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The Navy's Civilian Lawyers

The Honorable Robert J. Sander & Abram Burnett

9.0--Miscellaneous

*There is a debt of service due from every man to his country,
proportioned to the bounties which nature and fortune have measured to him.*
~Thomas Jefferson¹

I am honored to serve as the 23rd General Counsel of the Department of the Navy (DON), the Chief Legal Officer and head of the Office of the General Counsel (OGC).² In this position, I lead a global law firm of over 1,100 civilian attorneys and professional support staff providing legal advice to Navy and Marine Corps clients from nearly 150 locations around the world. My experience both as the Army's Principal Deputy General Counsel and as a member of the U. S. Army Reserves Judge Advocate General's (JAG) Corps has helped immensely in understanding client issues and bridging the gap between mission objectives and the legal requirements for meeting those objectives. Many of my colleagues throughout the Department of Defense Legal

¹ Letter from Thomas Jefferson, U.S. Vice-President Elect, to Edward Rutledge, Member of Electoral College and South Carolina Senate (Dec. 27, 1796), available at www.founders.archives.gov/documents/Jefferson/01-29-02-0189. The opinions expressed in this article are the authors' own and do not necessarily represent the views of the Department of Defense or its components, to include the Departments of the Navy and Army.

² Robert J. Sander was sworn into office on January 6, 2020, as the 23rd General Counsel of the Department of the Navy after his confirmation by the U.S. Senate on December 19, 2019. From June through December 2019, Mr. Sander served as the Senior Official Performing the Duties of the General Counsel of the Army. Prior to that, he served as the Principal Deputy General Counsel of the Department of the Army. During his time with the Army Office of General Counsel, Mr. Sander's duties included providing legal and policy advice to the Secretary of the Army, the Army Secretariat, and other Senior Army leaders. Prior to becoming Principal Deputy General Counsel of the Army, Mr. Sander performed a detail to the Office of the Director of National Intelligence Office of General Counsel. From 2010 to 2019, Mr. Sander worked as a Federal prosecutor in the U.S. Department of Justice, National Security Division, Counterterrorism Section. Previously, Mr. Sander served as the Chief of the Economic Crimes Unit and the Captain of the Narcotics Enforcement Team in the Montgomery County, Pennsylvania, District Attorney's Office. Mr. Sander also served as a Special Assistant United States Attorney for the Eastern District of Pennsylvania. In his military capacity, Mr. Sander is a Lieutenant Colonel in the U.S. Army Reserve Judge Advocate General's Corps, where he serves as a Senior Legal Advisor for the Network Enterprise Technology Command and the U.S. Army Intelligence Center of Excellence at Fort Huachuca, Arizona. Mr. Sander also currently serves an Adjunct Professor at the National Intelligence University in Bethesda, Maryland. Mr. Sander previously deployed to Djibouti, Africa for 13 months as the Acting/Deputy Staff Judge Advocate for the Combined Joint Task Force-Horn of Africa, and was deployed for six months in support of Operations Enduring and Iraqi Freedom, where he served as Trial Counsel for V Corps in Darmstadt, Germany. Mr. Sander received his Juris Doctor Degree from the Widener University School of Law, where he was a member of Law Review for the Delaware Journal of Corporate Law and a member of the Student Bar Association. Mr. Sander also has a Master of Science of Strategic Intelligence Degree from the National Intelligence University and a Bachelor of Business Administration Degree in Finance from Temple University.

Mr. Burnett is a DON OGC attorney currently assigned to the Naval Supply Systems Command.

Community agree, and have seen that a civilian career with organizations like the DON OGC is conducive to and, in many ways symbiotic with, their military reserve duties.

A Brief History of DON OGC

When people learn that I am the top lawyer for the Department of the Navy, I inevitably am met with a look of surprise. There is often disbelief or lack of understanding that CDR Harm Rabb or Lt. Col. Sara Mackenzie has not been promoted to the Flag or General Officer Ranks and has been providing the Navy and Marine Corps with legal advice ever since “JAG” went off the air. After explaining that Hollywood doesn’t always follow reality, people are pleased to learn that the civilian attorneys and support staff within DON OGC rival in both number and talent some of the world’s biggest and best law firms. And I get puzzled stares when I discuss how OGC lawyers, along with our brethren within the Navy Judge Advocate General’s Corps and Marine Judge Advocates, are called upon by the most senior levels of the Navy and Marine Corps leadership to provide timely, expert advice on often fast-paced and complex matters. Why, I am asked, are civilians handling such important issues rather than Navy or Marine Corps judge advocates? After all, for more than a century judge advocates have stood as the preeminent legal advisors to our military leaders. The answer may have something to do with the history of the DON General Counsel’s Office.

The DON’s reliance on civilian attorneys has a long and fabled history that dovetails with our military counterparts, which we affectionately call the “Navy and Marine Corps Legal Family.” The first use of a civilian lawyer within the Navy harkens back to the era of the United States Civil War, when the Union built-up its maritime presence with ships used for supplying positions, blockading ports, and bombarding Confederate outposts. In the early 1860s, the then-Secretary of the Navy hired private brokers for the negotiation and procurement of vessels, paying them a percentage of the purchase price of these ships and boats as a commission for their services.³ As one may surmise, some of the contracts written for these ships were lacking in quality and tinged with corruption.⁴ At the time, Congressional and public outcry resulted in the appointment of a solicitor to oversee the DON’s commercial practices.⁵ That civilian lawyer was an Assistant United States Attorney for the District of Columbia and later became dual-hatted, acting as a civilian judge advocate in courts-martial while also trying fraudulent contracts cases.⁶

³ See *Purchases for the Navy*, NY TIMES, Jan. 17, 1862, at 2, available at <https://www.nytimes.com/1862/01/17/archives/purchases-for-the-navy-the-answer-of-secretary-welles-to-the.html>; see also Stephen B. Oates, *Abraham Lincoln (1861-1865)*, in *PRESIDENTIAL MISCONDUCT: FROM GEORGE WASHINGTON TO TODAY* 105, 109-110 (James M. Banner, Jr. ed., 2019).

⁴ See Oates, *supra* note 3, at 105; see also John Barnhill, *American Civil War*, in *1 ENCYCLOPEDIA OF WHITE-COLLAR & CORPORATE CRIME* 27, 27-28 (Lawrence M. Salinger ed., 2005); Memorandum from Navy Dep’t Bureau of Supplies & Accounts to Sec’y of Navy (Mar. 31, 1920), reprinted in *2 NAVAL INVESTIGATIONS: HEARINGS BEFORE THE SUBCOMMITTEE OF THE COMMITTEE ON NAVAL AFFAIRS*, 66TH CONG., SESS. 2, at 2348 (1921).

⁵ See BUREAU OF NAVAL PERS., NAVPERS 10843-A, ORG. & FUNCTIONS OF THE OFFICE OF THE JUDGE ADVOCATE GEN. 2 (1961).

⁶ See Homer A. Walkup, *Lawyers for & of the Navy*, THE JUDGE ADVOCATE JOURNAL BICENTENNIAL ISSUE 29, 32 (1976); see also NAVPERS 10843-A, *supra* note 5, at 2.

By the end of the Civil War in 1865, Congress had authorized the President to appoint a Solicitor and Naval Judge Advocate.⁷ From this action the Navy Judge Advocate General's Corps claims its beginnings and proud heritage.⁸ Over the next 75 years, representation of the DON's "business" side of the house was a responsibility that ping-ponged between judge advocates, the Department of Justice, and various solicitor positions.⁹ However, because the primary focus of the judge advocate has historically been military justice, the need for lawyers trained in commercial law became evident whenever the DON went through a purchasing or procurement surge. Seeking out the advice of civilian attorneys for DON matters was a fitful experience. In the years leading up to both World Wars, the DON increased its reliance on these lawyers to assist with purchasing and contracting in the burgeoning shipbuilding industry.

By the late 1930s, with the drums of war beating in both Europe and Asia, the United States became increasingly alarmed that it might soon face enemies on two fronts. The Second Vinson Act¹⁰ and Naval Expansion Acts¹¹ marked the kick-starting of America's war machine and ushered in the modernization of what was, at the time, a mothballed Navy.¹² With these Acts came an influx of funding for new ships, planes, armaments, munitions plants, and bases, each requiring contracting with private vendors. Once formulaic, fill-in-the-blank contracts were no longer sufficient for the government's emerging requirements, and tax incentives for companies doing business with the government carried with them forests of legal paperwork. As the saying goes, necessity is the mother of invention, and the need for attorneys versed in commercial practices soon became evident.

Much as General "Wild Bill" Donavan turned to Wall Street in founding the Office of Strategic Services, which later became the CIA, so too the then-Secretary of the Navy looked to the major law firms of New York and other cities for civilian attorneys who would later become the plank owners of DON OGC. Heeding the call to duty, a handful of dedicated and patriotic attorneys came onboard, taking substantial pay cuts for the privilege of public service. They brought with them significant contract law experience, business savvy, and negotiation skills, all honed after

⁷ See Act to Establish the Office of Solicitor and Naval Judge Advocate, 38th Cong., Sess. 2, Ch. 76, 77, 13 Stat. 468 (1865); see also Act to Authorize the President to Appoint an Officer of the Navy or the Marine Corps to Perform the Duties of Solicitor and Judge-Advocate-General, 46th Cong., Sess. 2, 21 Stat. 164 (1880) (reauthorizing position of Navy Judge Advocate-General, which had lapsed).

⁸ See, e.g., NAVY JAG HISTORY, <https://www.jag.navy.mil/history.htm> (last visited June 9, 2020). The JAG Corps was formally established in 1967. See Pub. L. 90-179, § 2(1), 81 Stat. 546 (1967).

⁹ See MEMORANDUM FROM DEP'T OF DEF. GEN. COUNSEL TO CHAIRMAN, AD HOC COMM. ON CODIFICATION (May 31, 1956) *published in* Hearing of Subcommittee on the Judiciary on HR 7049, 84th Cong., Sess. 2, Senate 52-56 (June 1, 1956) (outlining history of Navy's use of civilian lawyers); see also NAVPERS 10843-A, *supra* note 5, at 2-5.

¹⁰ See Act to Establish the Composition of the United States Navy, Pub. L. 75-528, 52 Stat. 401 (1938).

¹¹ See Naval Expansion Act of June 14, 1940, Pub. L. 76-629, 54 Stat. 394 (1940); Naval Expansion Act of July 19, 1940, Pub. L. 76-757, 54 Stat. 779 (1940).

¹² See SEN. DAVID I. WALSH, THE DECLINE AND RENAISSANCE OF THE NAVY 1922-1944, 78th Cong., Sess. 2, S. Doc. No. 202 (1944), available at <http://www.ibiblio.org/pha/USN/77-2s202.html>.

decades of working with major corporations. So it was that, in July 1941, DON OGC was born in the shadows of a looming Second World War.¹³

Today's DON OGC

Almost 80 years later, OGC has grown from a handful of big city lawyers to over 1,100 legal professionals from all walks of life, including many who found OGC in their transition from active military duty to civilian service. Reviewing DON contracts still makes up a large portion of OGC business, but the legal portfolio has expanded to cover a plethora of other practice areas, including ethics and standards of conduct, litigation, employment and labor law, real estate law, patents and intellectual property rights, environmental law, Freedom of Information Act and Privacy Act law, intelligence and national security law, fiscal law, cyber security issues, legislative affairs, and arms control/foreign military sales. OGC attorneys support a client portfolio of almost \$200 billion, defend litigation involving over \$15 billion annually, and practice before various administrative boards, including the Armed Services Board of Contract Appeals, the Government Accountability Office, the Equal Employment Opportunity Commission, and the Merit Systems Protection Board. In federal courts, OGC attorneys team up with Justice Department Attorneys to represent the Government and provide support throughout the entire case.

The same call to duty that summoned our Sailors, Marines, Soldiers, Airmen, and Coastguardsmen to proudly wear our nation's uniform has been heard by many of the civilians working in OGC. In fact, fully 39% of the OGC workforce has prior military service, and many still currently don the uniform via their reserve capacity for each of the services.

Katie Dang, who is an OGC attorney with the Naval Supply Systems Command (NAVSUP) Weapon Systems Support in Mechanicsburg, Pennsylvania, is currently serving on a six-month mobilization as a judge advocate at the US Army War College in Carlisle, Pennsylvania. When asked to compare her civilian and military careers, Maj. Dang expressed a deep sense of pride in working for OGC. "DON OGC is one of the most cohesive operations within the DoD. No matter which command attorneys serve with, the commonality of all belonging to OGC builds instant rapport. I really like my colleagues and feel like that camaraderie is fostered at all levels of OGC." Maj. Dang also explained the sense of confidence that her OGC career has brought to her military practice. "My work as a civilian attorney in the DON has really given me a breadth of experience on legal issues, and with that comes a confidence that I can handle just about

¹³ OGC was originally established as the Navy's "Procurement Legal Division." In 1944, the name was changed to "Office of the General Counsel" to more accurately reflect that the legal services offered were not limited to the Navy's procurement programs. See Walkup, *supra* note 6, at 32.

anything that comes my way. I draw on my DON OGC experiences to help me on the Army reserve side. Likewise, I use my Army leadership experiences to help me on the DON side.”¹⁴

Similarly, for the last 10 years Jim Gross, who is an OGC attorney with NAVSUP Fleet Logistics Center (FLC) in Norfolk, Virginia, has served as a lieutenant colonel in the Air Force Reserve, Judge Advocate General Corps. When asked about his experiences with OGC, he replied, “I can’t say enough good things about this job. Most of what I do in my reserve capacity as a JAG is advise and give guidance to commanders, 90% of which is on good order and discipline or command-type issues. I do the same thing working for OGC—advise and give guidance—but on other issues, like ethics, fiscal law, and on procurements.”¹⁵ Lt. Col. Gross also explained that, following eight years of active duty, he worked in private practice before joining OGC and finds it much easier to meet his reserve commitments as a DON attorney.

DON OGC has plenty of Marine reservists within its ranks as well. Kevin Lyster, a lieutenant colonel Judge Advocate in the Marine Corps Reserve, believes that he has “the best of both worlds” working as a civilian attorney for OGC at the NAVSUP FLC in San Diego, California, and as a military attorney for the Marines.¹⁶ “It’s great to keep a foot in the military game, and working for OGC allows me to do that.” Lt. Col. Lyster described working for OGC and the Marine Corps as having two, concurrent careers. He pointed out that one of the benefits to OGC having nearly 150 offices around the world is that reservists rarely have a problem finding a unit to fulfill their reserve commitments. “I work in San Diego, which is a huge military town. Every other Monday I put on my uniform and drive to Miramar for my reserve duty, working on the 3rd Marine Aircraft Wing staff advising on criminal and operational issues. The next day I’m at a desk in my OGC office, working with DON senior leaders and advising on ethics, personnel, and contracts issues.”

As pointed out by Maj. Dang, Lt. Col. Gross, and Lt. Col. Lyster, the practice areas for judge advocates and OGC attorneys are different, but complimentary and not mutually exclusive. I maintain a close working relationship with both the Judge Advocate General of the Navy and the Staff Judge Advocate to the Commandant of the Marine Corps. They are my partners in our “Navy and Marine Corps Legal Family” where we engage on issues that bisect our respective jurisdictions. One such area is ethics, which in recent years has been at the forefront of that list due to lapses in ethical judgment by members of the military. We may go through changes in leadership and changes in mission focus, but our dedication to supporting and enforcing the

¹⁴ Telephone Interview by Abram Burnett with Katie Dang, Assistant Counsel, Navy Office of the General Counsel (May 11, 2020); *see also* E-mail from Katie Dang, Assistant Counsel, Navy Office of the General Counsel to Abram Burnett (May 13, 2020, 14:38 EST) (on file with the author).

¹⁵ Telephone Interview by Abram Burnett with James Gross, Assistant Counsel, Navy Office of the General Counsel (May 11, 2020); *see also* E-mail from James Gross, Assistant Counsel, Navy Office of the General Counsel to Abram Burnett (May 12, 2020, 13:26 EST) (on file with the author).

¹⁶ Telephone Interview by Abram Burnett with Kevin Lyster, Assistant Counsel, Navy Office of the General Counsel (May 11, 2020); *see also* E-mail from Kevin Lyster, Assistant Counsel, Navy Office of the General Counsel to Abram Burnett (May 12, 2020, 13:23 EST) (on file with the author).

ethical conduct of our Sailors, Marines, and Civilians is the one constant. To paraphrase D.H. Lawrence, ethics does not change with the calendar.

In addition to being the DON General Counsel, I am also dual hatted as the DON’s “Designated Agency Ethics Official,”¹⁷ which means that I am responsible for the entire DON’s ethics program which, among other things, prevents conflicts of interest in order to maintain the public’s trust. It is my job to ensure that all DON personnel properly understand and follow all ethics laws and regulations. We strive for perfection when it comes to training and enforcing ethics in our service to this nation; the American people deserve nothing less. I emphasize values-based decision-making rather than merely complying with minimum rules, and reinforce the expectation that DON personnel act with integrity and walk the “ethical midfield” on every step and every action taken. I also emphasize ethical leadership from the top down, and urge senior leaders to take ownership of the ethical climate within their commands. Only by demanding the best from ourselves and our colleagues can we maintain the highest professional standards. And by sowing the seeds of integrity throughout our organization, we are able to foster and cultivate an adherence to one of the most important aspects of our government service and reaffirm our devotion to a culture of ethical conduct.

The Future of DON OGC

DON OGC is a well-kept secret in the legal community, but offers unique opportunities and mission. With a rich history and a career path that surpasses those of private practice, it is as rewarding as it is challenging. It is also very much conducive to those civilian attorneys with military reserve obligations. To those legal professionals, including my fellow reservists, who are up for the challenge and want continue their service to this great country in a civilian role, I encourage you to apply for a career with DON OGC.

¹⁷ The Ethics in Government Act, 5 U.S.C. App. §§ 101 *et seq.*, requires that the head of each agency designate an ethics official to administer the agency’s ethics program. *See id.* § 402. For the Department of Defense, the General Counsel of each military department is its ethics official. *See* U.S. DEP’T OF DEF., DIR. 5500.07, STANDARDS OF CONDUCT para. 5.4 (Nov. 29, 2007).