[N]ever in the history of the United States had lawyers had such extraordinary influence over war policy as they did after 9/11.[1]

The role of the judge advocate is to provide commanders with the best and most complete legal inputs possible, free from both self-promotion (careerism) and the fear of the reaction of command to advice that may at times be unpopular, restrictive, or, in extreme cases, prohibitive.[2]

U.S. Army

Detainees relax in exercise yard in communal living facility, Guantanamo Bay Detention Facility

The Detainee Interrogation Debate and the Legal-Policy Process

By LISA L. TURNER

Near the start of Donald Rumsfeld's service as Secretary of Defense in the first term of President George W. Bush, he asked why there were so many lawyers in the Pentagon. He apparently believed the number of military and civilian lawyers could be streamlined or consolidated. Meanwhile, national security practitioners expressed increasing concern about *lawfare*—the strategy of using or misusing law and legal processes as a substitute for traditional instruments of power to achieve either strategic or operational effects. Detainee treatment was a principal area of disagreement between the most senior administration civilian lawyers and The Judge Advocates General (TJAGs), the most senior military lawyers in each Service. Despite Secretary Rumsfeld's remarks, Department of Defense (DOD) lawyers increased in number during his tenure, the administration suffered repeated strategic legal attacks related to detainee treatment, and Congress legislated independence of military lawyers (judge advocates, or JAGs) from civilian DOD attorneys. Recently, the Convening Authority for the Military Commissions declined to prosecute at least one detainee, finding that the application of some of the Secretary of Defense–authorized techniques was "torture."[3]

Detainee interrogation policy provides a case study into deviations from the national security legal-policymaking process. After identifying key administration lawyers and TJAG roles in legal-policy formation, this article explores legal ethical requirements to serve as advisor during policy development. It briefly examines civil-military relations issues relevant to the legal-policy process and concludes with discussion of legal-policy formation abnormalities during the detainee interrogation debate. The case study can inform process decisions during future national security debates.

Legal Structure and Process

Many newcomers to DOD are surprised to find what appear competing and overlapping Pentagon legal establishments. Most soon understand that TJAGs, Military Department General Counsel (GC), and DOD General Counsel (DOD/GC) generally serve complementary and necessary roles. Each has an important function in the legal-policy process.

The Army TJAG position was created on July 29, 1775. Most GC positions and the DOD/GC position were statutorily created after World War II. DOD does not have a TJAG. A legal team has served the Chairman of the Joint Chiefs of Staff (CJCS) since General Omar Bradley appointed a lawyer to his staff in

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1949. The Office of the Chairman of the Joint Chiefs of Staff Legal Counsel (OCJCS/LC) is a JAG. CJCS does not have a GC.

DOD/GC is statutorily the DOD "chief legal officer" (CLO). Department regulation assigns primacy to the DOD/GC opinions when there is a conflict with another DOD attorney. Statute does not define *chief legal officer*, but congressional actions since 1992 clarify that the designation does not include executive authority over or supervisory control of TJAGs, Judge Advocate General's Corps (JAG Corps), or OCJCS/LC. DOD/GC does not exercise "control" over the JAGs in terms of civilian control of the military. GCs and TJAGs assist DOD and Military Department civilian leadership exercise control of the military. Together, they support the constitutional framework that assigns responsibilities to both the President and Congress.

GCs are political appointees with significant political experience and connections but no military experience requirement. William J. Haynes II, the DOD/GC during the detainee debates, was an honors clerk captain on the Army GC staff (1984–1989), then the Army GC (1990–1993). He returned to the Pentagon in 2001 as DOD/GC. Haynes had a longstanding, close relationship with David Addington, a former DOD/GC, counsel to Vice President Richard Cheney and later his chief of staff. Addington and Haynes worked for then–Secretary of Defense Cheney. By contrast, the Air Force GC, Mary Walker, was new to the Pentagon but apparently had political connections to the administration.

TJAGs are general and flag officers who have served for decades in uniform as judge advocates at many levels of command. Most have Master of Laws degrees or have attended in-residence senior professional military education long programs. When identifying the roles of key national security lawyers, a former National Security Council attorney explained: "The judge advocates general of the military services, for example, are central players in the development of military law and legal-policy as well as the application of the law of armed conflict."[4] TJAGs involved in the detainee discussions spent their early careers working to mitigate the harm done to the Armed Forces as a result of Vietnam-era "perceived law of war violations."[5] They helped rebuild military credibility, morale, and professionalism. As Servicemembers, they are subject to and protected by military justice rules and the Geneva Conventions.

Congress has long recognized the need of commanders and policymakers to receive both civilian GC and independent military legal advice. While reorganizing and streamlining DOD in 1986, Congress expressly considered but rejected combining the GCs and JAG Corps.[6] In the early 1990s, while Cheney was Secretary of Defense and Haynes the Army GC, and during Addington's nomination process to be DOD/GC, Congress halted executive branch consolidation of legal services under GCs.[7] During the detainee debate, the executive branch again attempted to subordinate TJAGs to Military Department GCs and to transfer JAG Corps manpower to GC offices. As a direct result, Congress enacted statutory changes to prevent any "officer or employee of the Department of Defense [from interfering] with the ability of the Judge Advocate General to give independent legal advice to" their respective Service secretary or chief of staff; or "the ability of officers of the [Service] who are designated as judge advocates who are assigned or attached to, or performing duty with, military units to give independent legal advice to commanders."[8] Similarly, Chairmen of the Joint Chiefs of Staff have resisted recent attempts to bring OCJCS/LC under the control and direction of DOD/GC or to exclude OCJCS/LC from key meetings.[9] Congress emphasized the value of independent military legal advice for CJCS through recent legislation.[10]

The Judge Advocates General are general and flag officers who have served for decades in uniform as judge advocates at many levels of command

Even when tensions exist between a GC and TJAG, staffs productively cooperate and have strong relationships. Many GC staff were or are JAGs (for example, retired and/or Reserve Component). Significant issues are staffed up to TJAGs and GCs who advise decisionmakers. Occasionally, Service legal reviews are forwarded to DOD/GC for guidance. Operational issues typically come up from combatant command legal offices to OCJCS/LC, which often works the issues with DOD/GC. For some legal issues, combatant command JAGs coordinate directly with DOD/GC. OCJCS/LC coordinates many issues with the Services.

Typically, GCs and TJAGs agree on legal-policy issues. Disagreements usually reflect the different perspectives the lawyers bring with their roles rather than differences in legal opinions. Traditionally, the legal-policymaking process brings out these complementary perspectives. Most policymakers want to know about GC/TJAG differences to inform decisionmaking.[11]

Some have questioned the TJAG role in the detainee interrogation debate, given that the operational chain raised the issue (combatant command to CJCS). The answer partially lies in unique TJAG statutory responsibilities. TJAGs are statutorily charged with overseeing appointment of a lawyer as a judge advocate and with "direct[ing] the officers of [their Service] designated as judge advocates in the performance of their duties."[12] Additionally, "the staff judge advocate or legal officer of any command is entitled to communicate directly with the staff judge advocate or legal officer of a superior or subordinate command, or with the Judge Advocate General."[13] While most judge advocates serve in a commander's chain, TJAGs exercise professional legal supervision over all in their respective JAG Corps.

TJAGs also have unique statutory operational and military justice roles. They are the primary legal advisor to their Service chiefs in the latter's roles as Joint Chiefs. They supervise the administration of military justice and have statutory responsibilities related to military commissions.[14] Activities that could result in prosecution of military interrogators and plans to try detainees in military commissions are squarely in the TJAG purview.

OCJCS/LC also consults with TJAGs in their Service capacity. TJAG Service equities on detainee issues are significant. For example, they perform legal reviews on regulations such as then-governing Army Field Manual (FM) 34–52, *Intelligence Interrogation*. They oversee training of Servicemembers and others on a range of directly relevant issues.

On behalf of the Attorney General, the Office of Legal Counsel (OLC) issues legal advice on which the President and heads of executive departments rely in forming, executing, and supporting policy decisions.[15] The OLC was heavily involved in detainee interrogation issues. Many former OLC lawyers are among the most well known in the United States. Few, if any, have military experience. DOD/GC, as a matter of practice, requests legal opinions from the OLC on a range of matters. Federal regulation assigns the OLC the

responsibility of "advising with respect to the legal aspects of treaties and other international agreements."[16] History and regulation ascribe OLC opinions the weight of binding legal authority over the executive branch unless overruled by the courts, Attorney General, or the President.

Legal Roles and Responsibilities

Lawyers have a variety of professional ethical roles and responsibilities. Although not uniformly described, they generally fall within the following categories: advisor, advocate, negotiator, intermediary, and evaluator. Lawyers can craft plausible legal-policy arguments to support most desired endstates. Proper context is the key to the advocate role. This valuable skill is appropriate after a policy decision has been made and the lawyer is using his legal skills to support that decision.

Better policy is developed when a lawyer serves as a balanced advisor. Commanders and policymakers generally expect their lawyers to answer four questions on any proposed action:

- Is it legal?
- Is it advisable?
- If it is not legal or if it is ill advised, what are the alternatives?
- What is the recommended course of action?

The legal advisor should discern the desired endstate, provide right and left boundaries established by law, and ensure he does not present his opinion on policy as legal fact. Instead, his goal is to enable the decisionmaker to consider the strengths, weaknesses, and legal consequences of a proposed course of action in order to make a well-reasoned and deliberative decision. Similarly, when an operations planner is supporting a commander's mission statement, the planner provides the commander with various proposed courses of action, identifies pros and cons of each, and recommends a way ahead.

Codes of professional conduct establish legal professional ethics standards. TJAGs issue JAG Corps rules.[17] Failure to comply with Service credentialing and ethics rules may result in disciplinary or administrative action, to include court-martial. Ethics rules require lawyers to provide their client with "candid advice" based on their "independent professional judgment."[18] The Services teach that "'candid'—means 'not holding back.' It means being 'frank'; free from prejudice or bias; fair; impartial; free from guile; straightforward; very honest. It means judge advocates are not to be 'Yes Men and Women.'"[19] In 2001, a JAG later involved in the detainee debates as TJAG wrote: "The [judge advocate] must effectively explain the rules, provide the right advice always, and preclude problems by telling commanders what they need to know—even when it's difficult."[20] Civilian commentators concur that lawyers are obligated "to provide the client with straightforward advice, regardless of how unpleasant that advice may be."[21]

Leaders expect judge advocates to discuss nonlegal factors along with technical legal advice.[22] Narrowly focused legal advice "may be of little value to a client," particularly to senior leaders who have policy, political, and other practical considerations to weigh when making decisions.[23] Ethics rules instruct lawyers to "refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation."[24] They are to "discuss the legal and moral consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law."[25] They are also to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[26] Some jurisdictions mandate this broad-scope advice.[27]

the Office of Legal Counsel was heavily involved in detainee interrogation issues

Judge advocates have a longstanding reputation for candor. Senior leaders describe most judge advocates, in their advisory role, as the "red light on the commander's desk," the "honest broker" willing to "speak the truth to power," and the "conscience of the Service."[28] Most GCs recognize the importance of the JAG candid advisor role. The Honorable Jeh Johnson, a former Secretary of the Air Force GC and the new DOD/GC, recently reminded judge advocates, "You must live by one simple rule: you wear the uniform of a JAG to help policymakers and commanders shape the policy to fit the law, not to shape the law to fit the policy."[29]

OLC lawyers also have a long tradition of serving as forthright advisors. The Attorney General statute uses the word *advise* in describing his role in relation to other executive branches. The advisory role is also in statute with respect to the OLC role on international legal issues. OLC opinions are sometimes called "quasi-judicial" because they set forth the final executive position on a matter of law when the courts have not spoken to the issue. Balanced opinions are critical because these opinions are seldom reviewed by the courts. Advocacy is seldom appropriate for an OLC opinion.[30]

Lawyers are also guided by their oath to the Constitution. Civilian control of the military is a key constitutional principle. As discussed, TJAGs are not under the "control" of GC or OLC. Another constitutional issue is the tension among the three branches of government. Most policymakers understand that officers have as much of a duty to the legislative branch as well as to the executive branch.[31] Samuel Huntington explained, "If Congress was to play its part in determining national military policy, it required the same independent professional advice which the President received."[32] Reaffirming this obligation, prior to confirmation, Congress requires TJAGs and three- and four-star nominees to take an oath swearing to provide Congress their personal opinions on military matters when asked, even those opposing administration policy.

A third civil-military relations issue in the detainee debate is the degree to which civilians seek out military advice prior to making policy decisions. Some argue that civilians must consider military advice even though they do not have to adopt uniformed recommendations. The Constitution does not impose such a duty, but common sense and a long tradition of respect for the profession of arms usually lead civilian leaders to consult. The post-Vietnam military is sensitive to the duty to candidly advise civilian leaders. Similarly, policymakers may normally use their JAGs as often or as seldom as deemed appropriate. Some statutes or executive orders mandate TJAG review, but the detainee matters were not in that class of issues. Most policymakers value and desire judge advocate advice and build legal reviews into all manner of issue development.

Detainee Interrogation Debate[33]

Beginning in late 2001, a small group of the most senior administration lawyers became extraordinarily influential on national security matters. The self-described "War Council" included then–White House Counsel Judge Alberto Gonzales, Addington, Haynes, and

John Yoo, then-OLC counsel. The group met privately every few weeks to:

plot legal strategy in the war on terrorism, sometimes as a prelude to dealing with lawyers from the State Department, the National Security Council, and the Joint Chiefs of Staff who would ordinarily be involved in war-related interagency legal decisions, and sometimes to the exclusion of the interagency process altogether.[34]

It is worth noting that Addington once stated, "Don't bring the TJAGs into the process. They aren't reliable."[35] This group crafted the administration legal-policy positions on war and intelligence issues, among others. They dominated many national security discussions and were intimately involved in detainee issues.

In mid-September 2001, the first of many OLC memoranda was drafted to maximize the President's legal authority and to minimize constraints on his freedom of action. Operation *Enduring Freedom* began in October. In December, Mohamed al-Kahtani, the "20th hijacker," was detained. That month, the DOD/GC staff requested information on interrogations from the DOD agency that trains U.S. military personnel in survival, evasion, resistance, and escape (SERE) to resist interrogation techniques, including those illegal under the Geneva Conventions. A Senate inquiry later found this request "unusual" and unprecedented.[36] On December 28, OLC sent a memo to Haynes opining that there would be no U.S. habeas corpus jurisdiction for Guantanamo detainees. The first detainees, including al-Kahtani, arrived at Guantanamo on January 11, 2002.

On January 15, Haynes, Addington, Judge Gonzalez, Yoo, and others visited Guantanamo, toured the facility, and discussed detainee issues. A week earlier the U.S. Southern Command (USSOUTHCOM) staff judge advocate (SJA), with approval from the USSOUTHCOM commander but without coordination with Washington, DC, lawyers, invited the International Committee of the Red Cross (ICRC) to Guantanamo. Once they discovered the invitation, War Council lawyers expressed serious displeasure with it. ICRC representatives arrived at Guantanamo on January 17 to conduct activities. Also that month, War Council members debated the applicability of the Geneva Conventions to Guantanamo detainees with lawyers and decisionmakers from the State Department, National Security Council, and JCS.[37] On February 7, the President determined that *Enduring Freedom* detainees were not entitled to Geneva Convention protections, but to a lesser, undefined standard of "humane treatment."[38]

In February 2002, Major General (MG) Michael Dunlavey, USA, was selected to command Task Force 170 at Guantanamo.[39]

senior leaders describe most judge advocates, in their advisory role, as the "red light on the commander's desk," the "honest broker" willing to "speak the truth to power"

Secretary Rumsfeld instructed him to "maximize the intelligence production." MG Dunlavey was told to report directly to the Secretary. When the issue of reporting up through the USSOUTHCOM chain was raised, Secretary Rumsfeld responded, "I don't care who he is under. He works for me."[40] MG Dunlavey thereafter had regular, direct contact with the Office of the Secretary of Defense (OSD).

U.S. Air Force (Jim Varhegyi)

Air Force General Counsel Mary L. Walker speaks during Pentagon press briefing

MG Dunlavey arrived at Guantanamo in March 2002. By summer, al-Kahtani was recognized as a possible key information source. MG Dunlavey met with the Secretary and, separately, DOD/GC every month or two. Discussions between GC and the commander often focused on concern that the interrogations were not as effective as desired and that another approach was needed.[41] On July 25, the DOD/GC office received SERE documents on "exploitation" techniques including waterboarding, stress positions, and sensory deprivations as requested by Haynes. The National Security Council discussed interrogation techniques, to include those used in SERE training. On August 1, the now-famous OLC "torture" memo was signed. It asserted that to constitute a violation of the Federal law, detainee interrogations conducted outside of the United States would have to rise to the level of inflicting pain "associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions."[42] The opinion built on prior OLC opinions and the Presidential Geneva Conventions finding. That same day, OLC issued a more specific opinion approving Central Intelligence Agency (CIA) use of interrogation techniques, including some adapted from SERE training. The legal door for use of interrogation techniques far beyond any previously authorized for use by the U.S. military was now open. In isolation, al-Kahtani continued to resist standard techniques.

On September 26, 2002, Haynes, Addington, two OLC lawyers, the number two CIA

lawyer, and other Pentagon civilian lawyers flew to Guantanamo. They toured the detention facility, watched an interrogation, discussed potential new interrogation techniques, and met with MG Dunlavey and his lawyer, Lieutenant Colonel Diane Beaver, USA. On October 2, the chief lawyer for the CIA Counterterrorist Center went to Guantanamo and discussed aggressive interrogation techniques with the staff, to include LTC Beaver.

During late September and early October, MG Dunlavey's staff, with CIA and Defense Intelligence Agency operators, brainstormed nonstandard interrogation techniques they might apply. Under significant pressure to support the techniques, LTC Beaver and her team drafted a legal review. When her staff raised moral and policy concerns, she told them to address only domestic law. The JAGs did not have the OLC memos, but simply conducted their own legal research. In line with standard processes, LTC Beaver and her staff reasonably believed theirs was the first of what would be a long line of legal reviews.

On October 11, MG Dunlavey sent a memo and LTC Beaver's legal review to the USSOUTHCOM commander requesting approval to use new interrogation techniques. While the USSOUTHCOM legal review was pending, Haynes called the command's operational staff to advise that the request be approved and implemented as submitted. The officer declined to follow Haynes' instructions. The USSOUTHCOM SJA had several discussions with LTC Beaver in which the command expressed grave concerns with the joint task force (JTF) request. USSOUTHCOM and JCS lawyers then discussed serious concerns about the request. The USSOUTHCOM commander routed the request to General Richard Myers, USAF, then-CJCS, recommending "that the Department of Justice lawyers review the [four most controversial proposed] techniques." JAGs were still not aware of the OLC memos. On November 4, MG Geoffrey Miller assumed command from MG Dunlavey.

the President determined that Enduring Freedom *detainees were not entitled to Geneva Convention protections*

OCJCS/LC, then-Captain Jane Dalton, USN, initiated a legal and policy review that she believed the nature of the issues required. Given the various TJAG equities in the issue, she requested TJAGs' comment. During the first week of November 2002, TJAGs' staffs responded in writing to the JCS package with significant legal and policy concerns. They strongly recommended further detailed legal analysis of the proposal. DOD Associate Deputy Counsel for International Affairs also advised DOD/GC that further review was needed.

After meeting with Haynes, General Myers instructed Captain Dalton to stop the broad review because "Haynes [did] not want this process to proceed." General Myers and Haynes expressed concern about leaks and speed of analysis. Although the stand-down was unprecedented, Captain Dalton believed that she was not prohibited from conducting her own legal analysis or review. She spoke with Haynes and General Myers about legal and policy concerns, but neither DOD/GC nor LC produced any written legal review or summary of the written TJAG concerns.

On November 23, an unidentified person in OSD telephoned MG Miller and stated that all requested techniques were approved. Beginning that day, Guantanamo interrogators began to use expanded techniques on al-Kahtani. On November 27, Haynes personally typed a short cover-type memo to the Secretary of Defense recommending approval of 15 of the 18 requested techniques.[43] Written legal review beyond LTC Beaver's and any mention of TJAG concerns were absent.

On December 2, Secretary Rumsfeld approved the expanded techniques but without any guidance on administration of the techniques.[44] TJAGs were unaware of the Secretary's approval until the Navy GC, Alberto Mora, learned about the matter through an operator associated with interrogations. The Navy GC notified the Navy TJAG, and then led a series of meetings where he and the Navy TJAG lodged objections with DOD/GC, the special assistant to the Secretary of Defense, and the Deputy Secretary. The other TJAGs attended at least one meeting with DOD/GC where they vigorously joined the objection. After Mora told Hayes that he would put his objections in writing, Secretary Rumsfeld suspended use of the expanded techniques and instructed DOD/GC to have a broad group of lawyers examine the legal and policy issues "when he learned of [the] concern."[45] DOD/GC appointed the Air Force General Counsel, Mary Walker, to head the working group.

The working group lawyers included staffs of TJAGs, GCs, and LC.[46] The group's report states that it was "informed by a Department of Justice opinion."[47] OLC influence was much more significant. Despite being specifically chartered by Secretary Rumsfeld to provide legal analysis in addition to policy advice, efforts to form and apply independent analysis were quickly terminated. Yoo attended

DOD (Robert D. Ward)

Former Defense Secretary Rumsfeld greets William J. Haynes II, DOD General Counsel, July 2001

an early working group meeting where he instructed the group on his views. Upon Haynes' request, Yoo provided another opinion upon which the working group legal review was based.[48] The report used "significant portions" of the OLC opinion verbatim and OLC edited the draft.[49] Working group members were shown, but were not allowed to copy, an unsigned, undated version of the Torture Memo and were directed by Walker to apply the OLC legal analysis. Comments and contributions that departed from the OLC opinion were dismissed.

TJAGs and Mora lodged their deep concerns about the working group legal analysis and absence of balanced policy considerations orally and by email to Walker. When that approach failed, TJAGs followed up with memos to Walker.[50] They then met with DOD/GC to express their concerns.

TJAGs and/or their staffs then met with their Service chiefs. The Joint Chiefs met on the issue in a Pentagon conference room called "the Tank." Around this time, DOD/GC met with Secretary Rumsfeld and provided him with the final working group report. On April 16, 2003, the Secretary authorized some of the interrogation techniques and instructed that further requests for expansion should come to him. TJAGs were not given the final working group report or an opportunity to formally concur or nonconcur. Haynes told at least one TJAG that Secretary Rumsfeld had seen TJAG comments, the report would go no further, and DOD would return to standard techniques. Until the report became public 14 months later, TJAGs and Navy GC believed the working group report had never been finalized. TJAGs did not know about later Secretary-approved requests for expanded techniques.

Eight months later, a new OLC chief determined that the Yoo-drafted OLC opinions upon which the working group report was based were so flawed that they had to be withdrawn and replaced. OLC immediately informed DOD/GC of the withdrawal. When TJAGs learned of this repudiation months later, they unanimously recommended the working group report be rescinded and the issues be reexamined with independent legal analysis. They met with senior policymakers and lawyers in an attempt to have the DOD controlling regulation revised to clarify and require compliance with the Geneva Conventions.

In April 2004, criminal detainee abuse at Abu Ghraib, Iraq, became public and Congress immediately became involved. Over the next several years, at least a dozen military and congressional investigations examined interrogation issues. During this time, TJAGs spoke to Members of Congress and staffers, both publicly in testimony and in private, to provide their independent legal-policy opinions on various aspects of detainee treatment. Some investigations assert that the Guantanamo extraordinary interrogation techniques migrated to Iraq. Not all agree with the migration theory.

Recently, Susan Crawford, the former judge now in charge of the military commissions, stated that she was shocked, embarrassed, and upset by the interrogation of al-Kahtani. She declined to charge him in court because he had been tortured. The techniques objected to by TJAGs and Navy GC but authorized by Secretary Rumsfeld were applied in an "overly aggressive and too persistent" manner. She further stated:

You think of torture, you think of some horrendous physical act done to an individual. This was not any one particular act; this was just a combination of things that had a medical impact on him, that hurt his health. It was abusive and uncalled for. And coercive. Clearly coercive. It was that medical impact that pushed me over the edge.[51]

Secretary Rumsfeld suspended use of the expanded techniques and instructed DOD/General Counsel to have a broad group of lawyers examine the legal and policy issues

Process Analysis

The detainee interrogation legal-policy process was extraordinary. Several actions were unprecedented:

- DOD/GC solicitation of information on SERE training
- initial lack of a legal review for the Secretary of Defense written by anyone more senior than LTC Beaver for such a complex and strategic national security issue
- DOD/GC direct contact with the USSOUTHCOM operations staff without coordination with OCJCS/LC or the command's SJA
- DOD/GC verbal direction to USSOUTHCOM to implement the proposed techniques
- short-circuiting of legal reviews
- failure to forward the Service legal-policy concerns
- prohibition of working group lawyers to apply independent legal analysis
- level of resistance to consideration of TJAG legal-policy concerns
- lack of opportunity to nonconcur on the final working group report or to know the report was finalized
- discussion with DOD/GC and at least one TJAG regarding Secretary Rumsfeld's decision to return to Army FM 34–52 techniques
- apparent senior administration lawyer direct involvement in operations at the joint task force level (discussions during visits to Guantanamo).

Role and Responsibility Analysis

Advocacy versus Advisory. The later OLC-repudiated, Yoo-drafted detainee interrogation controlling legal opinions have been soundly criticized in the legal community as "cursory and one sided legal arguments."[52] The opinions were apparently based on the drafter's view that his job was that of policy-advocate, rather than advisor. Several former OLC lawyers insist the advocate role was inappropriate. TJAGs acted in accordance with their ethical responsibility to provide candid legal advice and policy considerations. Based on the historic and statutory role of TJAGs, War Council members should not have been surprised that judge advocates had a voice in legal-policy formation.

Civilian Control of the Military. Congress has repeatedly acted to ensure leaders are given the benefit of independent military legal advice. Each time a study or independent review panel has examined the primacy and control relationships between civilian and uniformed lawyers, the reviewers recognize that TJAGs (and LC) work with, not for, civilian lawyers. Together, they support constitutional civilian leadership over the military. The existence and independence of each must be maintained.

The relationship between TJAG independence and DOD/GC and OLC primacy remains nuanced. Law now prohibits DOD/GC from interfering with TJAG ability to provide

independent counsel.[53] It does not mention the Attorney General. The Presidential signing statement on the independence legislation instructs the executive branch to give primacy to the Attorney General and DOD/GC.[54] Policymakers are entitled to ask their military lawyers for legal-policy considerations such as missing Servicemember perspectives.[55]

Yoo alleges that TJAGs have no place in legal-policy formation and that they "undermined" civilian leadership through their actions, including testimony to Congress on their personal legal and policy analysis.[56] However, when asked, TJAGs' constitutional duty and oath to Congress require them to provide Congress their legal and policy opinions, even when those opinions conflict with executive branch positions. They complied with those duties.

Since the rise of professional military forces, there has been tension between civilian control and military efficacy.[57] Policymakers may task their staffs (including lawyers) to act as their agents and circumvent standard processes. Reasons for such action include the need for speed, secrecy, desire to accomplish an action before objections are lodged, or lack of respect for the opinions of certain parties. When a policymaker declines to use the normal processes, he increases the chance his decision will not be sufficiently informed. Cutting offices out of the process can also harm morale and increase destructive behaviors such as leaks to the media. In this case, as a result of the altered processes, executive department leaders were not provided the full range of relevant, fully staffed legal-policy considerations. Only the principal policymakers can say whether they would have wanted more or if members of the War Council were acting in accordance with their direction.

Lawfare attacks will not diminish in frequency or intensity; legal-policy issues will not get easier; and there will not be fewer lawyers. Governmental processes lend order to the chaotic array of challenges. They ensure that policymakers receive vetted, well rounded advice. Leaders should hesitate to exclude key advisors from policymaking processes. GC and TJAG skills must be used in the intended complementary fashion. And judge advocates must continue to serve as independent advisors who provide candid legal-policy advice from the military perspective. **JFQ**

NOTES

[1] Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (New York: Norton, 2007), 129–130.

[2] Harlan G. Wilder, "Independent Counsel by Design," *Wright Stuff* 2, no. 12 (2007).

[3] Susan Crawford, quoted by Bob Woodward, "Detainee Tortured, Says U.S. Official: Trial Overseer Cites 'Abusive' Methods Against 9/11 Suspect," *The Washington Post*, January 14, 2009, A1.

[4] James E. Baker, *In the Common Defense: National Security Law for Perilous Times* (Cambridge: Cambridge University Press, 2007), 311.

[5] Kevin M. Sandkuhler, Memorandum for General Counsel of the Air Force, Subject: Working Group Recommendations on Detainee Interrogations, February 27, 2003.

[6] Kurt A. Johnson, "Military Department General Counsel as 'Chief Legal Officers': Impact on Delivery of Impartial Legal Advice at Headquarters and in the Field," *Military Law Review* 139, no. 1 (1993), 40.

[7] Charlie Savage, *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy* (New York: Little, Brown, 2007), 279–289.

[8] 10 U.S.C. §§ 3037 (Army), 5046 (Marine Corps), 5148 (Navy), 8037 (Air Force); U.S. Congress, Conference Report 108–767 Regarding H.R. 4200, Ronald Reagan National Defense Authorization Act for FY 2005 (Washington, DC, 2004).

[9] After one review of the possibility of consolidating OCJCS/LC and DOD/GC, General Henry H. Shelton wrote to Secretary Rumsfeld: "While you and I usually agree on issues, there may be times when my military advice, and that of the Joint Chiefs of Staff, may differ from your position. Likewise, the separation of functions and responsibilities of the officers that has heretofore existed allows the examination of issues from the military perspective independent of that of the OSD organizations. While their advice is frequently in accord, there are occasions when they diverge." Henry H. Shelton, Memorandum for Secretary of Defense, Subject: Consolidation of Offices, August 22, 2001. This memo was signed shortly before Secretary Rumsfeld's remarks about the large numbers of legal offices in the Pentagon.

[10] National Defense Authorization Act for Fiscal Year 2008, Pub. L. no. 110–181, § 543, 122 Stat. 115, January 28, 2008.

[11] Independent Review Panel to Study the Relationships between Military Departments General Counsels and Judge Advocates General, "Legal Services in the Department of Defense: Advancing Productive Relationships," Washington, DC, September 15, 2005.

[12] 10 U.S.C. §§ 3037 (Army), 5148 (Navy), 5046 (Marine Corps), 8037 (Air Force).

[13] 10 U.S.C. § 806.

[14] 10 U.S.C. § 801, et seq.; 10 U.S.C. §§ 3037 (Army), 5148 (Navy), 5046 (Marine Corps), 8037 (Air Force).

[15] 28 U.S.C. §§ 510, 511, 512; 28 C.F.R. § 0.25.

[16] 28 C.F.R. § 0.25(e).

[17] See U.S. Army, *Army Rules of Professional Conduct For Lawyers*, Army Regulation (AR) 27–26, Legal Services (Washington DC, 1992), preamble.

[18] U.S. Air Force, *Air Force Rules of Professional Conduct and Standards for Civility*, Attachment 1, TJS–2, Rule 2.1, Advisor (Washington DC, 2005); AR 27–26, Rule 2.1, Advisor; U.S. Navy, *Navy Professional Conduct of Attorneys Practicing Under the Cognizance and Supervision of The Judge Advocate General*, JAG 5803.1C (Washington DC, 2004), Rule 2.1, Advisor. The Service rules are modeled after the American Bar Association Model Rules of Professional Conduct.

[19] Edward F. Rodriguez, unpublished remarks to Air Force Reserve Forces Judge Advocate Course 99–A, The Air Force Judge Advocate General's School, January 7, 1999.

[20] Jack L. Rives, "Expeditionary Law: Remarks on How to Succeed in the Deployed Environment," *Air Force Law Review* 51 (2001), 349. Lieutenant General Rives was involved in the issue first as then–Major General Rives, Deputy Judge Advocate General, and later as TJAG.

[21] Larry O. Natt Gantt II, "More Than Lawyers: The Legal and Ethical Implications of Counseling Clients on Nonlegal Considerations," *The Georgetown Journal of Legal Ethics* 18, no. 2 (2005); Richard B. Bilder and Detlev F. Vagts, "Editorial Comment: Speaking Law to Power: Lawyers and Torture," *The American Society of International Law American Journal of International Law* 98, no. 4 (2004).

[22] Gantt.

[23] American Bar Association, "Rule 2.1, Comment: Scope of Advice," Model Rules of Professional Conduct (1983, as amended).

[24] The Air Force and Army rules state that the lawyer "may" refer to these additional matters. The Navy/Marine Corps rules state the lawyer "should" so refer. TJS–2, Rule 2.1, Advisor; AR 27–26, Rule 2.1, Advisor; JAG 5803.1C, Rule 2.1, Advisor.

[25] The Army rule is quoted. The Air Force rule omits the word *moral*, thereby neither advocating for, nor prohibiting, such discussions. Army and Navy rules include the word *moral*. AR 27–26, Rule 1.2; JAG 5803.1C, Rule 1.2, which is substantially similar to the quoted rule; TJS–2, Rule 1.2(d).

[26] TJS–2, Rule 1.4; AR 27–26, Rule 1.4; JAG 5803.1C, Rule 1.4.

[27] State Bar of Arizona, Committee on Rules of Professional Conduct, Opinion 97–06 (1997).

[28] Air Force general and senior officer commanders' and vice commanders' responses to

proposed reduction of legal office staffs, 2006 (on file at Air Force TJAG Action Group); Secretary of the Air Force Michael W. Wynne, unpublished comments to Air Force JAG Corps senior judge advocate meeting, 2005 (on file at Air Force TJAG Action Group).

[29] Jeh C. Johnson, unpublished remarks to The Air Force Judge Advocate General's Keystone Leadership Summit, October 2007.

[30] Dawn E. Johnsen, "Guidelines for the President's Legal Advisors," *Indiana Law Journal* 81 (Fall 2006); Dawn E. Johnsen, "All the President's Lawyers: How to Avoid Another 'Torture Opinion' Debacle," *American Constitution Society for Law and Policy* (July 2007), available at <www.acslaw.org/files/Dawn%20Johnsen%20July%202007.pdf>.

[31] Yoo and others who support the "unitary executive theory" apparently do not agree that members of the Armed Forces should testify to Congress contrary to the administration. Instead, they emphasize the officer's duty to the Commander in Chief.

[32] Samuel P. Huntington, *The Soldier and the State: The Theory and Politics of Civil-Military Relations* (Cambridge: President and Fellows of Harvard College, 1957), 415.

[33] Facts not previously reported in the various congressional hearings, testimony, reports, articles, and books on detainees were gleaned by the author's interviews of lawyers and others personally involved in the process. Organizations in which they served include JCS, military Services, U.S. Southern Command, and JTF–170.

[34] Goldsmith, 22.

[35] Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals* (New York: Doubleday, 2008), 88.

[36] Senate Armed Forces Committee Inquiry into the Treatment of Detainees in U.S. Custody (2008).

[37] Douglas J. Feith, *War and Decision: Inside the Pentagon at the Dawn of the War on Terrorism* (New York: HarperCollins, 2008), 159–165.

[38] George W. Bush, Memorandum for the Vice President et al., Subject: Humane Treatment of al-Qaeda and Taliban Detainees, February 7, 2002.

[39] The JTF–170 mission involved DOD detainee interrogation operations and interagency coordination of Guantanamo detainee interrogations.

[40] Philippe Sands, "The Green Light," *Vanity Fair* (May 2008).

[41] Richard Shriffrin, testimony to Senate Armed Forces Committee Inquiry into the Treatment of Detainees in U.S. Custody, June 17, 2008.

[42] Jay S. Bybee, Memorandum for White House Counsel, Subject: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2341A, August 1, 2002.

[43] William J. Haynes II, Memorandum for Secretary of Defense, Subject: Counter-Resistance Techniques, November 27, 2002.

[44] Donald H. Rumsfeld, Memorandum for Commander USSOUTHCOM, Subject: Counter-Resistance Techniques, December 2, 2002.

[45] Department of Defense, "DoD Provides Details on Interrogation Process," June 22, 2004, available at <www.defenselink.mil/releases/release.aspx?releaseid=7487>: "On Jan. 15, 2003, the secretary of defense rescinded the Dec. 2 guidance when he learned of concern about the implementation of the techniques." See also Donald H. Rumsfeld, Memorandum for Department of Defense General Counsel, Subject: Detainee Interrogations, January 15, 2003.

[46] Department of Defense, Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations (Washington, DC: Department of Defense, April 14, 2003).

[47] Ibid., 2.

[48] John Yoo, Memorandum for Department of Defense General Counsel, Subject: Military Interrogation of Alien Unlawful Combatants Held Outside the United States, March 12, 2003. As with the Torture Memo, this memo was classified as "secret," and the JAGs did not see the signed opinion until it was declassified in 2008.

[49] Michael F. Lohr, Memorandum for the Air Force General Counsel, Subject: Comments on the 6 March 2003 Detainee Interrogation Working Group Report, March 13, 2003; Vivia Chen, "Interrogation Memo Puts Air Force Counsel in Hot Seat," *The American Lawyer* (August 6, 2004), available at <www.law.com/jsp/article.jsp?id=1090180294718>. Of note, the working group report and both of the relevant OLC legal opinions remained classified until after the disclosure of the criminal abuses at Abu Ghraib.

[50] Jack L. Rives, Memorandum for Secretary of the Air Force (SAF) GC, Subject: Final Report and Recommendations of the Working Group to Assess the Legal, Policy and Operational Issues Relating to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism, February 5, 2003; Jack L. Rives, Memorandum for SAF/GC, February 6, 2003; Kevin M. Sandkuhler, Memorandum for General Counsel of the Air Force, February 27, 2003; Thomas J. Romig, Memorandum for General Counsel of the Air Force, Subject: Draft Report and Recommendations of the Working Group to Access the Legal, Policy and Operational Issues Related to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism, March 3, 2003; Michael F. Lohr, Memorandum for the Air Force General Counsel, Subject: Working Group Recommendations Relating to Interrogation of Detainees, February 6, 2003; Michael F. Lohr, Memorandum for the Air Force General Counsel, March 13, 2003.

[51] Woodward.

[52] Goldsmith, 149.

[53] The statute reads: "No officer or employee of the Department of Defense may interfere with the ability of the Judge Advocate General to give independent legal advice to the Secretary of the [Service] or the [Chief of Staff of the Service or Chief of Naval Operations]." See 10 U.S.C. §§ 3037 (Army), 5148 (Navy), 5046 (Marine Corps), 8037 (Air Force).

[54] The signing statement instructs the executive branch to construe the statute "in a manner consistent with . . . the exercise of statutory authority by the Attorney General (28 U.S.C. 512 and 513) and the general counsel of the Department of Defense as its chief legal officer (10 U.S.C. 140) to render legal opinions that bind all civilian and military attorneys within the Department of Defense." George W. Bush, "Statement on Signing the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005," Weekly Compilation of Presidential Documents (Washington, DC: The White House, October 28, 2004).

[55] As the Senior Marine Corps lawyer wrote in his objection to the Walker working report, "OLC does not represent the services; thus, understandably, concern for servicemembers is not reflected in their opinion." See Kevin M. Sandkuhler, Memorandum for General Counsel of the Air Force, February 27, 2003.

[56] Glenn Sulmasy and John Yoo, "Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror," *UCLA Law Review* 54 (2007), 1,834; Michael L. Kramer and Michael N. Schmitt, "Lawyers on Horseback? Thoughts on Judge Advocates and Civil-Military Relations," *University of California Law Review* 55 (June 2008); Victor Hansen, "Understanding the Role of Military Lawyers in the War on Terror: A Response to the Perceived Crisis in Civil-Military Relations" (forthcoming, 2009).

[57] Eliot A. Cohen, *Supreme Command: Soldiers, Statesmen and Leadership in Wartime* (New York: The Free Press, 2002).