

# CRS Report for Congress

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## Generals and Flag Officers: Senior Military Officer Confirmations

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### Summary

This report describes the Department of Defense (DOD) process which discloses to the Senate adverse information about senior military officers awaiting confirmation of a General or Flag Officer (GFO) personnel action, such as a promotion or appointment. It also describes the DOD mechanism used to investigate administrative or criminal misconduct of Generals and Flag Officers (Admirals). Finally, the report analyzes trends in the way the Senate scrutinizes senior military leaders during the confirmation process, especially if these leaders failed to promote a proper leadership climate in the organizations they commanded. This report will be updated, as needed.<sup>1</sup>

### Senate Confirmation of Senior Military Officers

The role of the Senate in confirming senior military officer promotions and appointments stems directly from the U.S. Constitution. Article II, Section 2 of the U.S. Constitution states that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other Public Ministers and Counsels, Judges of the Supreme Court, and all Other Officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law.” Generals and Flag Officers (Admirals), fall into the category of “all Other Officers of the United States” and require Senate confirmation. Other military officers also require Senate confirmation, but this report, will focus on the process for the military’s highest ranking leaders — one-star through four-star officers.<sup>2</sup>

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<sup>1</sup> This report was prepared under the supervision of Edward Bruner, CRS Foreign Affairs, Defense, and Trade Division.

<sup>2</sup> General Officers are the highest ranking military leaders in the Army, Air Force, and Marine Corps. The Navy’s highest ranking military leaders are called Flag Officers.

Since the early 1990s, the Senate has become increasingly vigilant in examining senior military officer misconduct and ensuring that the nominees they confirm meet the highest standard of accountability. During the mid-1990s, numerous hearings and debates ensued about the suitability for promotion of many senior military officers. A heightening of Senate scrutiny can be traced to notable confirmation cases which included the following: In 1992, the Senate Armed Services Committee (SASC) vote to *not* award Thomas J. Hickey the retirement rank of Air Force Lieutenant General due to his failure to implement key directives to solidify the integrity of the Air Force promotion selection process;<sup>3</sup> in 1994, the debate over the retirement grade of Air Force Lieutenant General Buster C. Glosson, who was accused of improperly attempting to prejudice a promotion board;<sup>4</sup> and in 1994, the controversy over the retirement rank of Navy Admiral Frank B. Kelso II, because of his alleged responsibility for the Tailhook Convention scandal<sup>5</sup> in 1991 and a perceived lack of effort to integrate women into the Navy.<sup>6</sup>

Today, Senate scrutiny of the leadership accountability of senior military officers remains vigorous. During the March 2003 hearings regarding the sexual assault scandal at the U.S. Air Force Academy, Senator John W. Warner noted that the situation “demand(s) a deliberate critical examination and appropriate measure of accountability when a command fails in some key aspect of its mission, particularly when personnel charged to a commander’s care have been harmed”.<sup>7</sup> This comment and other similar statements made by Senators may be a signal that a new standard of accountability may continue to take shape in the Senate in the coming years. The key to this new standard may be the striking of a balance between congressional oversight, the Senate role to “advise and consent,” and DOD transparency in disclosing senior military officer adverse information during the confirmation process.

## DOD Policy and Terms

During the confirmation process, it is DOD policy to inform the President and the SASC of adverse information concerning the nominated senior military officers. Personnel actions involving General and Flag Officers that require Senate confirmation include nominations, appointments, reappointments, extensions, assignments, reassignments, promotions, and retirements. DOD Instruction 1320.4 describes the procedures used to process these personnel actions. To comprehend these procedures, it may help to understand two terms defined by the instruction:

**Adverse Information:** Any substantiated adverse finding or conclusion from an officially documented investigation or inquiry.

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<sup>3</sup> West, Joe. “Hickey is Denied 3<sup>rd</sup> Star,” *Air Force Times*, October 19, 1992, p. 6.

<sup>4</sup> Towell, Pat; “Air Force Generals Promoted Despite Flak From Senator,” *Congressional Quarterly Weekly Report*, October 15, 1994, p 2968.

<sup>5</sup> The 1991 Tailhook Convention scandal in Nevada begot a string of investigations after numerous allegations of “lewd and crude” conduct by Navy military aviators were reported.

<sup>6</sup> Pexton, Patrick, *Four Stars for Adm. Kelso*, *Navy Times*, May 2, 1994, p 3.

<sup>7</sup> US Newswire, Washington, *Senate Armed Services Committee Poised to Act on Nomination of Major General Robert T. Clark*, May 13, 2003.

**Alleged Adverse Information:** Any allegation of conflict of interest, failure to adhere to required standards of conduct, abuse of authority, misconduct or information serving as the basis for an incomplete or unresolved official investigation or inquiry into a possible conflict of interest or failure to adhere to standards of conduct or misconduct.

It is also helpful to understand the difference between promotions and appointments. In general, military officers are selected for promotion to one- or two-star rank by a centralized ad hoc selection board of general/flag officers. Candidates for three- and four-star appointments are not considered by a centralized board, but instead nominated by a Service Secretary through the Secretary of Defense. For reappointments to another three- or four-star position, the Senate is required to reconfirm the personnel action, even if no promotion is involved. According to Title 10, Section 1370 of the United States Code, GFO retirements must also be individually confirmed by the Senate.

## Consideration of Adverse Information

DOD Instruction 1320.4 identifies how *adverse information* is considered by board members during one- and two-star centralized promotion boards. Section 615, Title 10, U.S. Code, Armed Forces, closely governs the procedures used by the military to consider adverse information during the promotion process by giving specific guidance on the type of information that may be furnished to board members. Specifically, information about a particular officer may be furnished to a selection board only if the information exists in official military records (personnel folders, investigative records, etc.). Additionally, it must be determined by a Service Secretary to be “substantiated, relevant information” that could “reasonably and materially affect the deliberations” of the selection board. The law also mandates that before adverse information about an officer is furnished to a board, the information must be made available to the officer and that the officer must be given a reasonable opportunity to submit comments to the board.

The DOD instruction also directs that for all GFO promotions and appointments, the Service Secretary review all official DOD investigation records to confirm that each candidate meets prescribed standards of conduct. This internal review is usually led by the General Counsel of the respective military department. Records reviewed by each service include files from the Inspector General, military criminal investigation units, and Equal Employment Opportunity (EEO) organizations. For promotions to one-star, a Service Secretary directs a review of all adverse information covering the last 10 years of an officer’s career to identify negative trends. For two-, three- and four-star personnel actions, the review includes any *new* adverse information since the individual’s last Senate confirmation. Once the review is completed, the Service Secretary considers the adverse information, if any, and decides if he or she will support the nomination. If so, the Secretary will forward a nomination package identifying the proposed promotion or appointment to the Secretary of Defense through the Assistant Secretary of Defense/Force Management Policy (ASD/FMP).

## Nomination Package Certification

According to DODI 1320.4, if the Secretary of Defense supports a senior military officer nomination submitted by a Service Secretary and if no adverse information exists

on the nominee, the Secretary of Defense will endorse the nomination package and forward it to the President with the following certification:

All systems of records, to include EEO files and the Public Disclosure Report (for one-star nominations only), maintained in the DOD that pertain to this officer have been examined. The files contain no adverse information about this officer since his last Senate confirmation. Further, to the best of my knowledge, there is no planned or ongoing investigation or inquiry into matters that constitute alleged adverse information on the part of this officer.

If the Secretary of Defense supports the nomination, but adverse information exists, the Secretary identifies the information in a separate summary included with the nomination package submitted to the President. The summary outlines the adverse information, identifies the investigative agency, discloses findings, describes corrective actions taken, and explains why DOD leaders continue to support the nomination.

## **Reporting Adverse Information to the Senate**

Forty-eight hours after the President signs a nomination list, the White House Clerk will forward the list to the Senate Clerk. DOD Public Affairs will announce a Presidential nomination as soon as possible after Presidential signature and military department coordination. After a nomination reaches the Senate, ASD(FMP) is the primary DOD conduit to discuss adverse information or alleged adverse information with SASC members or staff. But, this does not prohibit the military services from communicating directly with the SASC, or other Senators or staff, about a nomination. If a nomination package signed by the President contains adverse information, ASD(FMP) will send a letter to the Chairman of the SASC, advising him of the information. Normally, DOD will not report *alleged* adverse information or other *unsubstantiated* allegations to the Senate. However, in extraordinary cases involving an allegation, which is receiving significant media attention or when the SASC brings an allegation to the attention of DOD, a summary of the unsubstantiated allegation is provided.

ASD(FMP) also monitors the names on a nomination list to determine if *new* adverse information exists. ASD(FMP) initiates monthly checks with each service and DOD IG on all nominations that have been received by the Senate, but have not yet been confirmed. If, after a nomination reaches the Senate, and adverse information or alleged adverse information is identified by DOD, the cognizant military department will notify ASD(FMP) within 5 business days. ASD(FMP) will advise the SASC of the information and will request that the nomination be held in abeyance until the matter is resolved. When the investigation or inquiry is completed on an officer whose nomination is on hold at the SASC, and the allegation is substantiated, the respective Service Secretary and the Secretary of Defense will decide if they still support the nomination. If support continues, then the nomination package will be resubmitted for re-approval by the President. If the President also continues to support the nomination, then ASD(FMP) will advise the SASC to proceed with the confirmation process. If, on the other hand, based on the new adverse information, the DOD administration does not support the nomination, the Secretary of Defense will submit a new nomination package through ASD(FMP), requesting that the President withdraw the nomination from the SASC. In instances

where the allegation is unsubstantiated, the ASD(FMP) will advise the SASC of the outcome of the investigation or inquiry and request that the nomination process proceed.<sup>8</sup>

## **DOD Investigations and Management of Adverse Information**

DOD's primary investigative mechanism is the Inspector General (IG). Allegations of administrative misconduct are investigated separately from allegations of criminal misconduct. Investigations of *criminal misconduct* are conducted by law enforcement agencies within each service Inspector General office. Criminal misconduct includes, but is not limited to, procurement fraud, computer crimes, bribery and kickbacks, financial crimes, government purchase card crimes, medical fraud, environmental crimes, and theft. There are four Defense Criminal Investigative Organizations (DCIOs) within DOD: The Defense Criminal Investigative Service (DCIS); US Army Criminal Investigation Command (USACIDC); The Naval Criminal Investigative Service (NCIS); and the Air Force Office of Special Investigations (AFOSI).<sup>9</sup>

Conversely, *administrative misconduct* is investigated by an inquiry directorate within the respective service. Examples of administrative misconduct include sexual harassment, improper relationships, abuse of authority, favoritism, and misuse of government property. According to the DOD IG Semiannual Report to Congress, April-September 2003, on September 30, 2003, there were 275 ongoing DOD senior officer investigations (included civilian leaders). During that six-month period, DOD reported that it closed 221 senior official cases, of which 32 (14%) identified misconduct to include: Misuse of government property and resources — 35%, abuse of authority and favoritism — 35%, improper personnel action — 16%, sexual harassment and improper relationship — 7%, and other misconduct — 7%.

## **Future Direction of Senior Military Officer Confirmations**

Some analysts believe senior military officer confirmations will likely continue to receive increased scrutiny by some Members of Congress. Recent hearings and statements suggest a concern in the Senate about the accountability of senior military officers who failed to promote a proper leadership climate in the organizations they commanded. An example is the scrutiny by Senators of the controversial circumstances surrounding the nomination of Major General Robert Clark to a three-star Army position. In 1991, he came under criticism because a soldier thought to be a homosexual was killed at Fort Campbell, Kentucky, during Clark's command. Although an Army investigation cleared Clark of tolerating anti-gay attitudes on the post, critics alleged that while he was in charge of Fort Campbell, he permitted an atmosphere of harassment. In a press release referencing this case, Senator Edward M. Kennedy stated: "We need to hold senior commanders accountable if they allow a climate of bigotry, intimidation and fear to exist

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<sup>8</sup> Department of Defense Instruction, Number 1320.4, *Military Officer Actions Requiring Approval of the Secretary of Defense of the President, or Confirmation by the Senate*, pp. 4-10.

<sup>9</sup> Inspector General of the Department of Defense Semiannual Report to the Congress, April 1, 2003 - September 30, 2003, pp.1-10.

on our nation's military bases".<sup>10</sup> Other recent misconduct cases including the 2003 Air Force Academy sexual assault investigations, also hint that the Senate may be poised to increase the scrutiny of senior military officer accountability during confirmation. The transparency of DOD investigations may continue to be key in this process.

DOD asserts that its investigative mechanism is objective, independent, and promotes confidence in its ability to "police its own." In the September 2003 Semiannual Report to Congress, Joseph E. Schmitz, Inspector General of the Department of Defense, states: "The trust of the American public in their government requires confidence that the institutions of their government are acting in their interest...For 25 years, Inspectors General have sought to promote integrity, efficiency, and effectiveness in the programs and operations of government." This analysis has identified that the DOD disclosure process appears mostly transparent and well defined. If improvements are required or desired, they are administrative in nature. For example, the DOD 10-year "look-back" may require refinement since the scope of the policy may actually be shorter than intended. As previously discussed, the disclosure of adverse information related to one-star nominations involves a review of files ten years back. A problem may stem from current DOD records disposition schedules, in which some services purge IG investigation reports dealing with administrative misconduct after two years (excludes *criminal investigation* files).<sup>11</sup> The investigation reports involving the administrative misconduct are held for ten years only if it involves a senior military officer. As result, a complete ten-year record of past investigations may not be available when compiling a disclosure for the Senate.<sup>12</sup>

Another weakness may exist in the DOD practice of disclosing only *new* adverse information since the last Senate confirmation of a senior military officer. This practice may make it difficult for the Senate to identify misconduct trends or note command climate issues. Additionally, DOD generally does not disclose *unsubstantiated* allegations unless the Secretary of Defense deems it relevant to the deliberations. This practice may prevent the Senate from getting a full disclosure of multiple unsubstantiated allegations and hinder Members from identifying possible negative trends. If the disclosure of adverse trends in the organizational climate of military bases and posts becomes more critical during the Senate confirmation process, the DOD IG Semiannual Report to the Congress is one possible tool that may facilitate transparency into any developing trends. The report currently provides meaningful statistical information concerning senior official inquiries, but may need to present a more rigorous analysis of any developing trends in command climate investigations. The addition of such an analysis to the report may allow Members to conduct confirmation and oversight functions more effectively.

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<sup>10</sup> Statement release from The Office of Senator Edward M. Kennedy on the Nomination of Major General Robert Clark, October 23, 2003, Contract: David Smith, (202) 224-2633.

<sup>11</sup> *Air Force Manual 37-139*, Records Disposition Schedule, March 1, 1996, Table 90-1, p 680.

<sup>12</sup> It is import to note, that all IG investigative reports are at some point destroyed in accordance with the schedules approved by the National Archives and Records Administration; however, the general details of the adverse information contained in those records will likely be reflected in the affected officer's permanent performance record and thus available for consideration by promotion boards when considering the individual for promotion. In this manner, an officer remains accountable for misconduct throughout his entire career.