
The Politicizing of Military Law— Fruit of the Poisonous Tree

Gregory M. Huckabee*

TABLE OF CONTENTS

I. INTRODUCTION	612
II. CIVILIAN VS. MILITARY LEGAL INTERPRETATION—WHO SHOULD HAVE THE LAST WORD?.....	613
A. <i>The Legal Advice System</i>	614
B. <i>Legislative Consideration of Realigning Military Legal Authority</i>	614
C. <i>DoD Makes a Different Policy Decision.</i>	615
D. <i>DoD Makes an About Face</i>	616
E. <i>Battle for Legal Command, Part II</i>	617
F. <i>Balance Between Primacy and Independence</i>	619
III. WHEN POLITICAL AGENDAS AND MILITARY LAW MEET	620
A. <i>The Seed is Planted—the First Yoo Memo</i>	621
B. <i>The Seed is Sown—the Second Yoo Memo</i>	622
C. <i>The Right to Be Wrong—Department of State Legal Advisor’s Memo</i>	623
D. <i>The Last Hope for Legal Discretion</i>	628
IV. POLICY IMPLEMENTATION AND DEPARTURE FROM LEGAL PRECEDENT	632
A. <i>The DOJ Seed of Opinion Flowers at DoD</i>	633
V. THE FRUIT GROWS POISONOUS.....	633
A. <i>Interrogation Fruit Seeds Are Sown</i>	634
B. <i>The Uniforms Sniff the Poisonous Fruit</i>	637
C. <i>A Four-Star Request to Taste the Fruit</i>	640
D. <i>The Fruit is Tasted and Cannot be Returned to the Seller</i>	641
E. <i>Speaking Truth to Power</i>	645
F. <i>The Cannon is Loose in the Pentagon</i>	648
G. <i>Politics vs. the Law in the Pentagon</i>	651
H. <i>Cause and Effect—What Happens When the Fruit is Digested</i>	660

* Associate Professor of Business Law, University of South Dakota. Prior to assuming his teaching duties, he served 27 years as a Regular Army Judge Advocate. He received his A.B., M.B.A., and J.D. from Gonzaga University in Spokane, WA; an LL.M. from The Judge Advocate General’s School in Charlottesville, VA; an M.S. in Education from Jacksonville State University in Jacksonville, AL; an M.A. in Congressional Studies from The Catholic University of America in Washington, D.C.; and an LL.M. from The George Washington University National Law Center in Washington, D.C. The author is indebted to Jason Stanford, Justin Johns, and Ryan Petersen; without whose invaluable assistance this article would not be possible.

I.	<i>What Happens When the Military Prosecutors Will Not Eat the Fruit?</i>	664
J.	<i>DOJ Confesses Error—A Matter of Political Judgment</i>	667
K.	<i>Wrong in Legal Policy, Wrong in Court X Two</i>	673
VI.	CONCLUSION—WHAT WAS GAINED, WHAT WAS LOST	678

*Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.*¹

I. INTRODUCTION

If it is true as Georges Clemenceau observed, that “war is too serious a matter to leave to soldiers”,² what about the interpretation of military law? Can military lawyers be relied on to provide nonpolitical, objective interpretations of the law of war and international law as it affects the military operations of their own forces? If Clemenceau is right at least with respect to legal interpretation, then it would befall government civilian legal leaders to make those important decisions. But what makes a civilian government counsel more objective than his military legal counterpart? And does the political nature of warfare militate against true objectivity in today’s domestic and international environments?

The purpose of this article is to examine the politicizing of military legal decision-making and its causes. Events since September 11, 2001, have served as opportunities for well-intentioned, but sadly misguided civilian legal leaders to dismantle and override a military legal system of ethical and moral purpose, and tradition. This “political legal thinking” is giving rise to a Machiavellian theme in contemporary military law interpretation—that “the ends [legally] justify the means” with tragic consequences.³ While some may understandably want to dispute the connection, this research is an attempt to connect the “dots” that mark the trail to the field of forbidden legal and moral fruit.

1. U.S. WAR DEP’T, ADJUNCT GENERAL ORDERS NO. 100, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD, art. 15 (Apr. 24, 1863), *reprinted in* INTERNATIONAL LAW DISCUSSIONS, 1903: THE UNITED STATES NAVAL WAR CODE OF 1900, at 118 (1904).

2. J. HAMPDEN JACKSON, CLEMENCEAU AND THE THIRD REPUBLIC 228 (2d prtg. 1948).

3. Matthew Prior, *Hans Carvel*, in THE POETICAL WORKS OF MATTHEW PRIOR 86, 88 (1948).

II. CIVILIAN VS. MILITARY LEGAL INTERPRETATION—WHO SHOULD HAVE THE LAST WORD?

While reasonable legal minds often differ involving how a legal policy question should be resolved, Congress made its concern known about how this might apply inside the Department of Defense (DoD) when it required in its 2005 National Defense Authorization Act that DoD establish an independent panel of outside experts to conduct a study and review of the relationships between the legal elements of each of the Armed Services.⁴ Co-chaired by former secretary of the Air Force F. Whitten Peters and former secretary of the Army John O. Marsh, the remaining five panel members consisted of retired service judge advocates and general counsel for the services.⁵ While certainly experts, having served years in Pentagon harness, a neutral observer might question whether they were truly “outside experts” given their professional and personal association and attachment to an institution they had served so well and honorably.

Of the five main responsibilities the panel was charged with studying, two focused on the ability of military lawyers to perform their duties effectively:

- Consider whether the ability of judge advocates to give independent, professional advice to their Service staffs and to commanders at all levels in the field is adequately provided for by policy and law; and,⁶
- Consider whether the Judge Advocates General and General Counsels possess the necessary authority to exercise professional supervision over judge advocates, civilian attorneys, and other legal personnel practicing under their cognizance in the performance of their duties.⁷

Unfortunately, in its sixty-nine page narrative report, a scant seven pages were devoted to addressing the “Balance Between Primacy and Independence” of military legal authority.⁸ This should have been the heart of the study when, in fact, the issues of structures, roles, responsibilities, professional supervision and development of civilian attorneys, legal support for joint commands, arguments why The Judge Advocates General should be elevated to a three-star rank, and a recitation of statutes

4. Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, §574(d), 118 Stat. 1811, 1923-24 (2004).

5. Indep. Rev. Panel to Study the Relationships Between Military Dep’t Gen. Counsels and Judge Advocate Gens., *Legal Services in the Dep’t of Defense: Advancing Productive Relationships*, masthead (Sept. 15, 2005) [hereinafter DoD Legal Services].

6. *Id.* at 5, 116.

7. *Id.* at 6, 116.

8. *Id.* at 36-42.

and orders affecting the Department of Defense (DoD) all supplanted the core purpose of the study. Sadly, the study revealed very little because virtually all of the topics mentioned above in the report were already well known to the public, Congress (since they created virtually all of it), and the Armed Services. What did the “outside (formerly inside) experts” have to say about the two congressionally directed topics above?

A. The Legal Advice System

The first uniformed lawyer was appointed on July 29, 1775, by the Second Continental Congress in response to a request from General George Washington who wanted William Tudor in the position of Judge Advocate General of the Army.⁹ While the Navy appointed uniformed lawyers intermittently, in 1880, Congress established the Navy Office of the Judge Advocate General.¹⁰ With the establishment of the Air Force in 1947, the Office of the Judge Advocate General was created the following year similar to the other Services.¹¹ The departments’ civilian general counsel were relatively new to the military legal scene, with the first one appearing in the Navy during World War II, handling essentially procurement matters, followed by the Army, with both general counsel supporting primarily their department secretaries, not their military staff.¹² After enactment of the National Security Act of 1947 and creation of the Department of Defense, the Air Force created the office of general counsel and the Army created a formal Department Counselor, later shortened to General Counsel, in 1950.¹³

To add further perplexity to this legal advisement scheme, the position of DoD General Counsel was created by Defense Reorganization Plan No. 6 of 1953 and implemented by DoD Directive 5145.1.¹⁴

B. Legislative Consideration of Realigning Military Legal Authority

Up until Congress enacted the Goldwater-Nichols Act in 1986,¹⁵ each Armed Service had a general counsel of some type, but they were not firmly described in

9. *Id.* at 8 n.17.

10. Act of June 8, 1880, ch. 129, 21 Stat. 164, 164 (1880).

11. DoD Legal Services, *supra* note 5, at 8.

12. *Id.* at 8-9.

13. *Id.* at 9.

14. *Id.* at 9-10 & nn. 20-21 (citing Reorganization Plan No. 6 of 1953, 67 Stat. 638, 639 (1953); U.S. DEP’T OF DEFENSE, DIR. 5145.1, GENERAL COUNSEL OF THE DEP’T OF DEFENSE (as amended 2 May 2001)).

15. Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, 100 Stat. 992 (1986).

statute, let alone in possession of statutorily defined relationships to the Judge Advocates General. The Goldwater-Nichols Act accomplished what the services had thus far failed to do with clarity—it codified the positions of General Counsel in the Military Departments.¹⁶ One of the key legislative purposes of Goldwater-Nichols was to enact a watershed consolidation of military functions to eliminate wasteful “duplication and staff layering” at all levels within DoD and the Military Departments.¹⁷ The dual Department General Counsel-Judge Advocate General legal systems were not overlooked when professional staff of the U.S. Senate Committee on Armed Services (SASC) recommended to the Committee that they amend the organization structures they were codifying to require the Judge Advocates General to report to their General Counsels instead of their Service Chiefs or Secretary. What is historically important to note is that the SASC consciously decided against this proposal and did not enact any language in support of this option.¹⁸ The 2005 Independent Panel of Experts acknowledged the same result.¹⁹

C. DoD Makes a Different Policy Decision.

Unsatisfied with this dual legal chain of command, DoD seized the initiative taking the matter into its own hands. On March 3, 1992, Deputy Secretary of Defense D.J. Atwood unilaterally issued a memorandum in which he identified General Counsels of all Military Departments as “‘chief legal officers ... responsible and accountable for the proper, effective and uniform interpretation and application of the law and delivery of legal services,’ whose opinions ‘shall be the controlling legal opinions of their respective Departments.’”²⁰ The opinion went on to mandate that the “civilian and military personnel performing legal duties ... under the Secretary ... shall be subject to the authority of the General Counsel.”²¹ In one administrative act, DoD sought to change what Congress had considered and rejected as a conscious policy choice when it was drafting the Goldwater-Nichols Act.

16. *Id.* (§ 501 (Department of the Army), § 511 (Department of the Navy), § 521 (Department of the Air Force), codified at 10 U.S.C. §§ 3019, 5019, and 8019, respectively).

17. Legal Services in the Department of Defense, Advancing Productive Relationships, 15 (Proposed Official Draft Aug. 10, 2005) [hereinafter DoD Draft]; *see also* Pub. L. No. 99-433, 100 Stat. 992 (1986).

18. DoD Legal Services, *supra* note 5, at 12 (citing STAFF OF S. COMM. ON ARMED SERVICES, 99TH CONG., DEFENSE ORGANIZATION: THE NEED FOR CHANGE 456-62 (Comm. Print 1985)).

19. DoD Legal Services, *supra* note 5, at 12-13.

20. *Id.* at 13-14.

21. *Id.* at 14.

D. DoD Makes an About Face

In many ways Washington, D.C. is a small town. While the uniform Services are prohibited by statute from lobbying Congress,²² when one or more branches of the military believes there is an encroachment by political forces on its statutory authority, there are private organizations and agents outside the government who act as spokespersons or agent *provocateurs*. In this case, the American Bar Association and Judge Advocates Association, through their agent RADM (ret) John S. Jenkins (former Navy Judge Advocate General), raised this issue to the House Subcommittee on Oversight and Investigations Committee on Veteran's Affairs.²³ In its report accompanying the National Defense Authorization Act for Fiscal Year 1993, the SASC expressed concern over the Atwood memorandum noting:

[The memorandum] is also susceptible to an interpretation that would assign to the military department General Counsels specific management duties with respect to the diverse legal organizations within their departments. If so interpreted, the memorandum could require the DoD and service General Counsels to undertake a range of specific duties that would diminish their ability to concentrate attention on important oversight responsibilities.²⁴

Unsatisfied that DoD would readjust the legal chain of command on its initiative, the SASC seized the DoD General Counsel nomination hearing of David S. Addington to obtain DoD rescission of the Atwood memo's usurpation of military legal authority to the department general counsel.²⁵ The SASC extracted from Mr. Addington "a clarification" that the Atwood memo "did not provide a basis for the [Department] General Counsel ... to direct the Judge Advocate General [TJAG] in the execution of any statutory responsibility of the respective TJAG."²⁶

Now that the new DoD General Counsel nominee had derailed, or least repudiated, the legal impact of the Atwood memo instituting a new Pentagon legal chain of command policy established the previous March, a second Atwood memo was forthcoming to clean up the legal battlefield. The new memo, issued August 14, 1992, superseded his previous March 3rd policy. Incorporating Mr. Addington's representations to the SASC, the Acting-Secretary of Defense memo stated that the

22. 18 U.S.C. § 1913 (2006).

23. *See Service Members' Civil Relief Act: Hearing on H.R. 4763 Before the H. Subcomm. on Oversight and Investigation Comm. on Veteran's Affairs*, 102d Cong. 102-35 (1992) (statement of John S. Jenkins on behalf of the American Bar Association).

24. S. REP. NO. 102-352, at 252 (1992).

25. *See id.* at 252-53.

26. DoD Legal Services, *supra* note 5, at 14-15 (citing *Nominations Before the Senate Armed Services Comm., Hearings Before the S. Comm. on Armed Services*, 102d Cong. 983, at 325-27 (1992) (statement of David S. Addington)).

“Military Departments shall ensure that the General Counsels serve as chief legal officers of their respective Departments and may issue controlling opinions,” but went on to require that such implementation be consistent with the statutes relating to the Judge Advocates General of the Military Departments.²⁷ Since virtually every duty a Service TJAG performs is based on statutory authority, this equivocation gutted the legal force and impact of the DoD attempt to make Department General Counsel the chief legal officer of their Departments.

E. Battle for Legal Command, Part II

A decade passed before the legal chain of command issue was revisited. The shot heard around the Pentagon was fired by the Secretary of the Air Force on May 15, 2003, when he issued Secretary of the Air Force Order (SAFO) 111.5.²⁸ Relations between the Air Force General Counsel and Judge Advocate General had deteriorated over time resulting in a failure to provide the Secretary a plan for improving visibility into the Air Force structure and for eliminating duplication between their respective offices. The Secretary’s “SAFO gave the General Counsel broad authority to set legal policy for the Department, to become involved in any legal matter, to oversee the provision of legal services throughout the Department, and to review all legal training within the Department.”²⁹ In particular, he made the General Counsel “solely responsible . . . for legal aspects of major matters arising in or involving the Department....”³⁰ In addition, the Office of The Judge Advocate General was given “a dotted line reporting relationship to the General Counsel, serving as the Principal Military Advisor to the General Counsel.”³¹

Predictably, all Service Judge Advocates General felt threatened by such a unilateral executive act. Their anxiety over this change in the legal status quo within the Pentagon caused Congress to revisit the issue. By giving the Department General Counsel executive authority over the Service TJAG, the Air Force Secretary’s order appeared to create the relationship previously authorized in the withdrawn and discredited first Atwood Memo.

In response, sending an unmistakable message to the Pentagon’s civilian political leadership, Congress enacted legislation stating that “[n]o officer or employee of the Department of Defense may interfere with the ability of the Judge Advocates General to give independent legal advice,” to their respective Secretary or Service Chief, “or the ability of judge advocates . . . [in] military units to give

27. DoD Legal Services, *supra* note 5, at 15.

28. DoD Draft, *supra* note 17, at 23.

29. *Id.*

30. *Id.*

31. *Id.* at 24.

independent legal advice to commanders.”³² Attempting to rein in the Air Force Secretary’s unilateral transfer of statutory authority to the Department General Counsel, the statute also provided the Air Force Judge Advocate General authority, similar in nature to that already possessed by the Army TJAG, to direct the duties of Air Force judge advocates. Both the Air Force General Counsel and TJAG could not possess this authority simultaneously, so Congress reclaimed for the Air Force TJAG what the Secretary had attempted to transfer on his own initiative. In its report, Congress wanted to send the DoD political leadership a message. It made its point clear by stating that this was “the second time in 12 years that attempts to consolidate legal services in the Department of Defense have led to congressional action” overruling it.³³ As a consequence, like the second Atwood memo, the “Secretary of the Air Force issued a new SAFO on July 14, 2005, superseding the May 15, 2003 SAFO.”³⁴ Another attempt at subjugating military legal authority to civilian political desires was thwarted.

Even the 2005 Legal Services in DoD independent panel of experts concluded that “[t]he legislation . . . appears to set a boundary on Secretarial discretion to give executive control of the legal function of a Military Department to the General Counsel and to subordinate the Judge Advocate General to the General Counsel’s organization.”³⁵ What is curious about this final report of the Panel is that it deleted an important analytical statement, involving the ongoing legal chain of command tension, that it made in its draft report of these events. In its Draft Report the Panel of Experts observed, “this discord has been largely confined within the walls of the Pentagon, and generally it appears not to have impacted commanders in the field. Nonetheless, it is unhealthy and unnecessary and must be resolved.”³⁶

Even more curious is the deletion from the Draft Report’s conclusion:

Accordingly, and especially in light of recent legislation, the panel does not perceive any need to reorganize the legal functions within the Military departments or to restructure the current statutory relationship between the General Counsels and TJAGs. At the same time, however, the Panel believes that greater clarity as to the roles of these two legal officers, as well as attention to the circumstances most conducive to their success, would be beneficial in avoiding the dysfunction that has characterized some General Counsel-TJAG

32. Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 574(a), 118 Stat. 1811, 1923-24 (2004).

33. H.R. REP. NO. 108-767, at 682 (2004) (Conf. Rep.).

34. DoD Draft, *supra* note 17, at 25.

35. DoD Legal Services, *supra* note 5, at 18.

36. DoD Draft, *supra* note 17, at 26.

relationships and promoting ‘a united, cohesive, interdependent collegial and seamless team.’³⁷

In its quest to produce a less critical analysis, this writer ponders why the Panel deleted its “dysfunctional” characterization of some General Counsel-TJAG relationships, especially after having heard testimony from so many witnesses before the Panel. Perhaps the credibility of the Panel’s Report is further questioned by what was also left out of consequence concerning this political-judge advocate legal struggle for the soul of military law.

F. Balance Between Primacy and Independence

The above subtitle is taken directly from the DoD Panel’s Final Report. The Panel observed in its introduction to this section that “[o]n one level, the designation of Chief Legal officer as the issuer of ‘controlling legal opinions’ is largely theoretical because disagreement between the General Counsel and TJAG on a matter of abstract legal interpretation or straight application of law to facts is rare.”³⁸ As events since 2001 involving military law will reveal later in this treatise, such a representation is factually wrong at worst, and naïve at best. Having served in the Office of the Judge Advocate General in the Pentagon from 1989-1994 during both Republican and Democratic administrations, the author witnessed numerous legal skirmishes between the Army TJAG and General Counsel (from 1989-1992) who subsequently became the DoD General Counsel in 2001, Mr. William J. Haynes II.

What is shamefully conspicuous by its absence in the Panel’s report is any analysis or discussion regarding the nature of the political roles of the General Counsel and the military judge advocate. The General Counsel is first and foremost a political appointee nominated by the President based on loyalty and commitment to supporting a policy program.³⁹ They must be confirmed by the Senate and, as the case of David Addington demonstrates, normally receive hearings before the SASC.⁴⁰ While Judge advocates are not political appointees, those above the rank of captain require Senate approval of their regular commissions.⁴¹ In addition, the President can dismiss his General Counsel, dismissing judge advocates is an altogether different procedural matter. Politically appointed General Counsels have a different purpose and function in the DoD. They are about partisan policy

37. *Id.* at 43.

38. *Id.* at 37.

39. *See* Reorganization Plan No. 6 of 1953, 67 Stat. 638, 639 (1953).

40. *Id.*; *see also* DoD Legal Services, *supra* note 5, at 33 (citing Nat’l Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 902, 108 Stat. 2663, 2823 (1994)).

41. Defense Officer Personnel Management Act, Pub. L. No. 96-513, § 531, 94 Stat. 2835 (1980).

implementation, whereas judge advocates are about constitutional and statutory duties devoid of partisan policy considerations. As we will see in subsequent examples, it is the clash and conflict of political agendas with neutral public service obligations that have fostered the military legal crisis that the Panel of Experts so studiously avoided in their investigation of this tension. This brings forth the salient question—what role do politics play in military law?

III. WHEN POLITICAL AGENDAS AND MILITARY LAW MEET

In 1993, the Clinton administration decided as policy that it would not accept Haitians or Cubans as refugees when they float into America on boats.⁴² The government made the logistical decision that all such personnel apprehended or rescued by the U.S. Coast Guard would be transported to the U.S. naval base at Guantanamo Bay, Cuba, where they would be detained until such time as they decided they wished to return home.⁴³ At that point, the U.S. Coast Guard would ferry them home.⁴⁴ While a number of organizations allegedly representing these detainees filed actions in U.S. District Court in Miami seeking refugee status, federal courts uniformly held they had no jurisdiction over the Navy leased base of Guantanamo as it did not qualify as U.S. territory.⁴⁵ U.S. government policymakers remained adamant that these detainees would not be admitted into the U.S. as refugees.⁴⁶ Then, without warning, the Clinton administration reversed its policy agreeing to let all detainees into the U.S. after a period of detention in the inhospitable encampments on the beach at Guantanamo.⁴⁷ As the years went by it became evident to the Clinton administration it had not thought through or correctly anticipated the end-state of its Guantanamo Refugee Detention Center. It had only made an interim decision that did not accurately judge what the appropriate outcome of such massive detentions of asylum seekers should be.

Fast forward to Afghanistan and Iraq in 2001-2002 when Secretary of Defense Donald Rumsfeld decided to transport Taliban, Al-Qaeda, and other alleged terrorists to Guantanamo.⁴⁸ Like the Clinton administration before him, he and the Bush

42. Bill Nichols & Juan J. Walte, *Clinton Warns Against Haiti Exodus*, USA TODAY, Jan. 15, 1993, at A5, available at 1993 WLNR 2242469.

43. *Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498, 1500, 1503 (11th Cir. 1992), cert. denied, 502 U.S. 1122 (1992).

44. *Baker*, 953 F.2d at 1500.

45. See, e.g., *id.* at 1506 (ruling that judicial review of detainment of Haitian refugees on United States vessels or at Guantanamo Bay is inappropriate).

46. See Derrick Z. Jackson, *Clinton, Backed by the Court, is Fighting Haiti's Refugees, Not Its Rulers*, BOSTON GLOBE, June 23, 1993, at 15, available at 1993 WLNR 1962188.

47. See David Adams, *15,000 Cubans Coming to Florida*, ST. PETERSBURG TIMES, May 3, 1995, at A1, available at 1995 WLNR 2241735.

48. See George Edmonson, *'Gitmo' Gets a Makeover as POW Camp*, COX NEWS SERVICE,

administration had not thought through the end-state of the 600+ captured terrorists brought to this detention center. Subsequent events would indicate they were to learn the lessons of their predecessors, but only more painfully. The decision to bring the captured “unlawful combatants” to Guantanamo was a political decision. This political decision by the Bush administration set in motion a, perhaps unforeseen, chain of events, representing the greatest challenge to military law since World War II.

When political decisions drive legal analysis, expediency is pitted against principle.⁴⁹ Therein lies the true danger and test of who Americans are, and what we truly believe. When law is subordinated to political preference, the uniquely American constitutional experiment is turned on its head. The Bush administration began its journey down this road after September 11, 2001. A shaken and angry nation looked to its President and Commander-in-Chief to respond to the unprovoked attack and murder on its shores of thousands of innocents in New York City, Pennsylvania, and Washington, D.C. In the days after the airliner assault, the Bush administration searched for an appropriate response. Congress, reflecting the justified rage of its citizenry, passed a Joint Resolution on September 18th to authorize the use of U.S. Armed Forces against those responsible for the recent attacks launched against the U.S..⁵⁰ While contemplating appropriate military action, the White House requested an opinion from the U.S. Department of Justice (DOJ) addressing the president’s war-making authority.

A. The Seed is Planted – the First Yoo Memo

A nineteen-page opinion from the Department of Justice (DOJ) Office of Legal Council (OLC) was submitted to the Deputy Counsel to the President on September 25th.⁵¹ The opinion reviewed historic precedents involving presidential exercise of the war power, but provided in its conclusion that there were no restrictions on its exercise.⁵² For a President who is not a lawyer, the following must have appeared to

Jan. 7, 2002.

49. In *Hamdi v. Rumsfeld*, 542 U.S. 507, 579 (2004), Justice Scalia wrote in dissent that: Many think it not only inevitable but entirely proper that liberty give way to security in times of national crisis—that, at the extremes of military exigency, *inter arma silent leges*. Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it..

50. Act of Sept. 18, 2001, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001).

51. Memorandum from John C. Yoo, Deputy Assistant Att’y General, Office of Legal Counsel, U.S. Dep’t of Justice, The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them (Sept. 25, 2001), [hereinafter Yoo Memo Sept. 25, 2001], available at <http://www.usdoj.gov/olc/warpowers925.htm>.

52. *Id.* at 9, 16.

be an authorization for an unrestrained exercise of power without consideration for the norms of international law and law of war:

[W]e think it beyond question that the President has the plenary constitutional power to take such military actions as he deems necessary and appropriate to respond to the terrorist attacks . . . Force can be used both to retaliate for those attacks, and to prevent and deter future assaults on the Nation. . . . In both the War Powers Resolution and the Joint Resolution, Congress has recognized the President's authority to use force in circumstances such as those created by the September 11th incidents. Neither statute, however, can place any limits on the President's determination as to any terrorist threat, the amount of military force to be used in response, or the method, timing, or nature of the response. These decisions, under our Constitution, are for the President alone to make.⁵³

Without any reference to the Geneva Conventions or established rules for the conduct of war, this DOJ legal opinion provided the President a blank check upon which he would write numerous orders that would sow the seeds for a policy that would place the principles of military law in moral bankruptcy. It is understandable that in the aftermath of September 11's devastation, emotions of leaders at all levels of government were running high. Yet, one of the salient reasons we have lawyers in government, is to check the unrestrained exercise of political power.

B. The Seed is Sown—the Second Yoo Memo

On January 9, 2002, Deputy Assistant Attorney General John Yoo issued a draft second opinion, this time to the DoD General Counsel, William J. Haynes II.⁵⁴ Mr. Haynes asked OLC for an opinion “concerning the effect of international treaties and federal laws on the treatment of individuals detained by the U.S. Armed Forces during the conflict in Afghanistan.”⁵⁵ Taking off seemingly where his earlier memo had ended, Mr. Yoo in response opined, “We conclude that customary international law, whatever its source and content, does not bind the President, or restrict the actions of the United States military, because it does not constitute federal law recognized under the Supremacy Clause of the Constitution.”⁵⁶

53. *Id.* at 16.

54. Memorandum from John C. Yoo, Deputy Assistant Att’y Gen., Office of Legal Counsel, U.S. Department of Justice, Memorandum Opinion for William J. Haynes II, General Counsel, Department of Defense, Application of Treaties and Laws to Al-Qaeda and Taliban Detainees (Jan. 9, 2002) [hereinafter Yoo Memo Jan. 9, 2002].

55. *Id.* at 1.

56. *Id.* at 2.

Congress previously sought to implement the four Geneva Conventions to which the U.S. was a party by enacting the War Crimes Act (WCA).⁵⁷ Furthermore, like customary international law, Mr. Yoo sought to eliminate this federal law as well as a restraint on the exercise of presidential power.

The WCA regulates the manner in which the U.S. Armed Forces may conduct military operations against the enemy; as such, it potentially comes into conflict with the President's Commander in Chief power under Article II of the Constitution. As we have advised others earlier in this conflict, the Commander in Chief power gives the President the plenary authority in determining how best to deploy troops in the field.⁵⁸

His analysis of the WCA, international law, and applicability of the Geneva Conventions to the detention of Al-Qaeda and Taliban militia members [the reason DoD requested the opinion] finds them all inapplicable.⁵⁹ He dismissed the concept of the law of war's applicability upon U.S. Armed Forces and the President observing, "Regardless of its substance, however, customary international law cannot bind the executive branch under the Constitution because it is not federal law."⁶⁰ Mr. Yoo used an 1814 citation from Chief Justice John Marshall to make his point that customary international law "is a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded."⁶¹ Disregarding almost 200 years in the development of international law and the law of war, the sum of the draft legal opinion was that under his Commander-in-Chief authority, the President can order any action he deems in the national security interest of the nation regardless of the War Crimes Act or customary international law to the contrary.

C. The Right to Be Wrong—Department of State Legal Advisor's Memo

Someone once observed that a lawyer should always reserve the right to be wrong. If legal scholars were perplexed at the opinions emanating from the Department of Justice on so poignant a topic, imagine what the lawyers at the Department of State were thinking after reviewing them. If military lawyers found themselves catching a cold after reading Mr. Yoo's legal assertions, lawyers at Foggy Bottom were catching pneumonia. Former Department of Defense Acting Secretary,

57. 18 U.S.C. § 2441 (2006).

58. Yoo Memo Jan. 9, 2002, *supra* note 54, at 11.

59. *Id.* at 34.

60. *Id.*

61. *Id.* (quoting *Brown v. United States*, 12 U.S. (8 Cranch) 110, 128 (1814)).

Deputy Secretary, and also DoD General Counsel in former Republican administrations, William Howard Taft IV, grandson of President and Chief Justice William Howard Taft, was serving as the chief Legal Advisor at the Department of State when the draft Yoo memo was received. Only two days after receiving it (January 11), Mr. Taft sent DOJ's Mr. Yoo the following:

While we have not been able in two days to do as thorough a job as I would like in reviewing your draft, I am forwarding these comments to you in draft form now for your consideration. They suggest that both the most important factual assumptions on which your draft is based and its legal analysis are seriously flawed.⁶²

Among Republican administration lawyers, such comments were as direct as anyone had ever seen before. Spending 40 pages critiquing not only Yoo's defective legal analysis, but also its factual basis, Mr. Taft wasted no time making his legal point:

Our concerns with your draft are focused on its consideration of the status of the detainees who were members of the Taliban Militia as a practical matter. Under the Geneva Conventions, these persons would be entitled to have their status determined individually. We find untenable the draft memorandum's conclusion this is unnecessary because (1) Afghanistan ceased to be a party to the Conventions, (2) the President may suspend the operation of the Conventions with respect to Afghanistan, and (3) customary international law does not bind the United States. As a matter of international law, the draft comments below show, all three premises are wrong.⁶³

When considering which of the two lawyers had more experience and knowledge in this important international law field, Mr. Taft appears to have a more lengthy resume of expertise than Mr. Yoo. But does that matter when a political decision is made that searches for legal justification? The political decision involved changed U.S. policy regarding detainees and application of the Geneva Conventions. In the sternest of terms the State Department Legal Advisor crossed swords with DOJ's Mr. Yoo:

In previous conflicts, the United States has dealt with tens of thousands of detainees without repudiating its obligations under the Conventions. . . Only the utmost confidence in our legal arguments could, it seems to me, justify deviating from the United States unbroken record of compliance with the Geneva

62. Your Draft Memorandum of Jan. 9, Memorandum from William H. Taft IV, Legal Advisor, U.S. Dep't of State, to John C. Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice 1 (Jan. 11, 2002).

63. *Id.* at 1.

Conventions in our conduct of military operations over the past fifty years. Your draft acknowledges that several of its conclusions are close questions. The attached draft comments will, I expect, show you that they are actually incorrect as well as incomplete. *We should talk.* [emphasis added]⁶⁴

Mr. Yoo responded to Mr. Taft with a revised draft on January 18, 2002, with Mr. Taft providing another critique of his international legal analysis five days later (January 23). Continuing to take issue with Yoo's basic legal policy premise, Mr. Taft wrote: "While I appreciate that there have been a number of revisions that take into account our earlier comments, we continue to have fundamental problems with the proposed analysis."⁶⁵ Succinctly stating his point, Taft argued:

[I]ndeed, you have barely addressed the requirements of international law, inasmuch as you rely on your conclusion under domestic law that it is not binding on the President in any case. Since your revised analysis is substantially similar to the earlier draft, our fundamental difficulties are for the most part already noted and explained in our earlier memorandum [Jan. 11], and so those comments remain applicable to your revised draft. In particular, we refer you back to our comments related to your analysis of the application of the Third Convention [GCW] and customary international law, with which we continue to find fundamental flaws.⁶⁶

Perhaps sensing the historic departure DOJ's proposed course of legal policy action would have in military terms Taft observed: "In essence, the current line of argument seems to be that we can treat Taliban forces now and in the future in whatever way we wish in order to punish the Taliban for their past breaches of the treaty [GCW]."⁶⁷ He made three arguments why this legal policy violated international law.⁶⁸ Knowing the importance of the legal policy issues in play based

64. *Id.* at 2.

65. Memorandum from William H. Taft IV, Legal Advisor, U.S. Dep't of State, to John Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, Re: Your Draft Memorandum of Jan. 18, 1 (Jan. 23, 2002).

66. *Id.* at 2.

67. *Id.* at 3-4.

68. *Id.* at 4.

This argument has three major flaws: First, it depends on the ability of the President to make a retroactive determination of suspension, despite the fact that such a retroactive determination may not be allowed under governing treaty law. Second, it does not explain how such a determination with respect to the Taliban in the past would relieve of us of our current obligations to the reorganized government of Afghanistan in the present. The detentions in Guantanamo are not in the past, they are in the present and future, so it is our current obligations that would apply. Finally, the line of argument in the OLC opinion fails to take into account that reciprocal mistreatment is not a recognized remedy for breach under the Geneva Conventions.

on his extensive experience in the Departments of Defense and State, the Legal Advisor in closing fired his last salvo regarding the character of Yoo's legal analysis: "We should note, however, that in addition to our legal concerns there are also a number of factual and legal inaccuracies in your draft."⁶⁹

An experienced political and legal leader concerned with this dangerous DOJ legal analysis, the State Department Legal Advisor sent a copy of his international law analysis to Alberto Gonzales, the President's Legal Counsel, on January 23, 2002, to ensure he was aware of the gravity of the change in legal policy DOJ was proposing.

I attach a copy of a memorandum for John Yoo, which comments on his latest draft opinion. Basically, it seems to me the issue here is whether we want to admit that we are carrying out our commitments under international law or assert that we are not required to do so while following an identical course of conduct. I fail to see the advantage in repudiating our treaty obligations when our actions conform to them. There is too much at stake to make a purely academic point at this time.⁷⁰

Without waiting for a State Department review of the January 18 revised Yoo draft memo to DoD General Counsel, Mr. William J. Haynes, DOJ OLC Assistant Attorney General Jay S. Bybee issued an official legal opinion to both Alberto R. Gonzales, Counsel to the President, and the DoD General Counsel Mr. Haynes four days later.⁷¹ Incorporating virtually all of the Yoo memos verbatim, OLC in thirty-seven pages proceeded to state as definitive legal interpretation its determination that international law was inapplicable to the President in the exercise of his Commander-in-Chief responsibilities under Article II of the U.S. Constitution.⁷²

Despite opportunity and warning before the administration proceeded on a legal policy course it would come to regret, political positions hardened and the law became capable of political interpretation. This was a turning point. French philosopher Voltaire once observed, "Define your terms, you will permit me again to say, or we shall never understand one another."⁷³ Dr. Philip D. Zelikow, Counselor of

Id.

69. *Id.*

70. Note from William H. Taft, IV, The Legal Advisor, Dept. of State, to Judge Gonzalez [sic], Jan. 23, 2002.

71. Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel, Dep't. of Def., Re: Application of Treaties and Laws to Al-Qaeda and Taliban Detainees (Jan. 22, 2002) [hereinafter Bybee Memo Jan. 22, 2002].

72. *Id.* at 11-15.

73. 5 M. De Voltaire, A PHILOSOPHICAL DICTIONARY, 52 (London, G. H. Reynell 1824) (1764).

the U.S. Department of State, offers: “Legal Policy is a term I would define as those policies that shape the administration of justice. That’s different from offering an interpretation of the law. It’s a policy task: What do you think the law *should* be? How do we think the administration of justice should be developed?”⁷⁴ But just as egos are strong in lawyers, they prove even stronger in politicians, and all the draft opinions and comments became permanent positions demarcating differences of thought, with law coming in second place.

Known as the “New Paradigm,” this plenary interpretation of presidential war power is based “on a reading of the Constitution that few legal scholars share.”⁷⁵ Fundamentally it states “that the President, as Commander-in-Chief, has the authority to disregard virtually all previously known boundaries if national security demands it.”⁷⁶ The public policy behind the New Paradigm was as follows:

[T]o allow the Pentagon to bring terrorists to justice as swiftly as possible. Criminal courts and military courts, with their exacting standards of evidence and emphasis on protecting defendants’ rights, were deemed too cumbersome. Instead, the President authorized a system of detention and interrogation that operated outside the international standards for the treatment of prisoners of war established by the 1949 Geneva Conventions . . . In November, 2001, [Vice President] Cheney said of the military commissions, “We think it guarantees that we’ll have the kind of treatment of these individuals that we believe they deserve.”⁷⁷

A former DOJ Associate Attorney General in the Reagan administration, Bruce Fein, observed that Bush’s presidential legal advisors had “staked out powers that are a universe beyond any other Administration. This President has made claims that are really quite alarming. He’s said that there are no restraints on his ability, as he sees it, to collect intelligence, to open mail, to commit torture, and to use electronic surveillance.”⁷⁸ Fein extrapolated this New Paradigm of constitutional war power interpretation noting, “If you used the President’s reasoning, you could shut down Congress for leaking too much.”⁷⁹ In particular, he observed about the expansive nature of the new paradigm:

74. Philip D. Zelikow, *Legal Policy in the Twilight War*, 28 ABA NAT’L SEC. L. REP. No. 2, at 8, 9 (2006).

75. Jane Mayer, *The Hidden Power: The Legal Mind behind the White House’s War on Terror*, THE NEW YORKER, July 3, 2006, at 44.

76. *Id.* “Under this framework, statutes prohibiting torture, secret detention, and warrantless surveillance have been set aside.” *Id.*

77. *Id.*

78. *Id.* at 46 (internal quotation marks omitted).

79. *Id.* Fein goes on to say, “His war powers allow him to declare anyone an illegal combatant. All the world’s a battlefield—according to this view, he could kill someone in Lafayette

9/11 is a novel case. War against a tactic rather than a nation-state is constitutionally troublesome because it means permanent war. There will always be at least one terrorist somewhere in the world hoping to kill an American, which is the definition of post-9/11 war under the Bush-Cheney doctrine.⁸⁰

D. The Last Hope for Legal Discretion

At the level of presidential legal policymaking, one must understand that the Counsel to the President is the coordinator of various legal opinions, who applies significant thought, reflection, and discretion before recommending a significant change in legal policy involving the law of war. On January 25, three days after receiving the DOJ OLC opinion, Counsel to the President Gonzales prepared a draft memo to the President, Subject: Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al-Qaeda and the Taliban.⁸¹ In his January 25 draft memo he stated in his introduction that he had advised the President on January 18 [2002] that DOJ had issued a legal opinion that held that Geneva Convention III on the Treatment of Prisoners of War (GPW) did not apply to the conflict with Al-Qaeda.⁸² This is interesting because the Bybee DOJ OLC memo is dated January 22, 2002, so Gonzales had reviewed and communicated its contents to the President prior to its official release, and prior to the opportunity for the State Department to provide its legal review and analysis.

Gonzales writes that the Secretary of State requested that the President reconsider his earlier decision on this issue, concluding that the GPW does apply to both Al-Qaeda and Taliban detainees.⁸³ In support of the DOJ OLC's earlier opinion, Gonzales argued that "OLC's interpretation of this legal issue is definitive. The Attorney General is charged by statute with interpreting the law for the Executive Branch. This interpretive authority "extends to both domestic and international law. He has, in turn, delegated this role to OLC."⁸⁴ After stating this, Gonzales indicated that the Legal Advisor to the Secretary of State had expressed a different view.⁸⁵ Nevertheless, arguing that inapplicability of the GCW preserves presidential war

Park [Washington, D.C. across from the White House] if he wants! It's got the sense of Louis XIV: 'I am the State.'" *Id.* (internal quotation marks omitted).

80. *But is it War? Conservatives Debate the Limits of Executive Power Post-9/11*, 93 A.B.A. J. 38, 39 (2007) [hereinafter *But is it War?*].

81. Draft Memorandum from Alberto R. Gonzales, to the President, Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al-Qaeda and the Taliban (Jan. 25, 2002) [hereinafter Gonzales Memo-GC].

82. *Id.* at 1.

83. *Id.*

84. *Id.*

85. *Id.*

power flexibility, Gonzales sided with OLC in denigrating the legal importance, applicability, and relevance of the GCW:

The nature of the new war places a high premium on other factors, such as the ability to quickly obtain information from captured terrorists and their sponsors in order to avoid further atrocities against American civilians, and the need to try terrorists for war crimes such as wantonly killing civilians. In my judgment, this new paradigm *renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions* requiring that captured enemy be afforded such things as commissary privileges, scrip (i.e., advances of monthly pay), athletic uniforms, and scientific instruments.⁸⁶

Provided a draft of the Gonzales memo, Secretary of State Colin Powell responded the very next day with his own detailed criticism of Gonzales's legal work.⁸⁷ Among his comments, the former National Security Advisor to Presidents Reagan and Bush (senior) and Chairman of the Joint Chiefs of Staff, then Secretary of State Powell made several bullet comments criticizing the legal policy change proposed:

- It will reverse over a century of U.S. policy and practice in supporting the Geneva Conventions and undermine the protections of the law of war for our troops, both in this specific conflict and in general.
- It has a high cost in terms of negative international reaction, with immediate adverse consequences for our conduct of foreign policy.
- It will undermine public support among critical allies, making military cooperation more difficult to sustain.
- Europeans and others will likely have problems with extradition or other forms of cooperation in law enforcement, including in bringing terrorists to justice.
- It may provoke some individual foreign prosecutors to investigate and prosecute our officials and troops.
- It will make us more vulnerable to domestic and international legal challenge and deprive us of important legal options[.]⁸⁸

86. *Id.* at 2 (emphasis added).

87. Memorandum from Colin L. Powell, Secretary of State, to Counsel to the President, Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan (Jan. 26, 2002) ("I appreciate the opportunity to comment on the draft memorandum. I am concerned that the draft does not squarely present to the President the options that are available to him. Nor does it identify the significant pros and cons of each option.").

88. *Id.* at 2-3.

Closing with respectful counsel, the Secretary of State noted, like his Legal Advisor Mr. Taft, that the draft memo to the President was inaccurate or incomplete in several respects.⁸⁹ Experience and maturity would ordinarily dictate caution under these circumstances. Unfortunately, as “reporter Bill Minutaglio points out in his new book ‘The President’s Counselor,’ Mr. Gonzales became an architect of these consequential policies. . . without having a lot of background in criminal justice, military justice or international law.”⁹⁰ Gonzales did not possess “the diplomatic portfolio to adequately measure what the creation of an all-encompassing tribunal aimed at citizens of other countries might mean for relations between the United States and its allies.”⁹¹ Faced with these daunting, articulate, and factually based opposing international law contentions, how could a White House counsel ignore these warnings and embrace a new theory of presidential power offered by OLC?

It was, in the end, very easy for Gonzales to plot the controversial courses he designed inside the White House counsel’s office. It was, in the end, the only thing he could think of doing in order to serve the needs of the one client he had personally served his entire public life.⁹²

Time would prove that White House decision-making was not concerned with the law, but with the exercise of power—the war power.

In his final memo to the President, Gonzales summarizes the State Department’s legal objections in seven bullets, the White House Counsel observed, “On balance, I believe that the arguments for reconsideration and reversal are unpersuasive.”⁹³ He summarily concludes his analysis of why the President should not change his decision with respect to application of the GPW stating: “Similarly the argument based on military culture fails to recognize that our military remain bound to apply

89. *Id.* at 4.

“I hope that you can restructure the memorandum along these lines, which it seems to me will give the President a much clearer understanding of the options available to him and their consequences. Quite aside from the need to identify options and their consequences more clearly, in its present form, the draft memorandum is inaccurate or incomplete in several respects. The most important factual errors are identified in the attachment.”

Id.

90. Michiko Kakutani, ‘Gonzales as an Architect of Presidential Power’ by Bill Minutaglio, N.Y. TIMES, July 11, 2006, available at <http://www.nytimes.com/2006/07/11/books/11kaku.html>.

91. *Id.* (quoting BILL MINUTAGLIO, *THE PRESIDENT’S COUNSELOR: THE RISE TO POWER OF ALBERTO GONZALES* 247 (2006)). “This new drive,” Mr. Minutaglio writes, “to expand Bush’s presidential powers—and the specific attempts to give him wartime powers, to give him sway over military tribunals—was predicated somewhat on serving Bush’s political personality and his presidential style at a time when urgency had been ratcheted up to the perhaps most intense level in recent modern history.” Kakutani, *supra* note 90 (quoting MINUTAGLIO, *supra*, at 233).

92. *Id.* (quoting MINUTAGLIO, *supra* note 91, at 233).

93. Gonzales Memo-GC, *supra* note 81, at 3.

the principles of GPW because that is what you have directed them to do.”⁹⁴ Conspicuous by its absence is any discussion of moral rectitude of the GPW inculcating the international law of war, but instead a mere relegation of its importance for military adherence being based solely on the Commander-in-Chief requiring it.

Gonzales’s memo to the President on such a poignant legal policy issue involving departure from established military law is characterized by a former Navy Judge Advocate General as “short-sided, narrow minded, and overly legalistic analysis. It’s too clever by half, and frankly, just plain wrong. Wrong legally, morally, practically, and diplomatically.”⁹⁵ Now Dean and President of the Franklin Pierce Law Center in Concord, New Hampshire, Rear Admiral (retired) John Hutson characterized what Gonzales was putting in place: “Once he reduced his legal analysis to simply that the Geneva Conventions don’t apply to terrorists without explaining what law, if any does apply, he created a downward spiral of unruliness from which we have not yet pulled out.”⁹⁶ In sum, “A careful, honest reading reveals that the legal analysis of the January, 2002 memo is very result oriented. It appears to start with the conclusion we don’t want the Geneva Conventions to apply in the present situation, and then it reverse engineers the analysis to reach that conclusion.”⁹⁷ Presciently, James Madison—father of the Constitution and president during the War of 1812—observed:

Perhaps it is a universal truth that loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad. Of all the enemies of true liberty, war is, perhaps, the most to be dreaded, because it compromises and

94. *Id.* at 4.

95. *Executive Nomination: Hearing Before the S. Comm. on the Judiciary Concerning the Nomination of Alberto Gonzales for Confirmation as Att’y Gen. of the United States* (Jan. 6, 2005) (Testimony of John D. Hutson), available at http://judiciary.senate.gov/hearings/testimony.cfm?renderforprint=1&id=1345&wit_id=3937 [hereinafter Hutson Testimony].

96. *Id.* at 4.

Afghanistan is a party to the [Geneva] Convention. The United States fought the Taliban as the de facto government of Afghanistan, in control of 90% of the country, and its armed forces as the “regular armed forces” of a party to the Convention. Those facts entitled Taliban and Al-Qaeda combatants from Afghanistan to a determination on a case-by-case basis of their status as prisoners of war. Moreover, any detainee not entitled to POW status is nevertheless entitled to basic humanitarian protections guaranteed by the Geneva Conventions and customary international law. This is the position taken by the State Department, but rejected by Judge Gonzales.

Id. at 3.

97. *Id.* at 4-5.

develops the germ of every other. War is in fact the true nurse of executive aggrandizement.⁹⁸

IV. POLICY IMPLEMENTATION AND DEPARTURE FROM LEGAL PRECEDENT

Despite the State Department Legal Advisor's serious opposition to DOJ's interpretation of the inapplicability of international law and precedent to the detention of Afghanistan detainees by U.S. forces, the political decision that they should be placed outside the reach of law proceeded to implementation. Secretary of Defense Rumsfeld issued an order January 19, 2002, stating that the detainees were not entitled to prisoner of war status under the Geneva Conventions of 1949.⁹⁹ In line with the two prior DOJ Yoo memos, Secretary Rumsfeld's memo additionally authorized conduct that deviated from customary international law and the law of war when he wrote "[t]he Combatant Commanders shall, in detaining Al Qaida and Taliban individuals under the control of the Department of Defense, treat them humanely and, *to the extent appropriate and consistent with military necessity*, in a manner consistent with the principles of the Geneva Conventions of 1949."¹⁰⁰ In the emphasized phrase, we see the separating out of conduct from application of the law of war and customary international law, which is embodied in U.S. military law, based on a new exception characterized as "consistent with military necessity." What that means is that virtually any conduct of the President, or subordinates acting pursuant to his general instructions, could be authorized, even if this action violated customary law of war principles previously adhered to by U.S. military personnel. This is a major paradigm shift in not only U.S. policy as addressed by Legal Advisor Taft, but in legal precedent. In all post-1949 conflicts U.S. legal precedent has always been to apply the Geneva Conventions. Even Mr. Yoo conceded this in his January 9, 2002 memo.¹⁰¹

98. *But is it War?*, *supra* note 80, at 40 (internal quotation marks omitted).

99. Memorandum from Donald Rumsfeld, Secretary of Def., to Chairman of the Joint Chiefs of Staff, Status of Taliban and Al Qaida (Jan. 19, 2002). "The United States has determined that Al Qaida and Taliban individuals under control of the Department of Defense are not entitled to prisoner of war status for purposes of the Geneva Conventions of 1949 ... The Combatant Commanders shall transmit this order to subordinate commanders, including Commander, Joint Task Force 160, for implementation." *Id.*

100. *Id.* (emphasis added).

101. Yoo Memo Jan. 9, 2002, *supra* note 54, at 26. "United States practice in post-1949 conflicts reveals several instances in which our military forces have applied the Geneva Conventions as a matter of policy, without acknowledging any legal obligation to do so. These cases include the Wars in Korea and Vietnam and the interventions in Panama and Somalia." *Id.*

A. The DOJ Seed of Opinion Flowers at DoD

Recall that the January 22, 2002, OLC opinion, signed by Assistant Attorney General Jay S. Bybee, was addressed to both Gonzales and DoD General Counsel Haynes.¹⁰² It discarded over 57 years of U.S. military legal precedent stating: “This memorandum expresses no view as to whether the President should decide, as a matter of policy, that U.S. Armed Forces should adhere to the standards of conduct in those treaties [Geneva Conventions] with respect to the treatment of prisoners.”¹⁰³ Military law and training has held that the Geneva Conventions apply and guide the conduct of U.S. military personnel in all international war-conflict situations.¹⁰⁴ This porous opinion would plow the field and plant the seeds of “fruit of the poisonous tree” of military misconduct. In the interest of national security and exercise of the President’s Commander-in-Chief authority, it authorized for the first time virtually any conduct, no matter how heinous, repulsive, or contrary to the principles of the international law of war. What transpired thereafter can be traced to these early legal opinions, turning the rule of law on itself.

V. THE FRUIT GROWS POISONOUS

Once the seed of unrestrained executive war power was planted, it proved only a matter of time before fruit of the poisonous political doctrine would mature. The first fruit appeared on February 26, 2002 when DOJ’s Office of Legal Counsel issued yet another opinion.¹⁰⁵ The opinion was prepared in response to a series of questions from DoD “concerning what legal constraints ... may potentially apply to interrogation of persons captured in Afghanistan.”¹⁰⁶ The opinion held, among other things, that the constitutional Self-Incrimination Clause (and hence Miranda rights) did not apply to custodial interrogations and were admissible in a trial by military commission for violations of the law of war.¹⁰⁷ The opinion reasoned that war crimes investigations by military personnel (unlawful combatants) preparing for trial by

102. Bybee Memo Jan. 22, 2002, *supra* note 71, at 1.

103. *Id.*

104. See DEPARTMENT OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, at A-1 (1956).

105. Memorandum from Jay S. Bybee, Assistant Att’y Gen., Office of Legal Counsel, Dep’t of Justice, to William J. Haynes II, Gen. Counsel, Dep’t of Def., Potential Constraints Applicable to Interrogations of Persons Captured by U.S. Armed Forces in Afghanistan (Feb. 26, 2002) [hereinafter Bybee Memo Feb. 26, 2002].

106. *Id.* at 1.

107. *Id.*

military commission are not the type of law enforcement investigations *Miranda* was mandated to regulate.¹⁰⁸

Again falling back on the previous DOJ opinions' theme regarding the ever expanding constitutional concept of the President's war-making power, Mr. Bybee held that this authority provided a sufficient basis for obtaining unwarned statements in military investigations that would be admissible even in federal court.¹⁰⁹ Using a 1946 Supreme Court case, he rationalized that such military investigations:

[A]re in some sense 'criminal' in nature, [but] their primary purpose is the execution of the President's wartime power as Commander-in-Chief 'to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war,' and not his authority as the nation's chief law enforcement officer.¹¹⁰

In addition, the opinion also held that the Sixth Amendment right to counsel did not apply prior to the initiation of adversary judicial criminal proceedings.¹¹¹

In sum, with no application of the Geneva Convention on Treatment of POWs, no *Miranda* warnings available during custodial interrogations, and no right to counsel, detainees in U.S. custody were quickly being weeded out of the field of law. They were rapidly becoming persons with no legal rights or protections whatsoever. In fact, they were shortly to become persons outside the reach of any law, a concept heretofore unknown in American jurisprudence. The prescient words of Justice Davis in *Ex parte Milligan* come to mind:

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all *classes of men at all times, and under all circumstances*. No doctrine, involving more pernicious consequences, was ever invented by the wit of man that any of its provisions can be suspended during any of the great exigencies of government.¹¹²

A. *Interrogation Fruit Seeds Are Sown*

Despite the best efforts of the Department of State to warn the White House of the poisonous fruit it was planting, the failure to identify an end-state in such political

108. *Id.*

109. *Id.* at 21,

110. *Id.* (quoting *In re Yamashita*, 327 U.S. 1, 11 (1946)).

111. Bybee Memo Feb. 26, 2002, *supra* note 105, at 27 (quoting *Texas v. Cobb*, 532 U.S. 162, 167-68 (2001) (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991))).

112. 71 U.S. 2, 120-21 (1866) (emphasis added).

decision-making and disregard for the legal maxims and traditions at the highest level of government brought forth a harvest that the U.S. is only beginning to appreciate and reject. On August 1, 2002, Mr. Yoo responded in a legal opinion to questions from White House Counsel Gonzales concerning the legality, under international law, of interrogation methods to be used during the current war on terrorism.¹¹³ In particular, he advised that interrogation methods used on Al-Qaeda operatives that do not violate the U.S. Torture Statute could not independently violate the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.¹¹⁴ Yoo advised, “Despite the apparent differences in language between the Convention and § 2340, international law clearly could not hold the United States to an obligation different from that expressed in § 2340.”¹¹⁵

The United Nations takes an entirely different view. In 2006, the UN Commission on Human Rights prepared a report concerning treatment of detainees at Guantanamo and observed, in part, that the U.S. is a party “to several international humanitarian treaties pertinent to the situation in Guantanamo Bay.”¹¹⁶ The U.S. is a party to “the Geneva Convention relative to the Treatment of Prisoners of War (Third Convention) and the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Convention) . . . many provisions of which are considered to reflect customary international law.”¹¹⁷ Furthermore, there are conventions to which the U.S. is not a party such as “the Additional Protocols I and II to the Geneva Conventions, some of their provisions—in particular article 75 of Additional Protocol I—are regarded as applicable as they have been recognized as declaratory of customary international law.”¹¹⁸ Clearly Mr. Yoo and the UN, backed by the U.S. Department of State Deputy Legal Advisor, cannot both be correct in their legal analysis.

Issued the same day, August 1, 2002, OLC Assistant Attorney General Bybee released another opinion with precedential policy-making impact.¹¹⁹ Also addressed

113. Letter from John C. Yoo, Deputy Assistant Att’y Gen., Office of Legal Counsel, Dep’t of Justice, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002) [hereinafter Yoo Memo Aug. 1, 2002].

114. *Id.* (citing 18 U.S.C. § 2340(1) (2006)); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85).

115. Yoo Memo Aug. 1, 2002, *supra* note 113, at 3.

116. U.N. Econ & Soc. Council [ECOSOC], Comm’n on Human Rights, *Economic, Social, and Cultural Rights; Civil and Political Rights: Situation of Detainees at Guantánamo Bay*, ¶ 9, U.N. Doc. E/CN.4/2006/120 (Feb. 15, 2006) [hereinafter UN Report].

117. *Id.*

118. *Id.*; see also Michael J. Matheson, Remarks, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT’L L. & POL’Y 419, 419 (1987).

119. Memorandum from Jay S. Bybee, Assistant Att’y Gen., Office of Legal Counsel, Dep’t

to White House counsel Gonzales, this 50 page opinion, which expanded in detail Yoo's memo of the same day, came in response to questions regarding the standards of conduct for interrogation of detainees under the Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment as implemented by U.S. statute under 18 U.S.C. § 2340-2340A.¹²⁰ It later became known in the press as "The Torture Memo."¹²¹ The purpose of the OLC memo was to redefine the U.S. meaning of torture—as being limited to those acts inflicting pain that is difficult to endure, "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily functions, or even death. For purely mental pain or suffering, it must result in significant psychological harm of significant duration, e.g., lasting for months or even years."¹²² The memo declared, "that the statute, taken as a whole, makes plain that it prohibits only extreme acts."¹²³ Even if these high standards are met and the federal Torture Statute was violated, the OLC opinion goes on to say: "We conclude that, under the current circumstances, necessity or self-defense may justify interrogation methods that might violate Section 2340A [the Torture Statute]."¹²⁴ The ends justify the means argument is made, as noted by Admiral Hutson, so that anything that "inhibits the President's discretion is unconstitutional and anything that carries it out is permitted."¹²⁵ The opinion further maintains that to violate the Torture Statute, "severe pain and suffering must be inflicted with specific intent, therefore, "[i]n order for a defendant to have acted with specific intent, he must expressly intend to achieve the forbidden act."¹²⁶

While both August 1st OLC memos were addressed to the White House Counsel, it is not a deductive stretch to believe they also made their way into the hands of political appointee DoD General Counsel William Haynes. With inapplicability of the Geneva Conventions to detainee treatment and the necessity and self-defense legal barriers in place to federal prosecution for violations of the Torture Statute, what were the legal boundaries now on interrogation techniques? As will later be recounted by U.S. Navy General Counsel Alberto J. Mora, Haynes saw "none."¹²⁷

of Justice to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002) [hereinafter Bybee Memo Aug. 1, 2002].

120. *Id.* at 1.

121. Michael Isikoff, *2001 Memo Reveals Push for Broader Presidential Powers*, NEWSWEEK, Dec. 18, 2004, available at <http://www.newsweek.com/id/55508>.

122. Bybee Memo Aug. 1, 2002, *supra* note 119, at 1.

123. *Id.*

124. *Id.* at 2.

125. Hutson Testimony, *supra* note 95.

126. Bybee Memo Aug. 1, 2002, *supra* note 119, at 3.

127. Memorandum from Alberto J. Mora, Gen. Counsel, Dep't of Navy, to Inspector Gen., Dep't of Navy, Statement for the Record: Office of Gen. Counsel Involvement in

B. The Uniforms Sniff the Poisonous Fruit

The Commander of the Guantanamo Bay detainee center sent his theater superior a memo dated October 11, 2002, requesting that he approve the interrogation techniques enclosed in a Counter-Resistance Strategies memorandum.¹²⁸ It included a legal review by his Staff Judge Advocate who found no violations of applicable federal law.¹²⁹ In view of the Aug. 1, 2002, Bybee memo, it is hard to find any applicable federal law with which to measure the proposed new “aggressive strategies.” Several of the proposed aggressive strategies, called Category II techniques, involved the “use of stress-position (like standing), for a maximum of four hours;” “[u]se of isolation facility for up to 30 days;” [d]eprivation of light and auditory stimuli; placing of a hood over detainee during transportation and questioning;” “[t]he use of 20-hour interrogations; removal of all comfort items (including religious items; removal of clothing; forced grooming (shaving of facial hair, etc.);” “[u]sing detainees individual phobias (such as fear of dogs) to induce stress.”¹³⁰ Category III techniques were also requested involving the “use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family;” “[e]xposure to cold weather or water (with appropriate medical monitoring);” and “[u]se of a wet towel and dripping water to induce the misperception of suffocation.”¹³¹ What is somewhat ironic is that the memo says that any Category III technique that requires “more than light grabbing, poking, or pushing, will be administered only by individuals specifically trained in their safe application.”¹³² If there is a definition of legal oxymoron, this is a candidate.

What is deeply disturbing is that this document, delineating more aggressive interrogation techniques approved by both the military lawyer and commanding

Interrogation Issues (July 7, 2004) [hereinafter Mora IG Memo].

128. Memorandum from Michael B. Dunlavey, Major Gen. USA, Commanding, to Commander, United States Southern Command, Counter-Resistance Strategies (Oct. 11, 2002), stating:

I am fully aware of the techniques currently employed to gain valuable intelligence in support of the Global War on Terrorism. Although these techniques have resulted in significant exploitable intelligence, the same methods have become less effective over time. I believe the methods and techniques delineated in the accompanying J-2 memorandum will enhance our efforts to extract additional information.

129. Memorandum from Diane E. Beaver, Lieutenant Colonel, Staff Judge Advocate, to Commander, Joint Task Force 170, Legal Review of Aggressive Interrogation Techniques (Oct. 11, 2002) [hereinafter Beaver Memo].

130. Memorandum from Jerald Phifer, Lieutenant Colonel, Director, J2, to Commander, Joint Task Force 170, Request for Approval of Counter Resistance Strategies (Oct. 11, 2002).

131. *Id.* at 2.

132. *Id.*

general, represent a distinct departure from Army custom, training, and policy as embodied in Army Field Manual (FM) 34-52, Intelligence Interrogation.¹³³ This Army policy manual is enforced by the Uniform Code of Military Justice (UCMJ), 18 U.S.C. § 2340 Torture Statute, and the Geneva Conventions for starters, at least they used to be until the Aug. 1, 2002, OLC Bybee Torture memo.¹³⁴ FM 34-52, published Sep. 28, 1992, contains not only Army interrogation policy and its limits, but also the Army's accumulated knowledge about interrogation techniques. "MI [military intelligence] interrogation units are a proven and valued collection asset. This manual incorporates the operational experiences and lessons learned. It builds upon existing doctrine and moves interrogation into the 21st century."¹³⁵ To say that FM 34-52 is the Army's interrogation bible, is a truism of Army doctrine. The Army's interrogation rules and value system are palpable:

The GWS, GPW, GC [Geneva Conventions], and U.S. policy expressly prohibit acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation.

Such illegal acts are not authorized and will not be condoned by the U.S. Army. Acts in violation of these prohibitions are criminal acts punishable under the UCMJ.¹³⁶

The question that arises from an intelligence collection point of view is how useful is information gained from interrogation techniques that violate the above boundaries? The FM answers that too based on its collection knowledge and experience of lessons learned:

Experience indicates that the use of prohibited techniques is not necessary to gain the cooperation of interrogation sources. Use of torture and other illegal methods is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the interrogator wants to hear.

Revelation of use of torture by US personnel will bring discredit upon the US and its armed forces while undermining domestic and international support for

133. See DEPARTMENT OF THE ARMY, FIELD MANUAL 34-52, INTELLIGENCE INTERROGATION, at iv (1992) [hereinafter FM 34-52].

134. *Id.*

135. *Id.* "During Southwest Asia operations, interrogators organized and operated a massive document exploitation (DOCEX) effort. Interrogation units screened, interrogated, or debriefed 49,350 enemy prisoners of war (EPWs), and gathered enough captured enemy documents (CEDs) for DOCEX to fill 18 trailer trucks." *Id.*

136. *Id.* at 1-8.

the war effort. It may also place US and allied personnel in enemy hands at a greater risk of abuse by their captors.¹³⁷

The FM presciently provides examples of physical torture:

- Forcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time.
- Any form of beating.

Examples of mental torture include:

- Mock executions.
- Abnormal sleep deprivation.
- Chemically induced psychosis.

Coercion is defined as actions designed to unlawfully induce another to compel an act against one's will. Examples of coercion include:

- Threatening or implying physical or mental torture to the subject, his family, or others to whom he owes loyalty.¹³⁸

With the above FM doctrinal examples, compare the JTF 170 request for more Aggressive Counter-Resistance Strategies and see whether they violate Army policy. Would use of stress-position (like standing) for a maximum of four hours or the use of twenty-hour interrogations constitute forcing an individual to stand, sit, or kneel in an abnormal position for a prolonged period? Would use of an isolation facility for up to thirty days or deprivation of light and auditory stimuli constitute mental torture; or how about placing of a hood over a detainee during transportation and questioning, or using detainees individual phobias (such as fear of dogs) to induce stress, or the use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family, or use of a wet towel and dripping water to induce the misperception of suffocation—would any of these be considered threatening or implying physical torture? Then there is the JTF request to use mild, non-injurious physical contact, such as grabbing, poking in the chest with a finger, and light pushing, or use of a wet towel and dripping water to induce the misperception of suffocation—would these constitute any form of beating prohibited by the FM? If the answer to any of these examples is “yes,” then we have documented that JTF 170 requested approval to torture detainees for the purpose of extracting intelligence information in violation of Army doctrine enforced by the UCMJ.

137. *Id.*

138. *Id.*

Admittedly the line between legitimate interrogation techniques and unlawful actions may be difficult to determine at times. Fortunately FM 34-52 provides a litmus test for measuring the line between lawful and unlawful interrogation techniques:

In attempting to determine if a contemplated approach or technique would be considered unlawful, consider these two tests:

- Given all the surrounding facts and circumstances, would a reasonable person in the place of the person being interrogated believe that his rights, as guaranteed under both international and US law, are being violated or withheld, or will be violated or withheld if he fails to cooperate.
- If your contemplated actions were perpetrated by the enemy against US PWs, you would believe such actions violate international or US law.

If you answer yes to either of these tests, do not engage in the contemplated actions.¹³⁹

Now go back and evaluate JTF 170's request in light of these two tests. A blind man can discern the line between permissible and impermissible conduct. Just put yourself in the detainee's place. But what did the August 1, 2002, Bybee memo do to this Army doctrine?

C. A Four-Star Request to Taste the Fruit

The next move in this migration towards the forbidden value fruit tree came from the commander of the U.S. Southern Command, under whose authority Guantanamo and JTF 170 fell. General James T. Hill wrote that JTF 170 had obtained critical intelligence, however, despite their best efforts, there were some detainees who "have tenaciously resisted our current interrogation methods."¹⁴⁰ In forwarding JTF 170's proposed counter-resistance techniques, he believed the first two categories were legal and humane, but recognized "I am uncertain whether all the techniques in the third category are legal under US law, given the absence of judicial interpretation of the US torture statute."¹⁴¹ Even General Hill had misgivings about

139. *Id.* at 1-9.

140. Memorandum from James T. Hill, Gen., U.S. Army Commander, to Chairman of the Joint Chiefs of Staff, Counter-Resistance Techniques (Oct. 25, 2002).

141. *Id.*

scenarios creating detainee perceptions of imminent death or suffocation. Clearly others at Guantanamo did not.

DoD General Counsel Haynes sent a memo to Secretary of Defense Rumsfeld on November 27, 2002, recommending that “as a matter of policy” he approve “Categories I and II and the fourth technique listed in Category III (‘Use of mild, non-injurious physical contact...’).”¹⁴² He asserted that “[w]hile all Category III techniques may be legally available, we believe that, as a matter of policy, a blanket approval of Category III techniques is not warranted at this time.”¹⁴³ Secretary Rumsfeld initialed his approval on the memo December 2nd, but added in his own handwriting an observation that would come back to haunt him “However, I stand for 8-10 hours a day. Why is standing limited to 4 hours?”¹⁴⁴

D. The Fruit is Tasted and Cannot be Returned to the Seller

Armed with the new and recently improved aggressive Counter-Resistance Techniques approved by the Secretary of Defense based on the Bybee OLC Torture memo authority, interrogators at Guantanamo went to work. The Secretary of Defense should have realized that such an important policy reversal would permeate through an electronically wired Armed Forces overnight. He expected instantaneous communications from around the world to his office, why should he believe it worked only one way. Good news travels slowly; bad news has a wider audience. Bad news came in the form of a December 26, 2002, Washington Post article that set off calls for congressional investigations and formal complaints to the President from Human Rights organizations.¹⁴⁵ The article documented techniques approved by the Secretary of Defense, including many that were and were not in widespread use.¹⁴⁶

The reporters uncovered that detainees “who refuse to cooperate inside this secret CIA interrogation center are sometimes kept standing or kneeling for hours, in black hoods or spray-painted goggles, according to intelligence specialists familiar with CIA interrogation methods.”¹⁴⁷ “At times they are held in awkward, painful positions and deprived of sleep with a 24-hour bombardment of lights—subject to what are known as ‘stress and duress’ techniques.”¹⁴⁸

142. Memorandum from William J. Haynes II, Gen. Counsel, to Sec’y of Def., Counter-Resistance Techniques (Nov. 27, 2002) [hereinafter Haynes Memo Nov. 27, 2002].

143. *Id.*

144. *Id.*

145. Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations; ‘Stress and Duress’ Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A1.

146. *Id.*

147. *Id.*

148. *Id.*

While the U.S. government publicly denounces the use of torture, each of the current national security officials interviewed for this article defended the use of violence against captives as just and necessary. They expressed confidence that the American public would back their view. . . Free from the scrutiny of military lawyers steeped in the international laws of war, the CIA and its intelligence service allies have the leeway to exert physically and psychologically aggressive techniques, said national security officials and U.S. and European intelligence officers. . .[At Guantanamo,] [a]lthough no direct evidence of mistreatment of prisoners in U.S. custody has come to light, the prisoners are denied access to lawyers or organizations, such as the Red Cross, that could independently assess their treatment. Even their names are secret

According to Americans with direct knowledge and others who have witnessed the treatment, captives are often “softened up” by MPs and U.S. Army Special Forces troops who beat them up and confine them in tiny rooms. The alleged terrorists are commonly blindfolded and thrown into walls, bound in painful positions, subjected to loud noises and deprived of sleep. The tone of intimidation and fear is the beginning, they said, of a process of piercing a prisoner’s resistance.¹⁴⁹

While the public and military are skeptical of news reports, the government has a system of Inspectors General who are required by statute to ferret out the truth when a complaint of wrongdoing has officially been made. In this case, the complaint of wrongdoing came from the U.S. Department of the Navy, General Counsel Alberto J. Mora himself, to the Navy Inspector General.¹⁵⁰ On December 17, 2002, the Naval Criminal Investigative Service (NCIS) Director David Brant reported to Mr. Mora that NCIS agents attached to JTF-160 at Guantanamo had learned detainees there “were being subjected to physical abuse and degrading treatment . . . allegedly . . . inflicted by [military] personnel attached to JTF-170, the intelligence task force.”¹⁵¹ While the NCIS agents had not seen or participated in the activity, they were informed that the aggressive interrogation treatment “was rumored to have been authorized . . . at a ‘high level’ in Washington, [D.C.]”¹⁵² The following day, Mr. Mora met with both Director Brant and Dr. Michael Gelles, NCIS Chief Psychologist, “who had advised JTF-160 in interrogation techniques and had spent time at the [Guantanamo] detention facility.”¹⁵³ Dr. Gelles related the ongoing

149. *Id.*

150. Memorandum from Alberto J. Mora, Gen. Counsel of the Navy, to Inspector Gen., Dep’t. of the Navy, Statement for the Record: Office of General Counsel Involvement in Interrogation Issues (July 7, 2004) [hereinafter Mora IG Memo].

151. *Id.* at 2-3.

152. *Id.* at 3.

153. *Id.*

conditions at Guantanamo, reporting that “guards and interrogators with JTF-170 ... were under pressure to produce results,” and as a consequence, were now “using abusive techniques with some detainees.”¹⁵⁴ Dr. Gelles stated these abusive techniques included “physical contact, degrading treatment (including dressing detainees in female underwear ...), the use of ‘stress’ positions, and coercive psychological procedures.”¹⁵⁵

Dr. Gelles shared with Mr. Mora extracts of detainee interrogation logs that provided factual evidence of detainee mistreatment.¹⁵⁶ Dr. Gelles went further stating that these techniques would violate guidelines in place for military and law enforcement personnel [FM 34-52]; he also believed these interrogation techniques were “violative of U.S. law if they were applied to U.S. persons.”¹⁵⁷ His concern was that “there was great danger ... that any force utilized to extract information would continue to escalate.”¹⁵⁸ “If a person being forced to stand for hours decided to lie down, it probably would take force to get him to stand up again and stay standing,” consequently, experience and training was critical in application of successful interrogation techniques.¹⁵⁹ Dr. Gelles explained:

In contrast to the civilian law enforcement personnel present at Guantanamo, who were trained in interrogation techniques and limits and had years of professional experience in such practices, the military interrogators were typically young and had little or no training or experience in interrogations. Once the initial barrier against the use of improper force had been breached, a phenomenon known as “force drift” would almost certainly begin to come into play. This term describes the observed tendency among interrogators who rely on force. If some force is good, these people come to believe, then the application of more force would be better. Thus, the level of force applied against an uncooperative witness tends to escalate such that, if left unchecked, force levels, to include torture, could be reached.¹⁶⁰

Director Brant weighed in at this point stating “NCIS personnel at Guantanamo viewed any such abusive practices as repugnant.”¹⁶¹ “They would not engage in them even if ordered and NCIS would have to consider whether they could even

154. *Id.*

155. *Id.*

156. *Id.* at 4.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

remain co-located in Guantanamo if the practices were to continue.”¹⁶² He reported that other “law enforcement and military personnel from other services were also increasingly disturbed by [these] practices.”¹⁶³ He reported to Mr. Mora “that NCIS had been officially informed that the coercive interrogation techniques did not represent simply rogue activity limited to undisciplined investigators or even practices sanctioned only by the local command, but had been authorized at a ‘high level’ in Washington,” but he did not know that source.¹⁶⁴

Shocked at this report, Mr. Mora recorded that he “was of the opinion that the interrogation activities described would be unlawful and unworthy of the military services, an opinion that the others shared.”¹⁶⁵ But what to do about it? The following day, December 19, “knowing the Department of the Army had Executive Agent responsibility for Guantanamo detainee operations,” Mr. Mora called his counterpart Army General Counsel, Mr. Steven Morello, who confirmed he “had information on the issue” and invited him to visit with he and his Deputy General Counsel, Mr. Tom Taylor.¹⁶⁶ Mr. Mora met with Mr. Morello and Mr. Taylor who provided him a composite document that contained the November 27th DoD General Counsel Haynes Memo to the Secretary of Defense and Secretary Rumsfeld’s approval of “certain identified interrogation techniques at Guantanamo.”¹⁶⁷ It also contained the JTF-170 Dunlavey request memo to the commander, Beaver legal brief, and SOUTHCOM commander’s endorsement.¹⁶⁸ Mr. Mora was unaware of all these documents, requests, or approvals.¹⁶⁹

Realizing the same danger that Mr. Mora saw in such aggressive interrogation techniques, “Mr. Morello and Mr. Taylor demonstrated great concern with the decision to authorize the interrogation techniques.”¹⁷⁰ “Mr. Morello said that ‘they had tried to stop it without success, and had been advised not to question the settled decision further.’”¹⁷¹ Mr. Mora reviewed the December 2nd approval memo and the accompanying Beaver brief in detail.¹⁷² A loyal political appointee of the Bush administration, who came into office with the President’s first team in 2001, with previous service in the Bush senior administration as General Counsel of the U.S. Information Agency, Mr. Mora knew what was occurring in terms of legal policy was

162. *Id.*

163. *Id.*

164. *Id.* at 4-5.

165. *Id.* at 5.

166. *Id.*

167. *Id.* at 5.

168. *Id.* at 5-6.

169. *Id.*

170. *Id.* at 6.

171. *Id.*

172. *Id.*

terribly wrong.¹⁷³ He would later recount in a detailed twenty-one page memo to the Navy Inspector General:

The brief held, in summary, that torture was prohibited but cruel, inhuman, or degrading treatment could be inflicted on the Guantanamo detainees with near impunity because, at least in that location, no law prohibited such action, no court would be vested with jurisdiction to entertain a complaint on such allegations, and various defenses (such as good motive or necessity) would shield any U.S. official accused of the unlawful behavior. I regarded the memo as a wholly inadequate analysis of the law and a poor treatment of this difficult and highly sensitive issue. As for the December 2nd memo, I concluded that it was fatally grounded on these serious failures of legal analysis. As described in the memo and supporting documentation, the interrogation techniques approved by the Secretary should not have been authorized because some (but not all) of them, whether applied singly or in combination, could produce effects reaching the level of torture, a degree of mistreatment not otherwise proscribed by the memo because it did not articulate any bright-line standard for prohibited detainee treatment, a necessary element in any such document. Furthermore, even if the techniques as applied did not reach the level of torture, they almost certainly would constitute “cruel, inhumane, or degrading treatment,” another class of unlawful treatment.¹⁷⁴

The Bybee Torture legal claims and defenses had appeared in Staff Judge Advocate Beaver’s legal brief and, as a consequence, Secretary Rumsfeld authorized the heretofore forbidden fruit now to be eaten. The Army values embodied in FM 34-52 were dying at the hands of politicization of military custom, tradition, and law. What is military duty if not doing what ought to be done?

E. Speaking Truth to Power

Navy General Counsel Mora, a civilian, knew what his duty should be. After consulting with Navy Secretary Gordon England of what he had learned, the Secretary authorized him to go forward using his best judgment.¹⁷⁵ He saw what Assistant Attorney General Bybee did not see and what Lieutenant Colonel Beaver did not have the courage to see:

In my view, the alleged detainee abuse, coupled with the fact that the Secretary of Defense’s memo had authorized at least aspects of it, could—and almost certainly would—have severe ramifications unless the policy was quickly

173. *Id.*

174. *Id.*

175. *Id.* at 7.

reversed. Any such mistreatment would be unlawful and contrary to the President's directive to treat detainees "humanely."¹⁷⁶

Mora went to see DoD General Counsel Haynes on December 20th.¹⁷⁷ He explained to him that NCIS had advised him that interrogation abuses were occurring at Guantanamo and that the agents believed them to be "unlawful and contrary to American values, and that discontent over these practices were reportedly spreading among the personnel on the base."¹⁷⁸ Mora showed him the December 2nd memo that Haynes had allowed the Secretary to sign.¹⁷⁹ He told Haynes that he was surprised the Secretary had been allowed to sign it because "some of the authorized interrogation techniques could rise to the level of torture, although the intent surely had not been to do so."¹⁸⁰ Haynes rebuffed him stating he "disagreed that the techniques authorized constituted torture."¹⁸¹ Mora urged him to examine the techniques more closely asking him:

What did 'deprivation of light and auditory stimuli' mean? Could a detainee be locked in a completely dark cell? And for how long? A month? Longer? What precisely did the authority to exploit phobias permit? Could a detainee be held in a coffin? Could phobias be applied until madness set in? Not only could individual techniques applied singly constitute torture, I said, but also the application of combinations of them must surely be recognized as potentially capable of reaching the level of torture.¹⁸²

Mora also pointed out the most glaring weakness of the authorization memo, "that it was completely unbounded—it failed to establish a clear boundary for prohibited treatment" by interrogators.¹⁸³ That boundary, he argued, was where the "point [of] cruel and unusual punishment or treatment began."¹⁸⁴ He also critiqued the JTF-170 Beaver legal brief, characterizing it "as an incompetent product of legal analysis ... urg[ing] him not to rely on it."¹⁸⁵ He also pointed out to Mr. Haynes the Secretary's jocular note at the bottom—about his standing 10 hours a day, would be interpreted by some as "a written nod-and-a-wink to interrogators ... that they should not feel bound by the limits set in the memo, but consider themselves authorized to

176. *Id.* at 6.

177. *Id.* at 7.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at 7-8.

184. *Id.* at 8.

185. *Id.*

do what was necessary to obtain the necessary information.”¹⁸⁶ He pointed out defense attorneys at the Military Commissions would call the Secretary as a material witness in their treatment.”¹⁸⁷ And yet Haynes had relied on this brief that contained the same points proffered in the August 1st Bybee Torture memo. At the meeting’s conclusion, Haynes said he would consider carefully what Mora had said.¹⁸⁸

On January 6, 2003, NCIS Director Brant informed Mora that the detainee mistreatment at Guantanamo was ongoing and that he had heard no information “that the December 2nd [Haynes/Rumsfeld] memo had been suspended or revoked.”¹⁸⁹ Mora also reviewed a December 26, 2002, letter from Kenneth Roth, the Executive Director of Human Rights Watch, to President Bush, which contained a legal analysis he considered largely accurate.¹⁹⁰ The letter had also been cited in a *Washington Post* article of the same date.¹⁹¹ Mora believed that the Roth letter and Post article confirmed that accounts of Guantanamo and other detainee interrogation abuse had started to leak out.¹⁹²

Mr. Mora met with Mr. Haynes on January 9th to express his surprise that the Rumsfeld memo had not been suspended and that the interrogation techniques were still in place.¹⁹³ Haynes defended asserting “the techniques were necessary to obtain information from the few Guantanamo detainees who it was thought were involved

186. *Id.*

187. *Id.*

188. *Id.*

I had entered the meeting believing that the December 2nd Memo was almost certainly not reflective of conscious policy but the product of oversight — a combination of too much work and too little time for careful legal analysis or measured consideration. I left confident that Mr. Haynes, upon reflecting on the abuses in Guantanamo and the flaws in the December 2nd Memo and underlying legal analysis, would seek to correct these mistakes by obtaining the quick suspension of the authority to apply the interrogation techniques.

Id.

189. *Id.* at 9.

This came as an unpleasant surprise since I had been confident that the abusive activities would have been quickly ended once I brought them to the attention of the higher levels within DOD. I began to wonder whether the adoption of the coercive interrogation techniques might not have been the product of simple oversight, as I had thought, but perhaps a policy consciously adopted—albeit through mistaken analysis—and enjoying at least some support within the Pentagon bureaucracy.

Id.

190. *Id.*

191. *Id.*

192. *Id.* at 9-10.

193. *Id.* at 10.

in the 9/11 attacks and had knowledge of other al Qaeda operations.”¹⁹⁴ Mora countered that he “did not consider it appropriate for us to advocate for, or cause the laws and values of our nation to be changed to render the activity lawful.”¹⁹⁵ He pointed out the December 26th *Washington Post* article, which stated that these interrogation practices were being leaked.¹⁹⁶ Among a number of new additional points he made to Haynes, Mora asserted:

Even if one wanted to authorize the U.S. military to conduct coercive interrogations, as was the case in Guantanamo, how could one do so without profoundly altering its core values and character? Societal education and military training inculcated in our soldiers American values adverse to mistreatment. Would we now have the military abandon these values altogether? Or would we create detachments of special guards and interrogators, who would be trained and kept separate from the other soldiers, to administer these practices?¹⁹⁷

Mr. Mora felt he had made little headway with Mr. Haynes as Haynes had listened, but said little during their meeting.¹⁹⁸ Mora concluded his meeting by telling Mr. Haynes he believed “the interrogation policies could threaten Secretary Rumsfeld’s tenure and could even damage the Presidency. ‘Protect your client,’ [Mr. Mora] urged Mr. Haynes.”¹⁹⁹

F. The Cannon is Loose in the Pentagon

Uncertain whether Mr. Haynes would do anything based on past experience thus far, Mr. Mora began building a coalition of legal forces.²⁰⁰ On January 10th, he “met in [his] office with CAPT Jane Dalton, JAGC, USN, Legal Advisor to the Chairman of the Joint Chiefs of Staff, who had called for the meeting at Mr. Haynes’s request.”²⁰¹ He made the same points with her about the December 2nd memo he had made to Haynes.²⁰² That very afternoon he also met with the General Counsels of the other Armed Services and their Judge Advocates General and covered with them the same arguments he had made to Haynes.²⁰³ Later that afternoon Haynes

194. *Id.* at 10-11.

195. *Id.* at 11.

196. *Id.*

197. *Id.*

198. *Id.* at 13.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 13-14

called Mora to “relay that modifications to the interrogation policy were in the offing and could come as early as next week.”²⁰⁴

With nothing occurring by January 15th, Mora decided to draft a memorandum addressed to Mr. Haynes and Captain Dalton providing his views in detail on the JTF-170 October 11, 2002, memo and the Secretary’s December 2nd approval.²⁰⁵ He had not thus far placed his views in writing but succinctly:

- a) stated that the majority of the proposed category II and all of the category III techniques were violative of domestic and international legal norms in that they constituted, at a minimum, cruel and unusual treatment and, at worst, torture;
- b) rejected the legal analysis and recommendations of the Beaver Legal Brief; and
- c) strongly non-concurred” with the adoption of the violative interrogation techniques.²⁰⁶

Seeking to light a legal fire under Mr. Haynes, Mr. Mora delivered a draft of this memo to Mr. Hayne’s office that morning.²⁰⁷ He then telephoned Haynes to tell him he was “signing out the memo late that afternoon unless he heard definitively that the use of the interrogation techniques had been or was being suspended.”²⁰⁸ They “agreed to meet later that day.”²⁰⁹ In this meeting Mr. Haynes folded his cards announcing “that Secretary Rumsfeld would be suspending the authority to apply the techniques that same day.”²¹⁰ Later, Haynes called Mora to confirm the Secretary had suspended the techniques.²¹¹ Mora indicated, in view of this, he would not be signing out his memo.²¹²

204. *Id.* at 14.

205. *Id.*

206. *Id.*

207. *Id.* at 15.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* “He asked whether I was not aware about how he felt about the issues or the impact of my actions. I responded that I did not and, with respect to his own views, I had no idea whether he agreed totally with my arguments, disagreed totally with them, or held an intermediate view. Mr. Haynes then said that Secretary Rumsfeld would be suspending the authority to apply the techniques that same day. I said I was delighted and would thus not be signing out my memo. Later in the day and after our meeting, Mr. Haynes called to confirm that Secretary Rumsfeld had suspended the techniques.” *Id.*

Secretary Rumsfeld signed a three-paragraph memo on January 15, 2003, reversing legal policy regarding interrogation techniques, at least for the time being.²¹³

(S) My December 2, 2002, approval of the use of all Category II techniques and one Category III technique during interrogations at Guantanamo is hereby rescinded. Should you determine that particular techniques in either of these categories are warranted in an individual case, you should forward that request to me. Such a request should include a thorough justification for the employment of those techniques and a detailed plan for the use of such techniques.

(U) In all interrogations, you should continue the humane treatment of detainees, regardless of the type of interrogation technique employed.

(U) Attached is a memo to the General Counsel setting in motion a study to be completed within 15 days. After my review, I will provide further guidance.²¹⁴

For his integrity, moral courage, and attention to duty, Mr. Mora would later receive the Profiles in Courage Award from the John F. Kennedy Library Foundation.²¹⁵ Mr. Haynes, on the other hand, at Secretary Rumsfeld's direction, decided to staff the problem of interrogation techniques.²¹⁶ On January 17, 2003, Haynes issued a memo to the General Counsel of the Air Force designating her as chair of an interdepartmental working group, and his executive agent, to prepare an assessment and recommendations that were to be responsive to the Secretary of Defense's memorandum on Detainee Interrogations.²¹⁷ He gave her a suspense date of January 29—12 days.²¹⁸ Hayne's memo is curious for several reasons: first, he had more civilian lawyers in his DoD General Counsel's office than all four service General Counsels combined. Second, he appointed the Air Force General Counsel who, up until this moment, had no involvement in the pressing issues, consciously passing over the one General Counsel who did—Mora. Third, how could such an important project and legal analysis of so many related issues be accomplished in just 12 days?

213. Memorandum from Donald Rumsfeld, Sec'y of Def., to Commander USSOUTHCOM, Counter-Resistance Techniques (Jan. 15, 2003).

214. *Id.*

215. John Shattuck, *In Search of Political Courage*, BOSTON GLOBE, May 22, 2006, at A11.

216. Memorandum from William J. Haynes II, to the Gen. Counsel of the Dep't. of the Air Force, Working Group to Assess Legal, Policy, and Operational Issues Relating to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism (Jan. 17, 2003).

217. *Id.*

218. *Id.*

Contracting out this important legal mission under these circumstances might lead one to believe Haynes wanted to create some distance from what was going wrong in order to maintain the perception of credibility and trust. Trust exponent Stephen M.R. Covey has observed: “But in reality, such action has the opposite effect . . . [P]eople feel their leader is not being honest and straightforward, that he’s ducking from interacting with them on these tough issues and leaving the ‘dirty work’ for others to do.”²¹⁹ As it turned out, neither Mr. Haynes nor Secretary Rumsfeld received their Working Group Report until March 6th, but it was revised again with another edition coming out April 4, 2003.²²⁰

G. Politics vs. the Law in the Pentagon

Having been out maneuvered and forced to concede his legal policy position, Mr. Haynes prepared a counter-offensive to Mora’s high ground by organizing this DoD interdepartmental working group of lawyers which he would influence to produce an interrogation legal policy that would overturn Mora’s temporary moral victory. Immediately following issuance of his memo, the Working Group was informed that the DOJ Office of Legal Counsel would be developing a legal memorandum that was to serve as definitive guidance on the issues addressed by it.²²¹ There was to be yet another Bybee/Yoo memo that would constrain the independent legal analysis of the military legal departments to include the Judge Advocates General.

Since the Department of the Navy General Counsel’s Office had to be a member of the Working Group, Mr. Mora knew the political legal policy game was afoot. Mora anticipated that simple opposition to the use of the aggressive and coercive interrogation techniques would not prove to be “sufficient to prevail in the impending bureaucratic reexamination of which procedures to authorize. We couldn’t fight something with nothing; was there anything in the scientific or academic literature that would support the use of non-coercive interrogation techniques?”²²² Mora met with the NCIS Chief Psychologist Dr. Michael Gelles and NCIS Special Agent Mark Fallon. Dr. Gelles asserted “[m]ost behavioral experts working in the field . . . viewed torture and other less coercive interrogation tactics not only as illegal, but also as ineffective.”²²³ At Mora’s direction, Dr. Gelles began preparation of two memos to

219. STEPHEN M.R. COVEY, *THE SPEED OF TRUST* 188 (2006).

220. *Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations* (Apr. 4, 2003). [Hereinafter *Working Group Report*].

221. Mora IG Memo, *supra* note 150, at 16.

222. *Id.*

223. *Id.*

The weight of expert opinion held that the most effective interrogation techniques to employ

be circulated to the Working Group as soon as possible.²²⁴ The first involved a summary of his thesis, and the second a “comprehensive discussion of the subject.”²²⁵

The DOJ OLC memo was forthcoming and Mr. Mora found significant errors in two key elements. The first was OLC’s legal analysis that “the application of cruel, inhuman, and degrading treatment to the Guantanamo detainees was authorized with few restrictions or conditions.”²²⁶ As later DOJ OLC action would confirm, this erroneous conclusion of law by Mr. Bybee and Mr. Yoo conflicted, as Mr. Mora pointed out, with “both domestic and international law, and trends in constitutional jurisprudence, particularly those dealing with the 8th Amendment protections against cruel and unusual punishment and 14th Amendment substantive due process protections that prohibited conduct ‘shocking to the conscience.’”²²⁷ Mora’s second objection involved the “extreme and virtually unlimited theory of the extent of the President’s commander-in-chief authority.”²²⁸ Both of these OLC conclusions of law had their progeny in the August 1, 2002, Torture Memo by Mr. Bybee and Mr. Yoo.

Mr. Mora was not alone in his perception that political policy was driving military legal policy. As members of the Working Group, the Judge Advocates General brought a nonpolitical perspective to legal policy determinations:

Military lawyers seem to conceive of the rule of law differently [than civilian counterparts]. Instead of seeing law as a barrier to the exercise of their clients’ power, these attorneys understand the law as a prerequisite to the meaningful exercise of power. Law allows our troops to engage in forceful, violent acts with relatively little hesitation or moral qualms. Law makes just wars possible by

against individuals with the psychological profile of the Al-Qaeda or Taliban detainees were ‘relationship-based,’ that is, they relied on the mutual trust achieved in the course of developing a non-coercive relationship to break down the detainee’s resistance to interrogation. Coercive interrogations, said Dr. Gelles, were counter-productive to the implementation of relationship-based strategies.

Id.

224. *Id.*

225. *Id.*

226. *Id.* at 17.

227. *Id.*

228. *Id.*

A key underpinning to the notion that cruel treatment could be applied to the detainees, the OLC formulation of the commander-in-chief authority was wrongly articulated because it failed to apply the *Youngstown Steel* test to the Guantanamo circumstances. If applied, the test would have yielded a conclusion that the commander-in-chief authority was probably greatly attenuated in the non-battlefield Guantanamo setting.

Id.

creating a well-defined legal space within which individual soldiers can act without resorting to their own personal moral codes.²²⁹

On February 5th, the Air Force Deputy Judge Advocate General sent a critical memo to his Air Force General Counsel Mary Walker.²³⁰ He found that in drafting the Working Group Report the legal opinions of the Department of Justice's OLC "were relied on almost exclusively. Although the opinions of DOJ/OLC are to be given a great deal of weight within the Executive Branch, their positions on several of the Working Group's issues are contentious. As our discussion demonstrate[s], others within and outside the Executive Branch are likely to disagree."²³¹ He went on to boldly find that "[s]everal of the more extreme interrogation techniques, on their face, amount to violations of domestic criminal law and the UCMJ (e.g., assault)" placing interrogators and the interrogated both at risk.²³² General Rives also pointed out that, while some nations may agree with the President's detainee status determination, many would see the more aggressive interrogation techniques as violative of international law, and perhaps their own domestic law, placing interrogators and the chain of command in danger of criminal prosecutions abroad, to include the International Criminal Court. To his credit, General Rives takes the moral high road arguing:

[T]he use of the more extreme interrogation techniques simply is not how the U.S. armed forces have operated in recent history. We have taken the legal and moral "high-road" in the conduct of our military operations regardless of how others may operate . . . We need to consider the overall impact of approving extreme interrogation techniques as giving official approval and legal sanction to the application of interrogation techniques that U.S. forces have consistently been trained are unlawful.²³³

229. Charles J. Dunlap, Jr., *Voices from the Stars? America's Generals and Public Debates*, 28 ABA NAT'L SEC. L. REP. No. 4, at 8, 10 (2006) (quoting Richard Schragger).

230. Memorandum from Jack L. Rives, Major General, USAF, Deputy Judge Advocate Gen., to Sec'y of Air Force/Gen. Counsel of the Air Force, Final Report and Recommendation 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 (Feb. 5, 2003).

231. *Id.*

232. *Id.* "Applying the more extreme techniques during interrogation of detainees places the interrogators and the chain of command at risk of criminal accusations domestically. Although a wide range of defenses to these accusations theoretically apply, it is impossible to be certain that any defense will be successful at trial; our domestic courts may well disagree with DOJ/OLC's interpretation of the law." *Id.*

233. *Id.* at 2.

The following day Major General Rives wrote a second legal opinion to the Working Group Chair again reiterating his contentious perception of the DOJ/OLC opinion.²³⁴ He made specific recommendations for modification of the report drafted February 4th, most of which were rejected, not finding their way into the final report.²³⁵

The next military law expert to weigh in was Rear Admiral Michael F. Lohr, the Navy Judge Advocate General.²³⁶ He pointed out the UCMJ does apply in interrogations.²³⁷ He questioned whether “the American people [will] find we have missed the forest for the trees by condoning practices that, while technically legal, are inconsistent with our most fundamental values . . . Moreover, I recommend that we consider asking decision-makers directly: is this the “right thing” for U.S. military personnel?”²³⁸

The Marines participated in the legal assault in the personage of Brigadier General Kevin M. Sandkuhler, Staff Judge Advocate to the Commandant of the Marine Corps. Marines are known for their “with the bark off” communication skills, and General Sandkuhler minced no words regarding the OLC opinion.²³⁹ Concurring with the comments and recommendations of the Air Force and Navy TJAGs and the Joint Staff Legal Counsel’s Office, the Marine observed “[t]he common thread among our recommendations is concern for servicemembers. OLC does not represent the services; thus, understandably, concern for servicemembers is not reflected in their opinion. Notably, their opinion is silent on the UCMJ and foreign views of international law.”²⁴⁰ He went on to contend that “authorization of aggressive counter-resistance techniques” by military personnel will adversely affect “treatment of U.S. Servicemembers by Captors; Criminal and Civil Liability . . . in

234. Memorandum from Jack L. Rivers, Major General, USAF, Deputy Judge Advocate Gen., to Sec’y of Air Force/Gen. Counsel of the Air Force, Comments on Draft 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 (Feb. 6, 2003).

235. *Id.* Among the rejected modifications are (1) “not[ing] several of the legal opinions expressed herein are likely to be viewed as contentious outside the Executive Branch;” (2) “choice of interrogation techniques involves a risk benefit analysis in each case;” (3) “the cultural and self-image of the U.S. Armed Forces suffered during the Vietnam conflict and at other times due to perceived law of armed conflict violations;” and (4) “several of the exceptional techniques, on their face, amount to violations of domestic criminal law and the UCMJ (e.g., assault).” *Id.*

236. Memorandum from Michael F. Lohr, Rear Admiral, Judge Advocate General, U.S. Navy, Introduced into Congressional Record by Sen. Lindsey Graham July 25, 2005, Working Group Recommendations Relating to Interrogation of Detainees (Feb. 6, 2003).

237. *Id.*

238. *Id.*

239. Memorandum from Kevin M. Sandkuhler, Brigadier Gen., USMC, Staff Judge Advocate, to General Counsel for the Air Force, Working Group Recommendations on Detainee Interrogations (Feb. 27, 2003).

240. *Id.*

Domestic, Foreign, and International Forums; U.S. and International Public Support and Respect of U.S. Armed Forces; Pride, Discipline, and Self-Respect within the U.S. Armed Forces; Human Intelligence Exploitation and Surrender of Foreign Enemy Forces, and Cooperation and Support of Friendly Nations.”²⁴¹ His recommendations for modification were not included either in the final Working Group Report.

The Army Judge Advocate General came forward next questioning OLC’s opinion that any federal statute or international law that interfered with the President when acting as commander-in-chief would prevail in the U.S. courts or in any international forum.²⁴² OLC’s view that customary international law is inapplicable to the President runs contrary to historic position taken by the U.S. government.²⁴³ Lastly, he observed that some of the proposed interrogation techniques violate Army doctrine as contained in FM 34-52, and may be of questionable practical value in obtaining reliable information from detainees.²⁴⁴

Rear Admiral Lohr came back on March 13th with more modifications, most of which were rejected.²⁴⁵ He steadfastly maintained it is untrue that there are no domestic limits on the President’s power to interrogate prisoners.²⁴⁶ One of them is Congress’s advice and consent to U.S. ratification to the Geneva Conventions that limit the interrogation of POWs.²⁴⁷ He argued the sentence needed to be added that “Under international law, the protections of the fourth Geneva Convention may apply to the detainees.”²⁴⁸ Critiquing the matrix prepared listing the types of interrogation techniques in the report, he observed “[i]t is not clear what the intent of the technique is. If it loses its effectiveness after the first or second use, it appears to be little more than a gratuitous assault . . . It also has the potential to be applied differently by different individuals.”²⁴⁹ Foreseeably, these recommendations for modification did not make their way into the Working Group Report either.

241. *Id.*

242. Memorandum from Thomas J. Romig, Judge Advocate General, U.S. Army, to Gen. Counsel of the Dep’t of the Air Force, 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 (Mar. 3, 2003).

243. *Id.*

244. *Id.*

245. Memorandum from Michael E. Lohr, Rear Admiral, Judge Advocate General, U.S. Navy, Comments on the 6 March 2003 Detainee Interrogation Working Group Report (Mar. 13, 2002).

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

To say that the Judge Advocates General were marginalized by Mr. Haynes and the Working Group Chair Mary Walker, is factually true. Washington Times reporter Nat Hentoff would write:

They don't get much publicity, but our military lawyers—Judge Advocate Generals—in the Army, Navy, Air Force and Marines—are an essential source of advice, in and out of combat, to our forces, on being faithful to our laws, treaties, the Constitution and our Uniform Code of Military Justice, unexcelled anywhere in the world. But since 2002, the Bush administration has been undermining the JAG's essential independence. The need for independent counsel of our military lawyers has been noted by the Supreme Court (*Greer v. Spock*, 1976); "(The military must be) insulated from both the reality, and the appearance, of acting as handmaiden for partisan political causes." This includes whichever party is in power.²⁵⁰

Mr. Hentoff would conclude his report by observing that the marginalizing and ignoring of the independent advice of the JAGs over the past four years has seen the Bush administration seriously erode what had been America's moral leadership around the world, including among our allies, in the war on terrorists.²⁵¹

When the OLC brief arrived from DOJ, Mora saw through Hayne's strategy with the OLC brief, seeing it as "a vastly more sophisticated version of the Beaver Legal Brief, but it was a much more dangerous document because the statutory requirement that OLC opinions are binding provided much more weight to its virtually equivalent conclusions."²⁵² In succession, contributions from the Working Group were rejected if they did not conform with the OLC opinion. Mora put his objections in writing to Mary Walker, the General Counsel of the Air Force and Chair of the Working Group.²⁵³ Unfortunately Ms. Walker was in the Hayne's camp responding: "I disagree and moreover I believe DoD GC disagrees."²⁵⁴

250. Nat Hentoff, *Seeking Justice - Administration Marginalizes JAGs*, WASH. TIMES, Sept. 11, 2006, at A21.

251. *Id.*

252. Mora IG Memo, *supra* note 150, at 17.

253. *Id.* "The OLC draft paper is fundamentally in error: it spots some of the legal trees, but misses the constitutional forest. Because it identifies no boundaries to action — more, it alleges there are none—it is virtually useless as guidance as now drafted and dangerous in that it might give some a false sense of comfort." *Id.*

254. *Id.* at 18. "My intent at this stage was to review the final draft report when it was circulated for clearance but, based on the unacceptable legal analysis contained in the early draft versions that were likely to be retained in the final version, I anticipated that I would non-concur with detailed comments." *Id.*

One dramatic event occurred in the course of this Working Group process when author of the OLC brief memo, John Yoo, met with Mr. Mora and his Deputy General Counsel on February 6th.

Asked whether the President could order the application of torture, “Mr. Yoo responded, ‘Yes.’ When I questioned this, he stated that his job was to state what the law was, and also stated that my contrary view represented an expression of legal policy that perhaps the administration may wish to discuss and adopt, but was not the law.”²⁵⁵

Mr. Mora maintains that no one in the Department of the Navy ever received a completed version of the Working Group Report and it was never circulated for clearance,²⁵⁶ it nevertheless found its way into print on March 6th with a revised version appearing April 4, 2003.²⁵⁷ Despite Mr. Mora’s statement that the Department of the Navy, let alone his General Counsel’s Office, never cleared or approved the final Working Group Report, the Report states that its content “is the result of the collaborative efforts of those organizations, after consideration of diverse views, and was informed by a Department of Justice opinion.”²⁵⁸ While disingenuous at best based in its representation that its assessment and content represents the views of the named organizations including all the military Department General Counsels and Judge Advocates General, available evidence reviewed previously from the Judge Advocates General and the Navy General Counsel would lead one to a different evidentiary conclusion.

This had occurred before, said Navy Judge Advocate General John Hutson, who reported that he and other JAGs in 2001-2002 were marginalized.²⁵⁹ Experts in the laws of war, he and other Judge Advocates General unsuccessfully tried to amend the military commission plan when they learned of it. “We were warning them that we had a long military history of military justice, and we didn’t want to tarnish it. The

255. *Id.* at 19.

256. *Id.* at 20.

257. U.S. Dep’t of Defense, Working Group Report on Detainee Interrogations (2003), reprinted in THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel eds., 2003).

258. *Working Group Report*, *supra* note 220, at 2.

On January 16, 2003, the DOD GC asked the General Counsel of the Department of the Air Force to convene this working group, comprised of representatives of the following entities: the Office of the Undersecretary of Defense (Policy), the Defense Intelligence Agency, the General Counsels of the Air Force, Army, and Navy and Counsel to the Commandant of the Marine Corps, the Judge Advocates General of the Air Force, Army, Navy, and Marines, and the Joint Staff Legal Counsel and J5. The following assessment is the result of the collaborative efforts of those organizations, after consideration of diverse views, and was informed by a Department of Justice opinion.”

Id. (internal citation omitted).

259. Mayer, *supra* note 75, at 52.

treatment of detainees was a huge issue. They didn't want to hear it."²⁶⁰ When he and other JAGs told DoD General Counsel Haynes they needed more information, he replied, "No, you don't."²⁶¹

The Working Group Report, incorporating the Bybee Torture memo legal opinion as its baseline, served as the official DoD imprimatur for interrogation methods applied worldwide, not just in Guantanamo. Echoing the legal policy proffered in the Torture memo, the Report stated "it may be appropriate for the appropriate approval authority to authorize as a military necessity the interrogation of such unlawful combatants in a manner beyond that which may be applied to a prisoner of war who is subject to the protections of the Geneva Conventions."²⁶² The Bybee OLC memo is extrapolated into poignant sections of the Report, such as defense of extreme interrogation measures. In order for a defendant to be guilty of torture, he must have specifically intended to "cause prolonged mental harm for the defendant to have committed torture."²⁶³ Another is that "if a defendant has a good faith belief that his actions will not result in prolonged mental harm, he lacks the mental state necessary for his actions to constitute torture."²⁶⁴ This would appear to make legitimate the interrogation technique of hooding a detainee and submersing him in water to create the fear of suffocation or drowning, yet this would not be torture for the previously stated legal policy reasons. Even the use of drugs was authorized providing their use or procedures did not rise to the level of disrupting profoundly the sense or personality; they had to produce an extreme effect in order to cross the line of legality. The report parsed this restriction even further requiring that the drug use must be calculated to produce such an extreme effect in order to be offensive, so if an extreme effect occurred such as death, but was not calculated, it would not be unauthorized or illegal.²⁶⁵

The Report goes even further with respect to accountability. It boldly stated the Department of Justice could not enforce the Torture Statute (18 U.S.C. § 2340A) against federal officials so long as they were acting pursuant to the President's constitutional authority to wage a military campaign.²⁶⁶ In another report section the Bybee and Yoo August 1, 2002, memos appear in the declarative statement:

260. *Id.* (quoting Rear Admiral Donald Guter).

261. *Id.*

262. *Working Group Report*, *supra* note 220, at 3.

263. *Id.* at 12.

264. *Id.* at 13.

265. *Id.* at 14.

266. *Id.* at 22. "Indeed, in a different context, DOJ has concluded that both courts and prosecutors should reject prosecutions that apply federal criminal laws to activity that is authorized pursuant to one of the President's constitutional powers." *Id.*

Any effort by Congress to regulate the interrogation of unlawful combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President . . . Congress can no more interfere with the President's conduct of the interrogation of enemy combatants than it can dictate strategy or tactical decisions on the battlefield. Just as statutes that order the President to conduct warfare in a certain manner or for specific goals would be unconstitutional, so too are laws that seek to prevent the President from gaining the intelligence he believes necessary to prevent attacks upon the United States.²⁶⁷

The Report opened another door through which military interrogators would feel unconstrained in their use of interrogation techniques. It claimed "[c]learly, any harm that might occur during an interrogation would pale to insignificance [sic] compared to the harm avoided by preventing such an attack, which could take hundreds or thousands of lives."²⁶⁸ It sent a clarion message marginalizing the rule of law in another part officially stating "If a government defendant were to harm an enemy combatant during an interrogation in a manner that might arguably violate criminal prohibition, he would be doing so in order to prevent further attacks on the United States by the al Qaida terrorist network."²⁶⁹ Another action politicizing military law involved the defense of superior orders. The Report held that "the defense of superior orders will generally be available for U.S. Armed Forces personnel engaged in exceptional interrogations except where the conduct goes so far as to be patently unlawful."²⁷⁰

In an April 16, 2003, memorandum for Commander Southern Command, Secretary Rumsfeld transmitted the Working Group Report and approved the use of specified counter-resistance techniques at Guantanamo.²⁷¹ He reiterated his previous statement that the U.S. Armed Forces would "continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner

267. *Id.* at 24.

268. *Id.* at 26.

269. *Id.* at 31.

In that case, DOJ believes that he could argue that the executive branch's constitutional authority to protect the nation from attack justified his actions . . . Although we are not aware of any authority that applies these concepts in the interrogation context, the justified use of force in military law enforcement may provide useful comparisons to the use of force against a detainee to exact intelligence for the specific purpose of preventing a serious and eminent terrorist incident.

Id.

270. *Id.* at 33.

271. Memorandum from Donald Rumsfeld, Sec'y of Def., for Commander, Southern U.S. Command, Counter-Resistance Techniques in the War on Terrorism (Apr. 16, 2003).

consistent with the principles of the Geneva Conventions.”²⁷² The “to the extent appropriate and consistent with military necessity” proved to be the loophole that would reinstitute the aggressive interrogation techniques and detainee abuse that JTF-170 had requested earlier and engaged in. Some of those techniques approved by the Secretary included: Fear Up Harsh: Significantly increasing the fear level in a detainee; Sleep Adjustment: Adjusting the sleeping times of the detainee; Dietary Manipulation; Environmental Manipulation: Altering the environment to create moderate discomfort; Isolation.²⁷³ Together with the Working Group Report, interrogators at Guantanamo, and in Afghanistan and Iraq, were in a whole new game—one without discernable boundaries.

H. Cause and Effect—What Happens When the Fruit is Digested

With the April 2003 DoD Working Group Report now on the military interrogation street worldwide, what would be its effects? “[A]n officer in the ‘Human Intelligence Effects Coordination Cell’ at the top of the U.S. military headquarters in Iraq, sent a memo to subordinate commands requesting what interrogation techniques they would like to use.”²⁷⁴ Captain William Ponce, the author of that request, sent this email message to those commands stating “[t]he gloves are coming off regarding these detainees ... Provide interrogation techniques ‘wish list’ by 17 AUG 03.”²⁷⁵ Given mounting casualties in Iraq, it is understandable many of the responses would be enthusiastic. A soldier attached to the 3d Armored Cavalry Regiment sent back an email fourteen hours later recommending that interrogators be authorized to use “open-handed facial slaps from a distance of no more than about two feet and back-handed blows to the midsection from a distance of about 18 inches.”²⁷⁶ He added that “fear of dogs and snakes appear to work nicely.”²⁷⁷ The 4th Infantry Division’s intelligence section responded with suggestions that detainees “be hit with closed fists and also subjected to low voltage electrocution.”²⁷⁸ There were more thoughtful responses like one from a major in the 501st Military Intelligence Battalion responsible for supporting the 1st Armored Division operations, who cautioned his intelligence headquarters in Baghdad, “We need to take a deep breath and remember who we are ... It comes down to standards of right and wrong—something we cannot just put aside when we find it

272. *Id.*

273. *Id.*

274. Thomas E. Ricks, *In Iraq, Military Forgot the Lessons of Vietnam; Early Missteps by U.S. Left Troops Unprepared for Guerrilla Warfare*, WASH. POST, July 23, 2006, at A1.

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.* (internal quotation marks omitted).

inconvenient, any more than we can declare that we will ‘take no prisoners’ and therefore shoot those who surrender to us simply because we find prisoners inconvenient.”²⁷⁹

In 2003, in an Army detention center in Iraq, Army interrogator Chief Warrant Officer Lewis Welshofer placed a sleeping bag over Iraqi Major General Abed Hamed Mowhoush’s head and sat on his chest as the man suffocated to death.²⁸⁰ Welshofer later said he thought “the general had information that would ‘break the back of the whole insurgency’” at a time when casualties were mounting.²⁸¹ The prosecutor, Army Major Tiernan Dolan, characterized Welshofer’s treatment of the general as “worse than you would treat a dog.”²⁸² “The treatment of the Iraqi general ‘could be fairly described as torture,’” Army judge advocate Dolan said.²⁸³ Welshofer was not convicted at court-martial of the more serious charge of murder, but instead, was convicted of negligent homicide.²⁸⁴

The interrogation and military police misconduct at Abu Ghraib prison have already been well reported, but the fact remains Lieutenant Colonel Steven L. Jordan, head of the interrogation center, was charged with cruelty and mistreatment, dereliction of duty, and other criminal offenses for his alleged involvement in the abuse of detainees at the prison in 2003 and for interfering with the abuse investigation.²⁸⁵ Officers above Jordan’s rank have already been relieved of command and reprimanded to include Brigadier General Janis Karpinski who was in charge of the prison.²⁸⁶

Major General Antonio Taguba was assigned to investigate the interrogation abuse of detainees at Abu Ghraib prison.²⁸⁷ After completing his investigation, on May 6, 2004, he was summoned to Secretary Rumsfeld’s office. “‘Here . . . comes . . . that *famous* General Taguba—of the Taguba report!’ Rumsfeld declared, in a mocking voice.”²⁸⁸ Considerably calmer Deputy Defense Secretary Paul Wolfowitz asked General Taguba, “Could you tell us what happened?”²⁸⁹ Taguba recalled responding, “I described a naked detainee lying on the wet floor, handcuffed, with an

279. *Id.*

280. Jon Sarche, *Army Interrogator Guilty of Negligent Homicide*, BUFF. NEWS, Jan. 23, 2006, at A4, available at 2006 WLNR 1378672.

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. Robert Burns, *Army Charges Former Abu Ghraib Officer*, AP NEWSWIRE, Apr. 29, 2006, available at 4/29/09 APWIRE 00:43:14.

286. *Id.*

287. Seymour M. Hersh, *The General’s Report*, THE NEW YORKER, Jun. 25, 2007, at 63.

288. *Id.* at 58.

289. *Id.*

interrogator shoving things up his rectum, and said, 'That's not abuse. That's torture.' There was quiet."²⁹⁰

How do you connect the Bybee Torture memo, the OLC memo to the DoD Working Group, and the Working Group Report with Abu Ghraib? Through the military chain of command. Information and field reports flow up a vertical organizational chain and command direction and legal policy flows down the same way—precisely what concerned the Judge Advocates General. Granting his only interview to Pulitzer Prize winning writer Seymour Hersh, General Taguba confirmed this transmission based on his own official investigation:

"From what I knew, troops just don't take it upon themselves to initiate what they did without any form of knowledge of the higher-ups," Taguba told me. His orders were clear, however: he was to investigate only the military police at Abu Ghraib, and not those above them in the chain of command. "These M.P. troops were not that creative," he said. "Somebody was giving them guidance, but I was legally prevented from further investigation into higher authority. I was limited to a box."²⁹¹

General Taguba discovered that his assignment limited his investigation to the 800th Military Police Brigade, but he uncovered information involving military intelligence units to include both the 205th Military Intelligence Brigade and the CIA.²⁹² Lieutenant Colonel Steven Jordan was mentioned in several interviews with the military police.²⁹³ As the chief interrogator, he was subsequently charged with criminal misconduct as noted earlier.²⁹⁴ More disturbing, General Taguba came to learn that Lieutenant General Sanchez, the Army commander in Iraq, and several of his generals in his Baghdad headquarters had extensive knowledge of the detainee abuse at Abu Ghraib long before the story was broken of Joseph Darby's CD depicting the abusive treatment.²⁹⁵

What connected the dots for General Taguba was his learning that just when the Sunni insurgency was gaining momentum in August 2003, Guantanamo's commander, Major General Geoffrey Miller, was ordered by the Pentagon to Iraq to survey the prison system to find ways to improve the intelligence interrogation system.²⁹⁶ A summary of Miller's recommendations are contained in General

290. *Id.*

291. *Id.* at 61.

292. *Id.* at 63.

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

Taguba's report.²⁹⁷ General Miller recommended "that the military police at Abu Ghraib should become part of the interrogation process: they should work closely with interrogators and intelligence officers in 'setting the conditions for successful exploitation of the internees.'" ²⁹⁸ Based on his interviews and accumulated evidence, General Taguba believed General Miller's approach was inconsistent with Army doctrine, which gave military police the mission to make sure prisons were orderly and secure, not intelligence interrogation.²⁹⁹ "His report cited testimony that interrogators and other intelligence personnel were encouraging abuse of the imprisoned detainees."³⁰⁰ One military policeman testified he was told to "[I]oosen this guy up for us . . . Make sure he has a bad night."³⁰¹ And they did have bad nights, and even worse days, as the infamous CD shows.

As Seymour Hersh reports, there have been a dozen investigations into Abu Ghraib and detainee abuse, but military investigators as a rule have been prevented, like General Taguba, from looking into the role of Secretary Rumsfeld and other civilian legal leaders in the Pentagon.³⁰² While the media was focused on Abu Ghraib, what was going on at Guantanamo with Major General Miller armed with his DoD approved aggressive interrogation techniques? Like NCIS, the FBI had been reporting since 2002 that military interrogators at Guantanamo were abusing detainees. After Abu Ghraib, the FBI complaints surfaced publicly. Secretary Rumsfeld's former aide, General Bantz J. Craddock, now commander of Southern Command, appointed three-star Lieutenant General Randall M. Schmidt to investigate the Guantanamo allegations. "I found some things that didn't seem right. For lack of a camera, you could have seen in Guantánamo what was seen at Abu Ghraib," General Schmidt said.³⁰³ Schmidt's investigation discovered that Miller, with encouragement from Rumsfeld, had identified one particular detainee for special interrogation treatment—Mohammed al-Qahtani—a Saudi believed to be the "twentieth hijacker."³⁰⁴ What Schmidt found was shocking. "Qahtani was interrogated 'for twenty hours a day for at least fifty-four days,'" General Schmidt reported to the Army Inspector General's Office responsible for reviewing his investigation findings.³⁰⁵ "I mean, here's this guy manacled, chained down, dogs

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.* at 65.

303. *Id.* at 66.

304. *Id.*

305. *Id.*

brought in, put in his face, told to growl, show teeth, and that kind of stuff. And you can imagine the fear.”³⁰⁶

To his credit, Schmidt reported to investigators that Miller “was responsible for the conduct of the interrogations that I found to be abusive and degrading.”³⁰⁷ General Schmidt dutifully recommended to General Craddock that Miller be “held accountable” and “admonished.”³⁰⁸ But surprisingly “Craddock rejected this recommendation and absolved Miller of any responsibility for the mistreatment of the prisoners.”³⁰⁹ On a related note, in a secret memorandum dated June 2, 2003, General George Casey, then director of the Pentagon’s Joint Staff, sent a warning to Central Command’s Commander General Michael DeLong.³¹⁰ It said that “CIA has advised that the techniques the military forces are using to interrogate high value detainees (HVDs) . . . are more aggressive than the techniques used by CIA who is [sic] interviewing the same HVDs.”³¹¹ General DeLong replied that the techniques being used “were ‘doctrinally appropriate techniques,’ in accordance with Army regulations and Rumsfeld’s direction.”³¹²

I. What Happens When the Military Prosecutors Will Not Eat the Fruit?

Marine prosecutor and veteran pilot Lieutenant Colonel V. Stuart Couch found himself assigned to the Office of Military Commissions in August 2003.³¹³ Provided the files of a number of Guantanamo detainees, one file contained the name of Mohamedou Ould Slahi who was believed to be directly connected to the 9/11 attacks.³¹⁴ “Under the Pentagon structure, Col. Couch had no direct contact with his potential [detainee] defendants.”³¹⁵ He received summaries of the defendants’ statements instead.³¹⁶ “Guantanamo prosecutors estimate that at least 90% of cases depend on statements taken from prisoners.”³¹⁷ Armed with this only source of evidence in the vast majority of detainee cases, the credibility of such incriminating statements becomes vital. In late 2003 Slahi had begun talking nonstop. “He was giving like a ‘Who’s Who’ of Al-Qaeda in Germany and all of Europe,” Colonel

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.* at 67.

311. *Id.*

312. *Id.*

313. Jess Bravin, *The Conscience of the Colonel*, WALL ST. J., Mar. 31, 2007, at A1.

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

Couch said.³¹⁸ A colleague passed on to Colonel Couch that Slahi had been admitted to the “‘varsity program’— an informal name for the Special Interrogation Plan authorized by then-Defense Secretary Donald Rumsfeld for the most recalcitrant Guantanamo prisoners.”³¹⁹ Suspicious that his Slahi statements might be involuntary, Colonel Couch and his NCIS case agent investigator began an “under the table” investigation to learn why Slahi had suddenly become so talkative.³²⁰ “What emerged, Col. Couch believed, was torture.”³²¹ Mr. Slahi’s treatment was “pieced together from interviews with government officials, official reports, and testimony,” together with information from Mr. Slahi’s attorneys.³²²

A detention board transcript says that “Mr. Slahi said, he was placed in isolation, subjected to extreme temperatures, beaten and sexually humiliated . . . at this point, ‘the recording equipment began to malfunction.’”³²³ “It summarizes Mr. Slahi’s missing testimony as discussing ‘how he was tortured while here at GTMO by several individuals.’”³²⁴ General Schmidt’s 2005 Guantanamo investigation report said a masked interrogator told Mr. Slahi on July 17, 2003, that he had dreamed of watching detainees dig a grave.³²⁵ The interrogator stated he saw “a plain pine casket with [Mr. Slahi’s] identification number painted in orange lowered into the ground.”³²⁶ Three days later the interrogator reported to Slahi “that his family was incarcerated.”³²⁷ There were many more interrogation activities such as a late night boat ride in Guantanamo Bay for Mr. Slahi while shackled and blindfolded.³²⁸ Colonel Couch says that the tipping point for him came when he found a forged letter “indicating that Mr. Slahi’s mother was being shipped to Guantanamo, and that officials had concerns about her safety as the only woman amid hundreds of male prisoners.”³²⁹

Colonel Couch made his own trip to Guantanamo and while there, preparing to observe an interrogation of a detainee, he was distracted by heavy metal music.³³⁰ He made his way to the source with an escort and observed a “prisoner shackled to a

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.* (internal quotation marks omitted).

328. *Id.*

329. *Id.*

330. *Id.*

cell floor, rocking back and forth, mumbling as strobe lights flashed.”³³¹ “Did you see that?” Couch asked his escort.³³² “The escort replied: ‘Yeah, it’s approved,’ Col. Couch said.”³³³ The treatment he witnessed was the same abuse he had been trained to resist if captured, but now Americans were employing it.³³⁴

While the 2006 Military Commissions Act permits use of evidence obtained before December 30, 2005, through “cruel, inhuman or degrading” methods, it draws the line at torture.³³⁵ With evidence obtained from torture inadmissible before Military Commissions according to the Act, Colonel Couch believed the mountain of information he had collected on Slahi reflected Slahi had unquestionably been the subject of torture.³³⁶ In a May 2004 meeting with the then chief prosecutor Colonel Bob Swann, Couch informed him that he could not prosecute Slahi for legal reasons, and he was morally opposed to the interrogation techniques.³³⁷ Colonel Couch recalls an impassioned argument where Colonel Swann claimed the UN Torture Convention did not apply to military commissions.³³⁸ Couch challenged him for legal precedent that would allow the President to disregard a treaty the U.S. had ratified.³³⁹ Swann asked for the Slahi case files and Couch was off the case.³⁴⁰

Another Marine, this time Major Dan Mori, assigned to defend one of the ten terror suspects at Guantanamo charged before the Military Commission, says of the Commissions:

[They were] a political stunt. The Administration clearly didn’t know anything about military law or the laws of war. I think they were clueless that there even *was* a U.C.M.J. and a Manual for Courts-Martial! The fundamental problem is that the rules were constructed by people with a vested interest in conviction . . . I hope that nobody confuses military justice with these “military commissions.” This is a political process, set up by the *civilian* leadership. It’s inept, incompetent, and improper.³⁴¹

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.*

341. Mayer, *supra* note 75, at 53.

J. DOJ Confesses Error—A Matter of Political Judgment

For reasons that have been addressed above, one week before Attorney General Designate Alberto Gonzales's Senate confirmation hearings, the Department of Justice reversed legal policy course. On December 30, 2004, OLC Acting Assistant Attorney General Daniel Levin sent a memo to the Deputy Attorney General regarding the August 1, 2002, OLC Bybee Torture Memo.³⁴² In what has to be the legal understatement of the decade he wrote:

Questions have since been raised, both by this Office and others, about the appropriateness and relevance of the non-statutory discussion in the August 2002 Memorandum, and also about the various aspects of the statutory analysis, in particular the statement that "severe" pain under the [Torture] statute was limited to pain 'equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. . . We decided to withdraw the August 2002 Memorandum, a decision you announced in June 2004.'³⁴³

In one stroke of the pen, all the legal damage done by the contentious and highly disparaged August 1st memo that had incorporated and expanded the January 11th Yoo and January 23, 2002, Bybee memos was obliterated, not to mention its progeny in the OLC March 2003 memo to the DoD Working Group. The new OLC memo stated that it "supercedes the August 2002 Memorandum in its entirety."³⁴⁴ In an admission of legal error, the memo repudiated the parsing language used by Yoo and Bybee to limit the definition of torture confessing:

We have also modified in some important respects our analysis of the legal standards applicable under 18 U.S.C. §§ 2340-2340A. For example, we *disagree* with statements in the August 2002 Memorandum limiting "severe" pain under the statute to "excruciating and agonizing" pain, or to pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." There are *additional areas where we disagree with or modify the analysis* in the August 2002 Memorandum, as identified in the discussion below. The Criminal

342. Memorandum from Daniel Levin, Acting Assistant Att'y Gen., to James B. Comey, Deputy Att'y Gen., Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (Dec. 30, 2004).

343. *Id.* at 1-2.

344. *Id.* at 2.

Division of the Department of Justice has reviewed this memorandum and concurs in the analysis set forth below.³⁴⁵

It is interesting to note the Criminal Division's concurrence is conspicuous by its absence in the August 1st Yoo and Bybee memos. With respect to the definition of torture, which is central to the determination of lawful vs. unlawful interrogation techniques (aggressive or otherwise), OLC's statutory interpretation of the law reversed Yoo's and Bybee's legal interpretation.³⁴⁶ "We conclude that under some circumstances 'physical suffering' may be of sufficient intensity and duration to meet the statutory definition of torture even if it does not involve 'severe physical pain,'"³⁴⁷ like taking a hooded Mr. Slahi for a night boat ride in shark infested waters in Guantanamo Bay. In disavowal of the Yoo-Bybee legal interpretations as the executive branch definition of the law, OLC now held "[a]ccordingly, to the extent that the August 2002 Memorandum suggested that 'severe physical suffering' under the statute could in no circumstances be distinct from 'severe physical pain,' we do not agree."³⁴⁸

In an attempt to minimize the August 1st Torture Memo legal interpretation that a violation of the Torture Statute required "specific intent," OLC now opined "We do not believe it is useful to try to define the precise meaning of 'specific intent' in section 2340 [Torture Statute]."³⁴⁹ Now for the first time OLC was to pick up on the purpose and intent of parsing the law. "In light of the President's directive that the United States not engage in torture, it would not be appropriate to rely on *parsing* the specific intent element of the statute to approve as lawful conduct *that might otherwise amount to torture*."³⁵⁰ In a final rescission of the previous presidential authority (New Paradigm) espoused under the plenary war power authority by Yoo and Bybee, despite what the Torture Statute provided, the "new" DOJ OLC legal interpretation rejected the President's constitutional authority to torture detainees in view of the existence of the Torture Statute.³⁵¹ "There is no exception under the statute permitting torture to be used for a "good reason."³⁵² "Thus, a defendant's

345. *Id.* (emphasis added) (internal citations omitted).

346. *See id.* at 10. ("Although we think the meaning of 'severe physical pain' is relatively straightforward, the question remains whether Congress intended to prohibit a category of 'severe physical suffering' distinct from 'severe physical pain'").

347. *Id.* at 12.

348. *Id.* at 10 (internal citation omitted).

349. *Id.* at 16 (footnote omitted).

350. *Id.* at 16-17 (emphasis added).

351. *Id.* at 1.

352. *Id.* at 17.

motive (to protect national security, for example) is not relevant to the question whether he has acted with the requisite specific intent under the statute.”³⁵³

A week later, at his Senate Confirmation hearing to be Attorney General, Alberto Gonzales was called to account for the August 1, 2002 Bybee Torture memo:

Senator LEAHY: . . . [T]his memo was DOJ policy for a couple years. It sat there from sometime in 2002, until just a couple weeks before 2005 . . . [I]t seems to be somewhat overridden. Of course, that may be just coincidental since your confirmation hearing was coming up. Do you think if the Bybee memo had not been leaked to the press, it would still be—because it had never been shown to Congress even though we had asked for it—do you think it would still be the overriding legal opinion?

Judge GONZALES: Sir, that I do not know. I do know that when it became—it was leaked, we had concerns about the fact that people assumed that the President was somehow exercising that authority to engage in torture, and we wanted to clarify the record that the President had not authorized or condoned torture, nor had directed any actions or excused any actions under the Commander in Chief override that might otherwise constitute torture, and that was the reason that the decision was made to delete that portion of the opinion.³⁵⁴

When you compare this statement of Gonzales with OLC Daniel Levin’s memo above, they seem to tell very different stories about what legally occurred. Senator Leahy went on during his examination to note “[t]he same reports you talk about say the Department of Defense relied on the memo. It is quoted extensively in the DOD Working Group report on interrogations. That report has never been repudiated. So apparently they did rely on the memo.”³⁵⁵ Since the Working Group Report stated that it relied on the OLC memo, which incorporated legal policy from prior OLC memos of Bybee and Yoo, the “new” OLC withdrawal memo simultaneously withdrew the primary legal authority upon which the DoD Working Group relied,

353. *Id.* (citation omitted).

Second, specific intent to take a given action can be found even if the defendant will take the action only conditionally. Thus, for example, the fact that a victim might have avoided being tortured by cooperating with the perpetrator would not make permissible actions otherwise constituting torture under the statute. Presumably that has frequently been the case with torture, but that fact does not make the practice of torture any less abhorrent or unlawful.

Id. (internal citations omitted).

354. *Confirmation Hearing on the Nomination of Alberto R. Gonzales to be Att’y Gen. of the United States Before the S. Judiciary Comm.*, 109th Cong. 59 (2005) [hereinafter *Gonzales Hearings*].

355. *Id.*

thus eliminating its legal basis for legal policy change regarding interrogation techniques. Senator Kennedy also asked questions trying to connect the dots between legal policy formulation and the White House:

Senator KENNEDY: ... Now, I want to ask you, did you ever talk to any members of the OLC while they were drafting the memorandum [Aug. 1 OLC opinion]? Did you ever suggest to them that they ought to lean forward on this issue about supporting the extreme uses of torture, as reported in the newspaper?

Judge GONZALES: Sir, I don't ever recall ever using the "leaning forward" in terms of stretching what the law is.

Senator KENNEDY: You talked to the OLC during the drafting of it?

Judge GONZALES: There [are] always discussions—not always discussions, but there often [are] discussions between the Department of Justice and OLC and the Counsel's office regarding legal issues.³⁵⁶

While the poisonous fruit was removed from the tree, the carnage that it left in its wake will be felt for decades to come. The United Nations Commission on Human Rights found torture to have occurred at Guantanamo: "The Special Rapporteur concludes that some of the techniques, in particular the use of dogs, exposure to extreme temperatures, sleep deprivation for several consecutive days and prolonged isolation were perceived as causing severe suffering. He also stresses that the simultaneous use of these techniques is even more likely to amount to torture."³⁵⁷ "The Parliamentary Assembly of the Council of Europe also concluded that many detainees had been subjected to ill-treatment amounting to torture [at Guantanamo], which occurred systematically and with the knowledge and complicity of the United States Government."³⁵⁸ Perhaps one of the most condemning findings came from America's closest ally in the war against terrorism. Lord Hope of Craighead, a member of Great Britain's House of Lords, stated: "some of [the practices authorized for use in Guantanamo Bay by United States authorities] would shock the conscience if they were ever to be authorized in our own country."³⁵⁹ The UN Report recorded over 104 violations of various treaties and international legal norms that the U.S. had

356. *Id.* at 65. "Judge GONZALES: Sir, as far as I'm concerned, the December 30th opinion from the Office of Legal Counsel represents the executive branch position with respect to the interpretation of the anti-torture statute. The August 1 OLC memo has been withdrawn. It has been rejected and does not represent the position of the executive branch." *Id.* at 130.

357. UN Report, *supra* note 116, at 25.

358. *Id.* (footnotes omitted).

359. *Id.*

violated involving the detainees at Guantanamo.³⁶⁰ Germany and Denmark, along with the European Union, have called for the closure of Guantanamo.³⁶¹ The predictions made in 2003 by the Judge Advocates General came true: the U.S. lost international moral rectitude because it politicized military law and the law of war by making it inapplicable to the detainees. But regardless of their viewpoints on the future of commissions, all JAGs agree that Guantanamo might have not proved a world-class nightmare for the Bush administration if a tiny circle of White House lawyers had not shut out the military lawyers while fashioning new military justice procedures on their own.³⁶²

Historian Arthur Schlesinger, who claimed that Richard Nixon is an extreme example of overreaching in his book “The Imperial Presidency,” says Bush “is more grandiose than Nixon.”³⁶³ As for the administration’s legal defense of torture, Schlesinger observes: “No position taken has done more damage to the American reputation in the world—ever.”³⁶⁴

If history will judge the U.S. by its leadership, one of our time’s most respected military and civilian leaders, former Secretary of State Colin Powell, President Bush’s Secretary of State during his first term, called for the closing of Guantanamo and moving its detainees to U.S. facilities:

If it was up to me, I would close Guantanamo. Not tomorrow, but this afternoon. I’d close it . . . I would also do it because every morning, I pick up a paper and some authoritarian figure, some person somewhere, is using Guantanamo to hide their own misdeeds . . . And so essentially, we have shaken the belief that the world had in America’s justice system by keeping a place like Guantanamo open and creating things like the military commission. We don’t need it, and it’s causing us far more damage than any good we get for it.³⁶⁵

360. See generally *id.*

361. Mayer, *supra* note 75, at 44.

362. John Gibeaut, *A Uniform Complaint: Former Military Justice Lawyers Recount Their Fight to Define Justice for Enemy Combatants*, 93 A.B.A. J. 52, 54, (2007). “Viewing the events of Sept. 11 as an act of war, the policy-makers had decided they needed to deal swiftly, surely and severely with terrorists through a process that couldn’t be stalled by defense challenges to abusive interrogation techniques or by evidence based on classified information or hearsay.” *Id.* at 55. “‘They really marginalized us,’ recalls Rear Adm. Donald J. Guter, now the law school dean at Duquesne University. As the Navy’s JAG from 2000 to 2002, Guter was inside the Pentagon on Sept. 11. One of his lawyers was killed in the attack. ‘Right off the bat we began voicing concerns, and they didn’t like it.’” *Id.* at 54-55.

363. Mayer, *supra* note 75, at 46 (citing ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973)).

364. Mayer, *supra* note 75, at 46 (citing SCHLESINGER, *supra* note 363).

365. Libby Quaid, *Powell Calls for Closing Guantanamo*, ASSOCIATED PRESS WORLDSTREAM, June 11, 2007, at A6 (quoting Colin Powell).

If there is any doubt about what America's allies think about Guantanamo and its detainees, a careful review indicates they are not exactly supportive of U.S. efforts. The Pentagon called the detainees "among the most dangerous, best-trained, vicious killers on the face of the earth."³⁶⁶ Since the detainee center opened in January 2002, 360 detainees have been released, more than half of those originally imprisoned.³⁶⁷ The Associated Press (AP) found that 205 of the 245 detainees it had tracked were either freed or cleared of charges.³⁶⁸ Only 14 trials involved released detainees, and eight were acquitted and six are awaiting verdicts.³⁶⁹ No one has been convicted of anything.³⁷⁰ The Afghan government has freed all 83 of their returned countrymen.³⁷¹ Some 67 of 70 of the Pakistani detainees were released after spending a year in their Adiala jail.³⁷² One senior military official reported their investigators determined that most of the Pakistanis had been "'sold' for bounties to U.S. forces by Afghan warlords who invented links between the men and al-Qaeda."³⁷³ All 29 of the detainees from Britain, Spain, Germany, Russia, Australia, Turkey, and Maldives were freed upon returning home.³⁷⁴ Four Britons sent home in January 2005 were investigated and released within eighteen hours; five Britons were repatriated earlier, and they were also released with no charges.³⁷⁵

A British-American lawyer representing several of the detainees, Clive Stafford Smith, said the AP's research indicates "that innocent men were jailed and that the term 'continued detention' is part of a politically motivated farce."³⁷⁶ Another lawyer representing detainees observed, "After all, it would simply be incredible to suggest that the United States has voluntarily released such 'vicious killers' or that such men miraculously reformed at Guantanamo."³⁷⁷ Why would our closest allies do such a thing, unless these 205—not an insubstantial number—were among the innocent.

366. Andrew O. Selsky, *Detainees Raise New Guantanamo Questions*, CONN. POST ONLINE, Dec. 15, 2006.

367. *Id.*

368. *Id.*

369. *Id.*

370. *Id.*

371. *Id.*

372. *Id.*

373. *Id.*

374. *Id.*

375. *Id.*

376. *Id.* (internal quotation marks omitted).

377. *Id.*

K. Wrong in Legal Policy, Wrong in Court X Two

Legal policy crafted initially by White House Counsel Alberto Gonzales and DOJ OLC attorneys John Yoo and Jay Bybee in 2002, permeated litigation that ensued as a consequence of the unlawful detainee determination and the new plenary presidential war power constitutional paradigm. While there are many cases that have risen to notoriety, there are two that stand out as beacons because the Supreme Court of the U.S. rejected the White House and DOJ OLC expansive interpretation of presidential and executive power.

The first case is actually a combination of two cases into one, *Shafiq Rasul v. Bush* and *Khalid Abdullah Fahad Al Odah v. United States*.³⁷⁸ Rasul, Odah, and fellow petitioners were Australian and Kuwaiti citizens who were captured abroad by U.S. forces and characterized as alien detainees held at Guantanamo; the petitioners brought habeas corpus actions in federal district court contesting the legality and conditions of their confinement.³⁷⁹ The Department of Justice maintained that, because the federal district court did not have jurisdiction over these detainees outside the U.S., it could not consider their claims.³⁸⁰ In essence, the government's argument was that the detainees were outside the reach of U.S. law, even though captured and imprisoned by U.S. military forces, with no recourse to U.S. courts.³⁸¹ The government based its argument on a World War II era case, *Johnson v. Eisentrager*, wherein the U.S. courts lacked jurisdiction involving German citizens captured by U.S. forces in China, were subsequently tried and convicted of war crimes by an American military commission in Nanking and incarcerated in then-occupied Germany.³⁸² The Supreme Court then held that U.S. courts lacked jurisdiction based on six critical facts: (a) The prisoners were enemy aliens who (b) had never been or resided in the U.S., (c) were captured outside the territory of the U.S. and held in military custody, (d) were there tried and convicted by the military, (e) for offenses committed there, and (f) were imprisoned there at all times.³⁸³

The Supreme Court, in a 6-3 vote, distinguished the facts in *Eisentrager* from the case at hand.³⁸⁴ The Court found in the present case that the 12 petitioners (a) are not nationals of countries at war with the U.S., (b) they deny that they have engaged in or plotted acts of aggression against this country; (c) they have never been afforded access to any tribunal, much less charged with and convicted of any wrongdoing; (d) and for more than two years they have been imprisoned in territory over which the

378. 542 U.S. 466, 470 (2004).

379. *Id.* at 470-71.

380. *Id.* at 475.

381. *Id.*

382. *Id.*

383. *Id.* at 475-76.

384. *Id.* at 476.

U.S. exercises exclusive jurisdiction and control.³⁸⁵ The Court also rejected the government's contention that the habeas corpus statute did not have extraterritorial application because Congress had not specifically stated it in the statute.³⁸⁶ Because the U.S. government exercised exclusive jurisdiction over Guantanamo pursuant to a treaty with Cuba (albeit a treaty not recognized by the Castro regime), and it conceded that the habeas statute would create federal court jurisdiction to the claims of a U.S. citizen held at Guantanamo, the Court found little reason to believe Congress intended the statute's geographical coverage to vary depending on the detainee's citizenship.³⁸⁷ The Court specifically held, like American citizens, aliens incarcerated at the base were entitled to invoke federal courts' habeas corpus statutory authority.³⁸⁸

The Court also found another basis for federal jurisdiction noting the petitioners contend they are being held in federal custody in violation of the laws of the U.S., and no party questioned federal jurisdiction over the military custodians.³⁸⁹ The Court rejected the government's argument that the detainees have no legal recourse to judicial review of their detention as an exercise of the President's constitutional war power stating: "What is presently at stake is only whether the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing."³⁹⁰ It is fascinating to note as a matter of precedent that the Supreme Court was willing to find jurisdiction in the case of the detainees, but declined to find jurisdiction at Guantanamo in the case of the Cuban-Haitian refugee detainees of the 1990s.³⁹¹

Another case decided on the very same day as *Rasul* and *Odah* (June 28, 2004) was *Hamdi v. Rumsfeld*, not an apparent coincidence as it also involved unlawful detainees.³⁹² Hamdi, captured in Afghanistan, turned out to be a U.S. citizen.³⁹³ Because Hamdi had been held incommunicado in a naval brig in Norfolk, Virginia, and later transferred to a brig in Charleston, South Carolina, his father acting as his best friend, petitioned for a writ of habeas corpus.³⁹⁴ When the District Court required additional material from the government regarding the detainee's status, the

385. *Id.*

386. *Id.* at 480.

387. *Id.* at 480-81.

388. *Id.* at 484.

389. *Id.* at 483.

390. *Id.* at 485.

391. *Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498, 1500, 1503 (11th Cir. 1992), *cert. denied*, 502 U.S. 1122 (1992).

392. 542 U.S. 507, 509 (2004).

393. *Id.* at 510.

394. *Id.* at 510-11.

government petitioned for interlocutory review and the case went to the Fourth Circuit Court of Appeals.³⁹⁵

At the Fourth Circuit the government contended that Hamdi was “‘an enemy combatant,’ and as such, ‘may be detained at least for the duration of the hostilities.’”³⁹⁶ The government also claimed that “‘enemy combatants who are captured and detained on the battlefield in a foreign land’ have ‘no general right under the laws and customs of war, or the Constitution . . . to meet with counsel concerning their detention, much less to meet with counsel in private, without military authorities present.’”³⁹⁷ The new paradigm of presidential war power appeared when the Department of Justice argued in its brief:

[T]he government asserts that “given the constitutionally limited role of the courts in reviewing military decisions, courts may not second-guess the military’s determination that an individual is an enemy combatant and should be detained as such.” The government thus submits that we may not now review at all its designation of an American citizen as an enemy combatant—that its determination on this score are the first and final word.³⁹⁸

Finding the new paradigm’s legal argument a bit expansive, the Court of Appeals said: “In dismissing [this petition], we ourselves would be summarily embracing a sweeping proposition—namely that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel at the government’s say-so.”³⁹⁹ The Court remanded the case to the District Court, but the case ultimately found its way to the highest court in the land to decide a very important question about the Article II presidential war making power and due process of law guaranteed by the Fifth and Fourteenth Amendments.⁴⁰⁰

In a 6-3 concurrence in the judgment and opinion that Hamdi should have an opportunity to offer evidence that he is not an enemy combatant, the Supreme Court vacated the Fourth Circuit Court of Appeal’s judgment and remanded it for further proceedings not inconsistent with its opinion.⁴⁰¹ Quoting from the Nuremburg Military Tribunal, the Court’s plurality opinion written by Justice Sandra Day O’Connor observed: “The time has long passed when ‘no quarter’ was the rule on the battlefield. . . . It is now recognized that ‘Captivity is neither a punishment nor an act

395. *Id.* at 513-14.

396. *Hamdi v. Rumsfeld*, 296 F.3d 278, 282 (4th Cir. 2002).

397. *Id.*

398. *Id.* at 283.

399. *Id.*

400. *Hamdi v. Rumsfeld*, 542 U.S. 507, 511 (2004).

401. *Id.* at 508-09.

of vengeance,' but 'merely a temporary detention which is devoid of all penal character.'"⁴⁰²

Justice O'Connor agreed with Hamdi's contention that Congress did not authorize his indefinite detention by its Resolution for the Authorization for use of Military Force (AUMF), responding that the Court takes his objection not to be the lack of certainty regarding when the war on terrorism will end, but the substantial prospect of its indefinite detention.⁴⁰³

The prospect Hamdi raises is therefore not farfetched. If the Government does not consider this unconventional war won for two generations, and if it maintains during that time that Hamdi might, if released, rejoin forces fighting against the United States, then the position it has taken throughout the litigation of this case suggests that Hamdi's detention could last for the rest of his life.⁴⁰⁴

While the government made a number of arguments justifying Hamdi's indefinite detention, the Court closed one such avenue observing "[c]ertainly, we agree that indefinite detention for the purpose of interrogation is not authorized."⁴⁰⁵ Addressing a related issue, Justice O'Connor asked the question what due process is constitutionally required to a U.S. citizen who disputes his enemy combatant status.⁴⁰⁶ In response Hamdi argued that he is owed a meaningful and timely hearing and that his "extra-judicial detention [that] begins and ends with the submission of an affidavit based on third-hand hearsay" does not meet the requirements of the Fifth and Fourteenth Amendments.⁴⁰⁷ The Government disagreed arguing in its brief "that any more process than what was provided below would be both unworkable and "constitutionally intolerable."⁴⁰⁸ The notion of plenary and unbounded constitutional presidential war power expounded by Gonzales, Bybee, and Yoo appears again in this Department of Justice position. Undaunted by lack of judicial or historical precedent, they attempted to preclude judicial review by making a separation of powers argument in support of their new presidential power paradigm. Referring to this position, Justice O'Connor wrote:

This is the argument that further factual exploration is unwarranted and inappropriate in light of the extraordinary constitutional interests at stake. Under the Government's most extreme rendition of this argument, "[r]espect for

402. *Id.* at 518.

403. *Id.* at 519-20.

404. *Id.* at 520.

405. *Id.* at 521.

406. *Id.* at 524.

407. *Id.* at 524-25 (citing Brief for Petitioners at 16, *Hamdi*, 542 U.S. 507 (No. 03-6696)).

408. *Id.* at 525 (citing Brief for the Respondents at 46, *Hamdi*, 542 U.S. 507 (No. 03-6696)).

separation of powers and the limited institutional capabilities of courts in matters of military decision-making in connection with an ongoing conflict” ought to eliminate entirely any individual process, restricting the courts to investigating only whether legal authorization exists for the broader detention scheme. At most, the Government argues, courts should review its determination that a citizen is an enemy combatant under a very deferential “some evidence” standard.⁴⁰⁹

Rejecting the Government’s contentions regarding the nature, breath, and scope of the separation of powers doctrine, the Court held “[w]e reaffirm today the fundamental nature of a citizen’s right to be free from involuntary confinement by his own government without due process of law, and we weigh the opposing governmental interests against the curtailment of liberty that such confinement entails.”⁴¹⁰ Deciding the factual case in its 6-3 decision, the Court found that a citizen-detainee challenging “his classification as an enemy combatant must receive notice of the factual basis for his classification,” and just as importantly must receive “a fair opportunity to rebut the Government’s factual assertions before a neutral decision maker.”⁴¹¹ The Court rebuked the Government’s sweeping assertion of presidential war power.⁴¹² In a draconian act of nailing a stake through the heart of the Bybee and Yoo DOJ OLC opinions, the Court said, “We have long since made clear that a state of war is not blank check for the President when it comes to the rights of the Nation’s citizens.”⁴¹³

409. *Id.* at 527 (citing Brief for the Respondents, *supra* note 408, at 26, 34). O’Connor elaborates on the standard as expressed in *Superintendent, Mass. Correctional Institution at Walpole v. Hill*, 472 U.S. 445, 455-57 (1985), explaining that the some evidence standard does not require a weighing of the evidence, but rather calls for assessing whether there is any evidence in the record that could support the conclusion. “Under this review, a court would assume the accuracy of the Government’s articulated basis for Hamdi’s detention, as set forth in the Mobbs Declaration, and assess only whether that articulated basis was a legitimate one.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 527-28 (2004).

410. *Hamdi*, 542 U.S. at 531. “It is during our most challenging and uncertain moments that our Nation’s commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.” *Id.* at 532.

411. *Id.* at 533.

412. *Id.* at 535.

In so holding, we necessarily reject the Government’s assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forego any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government. *Id.* at 535-36.

413. *Id.* at 536 (citing *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 587 (1952)). The

Also finding that the Government's claim that interrogations constituted adequate fact finding by a neutral party, Justice O'Connor wrote "[a]n interrogation by one's captor, however effective an intelligence-gathering tool, hardly constitutes a constitutionally adequate factfinding before a neutral decisionmaker."⁴¹⁴ Turning lastly to the right by Hamdi of access to legal counsel, the Court rejected the Government's contention again finding "[h]e unquestionably has the right to access to counsel in connection with the proceedings on remand."⁴¹⁵

Having lost its case, the government sought to make Hamdi go away, physically.⁴¹⁶ On September 24, 2004, just three months after the Supreme Court's decision, the government entered into a written agreement to release Hamdi in exchange for his renouncing his American citizenship and agreeing to his transfer to Saudi Arabia on October 11, 2004, and remaining there until 2009, subject to travel and monitoring restrictions by the Saudi government.⁴¹⁷ Like other allied releases of detainees transferred to their custody by the U.S., the government released what it had previously alleged to be a dangerous terrorist and detainee of interrogation value. Perhaps Justice Wiley B. Rutledge captured the essence of judicial scrutiny of extrajudicial war power government claims in a dissent he penned *In re Yamashita* in 1946 where he quoted Revolutionary War pamphleteer Thomas Paine: "He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself."⁴¹⁸

VI. CONCLUSION—WHAT WAS GAINED, WHAT WAS LOST

If the Army Field Manual 34-52 is to be believed as a repository of military intelligence interrogation expertise, what has been gained by aggressive interrogation techniques may be of substantially less value than what has been lost. Historians and

Hamdi court added, "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." *Hamdi*, 542 U.S. at 536 (citing *Mistretta v. United States*, 488 U.S. 361, 380 (1989)). "Likewise, we have made clear that, unless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions." *Hamdi*, 542 U.S. at 536 (citing *I.N.S. v. St. Cyr*, 533 U.S. 289, 301 (2001)).

414. *Hamdi*, 542 U.S. at 537.

415. *Id.* at 539.

416. Press Release, Richard Boucher, State Department, U.S. Transfers Yaser Esam Hamdi to Saudi Arabia (Oct. 11, 2004).

417. Joel Brinkley, *From Afghanistan to Saudi Arabia via Guantanamo*, N.Y. TIMES, Oct. 16, 2004, at A4.

418. 327 U.S. 1, 81 (1946) (Rutledge, J., dissenting) (quoting 2 THE COMPLETE WRITINGS OF THOMAS PAINE 588 (Philip S. Foner ed., 1945)).

legal writers for decades to come will have much to consider. The Guantanamo Bay Detainee Center is still in operation as of this date, June 1, 2010. What is going on there in terms of military intelligence value is highly speculative and questionable given the realities of interrogation posed by FM 34-52 and passage of time since most detainees' capture—2003.

What was lost is far more discernable. The American Bar Association conducted a survey in 2007 to determine how well the justice system is combating terrorism.⁴¹⁹ While 50 defense attorneys who have worked on terrorism cases were polled, the 50 assistant U.S. attorneys polled were instructed by U.S. Department of Justice spokesman Dean Boyd not to participate.⁴²⁰ He also declined to explain his reason to the ABA, who inquired.⁴²¹ The results of the survey are not inconsistent with what the Judge Advocates General forewarned.⁴²² On a related issue, one ethics writer notes that everyone has a trust account.⁴²³ "Simply put, trust means *confidence*."⁴²⁴ Trust accounts are subject to deposits and withdrawals. People, corporations, nation-states all have trust accounts. Stephen M.R. Covey notes "[t]rust is a function of two things: character and *competence*. Character includes your integrity, your motive, your intent with people. Competence includes your capabilities, your skills, your results, your track record. And both are vital."⁴²⁵ Prior to the politicization of military law, the U.S. Armed Forces enjoyed a global reputation of moral rectitude—

419. Mark Hansen & Stephanie Francis Ward, The 50-Lawyer Poll: Defense Attorneys Who have Tried Terrorism Cases Score the Legal System's Response to 9/11, 93 A.B.A. J. 30, 30 (2007).

420. *Id.*

421. *Id.*

422. *Id.*

The terrorism cases brought in federal court have made the U.S. safer. Disagree 58%, Agree 30%, No opinion 12%; The terrorism laws passed by Congress have made the U.S. safer. Disagree 80%, Agree 14%, No opinion 6%; Which branch of government has acquitted itself best on terrorism legal issues? Judiciary 80%, All have acquitted themselves equally well 2%, No opinion 18%; Which branch of government has acquitted itself worst on terrorism legal issues? Executive 84%, Legislative 8%, All have acquitted themselves equally poorly 8%;

What grade would you give the entire U.S. Justice system—including the executive, legislative, and judicial branches—in the legal war on terror? A 0%, B 10%, C 28%, D 30%, F 24%, No Opinion 8%; U.S. Supreme Court decisions on terrorism issues have: Unduly favored the government 24%, Struck the right balance 56%, No opinion 20%, Unduly favored defendants 0%; Privacy rights have been unduly compromised as a result of anti-terrorism efforts. Agree 94%, Disagree 4%, No opinion 2%.

Id. at 30-31.

423. COVEY, *supra* note 219, at inscription.

424. *Id.* at 5.

425. *Id.* at 30.

a code of professional conduct that reflected sound judgment, and, in the case of military interrogation techniques, embodied in Army doctrine contained in FM 34-52, and enforced by the Uniform Code of Military Justice (UCMJ). Our military motives and intent were clear and understood as announced and briefed daily at the Pentagon, and on the battlefield in all operations orders by company commanders, platoon leaders and sergeants, squad leaders and team leaders. Military competence was unquestioned as demonstrated not only by the armed forces' capabilities and skills exhibited during the opening days of Operation Desert Storm, but again with Operation Iraqi Freedom. Precision, proportionate force, careful target analysis and execution characterized the results achieved. The record was exemplary in the history of modern warfare.

With politicization of military law, the U.S. Armed Forces' law of war is changed to accommodate a more aggressive intelligence collection. Character and competence became the casualties on the road to exercise of plenary presidential war power. The integrity of the U.S. adherence to the rule of law was brought into international disrepute when the Geneva Conventions were characterized and treated as "quaint" by the president's legal counsel. American motive and intent have been challenged by the United Nations as well as our own military legal and civilian counsel leaders, with revelations of horrific treatment of detainees at Abu Ghraib and Guantanamo among others. Trust in American military competence and its capabilities and skills have been damaged with the advent of the disregard of Army doctrine and the physical and mental abuse of detainees by military personnel. The results achieved by this politicization of military law, this new legal policy articulated in the Gonzales and Bybee-Yoo OLC memos, and transmitted through the DoD Working Group Report and other DoD memos to the field, stain the conscience of those who thought this could never take place in American armed forces. The record reflects a tremendous withdrawal from the American trust account. Allies have refused to incarcerate or try detainees transferred to them, and have sought every opportunity to desert the U.S. on the battlefield in Iraq, withdrawing support at the first opportunity.

The American trust account is an important national asset belonging to and impacting all of us:

Trust impacts us 24/7, 365 days a year. It undergirds and affects the quality of every relationship, every communication, every work project, every business venture, every effort in which we are engaged. It changes the quality of every present moment and alters the trajectory and outcome of every future moment of our lives—both personally and professionally.⁴²⁶

The penultimate question remains—why did the President's Counsel, Alberto Gonzales, Assistant Attorney General for OLC Jay Bybee, and his deputy assistant

426. *Id.* at inscription.

John Yoo, and DoD General Counsel William Haynes deviate so far from mainstream military law and the laws of war, especially in view of timely warnings by Secretary of State Colin Powell, his State Department Legal Advisor William H. Taft IV, Navy General Counsel Alberto Mora, and the Armed Services Judge Advocates General? Their patriotism is not in question, but their judgment in making highly provocative military legal policy has certainly been deeply questioned by both the Congress and the Supreme Court of the U.S.

Perhaps the answer can be found in an allegory. Two university professors from the University of South Dakota were greeted in May 2004 by a German colleague who picked them up at the Hannover airport upon their arrival in Germany. Driving them to Wolfsburg in a brand new Volkswagen Teureg (SUV), the German professor entered the autobahn (German freeway) and quickly accelerated to 240 km per hour (150 mph); the autobahn has no speed limit. One of the American professors peering over the shoulder of his German driver observed that the digital gas gauge was calculating fuel consumption based on this speed. The American remarked “at this speed, do you know you are only getting 6 miles to the gallon of petrol?” The other American in the front who was pressed against the seat in what he characterized as Mach IV, squeaked, “why do you drive so fast?” The German professor proudly proclaimed, “because we can.” In their zeal to serve their president, Gonzales et al. charted a new legal course that politicized military law into political policy. Specifically, these presidential legal advisors transformed military law in three different ways: first, that no law prohibited the application of cruelty; second, that no law should be adopted that would do so; and third, that our government could choose to apply the cruelty, or not, as a matter of policy depending on the dictates of the perceived military necessity.⁴²⁷

Gonzales and his colleagues made a tremendous withdrawal on the U.S. trust account that has taken generations of Americans to build from deposits made in blood and sacrifice. They did it because they could, albeit through lenses that they fashioned themselves, not of the world the way it truly existed, but into one of their own design with new constitutional powers unlimited in scope for presidential war authority, limited or no rights for those impacted by exercise of these powers, and a new American landscape where the rule of law was subject to political policy determination. The law is what OLC says it is. Without oversight of any kind, the President has been damaged by incredibly poor legal advice. Former Associate Attorney General Bruce Fein, himself a Republican, characterized it as a lack of sophistication observing: “There is no one of legal stature, certainly no one like Bork, or Scalia, or Elliott Richardson, or Archibald Cox ... It’s frightening. No one knows the Constitution.”⁴²⁸

427. Alberto J. Mora, *An Affront to American Values*, WASH. POST, May 27, 2006, at A25 [hereinafter Mora-Values].

428. Mayer, *supra* note 75, at 46.

Gonzales and his legal followers sought to keep his memo and the OLC memos classified, not to mention all the DoD memos and correspondence. That these documents were leaked by inside government officials, as mentioned by Senator Leahy during Gonzales's confirmation hearing, is testament that there may be a higher loyalty in the DoD than to the President and his legal policy staff, that being to the Constitution of the U.S. Had these documents not been leaked, there would have been little accountability and no change in behavior. The Fourth Estate has once again done the nation a great service. Perhaps the greatest defender of American liberty is not its armed forces, but its free press as this research demonstrates.

What is to be learned from this torrid experience? If the price of freedom is eternal vigilance, perhaps our military and civil legal leaders paid too cheap a price for a fleeting attempt at preserving freedom. They will each have to determine for themselves in retrospect whether they did all they could to prevent this politicization of military law. If Navy General Counsel Alberto Mora is any model, his tenacious attempt to reverse this dangerous military legal policy change within the Pentagon is a matter of detailed record.

Congress is certainly not without culpability here. During Gonzales's confirmation hearing Senator Leahy stated that the Bybee Torture memo had not been shown to the Congress even though it had been requested. Congress became aware of it only when it was leaked.⁴²⁹ Even after the 109 page confirmation hearings that brought out much of the responsibility and repudiated DOJ OLC legal opinions, Gonzales was still confirmed to be Attorney General. In yet another exercise of highly criticized legal judgment, he was eventually driven from office over the unrelated firing of several U.S. Attorneys.⁴³⁰ Congress did not vigilantly exercise its oversight responsibility of either the Department of Justice or Department of Defense. If they had, Congress would have discovered what Navy General Counsel Mora did. If Congress is fundamentally a crisis driven institution, they failed to note as it occurred the politicization of the military law of war in connection with prisoners being captured in its name and under its 2003 Resolution for the Authorization of the Use of Force.

At the initiation of Senator John McCain (R-AZ), Congress prophylactically enacted the Detainee Treatment Act of 2005 that now provides for uniform interrogation standards, torture prohibitions, interrogator protections, and status for review of detainees held by the Department of Defense outside the U.S.⁴³¹ Under the

429. Gonzales Hearings, *supra* note 354, at 59.

430. Steven Lee Myers & Philip Shenon, *Embattled Attorney General Resigns*, N. Y. TIMES, Aug. 27, 2007, available at <http://www.nytimes.com/2007/08/27/washington/27cnd-gonzales.html>.

431. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (codified at 42 U.S.C. § 2000dd (2005)); see also Josh White & Carol D. Leonnig, U.S. Cites Exception in Torture Ban: McCain Law may Not Apply to Cuba Prison, WASH. POST, Mar. 3, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/02/AR2006030202054.html>

interrogator protections section, Congress sought to provide a form of cover for U.S. government personnel in any civil action or criminal prosecution brought against them involving the authorized detention and interrogation of aliens in or associated with international terrorist activities.⁴³² This protection provided that good faith reliance on the advice of counsel must be considered as an important factor in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful.⁴³³ This protection even authorizes the government to provide or retain counsel and pay counsel fees, court costs, and bail for any such federal employee or service member.⁴³⁴ Thus the Bybee-Yoo Torture memo, DoD Working Group Report, Lt. Col. Beaver Staff Judge Advocate JTF 170 memo and brief, and other related legal memos, no matter how legally and morally in error, could be a legal basis for defending the most unlawful of military conduct under the UCMJ and law of war. The “I was only following orders” defense has been resurrected after its earlier burial in Nuremburg.

As discussed, vigilance was missing both in military and congressional leadership. After all that has occurred, why should lawyers, military and civilian, still care about these issues? They should care because politicization of military law could happen again. History has a strange way of repeating itself unless lessons are learned from it. Military law does not belong just to the military, but to the entire nation, and vigilance of its moral rectitude is key to maintaining our national trust account, and a collective legal responsibility:

The Abu Ghraib abuses have been exposed; Justice Department memoranda justifying cruelty and even torture have been ridiculed and rescinded; the authorizations for the application of extreme interrogation techniques have been withdrawn; and perhaps, most critically, the Detainee Treatment Act of 2005, which prohibits cruel, inhuman, and degrading treatment, has been enacted, thanks to the courage and leadership of Sen. John McCain.

We should care because the issues raised by a policy of cruelty are too fundamental to be left unaddressed, unanswered or ambiguous. We should care because a tolerance of cruelty will corrode our values and our rights and degrade the world in which we live. It will corrupt our heritage, cheapen the valor of our soldiers upon whose past and present sacrifices depend, and debase the legacy we will leave to our sons and daughters. We should care because it is intolerable to us that anyone should believe for a second that our nation is tolerant of

432. 42 U.S.C. § 2000dd-1. “[I]t shall be a defense that such officer, employee, member of the Armed Forces, or other agent did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful.” *Id.*

433. *Id.*

434. *Id.*

cruelty. And we should care because each of us knows that this issue has not gone away.⁴³⁵

435. Mora-Values, *supra* note 427, at A25.