

**Office of Government Ethics**

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**Letter to a Designated Agency Ethics Official  
dated November 17, 2000**

This is in response to your letter of September 13, 2000, in which you request this Office issue a Certificate of Divestiture to [a judge] of the United States Court of Appeals for the Armed Forces (CAAF). For the reasons set out below, we have determined that a judge of the CAAF would not qualify as an "eligible person" for a Certificate, pursuant to 26 U.S.C. § 1043(b)(1)(A), and therefore we must deny your request.

**BACKGROUND**

The CAAF is a specialized military court of limited jurisdiction. Congress established the court "under article I of the Constitution." 10 U.S.C. § 941. CAAF judges are appointed from civilian life by the President, with the advice and consent of the Senate. See 10 U.S.C. § 942(b)(1). Unlike judges appointed under article III of the Constitution, CAAF judges do not enjoy constitutional life tenure and salary guarantees. Rather, CAAF judges are appointed for 15-year terms, and they are removable by the President for such cause as is specified by statute. See 10 U.S.C. § 942(b)(2), (c). Congress provided that the CAAF "is located for administrative purposes only in the Department of Defense." § 941.

As a condition of his confirmation by the Senate, [the judge] agreed to divest certain interests in companies doing business with the Department of Defense, at the request of the Senate Committee on Armed Services. He now requests a Certificate, in order to avoid "a considerable current Federal tax liability on the gain from the divestiture." A Certificate, if issued, allows the nonrecognition or deferral of capital gains resulting from the sale of these interests, pursuant to a provision in the Internal Revenue Code, 26 U.S.C. § 1043. The Office of Government Ethics (OGE) may issue such a Certificate to an eligible person, upon the determination that "divestiture of specific property is reasonably necessary to comply with any Federal conflict of interest statute, regulation, rule, or executive order (including section 208 of

title 18, United States Code), or requested by a congressional committee as a condition of confirmation." § 1043(b)(2)(A).

#### DISCUSSION

As you recognize, [the judge's] request raises an important threshold question concerning the eligibility of CAAF judges for a Certificate. Section 1043(b)(1)(A) permits the issuance of a Certificate for "an officer or employee of the *executive branch* of the Federal Government" (emphasis added). If [the judge] is viewed as occupying a position outside the executive branch, such as a position within the judicial branch, he would not qualify as an "eligible person" for a Certificate. It is necessary, therefore, to determine whether a judge of the CAAF is an officer or employee of the executive branch, within the meaning of the tax code provision.

Section 1043 does not itself define "executive branch." Nor are we aware of any generally applicable statutory provision -- whether in the tax code, title 5, or elsewhere -- that defines the phrase for all purposes. The phrase is used in numerous Federal statutes, sometimes with a specific definition, but frequently without any definition at all. See, e.g., 31 U.S.C. § 1353(c)(1) (specific definition); 5 U.S.C. 104(1) (undefined).

You have asserted that the CAAF generally is part of the executive branch, except where Congress has expressly provided otherwise. Because section 1043 is silent on the subject of whether or not the CAAF is part of the executive branch, you argue that, by default, the court is in the executive branch for purposes of the Certificate provision. You recognize that two other ethics statutes specifically place the CAAF within the judicial branch, rather than the executive branch. See 5 U.S.C. app. § 109(4), (10); 18 U.S.C. § 202(e)(1), (2). Neither set of statutory definitions is expressly applicable to section 1043, and you contend that these statutes are "narrow exceptions to the general rule" that the CAAF is part of the executive branch. You conclude, therefore, that these statutes do not support the location of the CAAF within the judicial branch for any other ethics purpose, such as the Certificate provision.

Based on our understanding of the overall legislative scheme for the executive branch ethics program, we disagree with your conclusion. The two sets of definitions cited above -- and the statutes of which they are a part -- are intimately related to the purposes of the Certificate provision and to the very structure of the executive branch ethics program, of which Certificates were intended to be a component. We believe that these statutes

indicate that CAAF judges are generally outside of the executive branch ethics program and, therefore, outside of OGE's supervision and authority to issue Certificates.

1. *Title I of the Ethics in Government Act*

First, "executive branch" is defined in title I of the Ethics in Government Act of 1978 (EIGA), as amended, which pertains to the financial disclosure requirements for executive, judicial and legislative personnel. Section 109(4) provides that "'executive branch' includes each Executive agency (as defined in section 105 of title 5, United States Code), other than the General Accounting Office, and any other entity or administrative unit in the executive branch." 5 U.S.C. app. § 109(4).

Standing alone, this definition may not be particularly helpful in addressing the status of the CAAF and its judges under section 1043.<sup>1</sup> However, the definition of "executive branch" is accompanied by a definition of "judicial officer" that locates the CAAF within the judicial branch, for purposes of the financial disclosure system. According to section 109(10), "judicial officer" includes "judges of the . . . United States Court of Appeals for the Armed Forces."<sup>2</sup> Although this definition does not expressly use the term "judicial branch" to describe the location of such "judicial officers," it is clear from the structure of the act and the legislative history that this was the intent.<sup>3</sup>

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<sup>1</sup> For one thing, this definition of "executive branch" is at least partly circular, in that it includes the catchall phrase, "and any other entity or unit *in the executive branch.*" Furthermore, it incorporates the definition of "Executive agency," including "Independent establishment," 5 U.S.C. § 105, which in turn is defined to include "an establishment in the *executive branch,*" 5 U.S.C. § 104, thus adding further circularity.

<sup>2</sup> In the original 1978 act, judges of the Court of Military Appeals -- which later became the CAAF -- were inadvertently omitted from the definition, but this was corrected by a provision in the Military Pay and Allowances Benefits Act of 1980, Pub. L. No. 96-579, § 12(c), 94 Stat. 3369 (1980). The correction was modeled on a similar change made the previous year "with respect to another Article I court, the United States Tax Court." S. Rep. No. 1051, 96th Cong., 2d Sess. 9 (1980).

<sup>3</sup> See, e.g., S. Rep. No. 170, 95th Cong., 1st Sess. 109 (1977)(financial disclosure requirements applicable to  
(continued...))

We believe that the placement of the CAAF within the judicial branch for purposes of title I of EIGA is quite significant for the Certificate issue. In many ways, the financial disclosure requirements of EIGA are the very foundation of the Federal ethics system, of which the Certificate program is but one part.<sup>4</sup> Congress identified several important purposes of public financial disclosure, and the requirements have withstood constitutional scrutiny on the ground that financial disclosure "will serve such 'substantial federal interests' as restoring public confidence and deterring conflicts of interest.'" *DuPlantier v. United States*, 606 F.2d 654, 668 (5th Cir. 1979)(citing S. Rep. No. 170, 95th Cong., 1st Sess. 21-22 (1977)), *cert. denied*, 449 U.S. 1076 (1981). The filing of financial disclosure reports is not a pro forma exercise, but involves an elaborate process for the substantive review of those reports by responsible ethics officials in order to prevent, detect, and resolve actual and potential conflicts of interest and other ethics problems. For this reason, title I vests a whole range of responsibilities and authorities in various ethics officials and offices, such as "designated agency ethics officials" (DAEO) and "supervising ethics offices." For example, title I includes provisions for the review of reports, certification of compliance with ethics laws, authority to obtain

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<sup>3</sup>(...continued)  
"adjudicatory officials of the judicial branch"); *id.* at 126 (statute "specifies what the supervising ethics office is for each of the employees in the three branches of the Federal government").

<sup>4</sup> OGE recognized the relationship between the financial disclosure system and the Certificate program when the agency treated the two subjects together in 5 C.F.R. part 2634. In fact, the OGE regulations apply the same definition of "executive branch," largely modeled on 5 U.S.C. app. § 109(4), to both the financial disclosure and Certificate provisions in part 2634. See 5 C.F.R. § 2634.105(f). Moreover, the Certificate rules expressly vest certain important responsibilities for processing and submitting Certificate requests in the designated agency ethics official (DAEO), which is an office created by Congress for the purpose of administering certain provisions of title I of EIGA. See 5 C.F.R. § 2634.1002(b). In this connection, we note that [the judge's] request was processed and submitted to OGE by the DAEO for the Department of Defense (DOD), which clearly is not the DAEO for the CAAF, since the DOD office has no authority to administer the provisions of title I for the CAAF. See 5 C.F.R. § 2634.105(e). With respect to the CAAF, the latter authorities are vested by Congress in the designee of the Judicial Conference, which, we understand, is the Office of the Committee on Financial Disclosure.

further information, authority to require steps to comply with the law, authority to issue rules and regulations regarding steps to comply with the law, and authority to issue advisory opinions concerning ethical requirements. See 5 U.S.C. app. § 106. Of special interest in connection with the subject of Certificates of Divestiture, title I gives certain ethics officials the authority to determine that divestiture of conflicting interests is required in a given case. See § 106(b)(3).

For officers and employees of the executive branch, the "supervising ethics office" is OGE. See 5 U.S.C. app. § 109(18)(D). At the agency level, many of the day-to-day compliance and review functions described above are performed by the agency DAE0, under the overall supervision of OGE. However, OGE clearly is *not* the supervising ethics office for any judicial officer, including judges of the CAAF. With respect to CAAF judges, the supervising ethics office is the Judicial Conference of the United States. See 5 U.S.C. app. § 109(18)(C). Moreover, the day-to-day compliance and review functions described above are performed by the Judicial Conference or officials specifically designated by the Judicial Conference.

Under this ethics system, OGE is essentially a stranger to the CAAF. For example, neither OGE nor any agency under OGE's supervision ordinarily would be the office to promulgate, interpret or apply rules governing the use of divestiture, or any other compliance measure, to resolve potential conflicts detected on a financial disclosure report submitted by a CAAF judge or a nominee for such position. See 5 U.S.C. app. § 106(b)(3) ("the use of any such steps shall be in accordance with such rules or regulations as the supervising ethics office may prescribe"). Apart from the divestiture provisions of title I, there appears to be some question about whether your office or the CAAF itself would consider CAAF judges to be subject to the divestiture provision in the OGE Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct). See 5 C.F.R. § 2635.403. Ordinarily, whether the personnel of any given entity are subject to the Standards of Conduct depends on that entity's own determination of whether it is an executive "agency," under 5 C.F.R. § 2635.102(a), based on its own interpretation of its enabling legislation. See Informal Advisory Letter 94 x 6. We have received no information from the CAAF indicating that the court views itself as an executive agency within the meaning of the

Standards of Conduct.<sup>5</sup> A reliable indicator usually is whether "the agency in question has submitted financial disclosure forms to OGE and sought OGE's oversight over the agency's compliance with ethics regulations and a myriad of ethics issues that fall under OGE's jurisdiction." OGE 94 x 6. The CAAF certainly does not submit financial disclosure forms to OGE, and we do not recall any instance in which the CAAF has sought OGE's oversight. Similarly, OGE does not review the CAAF's ethics program, pursuant to 5 U.S.C. app. § 402, which further indicates a longstanding assumption that the CAAF is not part of the executive branch for ethics purposes.

In sum, OGE's role in issuing Certificates is the pinnacle of OGE's "overall direction" of the executive branch ethics program. 5 U.S.C. app. § 402(a). OGE does not have such overall authority with respect to CAAF judges, who are largely, if not entirely, subject to the direction of a different supervising ethics office.<sup>6</sup> Given the need for rational and consistent lines of authority within the executive branch ethics program, we find compelling reason to construe § 1043 *in pari materia* with the provisions of title I of EIGA. See, e.g., *Wheeling-Pittsburgh Steel Corp. v. Mitsui & Co.*, 221 F.3d 924, 927-28 (3d Cir. 2000)(statutes interpreted together where part of comprehensive administrative scheme, in order to prevent practical problems and conflicting authority). Consequently, we attach great significance to the fact that section 1043 was written against a backdrop in which the CAAF was not part of the executive branch ethics program, and we interpret section 1043 consistent with Congress' design in title I to place the CAAF under the ethical superintendence of the judicial branch, rather than OGE.

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<sup>5</sup> In another context, the CAAF has stated that "this Court is not an administrative agency." *United States v. Matthews*, 16 M.J. 354, 364 (1983). We note also that your staff has advised us that the CAAF does not consider itself to be covered by the Privacy Act and the Freedom of Information Act, which ordinarily apply to executive agencies. See 5 U.S.C. § 552(f)(1); 5 U.S.C. § 552a(a)(1).

<sup>6</sup> Moreover, we are aware of at least one case in which an executive branch agency (DOD) was rebuffed in its attempt to supervise certain personnel policy decisions of the CAAF, on the ground that such efforts interfered with the fundamental independence that Congress intended for the court. See *Mundy v. Weinberger*, 554 F. Supp. 811 (D.D.C. 1982).

2. 18 U.S.C. § 202(e)

The second ethics statute, 18 U.S.C. § 202(e), reinforces our view that CAAF judges are not officers of the executive branch under the Certificate provision. "Executive branch" and "judicial branch" are defined in section 202(e) for purposes of the primary criminal conflict of interest laws in chapter 11 of title 18, United States Code. Pursuant to section 202(e)(2), the CAAF is expressly located in the judicial branch, rather than the executive branch: "'judicial branch' means . . . any court created by Congress pursuant to article I of the United States Constitution, including the Court of Appeals for the Armed Forces . . . ."

We believe it is helpful to look to the definitions in section 202(e) for guidance in determining whether CAAF judges are executive branch personnel eligible for a Certificate. The definitions in section 202 apply to 18 U.S.C. § 208, the basic financial conflict of interest statute. This is relevant because the Certificate authority was largely intended as a mechanism to mitigate the financial burden of compliance with section 208(a), which only covers personnel of the "executive branch," not the judicial branch. See Report of the President's Commission on Ethics Law Reform 25 (1989) (discussing section 208 as basis for recommending Certificate legislation). We recognize that Congress ultimately provided for Certificates in cases where divestiture is required for reasons other than section 208; however, we view this as broadening the possible bases for a Certificate for executive branch employees, not as extending the Certificate authority beyond personnel of the executive branch within the meaning of section 202(e).<sup>7</sup>

The legislative history includes an even more explicit link between eligible persons under section 1043 and personnel subject to section 208. Section 1043 was based on proposed legislation submitted to Congress by President Bush in 1989. As originally

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<sup>7</sup> No doubt, for example, Congress was aware that members of the article III judiciary occasionally may divest conflicting assets, pursuant to the divestiture provision in 28 U.S.C. § 455(f), yet Congress clearly did not intend to include article III judges in the class of "eligible persons" under section 1043. Likewise, we do not believe that CAAF judges are "eligible persons" merely because they occasionally may be required to divest certain assets at the request of a confirming committee or otherwise.

introduced, the Certificate proposal actually covered judicial personnel, but this was coupled with a contemporaneous proposal to extend section 208 to judicial personnel as well. See Proposed "Government-Wide Ethics Act of 1989," §§ 104, 108 (April 12, 1989); see also Report of the President's Commission at 12 (recommending that section 208 cover judiciary). The connection between Certificates and expanded coverage under section 208 is clear in the section-by-section analysis prepared by the Office of the President: the proposed Certificate provision "would apply to all judicial and executive branch officers and employees, officers and employees of the Congress (who would be covered by amendments to 18 U.S.C. 208)." Office of the President, Section-by-Section Analysis of Proposed "Government-Wide Ethics Act of 1989," at 18 (April 12, 1989). Congress, of course, did not adopt either of these proposals for covering judicial personnel. Furthermore, we think it noteworthy that the President's proposed legislation contemplated that Certificates for judicial personnel would be issued by "any person designated by the Judicial Conference," which is the appropriate supervising ethics office for the judicial branch, as discussed above. *Id.* Under the version ultimately enacted by Congress, however, Certificates may be issued only by OGE (or the President), which is not the supervising ethics office for judicial officers, including CAAF judges. In sum, we think it unlikely that Congress would have intended the anomaly that Certificates would be issued by an office that is not the appropriate supervising ethics office to personnel who are not covered by the conflict of interest statute that created the primary need for tax relief.

### 3. *The Edmond Case*

Finally, we note your reliance on *Edmond v. United States*, 520 U.S. 651 (1997). In *Edmond*, the Supreme Court held that certain judges of the Coast Guard Court of Criminal Appeals were inferior officers, rather than principal officers, and therefore could be appointed by the head of an agency, without nomination by the President and confirmation by the Senate, consistent with the appointments clause of the Constitution. In explaining why these judges could be considered inferior officers, the Court pointed out, among other things, that certain decisions of such judges are subject to review by "another Executive Branch entity, the Court of Appeals for the Armed Forces." 520 U.S. at 664 (emphasis added). In a footnote, the Court added that although "the statute [10 U.S.C. § 941] does not specify the court's 'location' for non-administrative purposes, other provisions of the UCMJ [Uniform Code of Military Justice] make clear that it is within the Executive



Branch." *Id.* at 665 n. 2. Specifically, the footnote listed provisions that limit the CAAF's review to only military tribunals, require the CAAF to meet with Department of Defense personnel to survey the military justice system, and vest removal authority in the President.

*Edmond* does not stand for the proposition that the CAAF is part of the "executive branch" as that phrase is used in all contexts and for all purposes. Clearly, Congress has seen fit to exclude the CAAF from the "executive branch" for certain statutory purposes, as discussed above. Nor do we believe that *Edmond* creates a rule of statutory construction to the effect that "executive branch" always includes the CAAF unless Congress expressly states otherwise. The *Edmond* court addressed a narrow constitutional issue under the appointments clause, and it did not address the meaning of the statutory phrase "executive branch" at all. We see nothing in the case that conflicts with our conclusion that "executive branch" in section 1043 must be interpreted in light of other ethics statutes that embody related Congressional purposes and that establish the overall framework in which the executive branch ethics program operates. While the CAAF may be a part of the executive branch for many purposes, Congress chose not to place the CAAF within the executive branch ethics program, of which the Certificate authority is a component.<sup>8</sup>

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<sup>8</sup> Your letter also refers to title 28, United States Code, on "Judiciary and Judicial Procedure," as support for the proposition that the CAAF is not part of the judicial branch. Specifically, you note that the CAAF is excluded from the definition of "court of the United States," under 28 U.S.C. § 451. However, section 451 defines neither "judicial branch" nor "executive branch," but only "court of the United States," for purposes of title 28. Moreover, the failure of this definition to include the CAAF is even less significant, when one considers the other judicial entities that are similarly excluded. Numerous courts that would appear to have little to do with the executive branch, and nothing to do with the executive branch ethics program, are also excluded from the definition of "court of the United States." See, e.g., *In re Perroton*, 958 F.2d 889 (9th Cir. 1992) (bankruptcy courts not covered); *Essex Electro Engineers, Inc. v. United States*, 757 F.2d 247, 251 n.1 (Fed. Cir. 1985) (claims court not covered). Furthermore, the Supreme Court has held that the CAAF is one of the "courts established by Act of Congress," for purposes of another provision in title 28, which authorizes courts to issue writs (such as writs of habeas corpus). *Noyd v. Bond*, 395 U.S. 683, 695 n.7 (1969)(quoting 28 U.S.C. § 1651).

While we regret that our response could not be more favorable, we conclude that OGE does not have the authority to issue a Certificate to [the judge], because he is not an officer or employee of the executive branch, within the meaning of section 1043.

Sincerely,

Amy L. Comstock  
Director