THE THIRD ANNUAL SOLF-WARREN LECTURE IN INTERNATIONAL AND OPERATIONAL LAW*

REFLECTIONS ON GOVERNMENT LAWYERING

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† This essay is an edited transcript of a lecture delivered on 24 February 2010 by Professor Jack Goldsmith to members of the staff and faculty of The Judge Advocate General's Legal Center and School, their distinguished guests, and officers of the 58th Judge Advocate Officer Graduate Course at The Judge Advocate General's Legal Center and School, Charlottesville, Virginia.

The Waldemar A. Solf Chair of International Law was established at The Judge Advocate General's School, U.S. Army (TJAGSA) on 8 October 1982 in honor of Colonel (COL) Waldemar A. Solf. On 16 August 2007, the Chair was renamed the Waldemar A. Solf and Marc L. Warren Chair in International and Operational Law.

Colonel Waldemar Solf (1913–1987) was commissioned in the Field Artillery in 1941. He became a member of the Judge Advocate General's Corps in 1946. He served in increasingly important positions until his retirement twenty-two years later.

Colonel Solf's career highlights include assignments as the Senior Military Judge in Korea and at installations in the United States; Staff Judge Advocate (SJA) of both the Eighth U.S. Army/U.S. Forces Korea/United Nations Command and the U.S. Strategic Command; Chief Judicial Officer, U.S. Army Judiciary; and Chief, Military Justice Division, Office of The Judge Advocate General (OTJAG).

After two years lecturing with American University, COL Solf rejoined the Corps in 1970 as a civilian employee. Over the next ten years, he served as Chief of the International Law Team in the International Affairs Division, OTJAG, and later as chief of that division. During this period, he served as a U.S. delegate to the International Committee of the Red Cross (ICRC) Conference of Government Experts on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. He also served as Chairman of the U.S. delegation to the ICRC Meeting of Experts on Signaling and Identification Systems for Medical Transports by Land and Sea.

He was a representative of the United States to all four of the diplomatic conferences that prepared the 1977 Protocols Additional to the 1949 Geneva Conventions. After his successful efforts in completing the Protocol negotiations, he returned to Washington and was appointed the Special Assistant to The Judge Advocate General for Law of War

General Miller, General Ayers, Colonel Burrell, distinguished guests, members of the 58th Graduate and 53d Operational Law of War Courses, staff and faculty of the Legal Center and School, it is a genuine honor to be invited today to speak to you in this distinguished lecture series named after Colonels Solf and Warren. For me it has been a special treat to meet Colonel Warren, whom I've long admired but never met. Thank you very much for inviting me.

I do not exaggerate when I say that there's no group of lawyers I admire more than military lawyers. I spent a very happy year, perhaps the best year of my professional career, in the Department of Defense's General Counsel's Office working side by side every day and many nights with lawyers from all of the services. I entered the Pentagon, I must confess, a mild and largely uninformed skeptic of what I viewed as the expanding roles and responsibility of military lawyers. But I am happy to report that I emerged a year later a convert to the importance of law and lawyers to the integrity of military action. I learned a lot from military lawyers that year; I've continued to learn from them over the years; and I hope to learn from you some more today during the question-and-answer period.

Today I am going to talk to you about my time in the Justice Department as the head of the Office of Legal Counsel (OLC), which is basically the legal advisor to the President. The President, as you know, is the Chief Executive Officer of the nation. He has delegated the power to interpret laws for the Executive Branch to the Attorney General, who in turn has delegated that power to OLC. The vast majority of legal advice I gave to the President and the Attorney General concerned legal issues related to the war on terrorism and national security law. I've written a book about these experiences called *The Terror Presidency*.[1] The occasion for me to return to these issues today is the release of a report last week by the Justice Department concerning an inquiry into

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Matters. Having been instrumental in promoting law of war programs throughout the Department of Defense, COL Solf again retired in August 1979.

In addition to teaching at American University, COL Solf wrote numerous scholarly articles. He also served as a director of several international law societies and was active in the International Law Section of the American Bar Association and the Federal Bar Association.

[1] JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION (2007).

potential ethical lapses by some of my predecessors.[2] I don't know how much you know about this so I'll just briefly summarize what has happened.

Since I left Washington to go to Harvard in 2004, I've taken approximately three dozen trips back to Washington to be questioned by a variety of investigatory bodies in Washington, all growing out of all things that happened during my year in the Justice Department. I was not a target of any of these investigations, but they wanted to talk to me nonetheless. One of these investigations was by the Office of Professional Responsibility (OPR), which is the ethics branch of the Justice Department. OPR conducted a five-year investigation of my predecessors, Jay Bybee and John Yoo, concerning their drafting of two interrogation memos that I withdrew.[3] OPR ultimately concluded that John Yoo and Jay Bybee had committed professional misconduct because they had failed to provide thorough, candid, and objective legal advice.[4]

The OPR finding was overturned by a senior career lawyer in the Deputy Attorney General's Office named David Margolis.[5] He overruled the OPR on the ground that they did not articulate a known, unambiguous obligation or standard against which they were judging the actions of the lawyers in question. Along the way in his remarkable seventy-page opinion, Margolis flagged a number of legal and other mistakes that OPR had made in bringing judgment on OLC's interrogation analysis. I have not studied the hundreds and hundreds of pages in the OPR matter to form a strong conclusion or to give you a full analysis of the arguments in play. But I do think that it provides an

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[2] *See* Memorandum from David Margolis, Assoc. Deputy Att'y Gen., to The Att'y Gen., subject: Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility's Report of Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists (Jan. 5, 2010) [hereinafter Margolis Memo], *available at* http://judiciary.house.gov/ hearings/pdf/DAGMargolisMemo100105.pdf.

[3] Memorandum from Jay S. Bybee, Ass't Att'y Gen., to Alberto R. Gonzales, Counsel to the President, subject: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002); Memorandum from John C. Yoo, Deputy Ass't Att'y Gen., to William J. Haynes II, Gen. Counsel of the Dep't of Def., subject: Military Interrogation of Alien Unlawful Combatants Held Outside the United States (Mar. 14, 2003).

[4] U.S. DEP'T OF JUSTICE, OFFICE OF PROFESSIONAL RESPONSIBILITY REPORT (2009), *available at* http://judiciary.house.gov/hearings/pdf/OPRFinalReport 090729.pdf.

[5] *See* Margolis Memo, *supra* note 2.

opportunity to reflect on some of the paradoxes, difficulties, and challenges of lawyering inside the Executive Branch, especially in a time of crisis. Although I will be speaking about my experiences advising the President, I think they're analogous to your experiences advising your non-lawyer superiors.

Let me begin by trying to articulate what an Executive Branch lawyer is supposed to do when he or she advises a client. What is the lawyer's obligation, especially when novel and difficult interpretative issues arise? I naively thought this was a simple matter when I entered the OLC job. I thought—and I testified to this effect at my confirmation hearings—that I was simply going to provide good faith, impartial legal advice. I was influenced by one of my predecessors, William Barr, who said, "Being a good legal advisor [to the President] requires that I reach sound legal conclusions, even if sometimes they are not the conclusions that some may deem to be politically preferable."[6] This was my attitude going in, and I think it's a good attitude to have going in. But as soon as I got there, I realized this attitude was too simple. There are many countervailing considerations and pressures, almost all of which, I thought, were legitimate, and all of which made the job much more difficult.

First, I was not an accidental pick for this job. The reason the President chose me for OLC was that his subordinates had read my writings and interviewed me and knew what my views were on various issues. They liked those views, so I was not a neutral choice. I was not chosen because they thought I was going to be completely neutral—neutral in the sense of not having views on a variety of issues that would come before me. As a group of Clinton Administration OLC officials once said, "The Office of Legal Counsel is located in the Executive Branch and serves both the institution of the Presidency and a particular incumbent, a democratically elected President in whom the Constitution vests Executive power."[7] Since the President is elected and exercises Executive power, he can choose to select his lawyers—people with whom he basically agrees on interpretative and legal issues.

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[6] *Id.* at 33.

[7] WALTER DELLINGER ET AL, PRINCIPLES TO GUIDE THE OFFICE OF THE LEGAL COUNSEL (2004), *available at* http://www.acslaw.org/files/2004%20programs_OLC%20principles_white%20paper.pdf.

The second countervailing consideration, related to the first, is that, as Elliot Richardson once said, "Advice to a President needs to have the political dimension clearly in view, without regard to any pejoratives attached to the word political."[8] This doesn't mean that you're supposed to be political, and it doesn't mean you can be an advocate in the same sense that you would if you were a private attorney advising a client. Rather, it means that the lawyer is a member of an Executive Branch and is not neutral to the President's or to the commander's agenda when advising him or her on a legal matter. Unlike a court that often just says "no" or "yes," I never said "no" to any of my superiors without trying to find a way to help them find a way to achieve their desired ends within the law. The third countervailing consideration was that, as Robert Jackson once said, the President "gets the benefit of a reasonable doubt as to the law."[9] Finally, many issues facing an executive branch lawyer have no or little judicial precedent. In those situations, the lawyer must apply not-entirely-neutral Executive Branch precedents, written by Executive Branch lawyers, in Executive Branch situations.

The challenge for the lawyer who faces these four considerations is to not to let them get out of control. Often when an Executive Branch lawyer advises a client on a national security matter, the advice takes place in secret without a dissenting opinion or appellate review. This is a situation fraught with the possibility of mistakes. But there are checks as well. For me, one was the powerful culture at OLC of detachment, professional integrity, and loyalty to the institution and to the law, not just the President or the particular client. At OLC I realized, as Margolis put it in his report, that an "enormous responsibility . . . comes with the authority to issue institutional decisions that carried the authoritative weight of the Department of Justice."[10] I knew that everything I did would affect the institution's reputation, and I felt sobered to be acting on behalf of the Justice Department and the Government. I was influenced in this respect by Walter Dellinger, another one of my predecessors, who said to me over breakfast before I was confirmed, "You won't be doing your job well, and you won't be serving your client's interests, if you rubber-stamp everything the client wants to do."[11]

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[8] *Id.* at 34.
[9] GOLDSMITH, *supra* note 1, at 35.
[10] *See* Margolis Memo, *supra* note 2, at 67.
[11] GOLDSMITH, *supra* note 1, at 38.

Applying all of these considerations is more an art than a science. Here is how I described the art in *The Terror Presidency*:

> I found myself at OLC managing what Jimmy Carter's Attorney General Griffin Bell, described as the tension between the "duty to define the legal limits of executive action in a neutral manner *and* the President's desire to receive legal advice that helps him to do what he wants." This ever present tension was unusually taut after 9/11, when what the President wanted to do was to save thousands of American lives. There is no magic formula for how to combine legitimate political factors with the demands of the rule of law. The head of OLC must be a careful lawyer, must exercise good judgment, must make clear his independence, must maintain the confidence of his superiors, and must help the President to find legal ways to achieve his ends, especially in connection with national security. OLC's success over the years has depended on its ability to balance these competing considerations—to preserve its fidelity to law while at the same time finding a way, if possible, to approve presidential actions.[12]

This brings me, finally, to the OPR matter. I explained in detail in *The Terror Presidency* how what I viewed as legal errors in the interrogation opinions, in combination with various contextual factors, led me to withdraw the interrogation opinions. The OPR report did not analyze whether the lawyers who wrote the opinions I withdrew got the right or wrong legal answer. Rather, it considered whether they committed professional misconduct. As I said in *The Terror Presidency*, and as I reiterated in a memorandum I submitted to David Margolis on OPR, I'm quite confident that these men did not act in bad faith. One cannot understand the substantive and craft errors in the opinions without keeping in mind that they were written in the summer of 2002 at a time when threat reports were extremely concrete and, as someone there then told me later, when everyone was sure on September 11th, 2002, there would be bodies in the streets of Washington. They acted under incredible pressure, under incredible fear.

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[12] *Id.* at 38–39.

This fear does not excuse or justify the legal errors. But it does put them in context. And it allows for some comparisons. For Yoo and Bybee were not the first Executive Branch lawyers in time of crisis to make mistakes and write opinions that were later repudiated. Let me give you some other examples.

Consider Robert Jackson—Supreme Court Justice, author of the famous *Youngstown* concurrence, Attorney General, Solicitor General, and one of the greatest lawyers of his generation. In the late summer of 1941, Attorney General Jackson advised President Roosevelt that he could exchange retired American naval destroyers for naval bases with the British. In the spring of that year, the consensus among lawyers was that this exchange would be clearly unlawful, not only under international law, but also under a variety of neutrality statutes. It was clearly prohibited, and that was Jackson's opinion in the spring of 1941. Over the summer of 1941, during the Battle of Britain as Nazi bombs fell on Britain, as the situation got more and more dire, and as Churchill's request became more and more desperate, Roosevelt changed his mind. He decided he was going to send the destroyers, and Jackson approved the action. Jackson had changed his mind, and he wrote an opinion explaining his reasoning. It is not a persuasive legal opinion, in my opinion. But you don't have to take my word for it, for many others agree. Edward S. Corwin, the famous Princeton constitutional law scholar at the time, said the opinion "was an exercise of unrestrained autocracy and the most dangerous opinion ever penned by the Justice Department."[13] Senator Daniel Patrick Moynihan, in his book on the laws of war, said that "Jackson clearly subverted the law and subjected Roosevelt to impeachment."[14]

Edward Bates was Abraham Lincoln's Attorney General when Lincoln decided to ignore Chief Justice Roger B. Taney's order to release a prisoner because the President lacked authority to suspend the writ of habeas corpus.[15] Bates, who had a reputation as a fine lawyer, wrote what Arthur Schlesinger Jr. later called an "exculpatory legal opinion" that said Lincoln had the power to suspend the writ of habeas corpus even though most people then thought only Congress had that

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[13] Edward S. Corwin, Letter to the Editor, *Executive Authority Held Exceeded in Destroyer Deal*, N.Y. TIMES, Oct. 13, 1940, at 72.
[14] DANIEL PATRICK MOYNIHAN, ON THE LAW OF NATIONS 72 (1990).
[15] *Ex parte* Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487).

power—a view that is accepted law today.[16] Bates's legal opinion is completely unconvincing.

Another example is Abram Chayes. Chayes was one of the most distinguished academic lawyers of the 20th century and was the Legal Advisor to the State Department during the Cuban Missile Crisis. He advised President Kennedy during the crisis that the quarantine of Cuba did not violate the U.N. Charter.[17] Most international lawyers think that Chayes was wrong.

What do these examples show? They show that the interpretative process is invariably shaped by the context in which it takes place. The opinions by Jackson, Bates, and Chayes were written by outstanding Executive Branch lawyers to help the President achieve a vital national security goal in time of crisis. These lawyers exploited ambiguities and loopholes in the law. They read the relevant precedents in ways that favored presidential power. They stretched the meaning of statutes and treaties. And they did not always give full play to contrary arguments or precedents. It's quite clear that they believed, in the context in which they acted, that they were doing the right thing under the law and that they did not act in bad faith. But their good faith interpretations of the law, under the pressure of events, were later viewed to be tendentious or erroneous.[18]

Why, one might ask, is Robert Jackson a hero while Bybee and Yoo are not? Why are Chayes and Bates not criticized more for their tendentious legal interpretations? There are many answers. One is obviously the subject matter of the opinions under discussion. Wherever one draws the line when interpreting limitations on coercive interrogation, the line is going to be controversial unless you draw it

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[16] Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att'y Gen. 74 (1868) (opinion of Edward Bates dated July 5, 1861).

[17] ABRAM CHAYES, THE CUBAN MISSILE CRISIS (1974).

[18] It's not just Executive Branch lawyers who shape the law to the crisis at hand. It's courts as well. Courts consist of lawyers who are supposed to be more detached than Executive Branch lawyers vis-à-vis the Executive. And yet, in times of crisis in our nation's history, courts have done things that later looked like stretching the law under the pressure of events. In the Civil War, the Supreme Court approved a number of military commissions that didn't have a modicum of due process. In World War I, they upheld prosecutions for seditious liable that have been viewed as violative of the First Amendment ever since. In World War II, they upheld the internment of Japanese-Americans that is today seen as an embarrassing black mark.

someplace where it shouldn't be, some place where it's just not a faithful reflection of the law. Moreover, those opinions came to light at about the same time as the terrible Abu Ghraib photos. The opinions and the abuse were invariably linked together whether there was, in fact, a connection or not.

Also, the context matters. Jackson, Bates, and Chayes acted in crises that turned out well. Those wars are over. And it is quite clear in retrospect that they were significant crises—the Battle of Britain, the Civil War, the Cuban Missile Crisis. Everything that happened in those crises is viewed through the afterglow of victory. For better or worse, the wars that are going on today are not viewed to have the same level of crisis. If the public had access to the same threat information that Yoo and Bybee were reacting to, I think their opinions would have been looked at differently, and I think if the war were over and we had achieved a clear victory, they would be looked at differently.

Also, I think it's fair to say that the opinions I withdrew contained not just legal mistakes but craft lapses as well. Jackson's opinion was much better crafted, in part because he had a lot longer to draft it and, in part, because the issues were easier and less contestable. The interrogation opinions were written in secrecy and disclosed much later. I don't think they were written in secrecy for any insidious purpose, but they were not released. Jackson's opinion appeared in the *New York Times* the same day as the destroyers-for-bases deal was announced. Finally, I think we live in a legalistic age today that Jackson, Chayes, and Bates did not live in. Legal standards in those days were viewed much more through a political lens, and today they're not. Compliance with the law is insisted on then in ways it was not in past times.

In my opinion, these examples from the past have implications for the OPR ethics investigation. It seems to me—and Margolis agreed—that at the very least, OPR should have exercised caution, or at least empathy, in judging people who exercise legal judgment in crisis. I think it's wrong to infer bad faith simply from the fact of error, even clear legal error, for that would have landed Robert Jackson in the ethics dock as well. Any rule that would land Jackson in ethics trouble for a legal opinion cannot be the right rule.

Also, OPR viewed the opinions not from the perspective of threat and danger in which they were written but, rather, from the clear perspective of hindsight. OPR's investigation took five and a half years.

It picked through every OLC draft, every e-mail related to every draft, and every collateral conversation. I want you to think about some of your written legal opinions and just imagine if every single e-mail that you wrote in time of crisis in connection with the drafting of those opinions, and every draft, and every collateral conversation, was picked over. I know that for my opinions, it wouldn't be a pretty experience. OLC did not have OPR's luxury of five and a half years to reach a decision. It had to act immediately. This is one of the difficulties of being an Executive Branch lawyer: You often don't have the luxury of time.

So what lessons can we learn from these episodes, and from what Yoo and Bybee have gone through compared to what Jackson went through? I think one important lesson is that when you're acting in situations of threat and danger and offering legal advice, it is important to remember that you will not be judged from that perspective. Rather, as my colleague Jim Comey, the Deputy Attorney General, once wrote, you will be judged "in a quiet, dignified, well-lit room" where your judgments will be "viewed with the perfect, and brutally unfair, vision of hindsight," where it is impossible to "capture even a piece of the urgency and exigency felt during crisis."[19] It also means that you're going to be judged not just on the basis of what you did at the time, but also to some degree on the basis of how things turned out.

I don't think you should shade your judgment based on a prediction of how things will turn out. I think you have to do the right thing in context, based on the factors I discussed earlier. But I also think it's appropriate—vital, in fact—to consider the future and to act in a way that you're going to be able to explain and justify later. Comey described this as a uniquely lawyerly ability: the ability "to transport ourselves to another time and place and the ability to present facts to an imaginary future fact-finder in an environment very different from the one in which we face crisis and decision."[20]

At a minimum, the decision-making *process* must maintain its integrity. A decision-making process with integrity—one that involves proper consultation with the right people and a careful opinion with good craft values—will inform how the decision is looked at later, even if the substance of the decision turns out not to have been, from the perspective

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[19] James B. Comey, *Intelligence Under the Law*, 10 GREEN BAG 439, 443 (2007).
[20] *Id.*

of hindsight, the right one. Ultimately, *how* the lawyer reached the decision will be scrutinized. If he or she reached the decision in a proper way, that will affect how critics view the merits. These are considerations that Bybee and Yoo, under the pressure of time and crisis, did not focus on enough.

Comey concluded his essay by saying:

> It is the job of a good lawyer to say "yes." It is as much the job of a good lawyer to say "no." "No" is much, much harder. "No" must be spoken into a storm of crisis, with loud voices all around, with lives hanging in the balance. "No" is often the undoing of a career. And often "no" must be spoken in competition with the voices of other lawyers who do not have the courage to echo it.
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> For all those reasons, it takes far more than a sharp legal mind to say "no" when it matters most. It takes moral character. It takes an ability to see the future. It takes an appreciation of the damage that will flow from an unjustified "yes." It takes an understanding that, in the long run, intelligence under law is the only sustainable intelligence in the country.[21]

I agree with this analysis. But I think it's incomplete. It's also very difficult, sometimes, to say "yes," especially in a controversial or contested context involving application of a controversial or contested law. I worry very much that in the increasingly politicized world in which lawyers' actions are judged, it has become harder and harder to say "yes." I don't know if this affects the military, but I know it affects the civilian side. Lawyers throughout the nation's civilian national security apparatus are extremely cautious about approving actions that are legal but are also politically controversial. This cautiousness seems personally rational in light of the enormous reputational harm suffered by many national security lawyers in the last seven or eight years. The 9/11 Commission Report criticized the pre-9/11 lawyer-induced risk aversion in the intelligence world caused by lawyers who give overly cautious advice and worry about saying "yes" when it might be controversial later. I worry that we're returning to that culture of risk aversion.

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[21] *Id.* at 444.

In closing, then, I want to emphasize that while it takes courage to say "no" when "no" is the right answer and will be controversial, it also takes the courage to say "yes" when "yes" is controversial but is the right answer. I don't envy you in making these tradeoffs every day, but I wish you good luck in doing so.

Thank you very much.