

**MILITARY COMMAND AUTHORITY:  
Constitutional, Statutory,  
and Regulatory Bases**

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***Program on Information Resources Policy***

Harvard University

Center for Information  
Policy Research

Cambridge, Massachusetts

A publication of the Program on Information Resources Policy.

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Regulatory Bases

Peter P. Wallace

September 1983, P-83-7

Project Director: Anthony G. Oettinger

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Program on Information Resources Policy, Harvard University, 200  
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Printing 5 4 3 2 1

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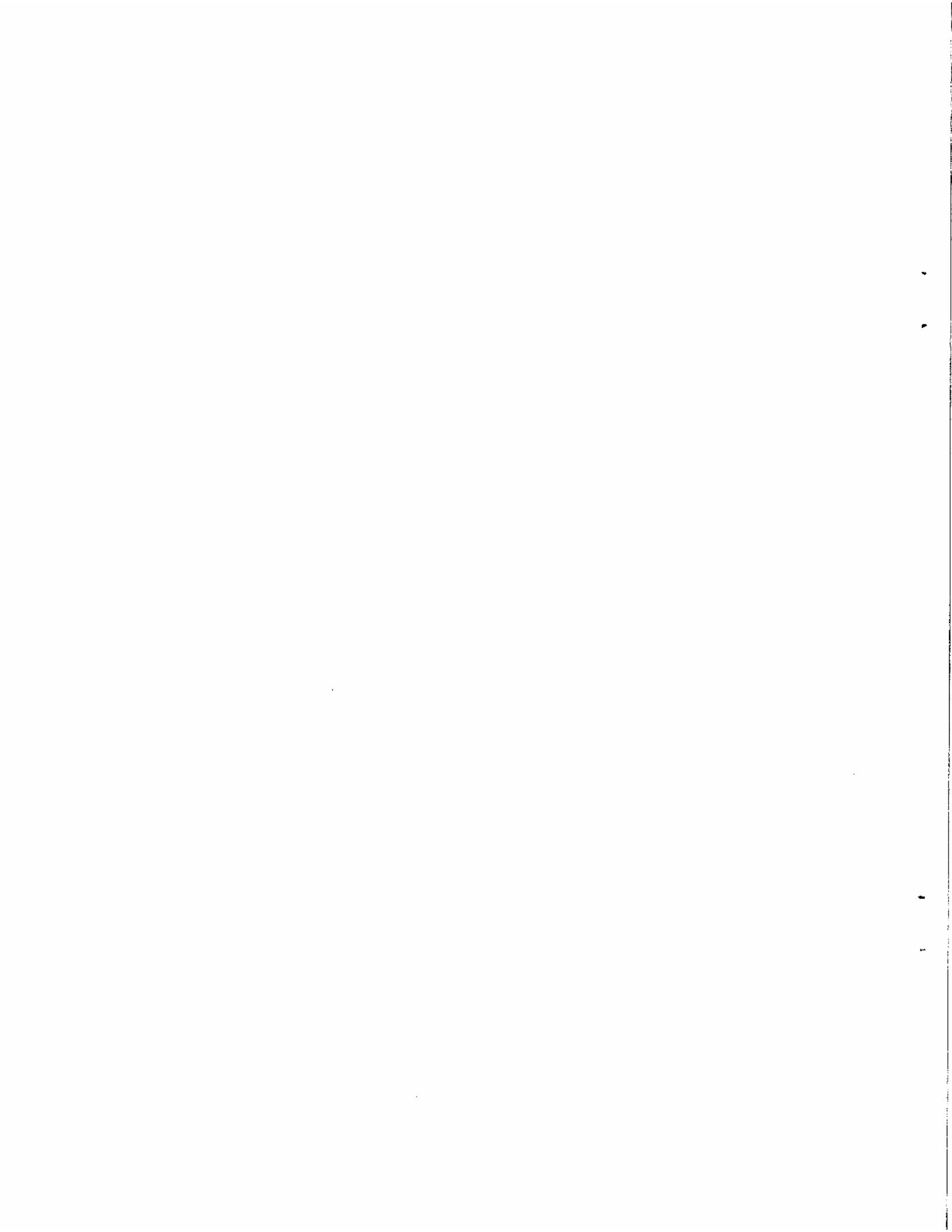
## ACKNOWLEDGMENTS

Special thanks are due to the following persons who reviewed and commented critically on drafts of this report. These reviewers and the Program's affiliates are not, however, responsible for or necessarily in agreement with the views expressed herein, nor should they be blamed for any errors of fact or interpretation.

Mark M. Lowenthal  
John McCloy  
Clark McFadden  
John Roberts  
Isaac Shapiro  
Richard B. Stewart

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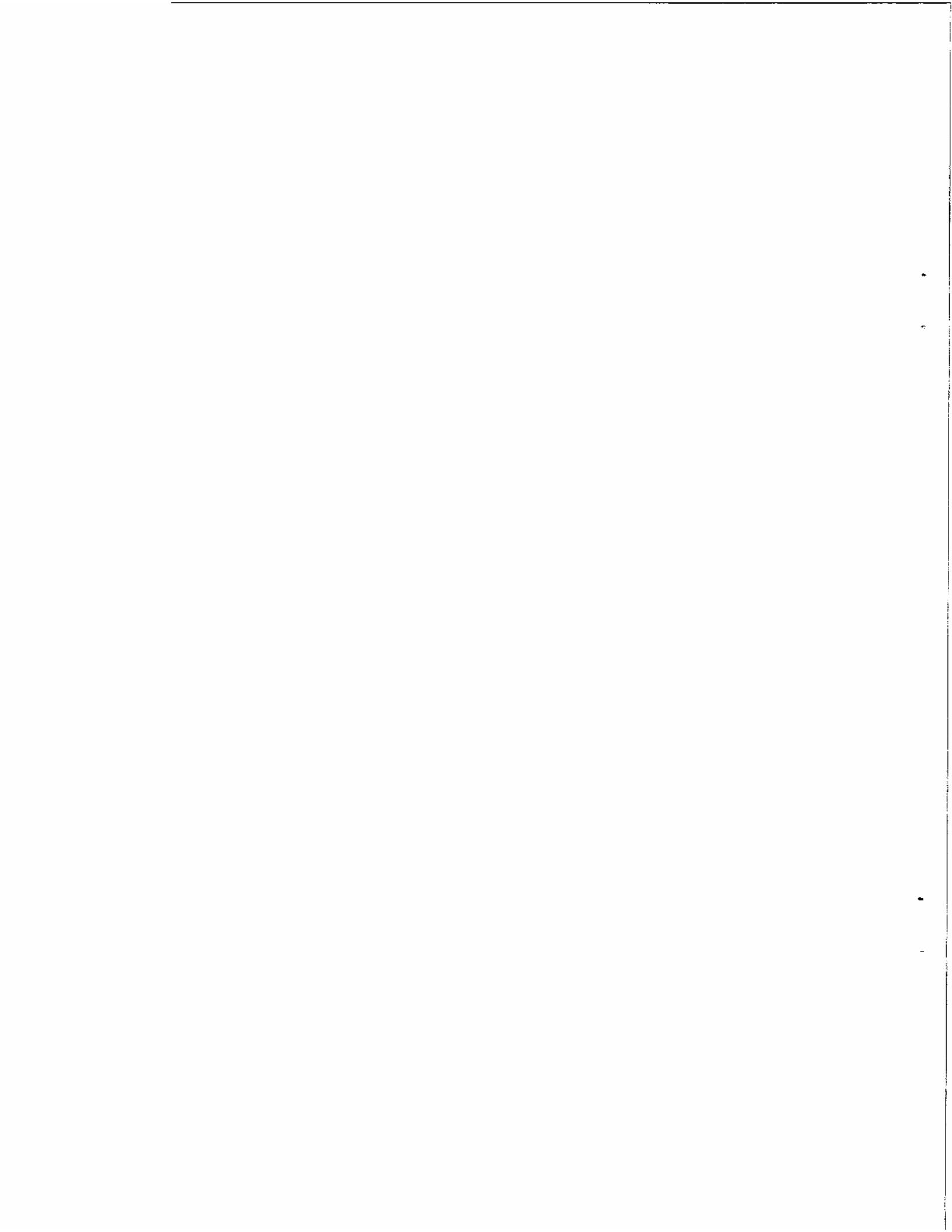
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## EXECUTIVE SUMMARY

WALLACE, PETER P., "Military Command Authority: Constitutional, Statutory, and Regulatory Bases."

- There is no effective unity of command among the Armed Services. Despite Congressional enactments following World War II, the Army, Navy and Air Force have remained essentially separate services even in the so-called Unified Commands.
- Although the Secretary of Defense exercises overall "authority, direction and control" of the Defense Department, he lacks specific authority "to command." Further, problems associated with resources, personal style, and political realities have inhibited Secretaries from functioning as a link in the operational chain of command.
- The Joint Chiefs of Staff are given the role, by statute, of strategic planners. In practice, but on ambiguous authority, they function as a full-fledged link in the chain of command, yet their structure and incentives are ill-suited to such a role.
- The commanders of the Unified Commands are the only full-time joint commanders, but the command organization both above and below them significantly de-emphasizes joint concerns and creates disincentives to raise joint issues.
- Experience bears out these conclusions:
  - At Pearl Harbor a large measure of the Japanese success resulted from a lack of unity of command.
  - The seizure of the U.S.S. Pueblo revealed similar problems in current command structures.
  - The command structure in Vietnam reflected greater concern for service autonomy than for streamlined, unified command.
- It has been 24 years since the chain of command was significantly modified. While not all problems in the current structure can be cured by statutory change, some can and there is ample basis to consider change.





## I. INTRODUCTION

This paper examines the Constitutional, statutory, and regulatory bases for military command authority in the United States. The paper's major focus is on the levels above and including the Unified or Specified Commands, but, to put this level in perspective, the levels below it are also examined. The goal of the paper is to address the question: How strong is the chain of command? That is, given the present legal framework and actual functioning of the chain of command, if the chain is stressed, which link is most likely to break?

Accordingly, this paper passes through three major steps: first, a brief examination of the historical and legal setting in which the chain of command functions; second, a detailed examination of the relevant Constitutional, statutory and regulatory provisions; and third, the examination of three case studies focusing on the working of the chain of command in practice. Finally, the implications and possible options for the chain of command will be assessed.

The basic intent of this paper is to describe the existing chain of command. The description has been undertaken from the positions and perspectives of the various members of the chain of command. Especially in the case studies, an effort has been made to describe the chain of command as it appeared to and functioned for each individual. The perspective that emerges is, at once, more varied and more objective than any description based on a single viewpoint.

The setting in which the current chain of command operates is unique both historically and legally. Historically, before World War

II, there was no single chain of command below the President; there were two, one for the Army and one for the Navy. After that war there were strong proponents for both unification, essentially a single chain of command, and cooperation, essentially the pre-war arrangement, but working together more closely. The resulting compromise introduced a measure of unification but still preserved basic service autonomy. Despite progressively more unification with succeeding reforms through the 1940s and 1950s, the broad lines of that compromise -- limited unification and service autonomy -- are still intact. As well as the compromise itself, the means by which it was formalized are crucial to understanding the current functioning of the chain of command. The Congress enacted the compromise in a detailed statute, the National Security Act of 1947, and has continued the detailed specification in statute of military roles, missions and even force levels.

This detailed statutory framework has created a legally curious situation since the courts have traditionally been reluctant either to become involved in military affairs or to decide questions where the Constitution vests authority exclusively in the legislative and executive branches. Thus a detailed statutory framework exists with scant prospect of judicial enforcement or interpretation. Examining this legal anomaly of detailed statutes lacking judicial interpretation is key to setting the scene for the second major part of this paper, an examination of the detailed framework itself.

Each successive link in the chain of command is examined as it has evolved since 1947. At this stage, however, a brief overview of that chain of command, using some necessarily ambiguous language, may

be helpful. The President's authority as Commander-in-Chief stems directly from the Constitution.<sup>1</sup> The authority of the Secretary of Defense is based on statute.<sup>2</sup> By directive, the Secretary has placed the Joint Chiefs of Staff (JCS) astride the chain of command.<sup>3</sup> The next statutory link in the chain is the individual combatant command which may be either a Unified or Specified Command.<sup>4</sup> Below the Unified Command level, component (single service) forces, under the operational control of the unified commander, but assigned and supplied by the military department, carry out that command's mission.<sup>5</sup> It is notable that at least two elements of the Department of Defense that have formerly been in the operational chain of command are absent. The service secretaries (e.g. the Secretary of the Army) are no longer in the operational chain of command though they are in the chain of command for administration and logistics, and the uniformed heads of each service (e.g. the Chief of Staff of the Army), as individuals, are no longer in the chain of command though they retain a role as members of the Joint Chiefs of Staff.<sup>6</sup>

The statute<sup>7</sup> does not distinguish between Unified and Specified Commands. Actually, however, these commands differ markedly. The Specified Command is a single service command with an ongoing mission, such as the Strategic Air Command. While not mandated by statute, all specified commands are Air Force Commands.<sup>8</sup> The Unified Commands on the other hand are, at least in theory, multiservice commands, such as the European Command which has both Army and Air Force units.<sup>9</sup>

The specific cases examined in this paper -- Pearl Harbor, Vietnam, and the Pueblo -- all reveal severe problems in the organization of command authority. Although to a certain extent they were

chosen with their problem-revealing quality in mind, that was not the sole criterion for choice. Pearl Harbor was chosen as, in effect, the case that started this whole process. It brought the United States into World War II, forcing an almost instant, radical restructuring of the military establishment. A major element of the contemporary judgment about Pearl Harbor was that a lack of unity of command below the President was a major contributing factor to the magnitude of the disaster, and this conclusion fueled the drive for post-war unification of the services. It therefore seemed appropriate to examine this case for itself, but also to assess whether the current structure has really solved the problems that originally initiated the changes.

The Pueblo case, to a certain extent, provided an opportunity for such a comparison. Like Pearl Harbor, Pueblo was a case of surprise aggression, limited to a single day; and it provided startling comparisons with Pearl Harbor.

Vietnam is a case obviously unlike the other two. The perspective of the Vietnam case study is over several years while Pearl Harbor and Pueblo, though parts of longer crises, are viewed through the perspective of a single day. But this very difference permitted types of observation of the chain of command that the other two cases did not. Most notably, it permitted observation of the functioning of the higher levels of the chain of command, the JCS and the Secretary. But the most compelling reason for including Vietnam is the most obvious. It is the only war we have fought with the chain of command as it is currently structured.

None of the three case studies, however, focus heavily on the President involved. To be sure, the "buck" must stop on the Presi-

dent's desk, and one might argue that in this sphere of life-and-death issues responsibility should be fixed no lower. The fact is, however, that whether praise or blame will be heaped on the Chief Executive depends in large part on how effectively responsibilities are carried out well below the Presidential level. So the organization of the command structure is worthy of attention; and if that the structure is flawed, it may also be in need of repair.

One other preliminary subject warrants discussion. The necessity of this paper may not be readily apparent. Surely, one might think, in the military, authority and responsibility are clearly and rigidly established. If problems exist in this area they must be attributable to the individuals involved, the uniqueness of events or just plain bad luck. To some extent this is, of course, true; but it is not the entire explanation. As the brief outline of the chain of command above may indicate, the complex web of relationships which exists, and the structure it creates, make authority as well as responsibility difficult to fix. Had American military efforts over the last 35 years been unfailingly crowned with success, there would be little reason to probe the defense organization. However, such has not been the case. Most notably, Korea and Vietnam have been less than unqualified successes.<sup>10</sup> Many factors, both routine and non-routine, could account for these results, but this paper focuses on the Constitutional, statutory, and regulatory bases of the chain of command. Thus something must be said of the rationale for that choice, the questions such a choice may raise and the criteria by which the present system, as well as any proposed system, could be judged.

From the end of World War II until 1958, the operational chain of

command was restructured four times.<sup>11</sup> Each restructuring brought about a closer unification of the military services. Such statutory restructuring stopped in 1958. Given more than 20 years of experience with the same statutory framework, it is possible to ask in the light of experience: How has it worked? Has unification gone far enough? Is, indeed, unification the solution to a problem? Given Congressional expressions of policy, to what extent is the current system a true reflection of that policy, what changes are possible within the existing framework and what changes would require a new framework or a significant change in Congressional policy?

But in a fundamental sense the relevant questions depend upon one's opinion of the structure as it currently exists. While, as might be expected, the chain of command has both its detractors and defenders, a consistent note of criticism has been sounded by many who have studied the system. In 1970 the Blue Ribbon Defense Panel,<sup>12</sup> after a year of study, recommended major restructuring of the Defense Department in general and the chain of command in particular. Three of the Panel's conclusions may serve to illustrate the tenor of the report:

The present arrangement for staffing the military operations activities for the President and the Secretary of Defense through the Joint Chiefs of Staff and the Military Departments is awkward and unresponsive; it provides a forum for inter-Service conflicts to be injected into the decision-making process for military operations; and it inhibits the flow of information between the combatant commands and the President and the Secretary of Defense, often even in crisis situations.

The Joint Chiefs of Staff could more effectively perform their important statutory role as principal military advisors to the President and the Secretary of Defense if they were relieved of the necessity of performing delegated duties in the field of military operations....

The present combatant command structure does not facilitate the solution of many serious problems which materially affect the security of the nation....Also, the present Unified Commands do not bring about unification of the Armed Forces, but rather are layered with Service component headquarters and large headquarters' staffs.<sup>13</sup>

But the Blue Ribbon Panel's recommendations went largely unimplemented.<sup>14</sup> Five years later, the Murphy Commission, whose mandate was to study the entire governmental organization for the conduct of foreign policy, again recommended that the Blue Ribbon Panel's findings be acted upon.<sup>15</sup> In 1978 the Steadman Report, while less critical in its findings, still found "...some fundamental shortcomings..." in defense organization.<sup>16</sup>

While a long line of unacted upon study recommendations is hardly unique in government, it is significant that criticism has most recently come from one most intimately connected with the system, a system not known for a high degree of dissent or self-criticism. The former Chairman of the JCS and Air Force Chief of Staff, General David C. Jones, in an article "Why The Joint Chiefs of Staff Must Change," relates his belief that:

Many good men have struggled very hard to make the best of the joint system, and most, if not all, have experienced a great sense of frustration in dealing with both large and small problems.

Much of this frustration comes from having to cope with legislative and organizational constraints which reflect concerns of the past, inhibit attempts to meet the rapidly changing demands of today's world and violate basic leadership and management principles. Yet, despite many studies that have periodically documented problems with this military committee system and made cogent recommendations for improvements, the system has been remarkably resistant to change. Committees can serve a useful propose in providing a wide range of advice to a chief executive or even in making some key policy decisions, but they are notoriously poor agents for running anything--let alone everything.<sup>17</sup>

Given this history of criticism and a spotty operational record, there is enough smoke surrounding the current system to justify investigating for fire. The fire, however, may be of at least two origins, either based in statute or based in policy. In many other areas of government these origins could be easily distinguished, usually through judicial decisions interpreting the reach of statutes and the discretion left to policymakers, but such is not the case with the chain of command since judicial interpretation is largely absent. Thus the application of statutes to concrete cases is left to the actors within the system, and one may legitimately question to what extent changing the statute would influence behavior.

But with this overarching problem in mind it still may be possible to evaluate the present system and within that evaluation to discern to what extent the statutory framework is involved. Evaluative criteria will center upon, first, the relationship between authority, responsibility and resources: To what extent does a commander within the chain of command who has the responsibility for a given task have the necessary authority to command the resources reasonably necessary to carry out that task? Second, incentives: What pressures act at each level of the chain of command in choices between single service and multiservice solutions, resolving or burying conflicts and the like? Finally, proximity: What distances, both psychological and physical, separate the responsible command from the problem to be solved?

The case studies furnish the material for these evaluations. Those studies are open to criticism as crises and hence not reflective of the everyday functioning of the chain of command. Certainly



evaluating the day-in, day-out functioning of the chain of command is critical. But the case studies perform two unique functions. They provide discreet data to balance the generalizations of an overall evaluation. Second, as crises, the cases are the test of the routine.

Thus the above criteria viewed from the perspectives of the various participants in the case studies will be the major bases for describing the effectiveness of the chain of command.

## II. THE SETTING

The setting in which an analysis of the chain of command must take place comprises both its historical evolution, which is fundamentally shaped by World War II, and its legal status, which is a unique result of Congressional and Executive activism and Judicial deference.

### A. Historical Setting

An integrated defense establishment is a relatively new phenomenon though not a new idea. Prior to World War II, no official except the President had the authority to coordinate the Army and the Navy even though the need for coordination was recognized in the early part of this century.<sup>1</sup> The Secretaries of War and Navy were co-equal Cabinet members. There were no institutional arrangements for coordinating the activities of Army and Navy units in the field. Local commanders cooperated to the extent they felt the need. While it would certainly be unfair and misleading to portray these arrangements as the exclusive pursuit of narrow service autonomy issues at the expense of national interests, the weakness of such a system was dramatically shown at Pearl Harbor.

The lack of coordination of the long-range reconnaissance mission, specifically, and a more general non-comprehension of the other service's mission, operations and limitations were significant contributing factors to the magnitude of that disaster.<sup>2</sup> Such loose coordination was immediately abandoned. In emulation of the British system, the Joint Chiefs of Staff were formed and a system of unified theater commanders established.<sup>3</sup> However, at the higher civilian

levels no new organization emerged and the war ended with the two cabinet officers still in co-equal and separate status.

While, as each link in the chain of command is examined, the relevant statutory provisions will be examined, it seems appropriate here to sketch out the broad outlines of post-World War II defense organization beginning with the post-war battle over the extent of unification. It is oversimplified, but not inaccurate, to say that the Army (including the Air Force) favored unification while the Navy opposed it. President Truman threw his weight on the unification side, but Congress, due to a large extent to those favoring the Navy position, hesitated.

By 1947, the log jam was broken and a compromise was reached which has influenced defense organization to the present.<sup>4</sup> A certain degree of unity was achieved in the creation of the position of a Secretary of Defense to head the National Military Establishment, and in the preservation the JCS and the Unified Commands. But service autonomy was also preserved. A separate Air Force was created and given Cabinet department status which the War (renamed Army) and Navy Departments retained. The roles and missions of each service were specified in statute, insuring both their individual autonomy and bureaucratic survival. This basic compromise of unification and autonomy was enacted as the National Security Act of 1947.<sup>5</sup>

Three major legislative and executive reorganizations followed, each of which shifted the compromise in the direction of unification but did not alter its essence. The 1949, 1953 and 1958 changes<sup>6</sup> progressively strengthened the role of the Secretary of Defense, downgraded the roles of the service secretaries, and strengthened the role

of the JCS. However, the services remain separate entities, important curbs remain on the JCS and Joint Staff, and the Secretary has only restricted authority over reorganization within the Defense Department. Since 1958, there have been no major reorganizations of the Defense Department though calls for a reorganization, as indicated by the studies cited earlier, have been persistent. The lack of statutory change has not, however, resulted in stagnation within Defense. Most striking has been the greatly increased centralization and growth in the role of the Secretary within the 1958 framework. Indeed, the Blue Ribbon Panel criticized the "excessive centralization of decision-making authority at the level of the Secretary of Defense."<sup>7</sup> This is an important point for the analysis here since this fundamental shift in decision making went on within the existing statutory framework.

This broad examination of the historical setting of the current chain of command is intended to make only a few general points. Integration of the military services is neither a new idea nor a recent fact, but the degree of integration that exists is the result of a conscious compromise between integration and service autonomy. From 1947, major organizational innovation only lasted 11 years. The 24 intervening years have been marked by organizational stagnation though not by a totally static set of roles in defense organization. It has also been the case, at least since 1947, that major change in defense organization has been the result of legal -- that is to say statutory -- change.

## B. Legal Setting

If one were to take as a starting point for analysis of the chain of command Justice Holmes' famous definition --

The prophecies of what the courts will do in fact, <sup>8</sup>  
and nothing more pretentious, are what I mean by the law.

-- then this starting point would be very close to the ending point for analysis since it is reasonably certain that where the chain of command is concerned the courts will do nothing.

Attempts to challenge military decisions in the courts have been unsuccessful.<sup>9</sup> The Political Question Doctrine,<sup>10</sup> bottomed on notions that the totality of the war-making power is divided between the Executive and Legislative branches, leaving little or no room for judicial interpretation or intervention, and that the military is a separate sphere responding to its own special necessities which the courts feel ill-equipped to judge, has regularly been cited by courts refusing to enter the realm of military command. In Gilligan v. Moran, 413 U.S.1 (1973), the most recent Supreme Court case applying the Political Question Doctrine to military affairs, the court applied the doctrine to dismiss a suit, seeking declaratory and injunctive relief, against the Ohio National Guard as a result of the events at Kent State University in 1970. The court saw the suit as "...a broad call on judicial power to assume continuing regulatory jurisdiction of the activities of the Ohio National Guard."<sup>11</sup> To this call the Court responded:

It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible -- as the Judicial Branch is not -- to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping and

control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.<sup>12</sup>

This very strong judicial language may overstate the strength of the doctrine somewhat. Gilligan was decided five to four and the majority did not hold the National Guard's conduct totally exempt from judicial review. It held only that in the context of a call for supervision "no justiciable controversy is presented."<sup>13</sup> Two members of the majority filed a concurring opinion emphasizing that point.<sup>14</sup> The four dissenting Justices did not reach the merits of the Political Question Doctrine, but believed the case should be dismissed for mootness.<sup>15</sup>

While it might thus be argued that the holding of Gilligan is not nearly as hospitable to the proposition that the courts will not review matters affecting the operation of the military as the language of the majority opinion would suggest, a Second Circuit Court of Appeals case at the end of the Vietnam War did so hold. In DaCosta v. Laird,<sup>16</sup> the court was

...called upon to decide the very specific question whether the Secretary of Defense, the Secretaries of the Army, Navy and Air Force, and the Commander of American Military Forces in Vietnam, may implement the directive of the President of the United States, announced May 8, 1972, ordering the mining of the port and harbors of North Vietnam and the continuation of air and naval strikes against military targets located in that battle-scarred land.<sup>17</sup>

After an attempt to develop relevant facts and standards the court concluded, "Thus it is our judgment that this court is without power to resolve the issue narrowly presented in this case."<sup>18</sup>

It is important in understanding this relatively cautious statement by the court to know that the Second Circuit had previously determined the Vietnam War to be constitutional, based on Congress-

ional acquiescence in continuing to appropriate funds for the war effort.<sup>19</sup> Only in the arguably cloudy context of Vietnam did the court find even the possibility of a challenge to a Presidential directive. Absent these special circumstances, the court found any challenge to orders of the Commander in Chief "...unpersuasive in light of the Constitution's specific textual commitment...."<sup>20</sup>

These cases serve to indicate the reluctance of the courts to become involved in reviewing actions that concern issues of operational military decision making.<sup>21</sup> It is true that the courts impose this restraint on themselves and so could lift it at anytime. In light of the questions considered in this paper, however, it seems most important that the courts have not reviewed or interpreted the statutes or decisions in the areas of military command. One does seem justified in concluding, in Justice Holmes' terms, that "the law" as he defined it practically does not exist.

Yet the conclusion that the concerns of this paper are not law runs into the obvious difficulty that the statutes look like law. They are enacted by Congress, signed by the President and duly printed in the statute books. In what sense, then, are statutes concerning command authority law?

A first answer might be provided by taking issue with Justice Holmes' formulation. Holmes' conception of law arose at a time when many others embraced a theory of Natural Law as the source for law. A modern formulation of this view is that:

Its fundamental tenet is an affirmation of the role of human reason in the design and operation of legal institutions. It asserts that there are principles of sound social architecture, objectively given, and that these principles, like those of physical architecture, do not change with every shift in the details of the design toward

which they are directed. Those who participate in the enterprise of law must acquire a sense of institutional role and give thought to how that role may most effectively be discharged without transcending its essential restraints. All of these are matters of perception and understanding and need not simply reflect personal predilection or inherited tradition.<sup>22</sup>

If this view seems to look to an underlying body of concepts, principles or norms, which are relatively unchanging and form the bases of societal organization,<sup>23</sup> then such a conception may be particularly suited to explaining the law of military command since the military as an institution in society is among the most homogeneous, structured and tradition laden.

Indeed another characteristic of the military -- its virtual monopoly of armed force -- draws our attention directly to the underlying values and norms of the military since, should these differ from the norms or written rules of society, the military has the capability unlike other groups, to impose its norms by force. Indeed the norms the military holds, how these norms are formed and what norms are most compatible with the subordination of military power to civilian control have formed the heart of the study of civil-military relations.<sup>24</sup> But United States history is devoid of attempts by the military to impose its conception of law by force. Thus one might conclude that military norms have been basically congruent with civilian norms. This conclusion does not solve the problem of the role of statutes concerning military command in a conception of law, and it does seem to point to the proposition that such statutes are not enacted as an attempt to impose Congressional or societal norms on a reluctant or rebellious military.

A second attempt at an answer to the function of the statutes



concerning military command authority might be provided by revising the conclusion reached in discussing Holmes' formulation of the law-as-judicial-decisions because judicial decisions are possible in one important area of military conduct.

In the wake of each of the three case studies considered later in this paper -- Pearl Harbor, the Pueblo and Vietnam -- there were those in government who called for investigations into the perceived failures involved. There were also those who wished to take the further step of trial by courts martial for some of the figures involved. Indeed as events unfolded some of the principals unsuccessfully sought courts martial as a device to clear their names and possibly fix responsibility in ways Congressional or military investigations did not.<sup>25</sup> In such a court martial, the interpretation of the statutes concerning the chain of command might be involved as one aspect of attempting to decide whether responsible officials and officers had performed their duty. But though the statutes might be the basis of decision in the event of some future military disaster and resulting court martial, they have not been in the past. It would therefore seem curious that so much energy had been put into enacting a detailed group of statutes on the mere possibility that they might some day be necessary. A slightly more probable, but still remote possibility is that the statutes were enacted as a kind of "safe harbor" for military conduct, that rather than leave the commander to the mercy of judgment under unarticulated norms, the statutes serve as prospective guides for conduct. But here again the lack of previous use belies the explanation. Yet it does highlight the fact that military command is a function being carried out continuously though it tends to be

examined only in the light of relatively rare active military operations. This continuity of the function of command draws attention to the third possible function of statute in military command.

If one starts from neither a positivist nor naturalist point of view as to the source of law, but rather inquires as to what causes the articulation of some positivist rules and not others or the development of some norms and not others, one is led to the notions of conflict and scarcity. Where water is clean and abundant, there will be few rules or decided cases on its use. In more arid regions, one would expect a more complex system of rules and decided cases fixing rights and responsibilities for water use.<sup>26</sup> It is thus a fundamental assumption of this paper that law, the articulation of norms and rules to guide conduct within a society, results from conflict.

If this idea has application to the present chain of command, one must look to sources of conflict. At least four are present and contribute in some degree to the presence of a statutory scheme: the budgetary conflict over resources, the Constitutional conflict between the Executive and Legislative Branches, a three-way conflict between the two Branches and the military over the extent of military authority, and conflicts among the services over roles and missions. While a definitive conclusion must await the examination of the statutes themselves, and their application, it is safe to conclude at this point that the possibility of enough conflict is present so that these statutes may serve the function of attempting to regulate such conflict, in effect, to establish the rules of the bureaucratic game in which the conflicts are played out.<sup>27</sup>

### III. EVOLUTION AND CURRENT FUNCTIONING OF THE CHAIN OF COMMAND

#### A. The Constitutional Level: The President and Congress

The Constitution explicitly divides power over the armed forces between the President and Congress. The English had not explicitly done so. The King was fully sovereign in war. He could declare it, fight it and end it. Only as war became costly and Parliament's power over the purse grew did the important financial limitation on the King's war making power arise.<sup>1</sup> The Framers went further than this. They explicitly vested the power "to raise and support armies..."<sup>2</sup> and "to provide and maintain a Navy"<sup>3</sup> in the Congress; and in a marked departure with English custom, also gave Congress the sole power "to declare War"<sup>4</sup> and a share of the power in ending it in the treaty ratification provision.<sup>5</sup>

The earliest exposition of the Commander in Chief role, by Hamilton in the Federalist, was the narrowest one of the military commander:

It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General or Admiral of the Confederacy.<sup>6</sup>

Yet, it was soon evident, and has been since, that where the power to command ends and the necessity to declare war begins is difficult to know.<sup>7</sup>

The War Powers Resolution<sup>8</sup> represents the latest Congressional attempt to fix the line; and the action of President Carter, characterizing the attempted rescue of American hostages in Iran as a "humanitarian mission" and hence outside the resolution,<sup>9</sup> illustrates the difficulty of any such attempt to fix the line.

Whatever the War Powers Resolution represents or whatever its future may be in light of the Supreme Court's holding that the legislative veto is unconstitutional,<sup>10</sup> it is not a fundamental attack on the Constitutional duty of the President to command the armed forces. The command function, especially in the sense of the right to issue military orders, has not been questioned, either by the Congress or the uniformed military. To be sure, different Presidents have had differing interpretations of precisely what that role was. Lincoln<sup>11</sup> and Franklin Roosevelt<sup>12</sup> were deeply involved in operational decisions. On the other hand, Wilson met General Pershing only once and Wilson only approved the brief, single written order to Pershing signed by Secretary of War Newton D. Baker.<sup>13</sup> Yet, no matter how active or passive a President has been in military command, there has not been any argument that the President has the right to define and exercise the command function once hostilities have been sanctioned by Congress.<sup>14</sup>

In juxtaposition to this core area of Presidential power stands a Congressional role which, if at times severely eroded in certain respects, has been active in the organizational aspects of defense, and, since World War II, has followed a consistent policy line. In the face of repeated requests by the Executive for greater unification of the services and greater flexibility in organizing them,<sup>15</sup> Congress has given ground slowly, reaffirming at every step its desire for three separate military departments, its hostility to a fully unified military staff, and its conviction that "civilian control" means Congress as well as the Executive.

Congressional insistence on separate military departments and

services<sup>16</sup> has been constant since world War II. In each statutory policy statement since 1947, Congress has explicitly signaled its desire not to merge the departments. It has gone even further by enacting each service's roles and missions into statute.<sup>17</sup> While the Secretary of Defense has limited authority to shift functions within the Department of Defense, any function vested by law may only be transferred or abolished after the Secretary has notified Congress. Congress then has a statutorily mandated period in which to object and thus block the transfer.<sup>18</sup> A major exception is that if the President determines that the threat of hostilities is imminent, functions may be transferred but not abolished upon notice to Congress.<sup>19</sup> This scheme ensures Congress an opportunity to approve virtually all transfers of function and any abolition of a statutory function thus making it impossible for any substantial change in a military department to take place without Congressional approval.

Congressional hostility to a truly unified armed forces staff has also been unswerving. When the Joint Chiefs of Staff was given a statutory basis in the National Security Act of 1947, Congress did not create a chairman.<sup>20</sup> In the 1949 amendments to the National Security Act, the position of chairman of the Joint Chiefs of Staff was created but was specifically given no vote.<sup>21</sup> And, at the same time, Congress specifically disapproved any intention to create "a single Chief of Staff over the armed forces nor an armed forces general staff."<sup>22</sup> When subsequent experience revealed that the Joint Chiefs of Staff never voted anyway, this restriction was removed.<sup>23</sup> Yet the Chairman now has no independent authority to speak for the Joint Chiefs of Staff and the statutory prohibition against an Armed Forces Chief of

Staff is still in place.<sup>24</sup> By limiting the time any officer can serve on a Joint Staff and by restricting the size of the Joint Staff,<sup>25</sup> Congress has further evidenced its hostility to a unified armed forces staff.

Finally, and most importantly since it provides the rationale and motivation for the above Congressional policies, Congress believes that civilian control of the military includes Congress as well as the civilian levels of the Executive branch. Though "civilian control" is not mentioned in the Constitution, it is a currently accepted principle of civil-military relations in the United States.<sup>26</sup> Congress has explicitly mandated one aspect of civilian control within the Executive Branch by forbidding anyone who has been a commissioned officer within the previous ten years from serving as Secretary,<sup>27</sup> Deputy Secretary<sup>28</sup>, or Under Secretary<sup>29</sup> of Defense.

But Congress has not been content simply to mandate civilian control inside the Executive branch. It has also affirmatively guaranteed itself access, and hence the effective possibility of control, to the uniformed military by ensuring that the Joint Chiefs of Staff have open access to Congress.<sup>30</sup> Thus, Congress has sought to preserve its role in shaping military policy.

The Constitutional division of control of the military yields, for the purpose of this paper anyway, two important conclusions. As for the President, whatever may be the ultimate extent of his power to use the armed forces, his narrow power to give orders to the military is clear and uncontested. Thus, the first link in the military chain of command is firmly anchored in the Executive and in the Chief Executive. As for the Congress, its active involvement, resting on an

equally sound Constitutional base, has had a profound effect on forging the chain of command. By codifying roles, guaranteeing open channels of communication and clearly articulating policy, Congress has also left its mark on the chain of command.

## B. The Statutory Level

### 1. The Secretary of Defense

From rather humble beginnings following World War II, the Secretary of Defense has emerged as one of the preeminent positions in the Federal Government. The budget he administers is gargantuan, his powers within that department are vast, and, most important for this study, he plays a somewhat ambiguous role in the chain of command as one who has authority over all operational elements within the department. To understand the current role of the Secretary of Defense, one must first understand the evolution of that role and the implications the increased role has had for other elements within the Department of Defense.

Greater unification of the services was the general theme of the post-war defense reorganization. At the Cabinet level the structure set in place in 1947 represented a big step toward unification since a Secretary of Defense was created as head of the National Military Establishment.<sup>1</sup> Yet the role that emerged has been characterized as a "weak" Secretary of Defense because the Departments of Army and Navy retained executive department status and were joined by the newly created Department of the Air Force.<sup>2</sup> The Secretary's duties were couched in language which further eroded his status. He was to "establish general policies and programs..." and "exercise general direction, authority and control over such departments."<sup>3</sup> While "general" might have been interpreted as expanding the Secretary's authority, it was interpreted as a limitation on that authority,



restricting the Secretary from becoming too deeply involved in the affairs of the services. The service secretaries were specifically given the right to go directly to the President after informing the Secretary of Defense and were specifically told to manage their departments as "individual executive departments" with all powers not specifically given to the Secretary of Defense.<sup>4</sup>

Strengthening the "weak" Secretary of Defense has been the effect of amendments since 1947. The 1949 amendments downgraded the Departments of Army, Navy and Air Force to military departments within the Department of Defense.<sup>5</sup> The "general" qualification was removed from the description of the Secretary's duties.<sup>6</sup> The service secretaries' authority to go directly to the President was deleted as well as the language reserving to them all authority not specifically vested in the Secretary of Defense.<sup>7</sup> However, a new provision was added restraining the Secretary of Defense from transferring statutorily mandated functions between military departments and granting the service secretaries and the members of the JCS the right to present their views directly to Congress.<sup>8</sup> Thus, although significantly strengthened in 1949, the Secretary's authority over the Department of Defense was still limited in some important ways.

In 1958, however, the restriction on the Secretary's transferring functions was rewritten into substantially its present form which gives him that authority subject to notification of the Congress and Congressional non-action within a specified period.<sup>9</sup> The access to Congress of the JCS<sup>10</sup> and the services secretaries<sup>11</sup> remains in force.<sup>12</sup> There have been no major statutory revisions in the Secretary's powers since 1958,<sup>13</sup> and arguably that office now enjoys

as much power and authority as statute is capable of conferring upon it.<sup>14</sup> Indeed, some were of the opinion that such was the case even before the 1958 amendments.<sup>15</sup>

Since 1958, however, the office has continued to grow in power and influence for essentially non-statutory reasons.<sup>16</sup> Indeed in 1970 the Blue Ribbon Defense Panel concluded that the process of centralization had gone too far within the Department of Defense, that the Secretary and the Office of the Secretary of Defense had accumulated an unmanageable work load and that the goal of organizational reform should be toward some decentralization of functions.<sup>17</sup>

One indication of how much the Secretary of Defense's role has increased is the extent to which the role of the service secretaries has decreased. From 1953 to 1958, the service secretaries, though having lost Cabinet rank in 1949, were still part of the operational chain of command as well as being the civilian heads of their respective departments. Their responsibilities included service doctrine, training, supply of forces, and operational employment. The 1958 amendments removed the service secretaries (as well as the uniformed heads of the services) from the operational chain of command. Their authority was clearly restricted to those forces remaining within their department -- in other words, those not assigned to a combatant command. This left the service secretaries with major responsibilities for training, administration and supply of combat forces. The degree to which the secretaries have been cut out of the flow of operational information was dramatically illustrated by Secretary of the Army Howard H. Callaway's assertion at his final press conference that:

If I went down to the tank [the JCS meeting room] this afternoon and asked to sit in on the meeting of the Joint Chiefs of Staff this building (the Pentagon) would go up in smoke.<sup>18</sup>

His comments are particularly illuminating since the members of the JCS, in their roles as uniformed heads of their services, are nominally subordinate to the service secretaries. Following Secretary Calloway's press conference, Congressional hearings were held and recommendations made that Congress consider legislation requiring that: the service secretaries should be kept fully informed, the help of the President and Secretary of Defense toward that goal should be enlisted as necessary, and the meetings of the JCS should be open to the service secretaries.<sup>19</sup> These recommendations do not, however, seem to have produced any major increase in the role of the service secretaries in operational matters. While it would be a crucial mistake to dismiss their role in training, administration and supply as trivial or unimportant, it is accurate to say that for operational decisions they are essentially absent. The major implication of this absence is that for operational matters, the full weight of "civilian control" falls on the Secretary of Defense.

Yet this evolution of roles and functions between the Secretary of Defense and the service secretaries has left one curious loophole. Nowhere in the statutes is the Secretary of Defense given the authority "to command." One could construct several reasonable arguments that the Secretary has this authority by implication. For example one might argue that the command authority is included within the "authority, direction and control" of the Defense Department. Or that since all residuary powers were vested in the Secretary by the 1949 amendments, and the 1958 amendments specifically took the service secretar-

ies out of the operational chain, the command authority now resides in the Secretary of Defense. Or lastly one might rely on the legislative history of the 1958 amendments which rather clearly indicates that the Congressional intent was to give the Secretary of Defense all the power to run that department that statute could confer, and hence an element so important as command must have been included therein. Yet, it is this very point that makes any attempt to derive command authority by implication so unpersuasive. Command is so critically important that one really has difficulty believing that Congress or the nation could rest very comfortably leaving the command authority open to argument. But this seems to be precisely what has happened.

## 2. The Joint Chiefs of Staff

Putting the Joint Chiefs of Staff on a statutory basis in 1947 was only formal recognition that the expedient organization adopted in 1942 had worked well in bringing World War II to a successful military conclusion. The formalizing of the JCS was also consistent with the drive for unification of the services since the JCS represented an institutional structure where the senior uniformed members of each service would meet. Yet the initial absence of a chairman and the strong connection each member retained to his respective service also represented the articulated Congressional policy not to merge the armed forces.

In comparison with other elements in the Department of Defense, the statutory framework of the JCS has undergone relatively little change since 1947. The major change was the addition of a chairman in 1949.<sup>1</sup> There have also been several minor statutory changes as discussed below, but the statutory language making the JCS responsible for all areas of strategic planning is virtually unchanged since 1947.<sup>2</sup>

It may be tempting for some purposes to think of the Chairman of the JCS as some kind of overall uniformed head of the armed forces. The Chairman is listed first in naming the members of the JCS.<sup>3</sup> He outranks all other officers of the armed forces.<sup>4</sup> He presides over meetings of the JCS, provides the agenda and informs the Secretary or President when the JCS disagrees.<sup>5</sup>

Yet these manifestations of leadership seem outweighed, at least as a matter of statutorily expressed policy, by countervailing statu-

tory provisions and statutory history. The clearest restriction on the Chairman's role is the sentence immediately following the one that grants the Chairman rank above all other officers:

However, he may not exercise military command over the Joint Chiefs of Staff or any of the armed forces.<sup>6</sup>

Congress has also disavowed any larger role for the Chairman in its general policy statement on national security:

it is the intent of Congress ... not to establish a single Chief of Staff over the armed forces...

In addition, as indicated earlier, when the position was created the Chairman was specifically forbidden to vote.<sup>8</sup> Only subsequently was the restriction removed as meaningless.<sup>9</sup> Whatever the Chairman's role may be in practice, by statute he seems most clearly characterized as an administrative head of the JCS and the Joint Staff, but he is not, by statute, imbued with authority to speak for the JCS or to issue orders or assume responsibility in their name.

There have been several other changes in the statutory framework surrounding the JCS which deserve mention. The size of the Joint Staff is regulated by statute<sup>10</sup> and currently set at 400 officers. The size has been increased twice: from 100 to 210 in 1949,<sup>11</sup> and from 210 to the present number in 1958.<sup>12</sup> These changes are really insignificant since the statute has openly been circumvented for years and the effective size of the staff which supports the JCS is vastly greater.<sup>13</sup>

The 1958 Reorganization also created within each service a Vice Chief of Staff position,<sup>14</sup> ostensibly to relieve the uniformed heads of the services of their strictly service-connected duties so as to free them to devote more time to their JCS duties.<sup>15</sup> If this was a

Congressional recognition that the members of the JCS were overworked, then assessing how well this reform has worked is important in analyzing the current workings of the chain of command.

The final change to be mentioned really only brought form in line with substance. In 1978, the Commandant of the Marine Corps was made a full member of the JCS. The 1947 language did not list the Commandant as a member of the JCS.<sup>16</sup> In 1952, the Commandant was given the right to attend meetings when matters affecting the Marine Corps were to be discussed.<sup>17</sup> Apparently virtually all matters discussed by the JCS concerned the Marine Corps and in 1978 the statute was amended to grant full membership status to the Commandant.<sup>18</sup>

Knowledge of the statutory framework sketched above for the JCS may be of less help in understanding the role of the JCS than the statutory provisions concerning any other link in the chain of command. The changes in the JCS role have resulted primarily from changes in the roles of the other actors within the Department of Defense, with the JCS merely assuming duties that formerly resided in other actors. One of the major purposes of the 1958 reorganization was to streamline the operational chain of command and remove any lingering doubts about command authority. To this end the service secretaries were removed from the operational chain and their authority limited to those forces which are not assigned to a combatant command. Similarly the service chiefs were also removed from the chain of command. This was accomplished by deleting the authority of the Chief of Naval Operations and the Chief of Staff of the Air Force "to command and supervise" forces within their services and restricting them only, as was the Army Chief of Staff, "to supervise" forces

not assigned to combatant commands.<sup>19</sup> The precise statutory scheme concerning the combatant commands will be discussed in the next section, but for the moment it is enough to note that it does not include the JCS. The JCS role in statute remained to give military advice to the Secretary and President and to do strategic planning.

However in 1958, the Secretary created the greatest ambiguity in the chain of command by issuing Department of Defense Directive 5100.1, December 31, 1958. This directive, entitled "Functions of the Department of Defense and its Major Components," departed significantly from the Congressionally enacted scheme. "The chain of command runs from the President to the Secretary of Defense and through the Joint Chiefs of Staff to the commanders of unified and specified commands."<sup>20</sup> The only elaboration this ambiguous formula receives is in the description of the functions of the JCS:

1. To serve as advisers and as military staff in the chain of operational command with respect to unified and specified commands, to provide a channel of communications from the President and Secretary of Defense to unified and specified commands, and to coordinate all communications in matters of joint interest addressed to the commanders of the unified or specified commands by other authority.

The language of the directive could imply any of several roles for the JCS. They could merely be the instrumentality through which command is exercised, making no input of their own. This role is implied by the "channel of communications" language, and would portray the JCS as merely the command voice of higher authority. A second possibility is that the JCS would function more as a traditional military staff with the Secretary as the commander. This interpretation finds some support in the "advisers and military staff" language



of the directive. This interpretation would seem to imply that the JCS would generate options and oversee implementation of the Secretary's decisions, but the business of command would be in large measure conducted from the Secretary to the combatant commander. Of course the ambiguous basis for the Secretary's assuming such a role has already been discussed. This type of role for the JCS is still possible if one conceives of the Secretary as the President's Chief of Staff. The third possibility is that the JCS would function as a full-fledged link in the chain of command. This role finds explicit support in the description of the chain of command. They would not only generate but also choose and implement options, be the principal, if not exclusive, contact for the combatant commanders and generally only go to the Secretary with problems that were beyond their capability to solve. All three interpretations seem plausible under the directive. While one is leery of premature conclusions, the third possibility seems to most closely describe reality, but under any one of the three, one might highlight several major conflicts inherent in the JCS as currently constituted.

To the extent the third interpretation is correct, the JCS must serve as both advisors and as commanders. Since all members of the JCS except the chairman are also the uniformed heads of their respective services, they must individually mediate unified versus separate service interests. They are the only entity in the chain of command that is not an individual. Yet, the chairman's role seems to be gravitating toward more of an active head of the JCS than just an administrative chairman. The incumbent Chairman, Army General John W. Vessey, has even recently suggested that the Chairman, rather than the

JCS, be made a commander.<sup>22</sup> One further characteristic deserves mention. With the service chiefs removed from the operational command channel, the JCS is the only uniformed body in Washington with a role in the operational chain of command. These conflicts may signal an ambiguous role for the JCS in the chain of command, but any conclusions about that role should come after the case studies have been examined.

### 3. The Unified Commands

In the post-war defense reorganization, the war-time unified command was continued as the device for ensuring active unity in the field among the military services and avoiding the type of problem of command by cooperation made so evident at Pearl Harbor. As the device was first adopted, however, it resembled more closely a mere coordination device than the dynamic command arrangement of World War II. The National Security Act of 1947 gave to the JCS as one of its duties, "subject to the authority and direction of the President and the Secretary of Defense"

(3) to establish unified commands in strategic areas when such unified commands<sup>1</sup> are in the interest of national security...

In 1949, the only change was that the requirement to determine that such commands were in the interests of national security was dropped and the provision then read

(3) est<sup>2</sup>ablishment of unified commands in strategic areas.

By 1958, however, this arrangement was seen to have several flaws. For example the Chief of Naval Operations (CNO) commanded all naval units subject only to the direction of the Secretary of the Navy.<sup>3</sup> The extent, therefore, to which the CNO commanded a ship assigned to a unified command was not clear. The goal of the 1958 reorganization was to remove such ambiguities and to provide for clear command relationships.<sup>4</sup> To this end the statutory authority of each of the service chiefs was amended to reflect explicitly that his authority was

consistent with the full operational command vested  
in unified or specified combatant commanders...<sup>5</sup>

Additionally the provision for unified commands was taken out of the section detailing the duties of the JCS and added to the section detailing the duties of the Secretary of Defense. Curiously, however it was the President who "shall establish ... with the advice and assistance" of the JCS but "through the Secretary of Defense," unified commands.<sup>6</sup> The new provision spelled out in some detail to what extent the Secretary of Defense, the services and the individual commanders were responsible for the forces assigned or not assigned to a Unified Command.<sup>7</sup> But on the question of who actually commands the commanders of the Unified Commands, as opposed to establishing the commands, the statutes are silent.

The statute in its current version seeks to define responsibilities in four areas. The force structure of the unified command is determined in the same manner as the establishment of that command.<sup>8</sup> The military departments assign forces to unified commands. Once assigned, a force may only be reassigned by the Secretary of Defense and a force not assigned remains in the military department.<sup>9</sup> The unified commands are responsible only to the Secretary and President.<sup>10</sup> But whether the Secretary has actual command authority over the Unified Commander is not addressed by the statutes. Thus one would have to fall back on the Constitutional authority of the President as Commander in Chief to find a firm basis for command authority. The military departments are made "responsible for the administration of forces assigned by that department" and the Secretary assigns responsibility for the support of forces to one or more departments.<sup>11</sup>

Immediately striking about this arrangement is that the military departments, thus far systematically excluded from the operational chain of command, enter here with substantial roles. It is the military departments which assign forces to the commands but the language of the section does not explicitly subordinate this task to the authority of the Secretary. Thus, although the military departments are elsewhere subordinated to the Secretary, it is at least arguable that the military departments enjoy some autonomy in deciding what forces to assign. This naturally leads to the question of what happens if they decide not to assign a force. The answer is probably that the Secretary could order the force assigned but the authority for doing so is more implied than explicit.

The support role of the military departments is also significant. Only the military departments have the capability for supporting -- by which is meant such things as furnishing replacement personnel and shipping supplies -- the unified commands. This structure relegates the Unified Commander to the position of only exercising command in the narrowest sense of being able to position and maneuver existing forces. The unified commander has no authority over the military departments and so is statutorily powerless to control his support in terms of either supplies or reinforcements. The Secretary does have authority over the military departments.<sup>12</sup> But the statutory scheme does seem to create problems rather than solve them.

It is also noteworthy that this statute fails to mention the JCS, except in an advisory role to the President and Secretary in the establishment of unified commands. This anomaly in leaving out what is arguably the next higher link in the chain of command is explained

because the JCS presence in the chain of command is by directive of the Secretary; and when Congress enacted this statutory scheme in 1958, it did so with the intent that the operational chain of command run through the Secretary directly to the combatant command. Thus to the extent the JCS functions as a discrete link in the chain of command, it exercises a role clearly not within the contemplation of this statute. One might then be led to question the basis on which the Secretary could authoritatively describe the chain of command to run "through" the JCS. One would have to rely upon the secretary's delegation authority:

Unless specifically prohibited by law, the Secretary may, without being relieved of his responsibility, perform any of his functions or duties, or exercise any of his powers through, or with the aid of, such persons in, or organizations of, the Department of Defense as he may designate.<sup>13</sup>

If one assumes this delegation authority is broad enough to permit delegation in the area of operational command, whose very basis is itself ambiguous, one may ask whether the Secretary could not also delegate his authority over the military departments concerning the assignment of forces and support functions to the JCS. The effect of such delegation would be to unify the operational and support functions within the JCS. Whether or not he could, to do so would create a curious situation where civilian service secretaries would be subordinate to a uniformed corporate body whose members, as individuals, were in turn subordinate to the individual service secretaries. It would also increase the staggering workload of the JCS. Such a delegation hardly seems a solution for promoting efficiency or clarity in the chain of command. It would also do such violence to the basic

structure of the Department that one must question its permissibility within the statutory scheme. Yet in the absence of such delegation, the implication must be drawn that the JCS in fact lacks authority over the military departments. To the extent this is true, the introduction of the military departments at the unified command level seems to create substantial complexities in the chain of command.

At the unified command level in the chain of command, the statutes fall silent and subordinate levels are regulated by directive or regulation. Yet some general description of the organization within a unified command is necessary to complete the picture of that level and to understand the case studies to follow. However, it should be signaled that no two commands are the same, and so a general description may be inaccurate as to any particular command.

The unified commander is a very senior, usually four-star, general or admiral who retains his service affiliation and may have subsequent assignment in his service. Certain commands have always been headed by individuals of one service. The European command is an Army command; the Pacific Command a Navy command. Under the unified commander there will be component commanders representing each of the services having units in that command. At the component command level and below, units of one service are seldom subordinated to commanders of another service. This means that unification only occurs at the level of the unified commander and his staff. For example in the Pacific Command, CINCPAC (Commander in Chief, Pacific) is the unified commander with his own staff made up of officers from all services. Naval units in the Pacific, however, are all under CINCPACFLT (Commander in Chief, Pacific Fleet), an admiral with an all Navy

staff. Air Force units are under the command of CINCPACAF (Commander in Chief, Pacific Air Forces), a general with an all Air Force staff. Thus, except for the unified commander, no units of a service are commanded by an officer of any other service. Therefore, the role of the military department, introduced at the unified command level, takes on predominant importance immediately below that level since supplies, replacements, promotions, training, and doctrine all come through the relevant military department. If the JCS as a corporate body represents more the compromise of individual service interests than the promotion of joint interests, then the unified commander is the only uniformed link in the chain of command to represent a truly unified service perspective. Given the paucity of resources at the unified commander's disposal, the assertion that the unified perspective is underrepresented might cause little surprise.



#### IV. THE CHAIN OF COMMAND IN PRACTICE: CASE STUDIES

This paper now turns to the examination of three case studies to flesh out the bare bones of command organization examined thus far. Operational case studies involving more than one combatant command are not available, unless one so considers Pearl Harbor; so these three all take place within a single command. However, the brief examination of Vietnam does permit an examination of the chain of command in an ongoing, operational setting; and since the command in Vietnam existed as a sub-unified command under the Pacific Command, it also gives something of a two-command perspective.

##### A. Pearl Harbor

The events leading up to the Japanese attack at Pearl Harbor on December 7, 1941, have been exhaustively documented.<sup>1</sup> It may be sufficient to recall that while the attack was a surprise, it came in a period of extreme tension between the United States and Japan. Japanese assets in the United States had been frozen, and high-level negotiations had been taking place for months.<sup>2</sup>

There were vast quantities of intelligence available to officials in Washington, the most secret and valuable source of which was MAGIC, the codeword for decoded Japanese cables.<sup>3</sup> This intelligence indicated that an attack by Japan somewhere was highly probable.<sup>4</sup>

The chains of command from Pearl Harbor were ordinary for the military of 1941. There were two, split between the Army and the Navy. The Army chain of command went from Lt. Gen. Walter C. Short,

Commanding General, Hawaiian Department, to General George C. Marshall, Chief of Staff, to Henry L. Stimson, Secretary of War and finally to President Franklin D. Roosevelt. The Navy chain of command went from Admiral Husband E. Kimmel, Commander in Chief U.S. Fleet and Pacific Fleet, to Admiral Harold S. Stark, Chief of Naval Operations, to Secretary of the Navy Frank Knox, and finally to the President.<sup>5</sup> Below the President, then, no one exercised authority over both Short and Kimmel.

In Hawaii, these two men commanded by cooperation. Their personal relations were cordial,<sup>6</sup> and they were aware of the need for such cooperation.<sup>7</sup> However, there were only slender arrangements for joint planning by their staffs and a real reluctance on the part of both commanders to probe too deeply into the command of the other.<sup>8</sup>

The Japanese attack was a crushing success.<sup>9</sup> They achieved both strategic and tactical surprise -- strategic surprise in that an attack on Pearl Harbor was unexpected and tactical surprise in that their attacking forces were totally undetected.

Given the rather obvious assumption that permitting the enemy such surprise was not the goal of our defense effort, an evaluation of the chain of command should center on the extent to which the structure of the chain of command contributed to both strategic and tactical surprise. Evidently, however, many other factors also contributed. Much of the effort of the eight investigations which followed focused on the individuals involved, particularly Kimmel and Short. Quite obviously the individuals made a difference.<sup>10</sup> A second factor was intelligence -- how it was generated, handled, evaluated and disseminated.<sup>11</sup> A third and sometimes underemphasized factor was the

Japanese. After all, people at Pearl Harbor were not involved with some essentially benign force; they were not trying to predict the weather. The Japanese faultlessly executed a daring, bold plan and did everything in their power to conceal it.<sup>12</sup>

However, all this said, our responsible officials operated within a structure and that structure did fundamentally contribute to the outcome at Pearl Harbor.

In attempting to answer the strategic surprise question, most attention must focus in Washington, for the very nature of the structure prevented a coherent strategic picture from emerging in Hawaii. Most clearly indicative of this fact is Roberta Wohlstetter's summary of the intelligence picture just prior to the attack:

It is only fair to remark, however, that no single person or agency ever had at any given moment all the signals existing in this vast information network. The signals lay scattered in a number of different agencies, some were decoded, some were not; some traveled through rapid channels of communications, some were blocked by technical or procedural delays; some never reached a center of decision. But it is legitimate to review again the general sort of picture that emerged during the first week of December from the signals readily at hand. Anyone close to President Roosevelt was likely to have before him the following significant fragments.<sup>13</sup> (emphasis added)

After reviewing the fragments, she demonstrates how difficult it was to separate the signals from the background noise; and even once separated, how difficult it was for anyone to draw what turned out to be the "right" conclusion from the ambiguous signals.<sup>14</sup> But separating signals from noise is part and parcel of intelligence work, and so, in a "vast network," is fragmentation of information.

Although Wohlstetter is concerned with intelligence, or the lack of it, she makes a key point about the way in which the command struc-

ture influences information flows and hence, inevitably, the decisions which are based upon that information. Her evidence shows that it was only at the Presidential level that such a coherent analysis would even have been possible. No one below that level had access to all the information. However, it is only when one attempts to divine who that mythical "anyone close to President Roosevelt" might have been that the full implication of the command structure becomes clear. There simply was no one nor any agency at the presidential level having the time or responsibility to analyze such data.<sup>15</sup>

Neither was there an agency below the Presidential level to perform such a function. The Army and Navy each had their own intelligence organizations. There was also a severe intraservice struggle in the Navy over the intelligence function,<sup>16</sup> but there is evidence the two service staffs cooperated.<sup>17</sup> However, staffs are not commanders and there was nowhere, short of the President, that intelligence could be joined with the command authority to take action on a joint basis, based on that intelligence.

But even had some integration existed in Washington below the President, it is at least arguable that such an organization would have been too removed from the scene at Pearl Harbor to be effective. There were enough intraservice problems between Washington and Hawaii to illustrate the difficulty of command from that distance. For example, Adm. Stark believed Kimmel was getting MAGIC, the decoded Japanese diplomatic messages, and only learned after the fact that Kimmel was not.<sup>18</sup> On the Army side, General Marshall had no clear idea of what alert status General Short was on in Hawaii after November 27. He assumed it was a full alert; in fact, the alert, was directed against possible sabotage.<sup>19</sup>

To evaluate how the Japanese obtained tactical surprise, we must shift the focus to Hawaii. For even given an ambiguous strategic picture, purely local measures might have yielded some detection of Japanese forces. Either of two means might have provided warning, but both were the subject of reciprocal wrong assumptions by the respective commanders. General Short assumed the Navy was conducting long range air reconnaissance when in fact it was not.<sup>20</sup> Admiral Kimmel assumed the Army's radar was fully operational when it was only being operated for training.<sup>21</sup>

From these and other factors the Congressional investigating committee concluded:

There was a complete failure in Hawaii of effective Army-Navy liaison during the critical period November 27-December 7. There was but little coordination and no integration of Army and Navy facilities and efforts for defense. Neither of the responsible commanders knew what the other was doing with respect to essential military activities.<sup>22</sup>

But lest one be tempted to ascribe this to personal factors, it is well to remember that Kimmel and Short were personally cordial.<sup>23</sup> Further, the conclusion goes to the integration of staffs, indicating a systematic lack of coordination.

Other indications also point to a more systemic, rather than personal, explanation for the situation in Hawaii. Both commanders displayed an attitude (see relations between COMNAVFORJAPAN and 5th Air Force in Pueblo case study) of scrupulously avoiding even the appearance of telling the other commander how to run his command. Thus neither questioned the other's operations or plans.<sup>24</sup>

Kimmel and Short did meet several times in the early days of December, but the subject of their meetings was the reinforcement of

Wake and Midway Islands with Army aircraft. The subject of their discussions was not whether to reinforce but who would command the islands and the aircraft. Neither wanted to let the other command "his" forces.<sup>25</sup>

The final indicator of systemic cause is the testimony of General Gerow, Chief of War Plans in 1941. He testified that a unified command for Hawaii was discussed, but not implemented, because of the difficulty, from an interservice perspective, of setting up such an arrangement.<sup>26</sup>

One might simply classify these examples as interservice rivalry of a bygone era. But they also stand for the proposition that where any coordinating authority is too far removed, naturally autonomous organizations will tend to behave autonomously.

That a lack of unity of command was a fundamental ingredient of the disaster at Pearl Harbor has long been established. What has been emphasized here is the degree to which structure, rather than personality, contributed to that lack of unity. This importance of structure is not a new conclusion either. The Congressional investigating committee's first recommendation was:

That immediate action be taken to ensure that unity of command<sup>27</sup> is imposed at all military and naval outposts.

The word "outposts" conveys the sense that Congress meant unity at the level where the attack is possible. Congress does not seem to mean unity at some far-off headquarters such as the White House, where of course unity did exist in 1941. It is worth remembering this distinction when evaluating the present defense establishment.

B. Vietnam<sup>1</sup>

By 1968 the United States' effort in Vietnam consisted of more than 500,000 ground troops, an extensive advisory effort to the South Vietnamese Army and a vast bombing effort against both South and North Vietnam.

From its origins in a small advisory effort, the chain of command controlling the United States forces' in and around Vietnam had grown into a complex and fragmented structure. COMUSMACV, Commander, U.S. Military Assistance Command, Vietnam, was a unified commander who commanded forces within South Vietnam.<sup>2</sup> These consisted of the U.S. advisors to the South Vietnamese Army which fell directly under COMUSMACV; the United States Army, Vietnam (the U.S. ground combat units); and COMNAVFORV, Commander, Naval Forces, Vietnam (the "brown water" Navy). The Air Force element in South Vietnam, 7th Air Force, reported both to COMUSMACV and to CINCPACAF in Hawaii.<sup>3</sup> But COMUSMACV's authority ended at the borders of South Vietnam. The Naval air campaign was conducted by Task Force 77, the carrier task force in the Tonkin Gulf which was part of 7th Fleet, reporting to CINCPAC through CINCPACFLT, the Naval component commander.<sup>4</sup> Thus although COMUSMACV was a unified commander, CINCPAC, to whom COMUSMACV also reported, was the unified commander who commanded the entire effort in and around South Vietnam. Above CINCPAC the chain of command was as outlined by current directive and statute -- the Joint Chiefs of Staff, the Secretary of Defense and the President.

No one event can serve as a touchstone for analyzing the chain of command in Vietnam. The three case studies on which this study

relies, however, concern the large-unit search-and-destroy missions as a ground force strategy,<sup>5</sup> the bombing campaign over the North,<sup>6</sup> and the reevaluation of policy at the beginning of the Nixon administration.<sup>7</sup> Since the search-and-destroy strategy was gradually abandoned in 1968 and President Johnson announced the bombing halt in March, 1968, the case studies rest on conclusions relevant to the U.S. effort in 1968-1969, and so perforce does this study. Naturally in so brief a space any conclusions about the chain of command in Vietnam must be broad and general. Yet focusing on the structure of the chain of command rather than on the personalities involved does suggest a few conclusions.

The presence of two unified commanders, COMUSMACV and CINCPAC, is difficult to justify. But taking CINCPAC out of the chain would have meant transferring the command of the Air Force and Navy bombing forces to an "Army" command and thus eliminating "...the Navy's only command in the conduct of the war in Vietnam."<sup>8</sup> Whether effecting the transfer would have had any positive effect on the war effort is problematic, but it is hard to see how maintaining this extra link in the chain of command aided the effort.

As the last military link in the chain of command and the first link in Washington, the JCS role in Vietnam is crucial to any evaluation. The case studies indicate that the JCS functioned primarily as advocates for the field commanders, CINCPAC and COMUSMACV, rather than as independent evaluators or as disinterested advisors to the Secretary and the President:

Autonomy for the field commander is an established military tradition. In matters of operations the Joint Chiefs routinely defer to the authority of the ranking officer in the field,



whatever their individual preferences. Moreover, his position becomes their position and in discussions with the President they assume an advocacy role for his requests.<sup>9</sup>

This role of the JCS as advocates applied both to ground forces and to the air war. In the context of the air war the case study offered an additional motive for the JCS role:

The unwritten code of the Chiefs required that each service's proposal be supported by the other two, allowing unified military advice without exception. This meant that the President consistently received a single opinion from the Chiefs as his military advisors. Furthermore, the Chiefs adhered to that opinion out of their tacit commitment to each other's prerogatives.<sup>10</sup>

If deference to the commander in the field is understandable, and even arguably fundamental to an effective military hierarchy, it does not impel a kind of back-scratching unanimity on the part of those charged with the duty of advising the President. This advocacy role of the JCS extended beyond force levels and operational decisions to policy evaluation as well. Even during the policy evaluation at the beginning of the Nixon administration, the JCS saw their role as single-voiced advocates for CINCPAC and COMUSMACV.<sup>11</sup>

Such a role for the JCS resulted both from factors specific to Vietnam but also from the structure of the chain of command. As the only military voice in Washington, if the JCS did not serve as advocates, it is doubtful others would. Also in the particular context of Vietnam the civilian levels of the government contained varying levels of support, doubt and hostility. For example, Secretary McNamara's attitude progressed along precisely that spectrum. This climate would certainly encourage advocacy among the military. Yet one may also ascribe this advocacy role to the struc-

ture of the chain of command where service chiefs and Joint Chiefs are one and are in turn the one military voice in Washington.

At the level of the Secretary of Defense the picture is more mixed. On the one hand, the Secretary seems to have been the captive of the military, but on the other he took an active role in military operations and strategy.

With respect to ground force strategy, Secretary McNamara "has described his own failure to intervene...in terms of his lack of expertise and the need to depend on men actually in the field."<sup>12</sup> It would of course be rare for any Secretary of Defense to be an expert in military operations.<sup>13</sup> The source of the problem might be that the Secretary lacked an independent source of military advice. His supposed advisors, the JCS, were functioning as advocates, and the Secretary has no other military staff on which to call. Yet in the bombing of the North, the same Secretary, along with the President, maintained a tight control of sorts by selecting targets that could be struck. As the case study on that bombing campaign put it:

By reviewing target recommendations on a regular basis and reserving authority for their release, McNamara and Johnson<sup>14</sup> hoped to keep a firm rein on the military.

Thus the Secretary could, where he chose, intervene in operational-type decisions. This elective operational role of the Secretary may be the only helpful conclusion that can be drawn in this case at this level of the chain of command. The different Secretaries of Defense who were involved in Vietnam were all variously effective on a policy level, but it is in their operational role as a link in the chain of command that their actions must be examined here. Possibly the strongest piece of evidence concerning the Secretary's role might

be that it was what had previously been regarded as basically an operational-type decision about force levels which eventually caused a dramatic shift in U.S. policy. When the new Secretary of Defense, Clark Clifford, secured President Johnson's agreement against the commitment of an additional 200,000 troops in the wake of Tet, 1968,<sup>15</sup> U.S. policy changed from open-ended commitment to a definitely limited response. Thus the Secretary of Defense could and did function effectively as a link in the chain of command.<sup>16</sup>

Three conclusions emerge from this cursory examination of the chain of command in Vietnam. The duplicative layer of COMUSMACV and CINCPAC may have resulted from service-centered considerations. The JCS functioned as advocates for the field commanders rather than as advisors. And the Secretary of Defense could function as an operational link in the chain of command.

C. Pueblo

The U.S.S. Pueblo was a small, slow, virtually unarmed intelligence-gathering ship<sup>1</sup> that operated under the cover of an oceanographic research vessel.<sup>2</sup> In January, 1969, the Pueblo departed on its first mission, to patrol along the coast of North Korea to monitor naval activity and gather signal intelligence.<sup>3</sup>

Pueblo's sister ship, the U.S.S. Banner, had completed 16 previous missions, at least one of which had been in the precise area of Pueblo's operations. Banner had been seriously harrassed by North Korean ships on several occasions, and for two of its missions support forces in the form of a destroyer just over the horizon and two fighter aircraft on five-minute strip alert had been specifically dedicated to her.<sup>4</sup>

The Western Pacific in January, 1969 was an active area of military operations. The United States was at the height of its force commitment in South Vietnam. In Korea, relations were perceived as strained between the North and the South. Two days before Pueblo was seized, a squad of 31 North Koreans sent to assassinate the President of South Korea was intercepted before it could carry out its mission.<sup>5</sup> Despite this situation, the risk to Pueblo's mission was characterized as "minimal" and no forces were specifically dedicated to support Pueblo.<sup>6</sup>

Admiral Thomas Moorer, then CNO and later Chairman, JCS, described Pueblo's chain of command:

Pueblo was assigned to the Pacific Fleet and further assigned to the Service Force, Pacific Fleet, for administrative purposes. For the operational mission during which she was seized,

Pueblo was assigned to the operational control of Commander, Task Force 96, who was also Commander Naval Forces, Japan. In his operational capacity as CTF 96, Commander, Naval Forces, Japan was a subordinate of Commander-in-Chief, Pacific Fleet, who is the naval component commander of Commander-in-Chief, Pacific, a unified combatant commander under the Joint Chiefs of Staff.

The Joint Chiefs of Staff, of which The Chief of Naval Operations is the Navy member, exercise command of all operating forces. Thus in the case of Pueblo, the command chain ran up from CTF 96; to Commander-in-Chief Pacific Fleet; Commander-in-Chief, Pacific; to the Joint Chiefs of Staff who in turn report to the Commander-in-Chief of the Armed Forces through the Secretary of Defense. (emphasis added)

On January 23, 1968, Pueblo was dead in the water slightly over 15 miles off the North Korean coast.<sup>8</sup> Around noon, the Pueblo first noticed an approaching patrol boat.<sup>9</sup> Within an hour Pueblo was surrounded by four North Korean vessels. The first message to leave Pueblo to alert higher headquarters that this was other-than-routine harrassment was at 1254. Pueblo's last transmission was at 1432. CINCPAC plotted that Pueblo was in Wonsun harbor by 1645, and sunset at Wonsun was at 1741.<sup>10</sup> The seizure was rapid, but there was some appreciable time for reaction if forces and commanders acted quickly.

Commander, Naval Forces Japan (COMNAVFORJAPAN), Admiral Johnson, did not command any forces which could have aided Pueblo.<sup>11</sup> COMNAVFORJAPAN therefore had to request (not command) forces from other elements in the area. By directive he was to look to the 5th Air Force, and the 7th Fleet,<sup>12</sup> and notify its higher headquarters, CINCPACFLT, of the situation. A request was made to the Commander, 5th Air Force, General McKee, for support in accordance with COMNAVFORJAPAN's orders.<sup>13</sup> The closest aircraft available to support Pueblo were in Okinawa and were sent to Osan, South Korea to refuel before

going on to aid Pueblo.<sup>14</sup> Those aircraft were stopped in Osan since they could not reach Pueblo before dark.<sup>15</sup>

There were two other elements in the area that might have been of assistance but did not react to the crisis. The aircraft carrier Enterprise was on maneuvers about 500 miles from Pueblo preparing to go to the Tonkin Gulf. But Enterprise was under the operational control of the Commander, 7th Fleet, not COMNAVFORJAPAN. Of course both were subordinate to CINCPACFLT, the naval component commander to CINCPAC. Yet although Enterprise received Pueblo messages by retransmission and so knew of the situation, it did not volunteer to help, and COMNAVFORJAPAN did not request help from 7th Fleet. It was almost three hours after Pueblo's first transmission that Commander 7th Fleet, who had CINCPAC aboard, told Enterprise to change course, but not to take any overt action.<sup>16</sup> A second element that might have assisted was a Marine air wing stationed at Iwokuni, Japan. This wing was generally subordinate to Commander, 7th Fleet. But as a Marine unit, it was not in the same communications net as Pueblo.<sup>17</sup> The Commander, 5th Air Force who knew of the Marine wing had no authority over it. The best he could do was to notify CINCPACAF. CINCPACAF had no authority over the Marines either and could either make a request to CINCPACFLT, a commander at his same level, or go to CINCPAC who was the lowest commander with authority over both the Marine air wing and 5th Air Force.

The special subcommittee of the House Armed Services Committee which investigated the Pueblo incident was unequivocal in its evaluation of the chain of command:

The inquiry made by this special subcommittee  
... has resulted in the unanimous view that there

exist serious deficiencies in the organizational and administrative military command structure of both the Department of the Navy and the Department of Defense.<sup>18</sup>

For the security of the United States it would be tempting to dismiss the subcommittee's conclusion as based on factors peculiar to the Pueblo crisis, and several idiosyncratic factors did contribute materially to the outcome. First, there were significant delays in the transmission of messages.<sup>19</sup> For example, it took one hour 25 minutes for Pueblo's first critical message to reach 5th Air Force.<sup>20</sup> These delays were attributable not to communications equipment but to human factors and severely restricted the amount of time more senior members of the chain of command had to react. Second, the crisis found many major commanders absent from their headquarters.<sup>21</sup> Third, possibly because the commanders themselves were out of touch, there was little action taken by their headquarters other than informing other headquarters, most of which already had the Pueblo messages anyway. Fourth, there were appallingly few forces available to react and most of those that were available were unsuited to the mission.<sup>22</sup> The heavy U.S. involvement in Vietnam was the major contributing factor here. As well as limiting reaction forces, the strain on U.S. forces was also cited as responsible for not having a destroyer closer to Pueblo.<sup>23</sup>

Yet the incident cannot be dismissed as solely based on idiosyncratic factors, for the very way the incident developed raised serious issues about the structure of the chain of command. If any one of the nearby commanders had sufficient forces to deal with the Pueblo seizure, the crisis would have been entirely different. But the precise point is that no one commander had such forces and thus com-

manders were forced to rely on coordination, requests and assumptions about what others were doing. Two major reasons inherent in the command structure chiefly explain this result. There was no effective unity of command below CINCPAC, and those links in the chain of command, CINCPAC and above, who possessed sufficient authority were too far away to influence the situation.

Several incidents illustrate the effect of the lack of effective unity of command below CINCPAC. COMNAVFORJAPAN had to request forces from 5th Air Force. It had no authority to order air support for Pueblo. It was under the impression it was requesting "on call" support, but when the call came no one was "on".<sup>24</sup> Fifth Air Force had not been asked to provide specific forces and so did not.<sup>25</sup> Possibly because the commands were separate, the arrangements were vague and as with many vague arrangements they fell through.<sup>26</sup> COMNAVFORJAPAN assumed 7th Fleet would be notified by Washington and so did not specifically request assistance.<sup>27</sup> This eliminated the quickest route to involve Enterprise.

The one commander who did think of Enterprise had a circuitous route to get to her. Commander, 5th Air Force requested Commander, PACAF to mention Enterprise to CINCPAC.<sup>28</sup> Had this been done (and there is no evidence it was) the chain down to Enterprise was from CINCPAC to CINPACFLT to Commander 7th Fleet to Commander, TF77 on board Enterprise. This was certainly a long route. A similar route would have had to have been followed for Commander 5th Air Force to have alerted the Marine air wing. When Commander 7th Fleet did contact Enterprise, it took 46 minutes for the message to be transmitted, and the message was not received until 1650.<sup>29</sup>



These incidents do not reveal refusals to cooperate or negligence of assigned duties. They do reveal that duties were assigned so that no one with the responsibility for protecting Pueblo also had the authority to do so.

Those commanders who had both authority and responsibility were too far removed from the scene. CINCPAC headquarters and the component commanders were in Honolulu. All levels above CINCPAC were in Washington. Communications delays, physical distances and possibly psychological distances may have contributed to the behavior of the senior links of the chain of command. They behaved mostly as observers of the situation rather than active commanders. When Walt Rostow, the President's national security advisor, tried to call CINCPAC, he found CINCPAC to be in South Vietnam and the most senior officer available to be the Deputy Chief of Staff for Plans and Operations. In response to Rostow's question, "Can you tell us what happened to the Pueblo?" the General answered, "Well, sir, you know it's a long way from here to there."<sup>30</sup>

## V. CONCLUSIONS

In preceding statutory and case study data is broad enough to allow the reader to reach independent conclusions about the current organization of the chain of command; now it is appropriate to set forth my reading of the data -- first by considering the reasons for the existence of the detailed statutory provisions, second by using the criteria set forth at the beginning for evaluating the chain of command and finally by assessing the role of statute as an element of change.

This study offered three possible explanations, at the outset, for the existence of a detailed statutory framework governing the organization of the chain of command. The positivist explanation of law as court decisions was rejected out of hand as the courts have generally refused to interpret these statutes. All that one might add in conclusion is that the statutes and directive, and especially the ambiguous "through," would provide ample meat for the judicial grinder should the courts abandon their self-imposed restraint embodied in the Political Question Doctrine.

The second explanation offered was the naturalist one of these statutes as articulations of basic norms. Several of the statutes examined do seem to serve the purpose of articulating underlying principles or norms of the role of the chain of command in the Constitutional scheme. The Congressional attempt to redefine the Constitutional division in the War Powers Resolution is the most striking, but prohibitions on an Armed Forces Chief of Staff, or a recent military officer as Secretary of Defense, and assured Congressional access to

the JCS, all represent a working out of the idea of civilian control of the military.

However, by far the greater number of statutes seem to represent an attempt to limit or channel bureaucratic conflict. The detailed and restricted authority of the Secretary to transfer functions, and the detailed specification of roles and missions are representative of this type of statute. This conclusion does not, however, imply a value judgment. Given the absence of judicial interpretation, rules for settling conflict, inevitable in any organization as large as Defense, must be worked out somehow. Given the importance of national defense as a governmental function and the Constitutional division of that function between the Executive and Legislative Branches, it is not inappropriate that such rules, which in other contexts might be worked out primarily within the Executive Branch, receive statutory status. However, this conclusion does seem key to understanding what possibilities for reform of the existing structure are possible. But before proceeding to that stage, some conclusions about the functioning of the chain of command are in order.

At the outset three criteria were proposed for evaluating the chain of command at each level: 1) the relation between authority, responsibility and resources, 2) the incentives and 3) the proximity to relevant events. These criteria will now be applied to each level of the chain of command in light of the case studies and the statutory framework.

As an exception, however, two levels of the chain of command, the highest and lowest, will not be evaluated. Presidents have regularly assumed responsibility for military events. Ultimately, President

Johnson assumed responsibility for Vietnam. President Carter took responsibility for the failure to rescue the hostages in Iran. The President is beyond evaluation in terms of this study since he is always responsible, but Presidential assumption of responsibility has a noble, if hollow, ring to it and attention frequently shifts to the opposite extreme -- the immediate commander involved. Admiral Kimmel, General Short and Commander Bucher, the Pueblo's Commander, all were subject to intense scrutiny and, arguably, came in for more of the blame than they deserved. In Vietnam such an immediate commander was harder to fix if only because of the duration of the war. However, if the case studies and the complexities of the statutory framework show anything, it is that the levels between the immediate commander and the President can contribute enormously to success or failure. So we will now evaluate those levels.

The Secretary of Defense is the one link below the President with authority and responsibility over all elements in the chain of command. Although forced to deal with a static structure due to Congressional specification of roles and missions and restrictions on his ability to transfer them, the Secretary does exercise "direction, authority and control," to use the statutory language, over all elements in DOD. The problems with the Secretary's role become apparent, however, as one attempts to assess his command authority and the resources available to him to carry out his command role. The Secretary's authority to command is not explicit. If it exists, it must be inferred from a combination of statutory sources, and legislative histories, or delegation from the President.

But whatever the precise contours of his command role, the

Secretary does seem to function as an element in the chain of command. If he is to be an effective link, one must assess the resources available to him to carry out that role. At first glance his resources are enormous. Specifically the JCS are to function as his military staff. (In addition, there are the civilian elements of DOD upon which the Secretary may call, with which this paper has not dealt.) But as the JCS have come to function as an independent link in the chain of command (see below), they are less able to play the role of the Secretary's staff. Without the JCS, the Secretary has no military staff of his own upon which to draw. Secretaries since 1958 have all had little military experience and seem to have conducted themselves more as managers and policymakers than as military commanders. The Pueblo and Vietnam case studies seemed to show these traits in Secretaries McNamara and Clifford. The Blue Ribbon Defense Panel arrived at similar conclusions.<sup>1</sup>

The incentives for the Secretary similarly point away from military command. He is a politically appointed Cabinet officer, presumably loyal to the President and heavily involved in policymaking rather than commanding. The Secretary is also rather far removed from the scene of military action. In Pueblo, Secretary McNamara was simply not involved in the crisis until well after Pueblo was in Wonsun harbor. In Vietnam, he felt the "need to depend on men in the field,"<sup>2</sup> according to the case study.

All these criteria indicate a Secretary who, although he may have some authority to command, has not, for a variety of reasons, usually been heavily involved in the command function. One is struck by the similarity between the pre-World War II President sitting, without

benefit of personal support, atop a vastly smaller defense establishment and the present Secretary of Defense sitting, also without personal military support, atop the vast defense establishment.

The JCS present the most complex evaluation problem. The mix of authority, responsibility and resources is extremely ambiguous. The Chiefs' authority rests not on statute but on the ambiguous language in DOD Directive 5100.1. Despite this most tenuous base for command, the Chiefs certainly seem to exercise it. Admiral Moorer used the term expressly in describing the chain of command for Pueblo.<sup>3</sup> General Jones spoke of the JCS as running "everything."<sup>4</sup>

If one may conclude the Chiefs do exercise command in some form, their responsibility for it is questionable, primarily in the sense that trying to fix responsibility for such a personal action as command upon a committee is difficult at best. The statutory scheme further undercuts responsibility since the JCS role, there, is as military staff to the Secretary and as advisors to the President and Secretary.

As to resources, the JCS has virtually none. The Joint Staff is limited to 400 and while this has been supplemented in the Organization of the Joint Chiefs, an arguable violation of the statute, the JCS, as a body, is largely deficient in support. Statutorily, the JCS, as a body, have no authority over the military departments, which control the training, administration, and supply of combatant forces. However, this restriction is more apparent than real since the individual service chiefs do have such authority; but since this authority arises from the individual service chief's role as head of his service and not as a member of the JCS, it seems another reason why individual

service interests rather than joint interests may prevail within the JCS. It is also an indicator that such staff resources as the Chiefs use are most often found in the services. This problem over resources is just one of the incentives that pulls the individual service chief away from a fully joint role. General Jones points to the obvious difficulty of the leader of a service being anything but a vigorous advocate for his service, especially on resource or mission questions, and still remaining a respected leader.<sup>5</sup>

However lest one think the JCS is a public battleground of dissent, it is clear that the Chiefs have learned the value of compromise.<sup>6</sup> One way in which statute contributes to this is that the Chairman is required to report to the Secretary when the Chiefs disagree, and they are reluctant to air controversy and do not seek decision by the Secretary unless absolutely necessary. From 1958 to 1969, approximately one percent per year of about 1,900 JCS decisions were referred to the Secretary.<sup>7</sup> Eight years later, the Steadman Report found "a trend in recent years toward fewer 'split' JCS papers being forwarded to the Secretary for decision. (emphasis added)"<sup>8</sup>

The increased pressures on the JCS have created an incentive for the Chairman to assume a greater role and to act for the JCS.<sup>9</sup> In Vietnam, General Wheeler assumed such a role as the Washington advocate for the field commanders. If such a response is understandable, it arguably runs afoul of the Congressional policy against "an Armed Forces Chief of Staff."<sup>10</sup> Here is one area where Congressional policy and current trends seem squarely opposed.

In terms of proximity, the JCS seem far removed from operational military decisions. Vietnam showed them functioning as advocates for

the field commanders rather than as exercising independent judgment. Pueblo showed them as too far removed to be involved. Given the JCS group character, such non-involvement is to be expected. Unless the Chairman assumes an arguably unauthorized role as a decisionmaker, it would seem easiest for the Chiefs to agree to endorse the commander in the field. This decision may be rationalized on proximity grounds, e.g. Washington is too far removed from the scene, or the man on the ground knows best. But such a decision is essentially a decision by the JCS to remain passive.

For operational military decisions then, the JCS appears a very weak link in the chain of command; but as the only uniformed link in Washington, they are subject to enormous pressure. In terms of the three criteria chosen for evaluation, the Chiefs rate poorly. In terms of the basic dilemmas in their current structure, they seem to function more as collective commanders than advisors, to articulate service interests at the expense of joint interest, and to attempt to compensate for their committee character by giving increased authority to the Chairman.

The Unified Commanders are the only military commanders who devote full time to joint command.<sup>11</sup> The individual commanders have total statutory authority and responsibility within their commands for their assigned missions. However, this is command only in the narrow operational sense of moving forces because Unified Commanders are deficient in their control of resources. By statute the logistical chain of command runs around the Unified Commander. With the component command system immediately below him, the magnitude of this omission is revealed. The Unified Commander has no authority over



personnel, training, doctrine or equipment for his forces.

The incentives for a Unified Commander are mixed. He is a member of a service; and although he may often retire after that command, he may also go on to further assignments within his service. Thus, his ties to his service are real. On the other hand, the Unified Commander is responsible for a joint mission, which is a powerful incentive to put that interest first. But possibly the most important incentive is the disincentive to raise joint service issues. The only forum is the JCS, which is hardly a hospitable forum for doing so. But for the Unified Commander to exercise his other option and demand his statutory right to go to the Secretary, thus circumventing the JCS, would quite possibly be to cut his own throat. However, as Vietnam showed, if the Unified Commander desires a voice in the policy councils in Washington, the JCS will be it.

The proximity of the Unified Commanders varied. In Vietnam, COMUSMACV was as proximate as one could hope — possibly too proximate since significant air and naval forces engaged in the war effort were not under his command. CINCPAC arguably was too removed and tended to rely on COMUSMACV to a large degree.<sup>12</sup> In Pueblo, CINCPAC and his staff just seemed to consider themselves too far removed to be effective.<sup>13</sup>

It is at levels below the Unified Command that the problems at this level are most apparent. Unification stops at a very high level. All units below the Unified Commander are single service; so when, as in Pueblo, resources from two services are necessary, command by cooperation seems the order of the day. The similarities of Admiral Kimmel and General Short at Pearl Harbor and Admiral Johnson and

General McKee in Pueblo are too great to be ignored. For commanders in their positions, there is no authority and little incentive to raise joint service issues. Often with the Unified Commander far removed from the scene, there seems no practical way to resolve such issues except by cooperation.

Thus, the Unified Commander is sandwiched above and below by structures that encourage single-service over multiservice issues. Further such a system cannot field multiservice forces at any level below the Unified Command. Yet this is precisely the level at which they are likely to be engaged.

Thus one may conclude that the chain of command as presently constituted presents three critical problems. Despite the rhetoric of unification, it remains essentially single service oriented. The Secretary of Defense, despite a heavy statutory responsibility, really functions marginally within the chain of command. And the Joint Chiefs of Staff, although omitted by statute, really carry a major share of the command burden though by structure and composition they are ill-suited to do so.

The final point of this paper must be to address the role of statute in changing these aspects of the chain of command. Initially one might say it is exclusive since no matter what might theoretically be possible by intra-Executive Branch action, major organizational changes in DOD have been accomplished by statute in the past and Congress has shown no signs of wishing to abdicate that role. So from a practical political viewpoint, at least, Congress must be consulted.

If statutory change were attempted, the ripest area for reform would be the JCS. Indeed the contradictions in the JCS role are so

fundamental that change seems compelled. Congressional endorsement of a major role for the Chairman would seemingly require a reversal of Congressional policy but is certainly within Legislative purview. More radical reforms such as a civilian position which would assume the JCS responsibilities for operational decisions, or separating the Joint Chief and service head roles are also possible. If the political consensus could be built, the JCS level problems seem tractable to statutory reform.

The service unification issue seems of a different magnitude. In one sense, statute is unnecessary since there is no legal bar to assigning units from one service to operate under command of another service. But in another sense, the services have preserved their autonomy so successfully that one wonders if, even should Congress begin to be so disposed, successful legislation could be drafted that would change the rules of the bureaucratic game enough to compel a significantly greater degree of unification.

The final problem and possibly the most important, that of the role of the Secretary of Defense, seems both the most and least amenable to statutory change. Initially one might question whether the Secretary should be a military commander. The current statutes answer that question, albeit ambiguously, in the affirmative since the Secretary is placed directly in the chain of command. Naturally the ambiguity in the Secretary's role as military commander could be resolved by simply inserting the word "command" along with "authority, direction and control" in describing the Secretary's powers within the Defense Department. However, to what extent this statutory change would influence the behavior of particular Secretaries of Defense is

problematic. The problem is one of individuals, not statutes. Just like Woodrow Wilson in World War I, some Secretaries will be content to delegate operational military decisions. In the presence of such style, statute seems of little help.

There can be little doubt that the structure of the chain of command influences the outcome of military operations. After a relatively brief period of organizational innovation, Defense organization has been essentially static for 24 years. Given a less-than-totally successful military record during that time and some consistently identified problems in the statutory framework, some change is overdue. Under the current system, it is the highest irony that the very problem of a lack of effective unification, identified as a major cause of the Pearl Harbor disaster, is as prevalent today as it was on December 6, 1941.

NOTES

I. INTRODUCTION

1. U.S. Const. art.II, Sec. 2, cl.1 "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the Several States, when called into the actual Service of the United States;..."
2. 50 U.S.C. Sec. 401 (1976) reads in part "... to provide a Department of Defense, including the three military Departments of the Army, the Navy (including naval aviation and the United States Marine Corps), and the Air Force under the direction, authority and control of the Secretary of Defense;..." It should simply be noted at this point, pending detailed further discussion, that the word "command" is absent here.
3. Dept. of Defense Directive Number 5100.1, Dec. 31, 1958, Part II, 2(c). "The chain of command runs from the President to the Secretary of Defense and through the Joint Chiefs of Staff to the commanders of unified and specified commands." (emphasis added) The meaning of this ambiguous "through" is essential to understanding the operation of the chain of command and will be examined subsequently.
4. 10 U.S.C. Sec. 124(a) (1976) "With the advice and assistance of the Joint Chiefs of Staff, the President, through the Secretary of Defense, shall -- (1) establish unified combatant commands or specified combatant commands to perform military missions;..."
5. My language here is purposely ambiguous since the process by which forces are assigned is somewhat clouded and will be explored in more detail later.
6. The Chief of Staff of the Army never had "command" authority by statute. The Chief of Naval Operations and the Chief of Staff of the Air Force both had "command" authority until this was deleted by amendment in 1958 as incompatible with the authority of the unified commanders. Act of September 2, 1958, Pub. L. No. 85-599, Sec. 4, 72 Stat. 516 (1958) (hereinafter 1958 Act) (See section on Unified Commands, infra, for statutory language).
7. 10 U.S.C. Sec. 124 (1976).
8. Specified Commands include the Strategic Air Command and the Military Airlift Command. Unified Commands include the European Command, Pacific Command, Atlantic Command, Southern Command, Readiness Command, Aerospace Defense Command, and the Rapid Deployment Joint Task Force.
9. It is beyond the scope of this paper, but important nonetheless that the individual who is a unified commander may simultaneously

fill one or even two other positions. For example, the US Army general who commands the European Command is also the Supreme Allied Commander, Europe, who is the Commander of all NATO forces in Europe. Thus the individual, in filling these two roles, may be subject to conflicting pressures from two chains of command, the United States chain to European Command and the multinational chain leading to NATO, even though the positions are theoretically distinct. This paper, however, will consider the unified commander in the U.S.-only role.

10. One might also cite the more recent failed attempt to rescue hostages in Iran. On the other hand, the Cuban Missile Crisis in 1962 and the intervention in the Dominican Republic in 1965 were cases where military forces effectively carried out their assigned tasks within the established policy guidelines.
11. These include the National Security Act of 1947 and the major amendments to that Act in 1949, the 1953 Presidential Reorganization Plan and the 1958 Act, all of which are considered in detail later in this paper.
12. The panel did seem to merit its appellation of Blue Ribbon. Some of its members were Lewis F. Powell, now Justice Powell, Lane Kirkland of the AFL-CIO, and William Clements, later Deputy Secretary of Defense and Governor of Texas. In my opinion the Panel's is the most insightful study to date of the Defense Department.
13. Blue Ribbon Defense Panel, Report to the President and the Secretary of Defense, 1 (1970) (hereinafter Blue Ribbon Defense Panel).
14. It should be noted that three members of the Panel filed separate statements ranging from qualified support to almost unqualified dissent. Blue Ribbon Defense Panel, 198-211.
15. Commission on the Organization of the Government for the Conduct of Foreign Policy (Murphy Commission), vol. 4 appendix K, 440 (1975) (hereinafter Murphy Commission).
16. R. Steadman, Report to the Secretary of Defense on the National Military Command Structure, 1 (1978) (hereinafter Steadman Report).
17. D. Jones, "Why the Joint Chiefs Must Change," at 1, draft as released by the Office of the Chairman, Joint Chiefs of Staff. An abbreviated version appeared in Directors and Boards (February, 1982).

## NOTES

II. THE SETTING

1. In 1903, Secretary of War Elihu Root had been the motive force behind creation of a joint Army-Navy board "...for the purpose of conferring upon, discussing, and reaching common conclusions regarding all matters calling for cooperation of the two services." E. Root, The Colonial Policy of the United States, 431-32 (1916).
2. See, Pearl Harbor case study, infra.
3. E.g., General Eisenhower commanded all allied forces in the European Theater. These included not only United States Army and Navy units but also British, Canadian, Free French, etc., forces.
4. M. Lowenthal, "The Department of Defense: Organizational History" Congressional Research Service, 9-11 (1978).
5. The National Security Act of 1947, ch. 343, 61 stat. 495 (1947) (hereinafter National Security Act). This act also established the Central Intelligence Agency and the National Security Council, among other agencies. The Act was a complete review of national security organization and not just military organization.
6. The National Security Act Amendments of 1949, ch. 421, 63 stat. 581 (1949) (hereinafter 1949 Amendments), Reorganization Plan No. 6 of 1953, 67 Stat. 638 (1953) and 1958 Act.
7. Blue Ribbon Panel, 1.
8. O. Holmes, "The Path of the Law", Collected Legal Papers 173 (1921).
9. See, L. Tribe, American Constitutional Law 173 (1978).
10. Id. 71-79. The Political Question Doctrine is not confined exclusively to military affairs, but is applicable to any question which the Courts deem to be exclusively within the domain of the other two branches.
11. 413 U.S. 5.
12. Id. at 10.
13. Id. at 11.
14. Concurring opinion of Blackmun and Powell, JJ., Id. at 12-14.

15. Dissenting opinion of Douglas, Brennan, Stewart and Marshall, JJ, Id. at 12. The grounds for mootness were that the training methods of the Ohio National Guard had changed and that those in charge at the relevant time were no longer in charge.
16. 471 F.2d 1146 (2d Cir. 1973).
17. Id. at 1147.
18. Id. at 1157.
19. Orlando v. Laird, 443 F.2d 1039 (2d Cir.), cert. denied, 404 U.S. 869 (1971).
20. DaCosta, supra, at 1157.
21. Naturally, two cases cannot serve to explore fully the contours of the Political Question Doctrine or the courts' review of military decisions, but for the purposes of this paper they do fairly represent the general stance of the courts vis-a-vis operational military decisions.
22. L. Fuller, Anatomy of the Law, 116 (1968).
23. Id., at 98.
24. S. Huntington, The Soldier and the State (1957). See Chapter 4, "Power, Professionalism, and Ideology: Civil-Military Relations in Theory."
25. Admiral Kimmel, see Pearl Harbor case, infra, actively pursued a courtmartial as a device for getting at the question of the responsibility of those in Washington. Commander Bucher, the Pueblo's captain, seriously considered requesting a court martial when he felt the Navy Board of Inquiry, in assigning responsibility for Pueblo's capture, failed to focus on the actions of those higher in the chain of command.
26. See, Fuller at 116 where he develops the idea of differences in climate as an obvious limit to any universal natural law theory.
27. This conception of statutes as rules of the bureaucratic game does not solve the problem of who interprets the rules or how they are enforced other than to draw attention to the fact that these functions may be performed in more political than judicial ways. By this is meant that these statutes may serve the same function that "the law" serves in private settlement negotiations where both sides may use their interpretation of "the law" as one element of a bargaining strategy to arrive at an acceptable solution.



NOTESIII. EVOLUTION AND CURRENT FUNCTIONING OF THE CHAIN OF COMMANDA. The Constitutional Level: President & Congress

1. The Federalist No. 69 (A. Hamilton) draws this distinction.
2. U.S. Const. art I, Sec. 8, cl.12.
3. U.S. Const. art I, Sec. 8, cl.13.
4. U.S. Const. art I, Sec. 8, cl.11.
5. U.S. Const. art.II, Sec. 2, cl.2.
6. The Federalist No. 69 (A. Hamilton).
7. Thomas Jefferson's ordering a Naval Squadron to the Mediterranean against the Barbary Pirates in 1801 is probably the first instance to illustrate this difficulty. See, W. Goldsmith, The Growth of Presidential Power 373-78 (1974). President Truman's justification for the seizure of the steel mills under the Commander in Chief power and the Supreme Court's rejection of that rationale represent a modern judicial attempt to limit the Commander in Chief role. See Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952).
8. The War Powers Resolution, 50 U.S.C. Secs. 1541-48 (1976).
9. New York Times, April 27, 1980, at 1, col. 4. More recently, the Reagan administration has interpreted the War Powers Resolution as not applicable to either the commitment of advisors to El Salvador or Marines to Beirut. Senator Thomas F. Eagleton, for one, has criticized that interpretation. New York Times, November 17, 1982, at A35.
10. Immigration and Naturalization Service v. Chadha, 51 U.S.L.W. 4907 (U.S. June 23, 1983) (No. 80-1832).
11. 2 Goldsmith, Growth of Presidential Power 941 (1974).
12. 3 Goldsmith, Growth of Presidential Power 1779 (1974).
13. Id. at 1707-09.
14. See, Orlando v. Laird, supra. Recent Presidents, reflecting their individual styles and preferences, have varied significantly in organizing their staffs to conduct national security affairs. This individuality has certainly affected the conduct of the Commander in Chief role, but an individual appraisal of each President's command performance is beyond the scope of this paper.

15. For a good concise discussion of the 1947, 1949, 1953 and 1958 reorganizations See, Lowenthal, supra, 9-29.
16. 50 U.S.C. Sec. 401 (1976) "to provide that each military department shall be separately organized under its own Secretary...." Earlier versions of this section stressed the separateness of the departments more emphatically. This statutory section in its various versions best expresses the evolution of Congressional thinking in defense organization. The current version is as follows:

In enacting this legislation, it is the intent of Congress to provide a comprehensive program for the future security of the United States; to provide for the establishment of integrated policies and procedures for the departments, agencies, and functions of the Government relating to the national security; to provide a Department of Defense, including the three military Departments of the Army, the Navy (including naval aviation and the United States Marine Corps), and the Air Force under the direction, authority, and control of the Secretary of Defense; to provide that each military department shall be separately organized under its own Secretary and shall function under the direction, authority, and control of the Secretary of Defense; to provide for their unified direction under civilian control of the Secretary of Defense but not to merge these departments or services; to provide for the establishment of unified or specified combatant commands, and a clear and direct line of command to such commands; to eliminate unnecessary duplication in the Department of Defense, and particularly in the field of research and engineering by vesting its overall direction and control in the Secretary of Defense; to provide more effective, efficient, and economical administration in the Department of Defense; to provide for the unified strategic direction of the combatant forces, for their operation under unified command, and for their integration into an efficient team of land, naval, and air forces but not to establish a single Chief of Staff over the armed forces nor an overall armed forces general staff.

17. The roles and missions of the Navy are set forth at 10 U.S.C. Sec. 5012; the Marines at 10 U.S.C. Sec. 5013; the Army at 10 U.S.C. Sec. 3062(b); and the Air Force at 10 U.S.C. Sec. 8062(c) (1976). The Navy section provides an example of the detail which Congress used:

(a) The Navy, within the Department of the Navy, includes, in general, naval combat and service forces and such aviation as may be organic therein. The Navy shall be organized, trained, and equipped primarily for prompt and sustained combat incident to operations at sea. It is responsible for the preparation of naval forces necessary for the effective prosecution of war except as otherwise assigned and is generally responsible for naval reconnaissance, antisubmarine warfare, and protection of shipping.

(b) All naval aviation shall be integrated with the naval service as part thereof within the Department of the Navy. Naval aviation consists of combat and service and training forces, and includes land-based naval aviation, air transport essential for naval operations, all air weapons and air techniques involved in the operations and activities of the Navy, and the entire remainder of the aeronautical organization of the Navy, together with the personnel necessary therefor.

(c) The Navy shall develop aircraft, weapons, tactics, technique, organization, and equipment of naval combat and service elements. Matters of joint concern as to these functions shall be coordinated between the Army, the Air Force, and the Navy.

(d) The Navy is responsible, in accordance with integrated joint mobilization plans, for the expansion of the peacetime components of the Navy to meet the needs of war.

18. 10 U.S.C. Sec. 125(a) (1976). In light of the Supreme Court's holding in Chada, supra, the constitutionality of this provision is suspect.
19. 10 U.S.C. Sec. 125(b) (1976).
20. National Security Act Sec. 211(a) (current version at 10 U.S.C. Sec. 141 (1976)).
21. National Security Act Amendments of 1949, ch. 412, Sec. 7(b), 63 Stat. 581 (1949) (current version at 10 U.S.C. Sec. 141 (1976)) (hereinafter 1949 Amendments).
22. Id. at Sec. 2 (current version at 50 U.S.C. Sec. 401 (1976)).
23. 1958 Act, Sec. 7, (current version at 10 U.S.C. Sec. 141 (1976)).
24. 50 U.S.C. Sec. 401 (1976) "...but not to establish a single Chief of Staff over the armed forces nor an overall armed forces general staff."
25. 10 U.S.C. Sec. 143 (1976). The number of officers is limited to 400 and the tour of duty to three years with an individual reeligible for assignment to the Joint Staff after a three year interval.
26. U.S. Const. art II, Sec. 1, cl. 6 requires that the President "not receive any other Emolument from the United States" which might be construed to prohibit the President's holding a commission in the armed forces as an "Emolument." In any event, President Eisenhower resigned his commission which was later restored by act of Congress. See Huntington, supra, ch. 3, for a detailed discussion of civilian control.

27. 10 U.S.C. Sec. 133(a) (1976). This prohibition was waived once, for General George C. Marshall, Secretary of Defense under President Truman, 1950-1951.
28. 10 U.S.C. Sec. 134(a) (1976).
29. 10 U.S.C. Sec. 135(a) (1976).
30. 10 U.S.C. Sec. 141(d) (1976).

NOTESB.1. The Statutory Level: Secretary of Defense

1. National Security Act, Sec. 201(a).
2. Id. at Secs. 205(a), 206(a), and 207(a).
3. Id. at Sec. 202(a) (1)&(2) (emphasis added).
4. Id.
5. 1949 Amendments, Sec. 4, (amending National Security Act Sec. 201(b)).
6. Id. Sec. 5 (amending National Security Act Sec. 202(b)).
7. Id.
8. Id. (amending National Security Act, Sec. 202(c)).
9. 1958 Act, Sec. 3, 72 Stat. 514 (1958) (current version at 10 U.S.C. Sec. 125 (1976)). The current version is daunting in detail but its full weight only applies to a Congressionally determined "major combatant function, power or duty" of the services. See, Sec. 125 (a)(1). The viability of this section, like the War Powers Resolution, is questionable following the Supreme Court's finding the legislative veto unconstitutional in Immigration and Naturalization Service v. Chadha on June 23, 1983.
10. 10 U.S.C. Sec. 141(d) (1976).
11. See e.g., 10 U.S.C. Sec. 3012(b) (1976) as to the Secretary of the Army.
12. This authority has been characterized as "statutory insubordination," but given the Congressional view of its own responsibilities, this "insubordination" is inherent in the Congressional concept of civilian control.
13. In 1962 Congress codified the Secretary's duties at 10 U.S.C. Sec. 133, but without the intent to change the meaning of the language. U.S. Code Cong. & Ad. News, 87th Cong., 2d Sess., 2456, 2463.
14. This is meant in the sense that there are no residual areas of power outside the Secretary's authority. Of course statutory grants of power to other entities and the limitations on the transfer of functions are curbs on the Secretary's power.

15. Department of Defense Reorganization Act of 1958: Hearings on H.R. 12541 Before the Senate Comm. on Armed Services, 85th Cong., 2d Sess. 13-16 (1958) (opinion of Sen. Russell in exchange with Secretary of Defense McElroy). Their exchange related more to the authority of the Secretary to run DOD internally than to major changes in Congressional policy.
16. Lowenthal, supra, 50-51.
17. Blue Ribbon Defense Panel, 1.
18. Access of Service Secretaries to Military Information, H.R. Rep. No. 94-952, 94th Cong., 2d Sess. 1 (1976).
19. Id. at 4.

NOTESB.2. The Joint Chiefs Of Staff

1. 1949 Amendments, Sec. 7(b) (current version at 10 U.S.C. Sec. 142 (1976)). Admiral Leahy, as Chief of Staff to the President, sat with the JCS during World War II and functioned in some respects as a de facto chairman.
2. 10 U.S.C.A. Sec. 141(e) (1982)

(a) There are in the Department of Defense the Joint Chiefs of Staff consisting of --

- (1) a Chairman;
- (2) the Chief of Staff of the Army;
- (3) the Chief of Naval Operations;
- (4) the Chief of Staff of the Air Force; and
- (5) the Commandant of the Marine Corps.

(b) The Joint Chiefs of Staff are the principal military advisers to the President, the National Security Council, and the Secretary of Defense.

(c) Subject to the authority and direction of the President and the Secretary of Defense, the Joint Chiefs of Staff shall --

(1) prepare strategic plans and provide for the strategic direction of the armed forces;

(2) prepare joint logistic plans and assign logistic responsibilities to the armed forces in accordance with those plans;

(3) establish unified commands in strategic areas;

(4) review the major material and personnel requirements of the armed forces in accordance with strategic and logistic plans;

(5) formulate policies for the joint training of the armed forces;

(6) formulate policies for coordinating the military education of members of the armed forces;

(7) provide for representation of the United States on the Military Staff Committee of the United Nations in accordance with the Charter of the United Nations; and

(8) perform such other duties as the President or the Secretary of Defense may prescribe.

(d) After first informing the Secretary of Defense, a member of the Joint Chiefs of Staff may make such recommendations to Congress relating to the Department of Defense as he may consider appropriate.

3. 10 U.S.C. Sec. 141(a)(1) (1976).
4. 10 U.S.C. Sec. 142(c) (1976).
5. 10 U.S.C. Sec. 142(b) (1976).
6. 10 U.S.C. Sec. 142(c) (1976).
7. 50 U.S.C. Sec. 401 (1976).
8. 1949 Amendments, Sec. 7(b).
9. 1958 Act, Sec. 7.
10. 10 U.S.C. Sec. 143(a) (1976).



11. 1949 Amendments, Sec. 7(c).
12. 1958 Act, Sec. 5(a).
13. E.g., "All told, including the Office of the Chairman, the Joint Staff, and these other JCS activities (which are not considered part of the 400 officer ceiling imposed by Congress), approximately 1,700 persons work in this organization, some 1,200 of them military." C. Buckland, The Department of Defense 91 (1968). By whom the excess 1,300 persons "are not considered part of the ceiling" is not clear. Even the organization described above does not include the considerable extent to which JCS requirements are "farmed out" to the respective services for staff support.
14. 1958 Act, Sec. 6.
15. Blue Ribbon Defense Panel.
16. National Security Act, Sec. 211(a).
17. Act of June 28, 1952, Pub. L. No. 416, Sec. 2, 66 Stat. 282.
18. Act of October 20, 1978, Pub. L. No. 95-485, tit VIII, Sec. 807, 92 Stat. 1622.
19. 1958 Act, Sec. 4.
20. DOD Directive 5100.1, Sec. II (2)(c). In light of the discussion of the lack of a statutory basis for the Secretary of Defense to command, this directive creates a double ambiguity since the Secretary, in issuing this directive, may be assuming and delegating authority he does not have.
21. Id. at Sec. IV (1).
22. New York Times, June 29, 1983, at 29, Col. 3.

NOTESB.3. Unified Commands

1. National Security Act, Sec. 211(b).
2. 1949 Amendments, Sec. 7(b).
3. Several articles appeared in the Navy's JAG Journal discussing the 1958 reorganization and its effect. See e.g. J. Grant, "The Reorganization Act of 1958: The Authority of the Chief of Naval Operations to Command," JAG Journal 2, (May, 1959).
4. 1958 Act, Secs. 4-5.
5. Id. at Sec. 4. Parallel language was used to amend the authority of the Chief of Staff of the Army, 10 U.S.C. Sec. 3034, the Chief of Naval Operations, 10 USC Sec. 5081, the Commandant of the Marine Corps, 10 U.S.C. Sec. 5201, and the Chief of Staff of the Air Force, 10 U.S.C. Sec. 8034.
6. The intent of the "through" language is not clear since the President would seem to have the power to establish unified commands as Commander in Chief. A possible explanation is that Congress sought to indicate that it did not wish final authority for unified commands to rest with the Secretary which might be implied since this authority is in the section detailing the Secretary's duties.
7. 1958 Act, Sec. 5(b). In 1962, in enacting this provision as a separate article within Title 10, the language was slightly rewritten and broken up into subparagraphs without the intent to alter its effect. 10 U.S.C. Sec. 124 (1976). The Congressional intent is given at U.S. Code Cong. & Ad. News, 87th Cong., 2d Sess. 2456, 2463.
8. 10 U.S.C. Sec. 124(a) (1976). Thus again, as in the DOD Directive placing the JCS in the chain of command, the ambiguous "through" is operative. Where, as here, the word is used within a well-established relation, as between the President and the Secretary of Defense, it might be defended on the ground of allowing needed flexibility in working out the precise relationship. However where, as in DOD Directive 5100.1, "through" is used to create a relationship in describing the chain of command as running "through the Joint Chiefs of Staff" (see p. 32) the ambiguity can be baffling. But even in the context of this statute, one may well criticize the use of the term on the ground that such an ambiguous "through" creates confusion by attempting to define imprecisely a relationship which is so closely bound up with the prerogative of the Commander in Chief.

9. 10 U.S.C. Sec. 124(b) (1976).
10. 10 U.S.C. Sec. 124(c) (1976).
11. 10 U.S.C. Sec. 124(d) (1976).
12. Id. It is curious that subsection (d) unlike subsection (b) dealing with force assignment, is prefaced by the phrase "subject to the authority, direction and control of the Secretary." The discrepancy in language may be no more than sloppy drafting, but it does provide some basis for the argument of the autonomy of the military department in assigning forces.
13. 10 U.S.C. Sec. 133(d) (1976).

NOTESIV. THE CHAIN OF COMMAND IN PRACTICE: CASE STUDIESA. Pearl Harbor

1. There were eight separate official investigations, from an independent commission headed by Justice Owen J. Roberts immediately after the event, to a full-scale Congressional investigation after the war, U.S. Congress. Senate Investigation of the Pearl Harbor Attack, Report of the Joint Committee on the Investigation of the Pearl Harbor Attack, Document No. 244, 79th Congress, 2d Sess. (1946). (Hereinafter Pearl Harbor Report). A most exhaustive factual source is G. Prange, At Dawn We Slept (1981) which also contains a list of the official investigations at 823-25.
2. Prange, 5, 167, 165-171.
3. R. Wohlstetter, Pearl Harbor 75 (1962).
4. Wohlstetter, 386-7.
5. Pearl Harbor Report, Appendix B, 275-78.
6. For example, Kimmel and Short had a biweekly golf date. Prange, 53.
7. Prange, 58.
8. For example, Kimmel never visited Army facilities key to Pearl Harbor defense nor did he know of Short's alert plans. Prange, 701.
9. "As a result of the December 7 attack on Hawaii, military and naval forces of the United States suffered 3,435 casualties; Japan less than 100. We lost outright 188 planes; Japan 29. We suffered severe damage to or loss of 8 battleships, 3 light cruisers, 3 destroyers and 4 miscellaneous vessels; Japan lost 5 midget submarines. The astoundingly disproportionate extent of the losses marks the greatest military and naval disaster in our Nation's history." Pearl Harbor Report, 65.
10. The contemporary judgment fell heavily on them. They were both relieved on December 16. Prange, 589. The Roberts Commission, the first investigation, charged Kimmel and Short with "dereliction of duty." Id. at 600. Only after the war, with the MAGIC messages released, did more attention focus on the actions of Marshall and Stark and their staffs. Indeed one member of the Congressional committee believed that Marshall and Stark should be judged by the same standard as Kimmel and Short and that any guilt attached to the latter belonged equally to the former.

11. The best analytical account of this aspect of Pearl Harbor is Wohlstetter, supra.
12. Prange is particularly good on this aspect; Wohlstetter, 393.
13. Wohlstetter, 385.
14. Id. at 385-401.
15. See Prange, 86 for how MAGIC was handled in Washington. See also R. Lewin, The American Magic (1982).
16. Prange, 86-88.
17. Id. at 82.
18. Wohlstetter, 181-82, 394.
19. Id. at 260.
20. Pearl Harbor Report, 151-52.
21. Id.
22. Id. at 153.
23. Note 6, supra.
24. Wohlstetter, 28. "It was General Short's policy not to inquire of Admiral Kimmel about any naval details, and Admiral Kimmel kept the same respectful distance from General Short."
25. Wohlstetter, 55-56.
26. Pearl Harbor Report, 240-45.
27. Id. at 252.

NOTESB. Vietnam

1. The data in this case study are taken from three case studies prepared for the Commission on the Organization of the Government for the Conduct of Foreign Policy (Murphy Commission) July, 1975. Vol 4, Appendix K, Part VI. They are "Fighting in South Vietnam" (hereinafter referred to as "Fighting"), "Bombing North Vietnam" ("Bombing"), and "NSSM 1" (National Security Study Memorandum).
2. NSSM 1, 426.
3. Bombing, 411.
4. Id. at 400.
5. Fighting, 383-96.
6. Bombing, 397-416.
7. NSSM 1, 417-33.
8. Id. at 427.
9. Fighting, 387.
10. Bombing, 412.
11. NSSM 1, 427.
12. Introduction, 382.
13. There has been only one recognized: George C. Marshall, who served as Secretary of Defense under President Truman. Such expertise is made less likely than might otherwise be the case by the statutory prohibition against anyone who has been an active duty commissioned officer within ten years of serving as Secretary of Defense. 10 U.S.C. Sec. 133(a) (1976).
14. Bombing, 400.
15. Fighting, 391.
16. The case studies do not address in any depth the role which the President played in Vietnam, and so no analysis of the Presidential role will be attempted here.

NOTESC. Pueblo

1. Pueblo was 176.5 feet long, had a flank speed of 13 knots and carried two .50 caliber machine guns. Inquiry into the U.S.S. Pueblo and EC 121 Plane Incidents: Report of the Special Subcomm. on the U.S.S. Pueblo of the House Comm. on Armed Services, 91st Cong., 1st Sess. 1646 (1969). (Hereinafter referred to as Pueblo Report.)
2. L. Bucher, My Story, 177 (1970).
3. Pueblo's sailing orders are reproduced at: Inquiry into the U.S.S. Pueblo and EC 121 Plane Incidents: Hearings before the Special Subcomm. on the U.S.S. Pueblo of the House Comm. on Armed Services, 91st Cong., 1st Sess. 639-40 (1969) (Hereinafter referred to as Pueblo Hearings).
4. Testimony of RADM Frank L. Johnson, COMNAVFORJAPAN, Pueblo Hearings, 734-35.
5. T. Armbrister, A Matter of Accountability, 31 (1970).
6. Armbrister, 189-195, recounts approval of Pueblo's mission and risk factors. Pueblo Hearings at 738 gives RADM Johnson's rationale for not asking for support forces.
7. Pueblo Hearings, 638. Admiral Moorer's concept of the chain of command is somewhat at variance with statute. It is also important as at least one member's concept of the role of the JCS.
8. The chronology of events is not seriously disputed in the sources. Times in my account are generally taken from Pueblo Report, 1958-61.
9. Bucher, 177.
10. Testimony of LTG McKee, Commander 5th Air Force, Pueblo Hearings, 865.
11. RADM Johnson, Pueblo Hearings, 736.
12. Id.
13. Id.
14. LTG McKee, Pueblo Hearings, 865.
15. Id. at 869. An issue which was explored in detail in the hearings was why the aircraft in Korea were outfitted with nuclear ordinance and hence were not capable of aiding Pueblo.

That fascinating issue which also has some relevance to command organization is really beyond the scope of a case study focused exclusively on the reaction to the seizure of the Pueblo.

16. Pueblo Report, 1670-71.
17. Armbrister, 212. See, Pueblo Report, 1670.
18. Pueblo Report, 1619.
19. Pueblo Report, 1664-65, contains a table giving messages and delays.
20. Handling of Pueblo's two critical messages is dealt with in detail in Pueblo Report, 1666-67.
21. COMNAVFORJAPAN was in Tokyo at a conference. Pueblo Hearings, 740. CINCPACFLT was at dinner at his quarters and did not return to his headquarters until after Pueblo was in port. Armbrister, 236-37. CINCPAC was in South Vietnam and was enroute from Danang to elements of the Seventh Fleet. Pueblo Hearings, 796.
22. See, e.g., Pueblo Hearings, 886. Statement of GEN Earl G. Wheeler, Chairman, JCS.
23. Testimony of RADM Johnson, Pueblo Hearings, 744.
24. Testimony and questioning of RADM Johnson, Pueblo Hearings, 741.
25. This situation is strangely reminiscent of the faulty assumptions of Adm. Kimmel and Lt. Gen. Short concerning the long-range reconnaissance mission.
26. An Air Force Officer at 5th Air Force gave this account of a call from a staff officer at COMNAVFORJAPAN:

"What about the Air Force alert?"

"I said, 'There isn't any alert,'... 'You never asked for one.' I could sense surprise in his voice. I had the distinct impression that he was shocked."

Armbrister, 213.

27. Armbrister, 214.
28. Pueblo Hearings, 876; Armbrister, 220.



29. Pueblo Report, 1671; Armbrister, 229. This was five minutes after the time CINPAC's staff calculated Pueblo was in Wonson harbor.
30. Armbrister, 222-23.

NOTESV. CONCLUSIONS

1. Blue Ribbon Defense Panel, 22, 27-28.
2. Vietnam, note 12, supra.
3. Pueblo, note 7, supra.
4. Introduction, note 17, supra.
5. Jones, 10-11.
6. In this context the similarity to oligopoly behavior among business entities is striking. In markets of few sellers (analogous to the four services), sellers usually learn that they have more to gain by cooperating in pricing decisions rather than being vigorously competitive. See P. Areeda, Antitrust Analysis, Ch. 2C (3rd ed. 1981). Similarly, the Chiefs have learned to keep dissent among themselves and present a united front in requests for resources as the Vietnam case study indicated.
7. Blue Ribbon Defense Panel, Appendix N, at 20.
8. Steadman Report, 56.
9. Jones, 5.
10. 50 U.S.C. Sec. 401 (1976).
11. Of course the Chairman devotes full time to joint affairs but he is not, at least by statute, a commander.
12. This command arrangement was judged "a confused, distorted and divided command structure, imposed through a series of Service compromises...." Blue Ribbon Defense Panel, 22.
13. Pueblo, note 31, supra.