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Memorandum Inspection Report

Review of Treaty Management Responsibilities in the Office of Treaty Affairs

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Introduction

At the request of the Senate Foreign Relations Committee and the House International Relations Committee, OIG undertook a review of the treaty management responsibilities of the Office of the Legal Adviser (L). The starting point for this review was the findings and recommendations made in the inspection of L carried out between January and March 2003 (*Inspection of the Office of the Legal Adviser, Report Number ISP-I-03-34, September 2003*). However, the review also included an investigation of the specific circumstances behind L's failure to report a number of international agreements to Congress as required by law.

The 2003 inspection identified a number of weaknesses in L's ability to carry out this mandate. Staffing levels in the Office of Treaty Affairs had been steadily reduced while the number of international agreements signed by U.S. agencies increased significantly. The office lacked an effective system for tracking such agreements, and a contract to create a new one was so unsuccessful that L hired a second contractor to start over with new software. OIG found no evidence of any attempt to withhold information from the Congress. Throughout the bureau, however, attorney supervisors concentrated on providing substantive advice on legal issues rather than on management and operations. Those with direct responsibility for Case Act reporting gave priority to ensuring that individual agreements had been carefully vetted rather than to expeditious processing, creating a steadily growing backlog. Its dimensions were not fully realized until June 2004, when L discovered that several hundred texts in its possession had not been reported to Congress.

The bureau carried out some, but not all, of OIG's recommendations to address these weaknesses. This report reviews those actions, identifies additional and more specific issues, and makes new recommendations to improve accountability and prevent this failure from recurring.

What Happened?

The Case-Zablocki Act of 1972¹ requires the Secretary of State to transmit to Congress the text of any international agreement to which the United States is a party within 60 days of its entry into force. This procedure is separate from the Senate's treaty-ratification powers. This requirement is designed for information

¹ Public Law 92-403.

rather than approval and is intended to ensure that Congress is aware of commitments made on behalf of the United States by any U.S. agency. The Act also requires any agency wishing to negotiate such an agreement to seek prior authorization from the Secretary of State. Responsibility for ensuring that these requirements are met rests with the Legal Adviser, who delegates it to the Office of Treaty Affairs (L/T).

L/T has traditionally been regarded with great respect by other offices in L. Treaty work is close to the heart of what L does, and expertise on complex international agreements is demanding and prestigious work. It is therefore hard to exaggerate the sense of shock and chagrin with which L discovered that it had “lost” important agreements in its crowded and increasingly messy files.

In an article dated May 17, 2004, *Newsweek* magazine reported that the United States had concluded classified Status of Forces (SOFA) agreements with countries in the Middle East and elsewhere that contained controversial clauses or commitments. Senator Joseph Biden wrote to the Department asking if this was true. Analysts in L/T could find no record of any such agreements. However, records indicated that more general authority to negotiate agreements with these countries had been granted in 2002 or earlier. By searching through the piles of cables, letters, faxes, e-mail messages, and other partial reports of agreements that had been received but not yet entered into records, L/T discovered the texts of new SOFA agreements in this area that had been concluded but had never been reported to Congress. These texts did not contain the controversial clauses reported in the press. Since it remained unclear whether these were in fact the agreements to which the senator was referring, the analysts looked further. They discovered an extensive backlog of unprocessed mail containing other texts that no one had had time to collate, analyze, approve, or even record. With assistance from other offices, L/T made an urgent, comprehensive search “to find out what we didn’t know.” That search uncovered over 600 agreements, dating back to at least 1996, that had never been reported to Congress as required.

What Went Wrong?

Inadequate Resources

Staffing levels in the treaty office have been reduced for years while workload has increased. In 1960, the office employed 26 people. By the time of the inspection, the staff had been reduced to 12 and no longer included an employee dedicated solely to the Case Act function. During this time, the volume and complexity

of international agreements expanded dramatically. L did not assign sufficient additional resources to the treaty and agreement function in response to changes in its workload.

L/T also operates with insufficient space. Short of space throughout the bureau as its work expanded, L shoehorned a second office into L/T's suite, reducing the space available for treaty work. OIG's inspection report warned that "space available for [treaty] operations has been reduced to the point where necessary operations can no longer be carried out." The treaty vault – a purpose-built facility that serves as both a reference library and the repository for agreements dating back to 1785 – is full, unable to cram a single additional paper onto its overflowing shelves. Until the bureau can transfer more of its records to electronic files as recommended below, its treaty analysts cannot perform their function without adequate storage space for files. Instead of waiting until it has the funds to renovate the suite completely, L needs to give priority to allocating additional space to Case Act operations, either within the suite or by identifying space for filing elsewhere.

Need to Improve Management and Accountability

Insufficient staffing and space contributed to, but did not cause, the breakdown in reporting. Existing resources have not been well managed. As noted in the inspection report, attorneys come to L to practice international law, not manage programs or resources. Supervisors at all levels tend to concentrate on law and not on management, although the bureau has made concerted efforts to change this since the inspection. The Deputy Legal Adviser who oversees L/T, for example, is responsible primarily for its substantive legal work and does not have line authority over resource allocations, operations, or productivity measurement as opposed to quality control.

The Assistant Legal Adviser for Treaty Affairs, an experienced and senior attorney, devotes his time primarily to legal issues, not to managing the office or to supervising its employees. He does not have a deputy. Reflecting this approach, the culture of the office emphasizes legal work and understates the importance of such program duties such as maintaining archives, publishing completed treaties, and reporting international agreements to the Congress. No one, for example, is in overall charge of files and record management.

As a first step, OIG's inspection report recommended creating a position in L/T to manage treaty archives. This position should be filled by a trained archivist, not a lawyer. L agreed with this approach, but did not immediately carry out the

recommendation, citing more pressing needs for the limited number of new positions it had available. The bureau plans to seek this position in the next budget cycle. It remains a needed step, and the recommendation is reissued as Recommendation 1 of this review.

Recommendation 1: The Office of the Legal Adviser should create and fill an administrative position with overall responsibility for managing the Department's treaty archives. (Action: L)

The inspection also recommended that one of the three attorneys in L/T be made a de facto deputy, responsible for overall management and operations. At present, while each analyst takes a high degree of personal responsibility, they work as individuals; no one is assigned responsibility for supervising and coordinating them or making sure their work is reported to Congress. Unlike most other offices in L, the Treaty Office has too many "program" duties for an Assistant Legal Adviser to manage effectively without a deputy of some kind. L was initially skeptical of this approach, pointing out that attorneys are not trained in management and find it difficult to spare the time from legal duties. Nevertheless, the bureau identified an attorney with good management skills and assigned her to the office with provisional instructions to work on both law and management. This shift has already brought significant improvements, and L should make the new responsibilities permanent and formal so that they can be reflected in evaluations of performance.

Recommendation 2: The Office of the Legal Adviser should revise the position description of the second-ranking person in the Office of Treaty Affairs to include the function of a deputy, with a particular focus on management. (Action: L)

L also needs to improve its management controls. OIG could find no record that potential problems in Case Act compliance had been adequately brought to the attention of the Legal Adviser. Neither the head of the Treaty Office nor the Deputy Legal Adviser to whom he reports, for example, had reported and acted on the implications of the fact that fewer agreements were being sent to Congress than was normal. OIG concluded that the Legal Adviser does not have in place an adequate system for ensuring that he is alerted, through his chain of command, to problems of this kind. In a memo to the Secretary dated July 26, 2004, L acknowledged the need for better management controls and promised to revise them as necessary.

The Case Act requires an annual report by the President listing agreements that are submitted late. Officials in L told OIG they do not find this requirement onerous. If anything, they suggested, the report was helpful in identifying the reasons for late submissions, including late reporting by other agencies and posts. Because it does not include agreements that were never submitted at all, however, this report did not alert either Congress or the Department to the current problem.

Recommendation 3: The Office of the Legal Adviser should continue to report its progress on Case Act compliance to the Management Controls Steering Committee until it is able to certify that adequate procedures are in place to provide a reasonable guarantee against a further breakdown in Case Act reporting. (Action: L)

Recommendation 4: The Office of the Legal Adviser should revise procedures such as its required, weekly Activity Reports to place more emphasis on timely warnings of potential problems in addition to listing accomplishments. (Action: L)

No Effort to Mislead the Congress

OIG found no evidence of any attempt by L to withhold information from the Congress. The failure to report the classified agreements sought by Senator Biden, for example, was due to negligence and not to disagreements between the executive branch and Congress over whether they needed to be reported. However, the bureau exercises broad discretion in determining whether an agreement is reportable under Case-Zablocki. L does not report nonbinding (political) agreements. It also considers some agreements too “trivial” to report: project agreements for economic aid, for example, are not reported unless they are for more than \$25 million.

This approach is consistent with Department regulations and the bureau’s understanding of the Case-Zablocki Act. The Act does not define “international agreements,” but report language accompanying the legislation suggests that Congress wished to receive only “significant” texts. Nevertheless, there may be some confusion over this approach. Of the more than 600 texts that L told Congress had not been reported, OIG found that approximately one-third were due to uncertainty among analysts as to whether they were sufficiently significant to report. To ensure consistency, the bureau needs to clarify its procedures in this area.

Recommendation 5: The Office of the Legal Adviser should issue written guidelines to ensure a uniform interpretation of procedures to determine what agreements need to be reported to Congress under the Case-Zablocki Act. (Action: L)

Streamlining Procedures in the Treaty Office

A more important factor in the failure was the absence of procedures in the Treaty Office for keeping track of its workload. Before the inspection, for example, L/T did not maintain a simple log of all incoming correspondence. Texts arriving in the office were not immediately recorded by its secretary, but were passed on to an analyst who entered them in records only after he could analyze them to determine whether they were reportable agreements.

OIG's inspection helped L focus on the bottleneck that this created and the risk that it would have no record of agreements backed up still awaiting action. The majority of the classified agreements that were not reported were discovered backlogged at this point — still unopened, never recorded, and gradually forgotten.

L/T also did not use the kind of annual charts or “tickler” systems that are standard management tools in offices more oriented to production, not just quality control. For example, it assembled regular lists of those agreements that were ready to report to Congress, but did not keep records of those that were not.

Shortly after the inspection, L assigned a paralegal to L/T to begin keeping a record of all texts received, including those that were not reported to Congress for one reason or another. This action freed the analysts to make more progress on the backlog of agreements they were facing and created a valuable new tool for management. This new system included logs of who had been assigned the action on a text and what decisions they had made, and started a reminder system based on the 60-day reporting requirement. While it did not identify past problems, it will provide increased assurance against reporting failures in the future.

Of the more than 600 agreements not reported to the Congress, relatively few can be explained by late reporting from a bureau, post, or other agency. Incomplete reporting, however, was a major factor. Most of the documents arriving in L/T are not complete – consisting, for example, of an implementing arrangement without a copy of the underlying agreement or a foreign language note without an English

translation. Analysts must work extensively with bureaus, posts and agencies to obtain the missing pieces before they can assemble a package that can be researched for legal and other flaws, assigned authoritative legislative basis, summarized, and reported to Congress.

As noted in the inspection report, L/T is too dependent for this work on a small cadre of experienced, senior analysts who will all reach eligibility for retirement at the same time. To prevent disruption, OIG informally recommended that the bureau begin now to identify and train a generation of younger analysts. L has already taken steps to put this recommendation into effect.

Making Better Use of Electronic Systems

To get ahead of the avalanche of paper in L/T (and get around its chronic lack of clerical support), the bureau needs to replace its paper records with a searchable, electronic database of treaty and agreement actions. As noted in the inspection report, two successive contracts to produce an integrated Treaty Information Management System (TIMS) failed to produce a completed system by the dates agreed on in the contracts. Disagreements between users and providers dragged on without resolution, creating mutual frustration and leaving treaty operations caught between the former, card-based records system and the new but incomplete TIMS system. Less than a third of L/T's records have been transferred to TIMS, and the system was of help in finding only 160 of the 600 missing documents.

These contracts failed to include provisions for some necessary actions to complete the project, including adequate training, testing, and data entry. Most importantly, however, L assigned a low priority to this work. It did not provide assistance from its own information technology office or assign a project manager to bring the work to closure. This contributed directly to the failure to report agreements, because the bottleneck described above occurred in part because L/T could only use TIMS on a single, overloaded workstation. The software used proved incompatible with others.

The inspection report recommended that L set a firm date for completion of TIMS. Because of competing demands on its limited computer staff, L did not succeed in carrying out this recommendation. It is modified and reissued as part of this report.

Recommendation 6: The Office of the Legal Adviser should establish a firm date for completion of the Treaty Information Management System, assigning a full-time project manager to oversee completion of the project and providing additional resources as necessary to complete needed data entry, training, and testing. (Action: L)

There are other ways in which more use of electronic systems could help prevent Case Act reporting problems. For example, the bureau could explore the feasibility of sending reports to Congress electronically. L could also plan and carry out a contract to create an electronic record of all Circular 175 authorities granted to negotiate agreements, and use it to keep track of how negotiations are proceeding. This would help it to reduce surprises and plan its workflow. The bureau could remind all embassies of their responsibility to send the texts of international agreements to the Department promptly, with the distribution indicator KTIA, and encourage them to do so electronically rather than by pouch. While image copies may be necessary for some archive work, the work necessary to prepare an agreement for Case Act reporting can more easily be done electronically.

L could also ease the strain on overloaded analysts by moving other aspects of the treaty management process, such as publication, into the information age. As informally recommended in the inspection report, for example, it should seek to revive a lapsed agreement with a private company to put required publications such as the *Treaties and Other International Acts Series* (TIAS) on the Internet.

Centralizing Responsibility for Case Act Reporting

Some reports suggested that miscommunication between L and the Bureau of Legislative Affairs (H) played a role in the failure to report agreements. After comparing records in the two bureaus, OIG concluded that this might have delayed transmission in some cases but did not prevent it, and does not explain any of the missing documents.

Nevertheless, the present division of responsibility under which unclassified Case Act agreements are reported to Congress by L and classified agreements by H creates the potential for lapses. Despite the excellent records in H, for example, L has no effective way of being certain that an agreement was in fact transmitted unless it always receives a “comeback” copy. To improve accountability and avoid the possibility of agreements being lost between two bureaus, OIG believes the responsibility for all Case Act reporting should be centralized in L.

Recommendation 7: The Legal Adviser and the Assistant Secretary for Legislative Affairs should prepare a memorandum recommending that responsibility for classified Case Act reporting be transferred from the Bureau of Legislative Affairs to the Office of the Legal Adviser. (Action: L, in coordination with H)

Cooperation from Bureaus, Posts and Agencies

No matter what improvements L makes in its own procedures for reporting international agreements, it cannot tell Congress what it does not know. Even if all known agreements are reported in a timely fashion, the Department cannot give an absolute assurance that there are not additional agreements and commitments made by other agencies of which it was not made aware.

L's main instrument for making sure it is aware of all agreements is the value it provides to other agencies and bureaus through Circular 175 authority. This helps them to be sure that their agreements will stand up in foreign courts, as well as not be contradicted by other commitments. As noted in the inspection report, the rate at which agencies are concluding international agreements threatens to outstrip L's ability to perform this function. Nevertheless, it is a critically important function, which L/T should not neglect as it concentrates on Case Act reporting problems. A GAO report in 1978 found wide discrepancies in agencies' awareness of their responsibilities in this regard, a situation L believes has not entirely changed.²

Recommendation 8: The Office of the Legal Adviser should circulate instructions to all Federal agencies to ensure that they are aware of their responsibility to obtain Circular 175 authority before negotiating international agreements and to notify the Office of the Legal Adviser if they intend to make new use of dated, blanket authorities. (Action: L)

This review was conducted in Washington, DC, between September 9 and October 1, 2004, by Keith P. McCormick (team leader) and Siobhan Hulihan.

² *Reporting of U.S. International Agreements by Executive Agencies Has Improved*, ID-78-57, October 31, 1978

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