritative and precedent setting advice. Absent a specific statutory statement by Congress to the contrary, I am of the opinion that the law precludes hiring outside counsel without the permission of the Attorney General.

It has been suggested that the following language from Office of Federal Procurement Policy Letter 92-1 establishes a benchmark that makes legal advice not inherently governmental. "The following list is of services and actions that are not considered to be inherently governmental functions... [c]ontractors' providing legal advice and interpretations of regulations and statutes to Government officials." OFPP Letter 92-1, Appendix B. This conclusion, however, is unwarranted. First, OFPP 92-1 specifically states " ...this policy letter does not purport to specify which functions are, as a *legal matter* [emphasis added], inherently governmental, or to define the factors used in making such legal determination." OFPP Letter 92-1, para 4. Second, the letter states "[I]ts purpose is to assist Executive Branch officers and employees *in avoiding* [emphasis added] an unacceptable transfer of official responsibility to Government

contractors." OFPP Letter 92-1, para 1. Paragraph 5 of the letter (later codified almost verbatim in the Federal Activities Inventory Reform Act) states:

An Inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as to:

- (a) bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;
- (b) determine, protect, and advance its economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;
- (c) significantly affect the life, liberty, or property of private persons;
- (d) commission, appoint, direct, or control officers of employees of the United States; or
- (e) exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or disbursement of appropriated and other Federal funds.

The provision of legal advice includes actions in all five of the listed categories. Legal advice to Government officials generally is based upon an initial analysis of the applicable laws relating to the Department function in question. Rendering legal advice always includes review of the statute, decision, regulation or policy in question and the application of the law to the proposed course of action. The actions of any federal agency are inextricably bound up in the interpretation of, and application of, law to agency missions. Proposed actions of agencies, the pursuit of agency positions in civil and criminal proceedings, agency actions impacting on citizens, appointments of employees and officials, and the acquisition of services are all closely regulated by law. The final agency position is, in many ways, firmly delineated by law. The OFPP 92-1 statement that contractors may provide legal advice must be read in concert with the previously published OLC legal opinion and thus is limited by those opinions. Authoritative and precedent setting legal advice, litigation support and claims processing can only be accomplished by Government lawyers.

Therefore, instead of announcing a new government policy, the OFPP letter merely acknowledged existing law as discussed in the cited OLC opinions.

I also recognize in this opinion, the special role that an Army Lawyer has to both the employer and client, The Army. The Army Lawyer – whether civilian or uniformed - has a special duty towards The Army as both employer and client when representing the interests of The Army. Army Rule of Professional Responsibility 1.13 states "an Army Lawyer represents the Department of the Army acting through its authorized agents." In his opinion discussing the special role of the Attorney General to the United States as a whole, (then) Assistant Attorney General Olson noted "unlike the private attorney, the Attorney General does not have the option of withdrawing altogether from

the representation of client agencies, as long as the interests of the United States for which he is held responsible are at stake." 6 Op. O.L.C. 47, 55. The same is true in general of Army Lawyers. An Army Lawyer is bound to the client in a special relationship that transcends contract or even an attorney-client relationship between attorneys and private clients or corporate entities. Thus the legal advice of Army Lawyers is uniquely and inextricably tied to the execution of the mission of the Army.

For all of the foregoing reasons, I conclude that, as a matter of law, the provision of legal advice to Army officials exercising agency discretion is "inherently governmental."

I am aware that certain services relating to unique or specific narrow legal issues have been out-sourced in the past. Instances may occur in the future where outside assistance may be necessary and appropriate when expertise is not available within the Army legal community. Because the General Counsel is responsible for provision of legal services, any request for out-sourcing must be forwarded to the Office of the General Counsel for consideration. If outside counsel is required, and appropriate, I will make necessary coordination with the Department of Defense General Counsel to seek the approval of the Attorney General of the United States on the request.



Steven J. Morello

CF:
Secretary of the Army
Assistant Secretary of the Army
(Manpower and Reserve Affairs)
General Counsel, Department of Defense